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INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to E to the Report of the Panel to be found in documents WT/DS477/R and WT/DS478/R.

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ANNEX A-1

PRELIMINARY RULING OF THE PANEL

1 PROCEDURAL BACKGROUND

1.1. On 11 December 2015, Indonesia submitted to the Panel a request for a preliminary ruling concerning the consistency of New Zealand's and the United States' panel requests and first written submissions with the requirements of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[1] Specifically, Indonesia sought a ruling from the Panel finding that:

a. the co-complainants' "apparent" claims under Article III:4 of the GATT 1994 and Article 3.2 of the Agreement on Import Licensing Procedures (Import Licensing Agreement) are outside the Panel's terms of reference; and

b. the co-complainants' failure in their panel requests as well as their first written submissions to meet the requirements of Article 6.2 of the DSU has "clearly prejudiced, and continues to prejudice" the preparation of Indonesia's defence, thereby violating Indonesia's right to due process in these proceedings.[2]

1.2. In response to the Panel's invitation to provide their views on Indonesia's request, the United States and New Zealand provided a joint communication on 21 December 2015.[3] The Panel also provided third parties with an opportunity to comment on the preliminary ruling request prior to the submission of Indonesia's first written submission and therefore before the date specified in the Panel's timetable for third party submissions. Only Australia and Brazil took advantage of this opportunity and submitted to the Panel on 6 January 2016 their comments on Indonesia's preliminary ruling request.

1.3. Having carefully considered Indonesia's request, the written comments of the co-complainants and of the above-mentioned third parties, and given Indonesia's request that we rule on this matter before the first substantive meeting[4], the Panel decided to communicate its conclusions on Indonesia's request on 27 January 2016, which was prior to the first substantive meeting. At that time, the Panel indicated that, following prior practice[5] and in the interest of the efficiency of proceedings, more detailed reasons in support of those conclusions would be provided as soon as possible and, in any event, prior to the date of issuance of the Interim Report.[6] Our ruling is set forth below and includes the conclusions issued to the parties on 27 January 2016.

2 MAIN ARGUMENTS OF THE PARTIES AND THE THIRD PARTIES

2.1 Main arguments of the parties

2.1.1 Indonesia

2.1. Indonesia requests the Panel to issue a preliminary ruling finding that the first written submissions of the United States and New Zealand are inconsistent with the requirements of the DSU.[7] Specifically, Indonesia contends that the co-complainants' "potential claims" under Article 3.2 of the Import Licensing Agreement and Article III:4 of the GATT 1994 were "not properly identified" in their respective panel requests and, therefore, the Panel should "exclude

[1] Indonesia's request for a preliminary ruling, para. 1.
[2] Indonesia's request for a preliminary ruling, para. 28.
[3] Co-complainants' joint comments on Indonesia's preliminary ruling request.
[4] Indonesia's request for a preliminary ruling, para. 3.
[5] See, for instance, Panel Reports, *Canada –Renewable Energy/Canada –Feed in Tariff Program*, para. 7.8; and *United States – Lamb*, paras. 5.15-5.16.
[6] Conclusions of the Preliminary Ruling by the Panel, 27 January 2016, para. 1.3. These conclusions will form part of the Interim Report of the Panel.
[7] Indonesia's request for a preliminary ruling, para. 1.

these potential claims" from its terms of reference.[8] For Indonesia, the inconsistencies between the panel requests and the first written submissions have prejudiced and continue to prejudice the preparation of Indonesia's defence and compromise the due process objectives of the DSU, in particular, of Article 6.2.[9]

2.2. Indonesia submits that under Article 7.1 of the DSU, for a party's claim to fall within the Panel's terms of reference, the complainant must "sufficiently identify" the claim in the panel request[10], that is, it must refer to the specific measure(s) at issue and the legal basis of the complaint. Indonesia finds support in the panel's findings in *EC – Tube or Pipe fittings*[11] as well as the Appellate Body's findings in *EC and Certain Member States – Large Civil Aircraft* and *China – Raw Materials*, where, according to Indonesia, it was determined that failure to list or refer to specific measures or claims in the panel request would result in the claims being outside the Panel's jurisdiction.[12]

2.3. Indonesia argues that the co-complainants' panel requests only "describe" claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, but[13] their first written submissions "raised new claims", namely, Article III:4 of the GATT 1994 in the case of New Zealand, and Article 3.2 of the Import Licensing Agreement in the case of both New Zealand and the United States.

2.4. Indonesia considers that the claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement were not properly identified because these provisions were only mentioned in footnotes to the panel requests and, to the extent the co-complainants refer to possible violations of these provisions by Indonesia, they do so in "conditional and ambiguous language".[14] In its view, this has resulted on Indonesia and third parties being "left to wonder" whether the co-complainants "meant to include" claims under these provisions within their panel requests or not.[15] Indonesia relies on the following definition of "footnote" found in the Oxford Advanced Learner's Dictionary: "(1) an extra piece of information that is printed at the bottom of a page in a book or (2) (of an event or a person) that may be remembered but only as something/somebody *that is not important*".[16] Indonesia observes that the identification of the legal basis of claims in a panel request is "very important and not an extra piece of information."[17] According to Indonesia, the Panel should therefore find that these claims are outside its terms of reference.[18]

2.5. Indonesia further argues that, should the Panel consider that "putting the legal basis of a claim in the footnotes is acceptable"[19], it nevertheless contends that those claims are not sufficiently identified. Indonesia reproduces footnotes 5, 7, 8, 12 and 14 of the panel requests, noting that they "only repeat treaty provisions" and arguing that there is "no proper or sufficient explanation" of how the measures at issue are inconsistent with Article III:4 of the GATT 1994 or Article 3.2 of the Import Licensing Agreement.[20] Indonesia recalls that in *China—Raw Materials*, the Appellate Body determined that the claims were not sufficiently identified because the complainants "merely 'challeng[ed] some (groups of) measures as inconsistent with some (groups) of the listed WTO obligations'" and therefore the complainants did not "'provide the basis on which the Panel and China could determine with sufficient clarity what 'problem' or 'problems' were alleged to have been caused by which measures.'"[21] Indonesia asserts that the situation in the

[8] Indonesia's request for a preliminary ruling, para. 1. Indonesia refers to "apparent claims" in paras. 13-14 and 27-28.
[9] Indonesia's request for a preliminary ruling, para. 2.
[10] Indonesia's request for a preliminary ruling, para. 5.
[11] Indonesia's request for a preliminary ruling, para. 6 (referring to Panel Report, *EC – Tube or Pipe Fittings*, para. 7.14).
[12] Indonesia's request for a preliminary ruling, para. 6 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft,* para 640, and Appellate Body Report, *China – Raw Materials*, para. 219).
[13] Indonesia's request for a preliminary ruling, para. 7.
[14] Indonesia's request for a preliminary ruling, para. 10.
[15] Indonesia's request for a preliminary ruling, para. 10.
[16] Indonesia's request for a preliminary ruling, para. 11. (emphasis original)
[17] Indonesia's request for a preliminary ruling, para. 12. (underlining original)
[18] Indonesia's request for a preliminary ruling, para. 13.
[19] Indonesia's request for a preliminary ruling, para. 14.
[20] Indonesia's request for a preliminary ruling, paras.14-20.
[21] Indonesia's request for a preliminary ruling, para. 20.

present dispute is "exactly the situation here" because the complainants only repeat the treaty provisions in a footnote and do not explain how the measures at issue, which consist of various laws and regulations, violate the said provisions.[22]

2.6. For Indonesia, the "confusion" resulting from this lack of clarity is compounded by the fact that the panel requests are identical, but the first written submissions are different with respect to the two relevant provisions. Indonesia explains that while the United States' first written submission only "appeared to advance" a claim under Article 3.2 of the Import Licensing Agreement, New Zealand's first written submission "attempted to invoke" both Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement.[23]

2.7. Indonesia also argues that it has suffered prejudice because it "does not sufficiently understand the new claims"[24] under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement that were raised by the co-complainants in their first written submissions. Indonesia asserts that it is "critical" that a panel request provide the responding party "with sufficient clarity of the case it has to answer" and that a party's submissions during panel proceedings cannot cure a defect in a panel request.[25] In Indonesia's view, these "apparent" claims were not sufficiently identified in the panel requests. Indonesia submits that the fact that these claims were only mentioned in footnotes and that the footnotes only repeated the legal provisions "without ever explaining why" the measures at issue violate these two provisions are "acts of WTO inconsistency that clearly prejudice Indonesia's ability to defend itself" in this dispute.[26]

2.1.2 New Zealand and United States (co-complainants)

2.8. In a joint communication, the co-complainants assert that Indonesia's arguments "lack merit" and submit that the panel requests "on their face" satisfy the requirements of Article 6.2 of the DSU with respect to the claims under Article 3.2 of the Import Licensing Agreement and Article III:4 of the GATT 1994. The co-complainants request the Panel to find that the claims at issue are properly within its terms of reference.[27]

2.9. Concerning Indonesia's argument that the relevant claims were not properly identified because they were included in footnotes, the co-complainants submit that Indonesia offers no analysis as to why the use of footnotes in discussing the claims is, by itself, inconsistent with Article 6.2 of the DSU. They observe that Indonesia does not explain why specifying a provision alleged to be breached in a footnote "would itself render the identification of that provision unclear"[28] and note that Indonesia "simply suggests" that placement in a footnote renders the language "not important".[29] The co-complainants point out that "[s]imply characterizing" a footnote as "not important" runs contrary the "general usage of footnotes in treaties and international agreements", and they provide the example of footnote 1 to Article 4.2 of the Agreement on Agriculture, which conveys key aspects of the legal obligation therein.[30] The co-complainants further assert that in determining whether a panel request complies with Article 6.2 of the DSU, a panel must evaluate the request "as a whole" and "on the basis of the language used".[31] In the co-complainants' view, nothing in Article 6.2 indicates that a complainant's claims would "somehow be limited by the format" in which those claims are presented.[32] In support of their position, the co-complainants also refer to *US – Products from China* where the Appellate

[22] Indonesia's request for a preliminary ruling, paras. 20-21.
[23] Indonesia's request for a preliminary ruling, para. 22.
[24] Indonesia's request for a preliminary ruling, para. 27.
[25] Indonesia's request for a preliminary ruling, para. 25.
[26] Indonesia's request for a preliminary ruling, para. 27.
[27] Co-complainants' joint comments on Indonesia's preliminary ruling request, paras. 1-2.
[28] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 10.
[29] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 10.
[30] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 10.
[31] The co-complainants refer to Appellate Body Reports, *China – HP-SSST*, para. 5.13*; EC – Fasteners*, para. 562*; US – Carbon Steel*, para. 127 (stating that compliance with Article 6.2 is determined "on the merits of each case having considered the panel request as a whole, and in light of attendant circumstances"). Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 11.
[32] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 11.

Body observed that "footnotes are part of the text of a Panel request, and may be relevant to the identification of the measure at issue or the presentation of the legal basis of the complaint".[33]

2.10. Concerning Indonesia's argument that the language setting out the claims under Articles 3.2 of the Import Licensing Agreement and III:4 of the GATT 1994 is "conditional and ambiguous", the co-complainants submit that it lacks merit because Indonesia failed both to identify the allegedly conditional and ambiguous language and to explain the reasons why the language does not meet the requirements of Article 6.2.[34] While considering that the Panel may reject Indonesia's argument on that basis alone, the co-complainants also argue that, to the extent that Indonesia is arguing that the relevant claims are outside of the Panel's terms of reference because they are conditional claims, this argument lacks any legal basis and the Panel should reject it.[35] The co-complainants contend that nothing in the DSU precludes a complainant from pursuing conditional or alternative claims and they refer to the observation of the panel in *Korea – Commercial Vessels* that raising complementary or alternative claims is very common in WTO dispute settlement. The co-complainants affirm that, as with any claim, a claimant intending to pursue complementary or alternative claims "simply must", by the terms of Article 6.2, refer to each of the relevant provisions in the panel request.[36]

2.11. The co-complainants also find no merit in Indonesia's argument that the sufficiency of the panel requests was undermined because, despite identical panel requests, New Zealand pursued its claim under Article III:4 of the GATT 1994 in its first written submission, while the United States did not. The co-complainants consider that a complainant is not required to pursue all the claims referenced in its panel request, and they maintain that a decision not to pursue a claim is not relevant in determining whether a claim falls within a panel's terms of reference.[37]

2.12. The co-complainants also reject Indonesia's argument that the panel requests did not provide sufficient explanation of how the measures are inconsistent with the cited provisions. According to the co-complainants, Indonesia misstates the requirements of Article 6.2 of the DSU.[38] Referring to the Appellate Body's findings in *China—HP–SSST*, the co-complainants argue that to comply with Article 6.2, one need only state the claim at issue; argumentation "as to why and precisely how" the measure breaches the relevant provision is not required.[39] They maintain that the panel requests properly identify the claims under Article 3.2 of the Import Licensing Agreement and Article III:4 of the GATT 1994: they identify the measures imposed as relevant to the claims, describe their operation, set forth the legal bases for the claims by listing and summarizing the provisions of the covered agreements with which these measures are inconsistent, and connect the aspects of the measures relevant to the claims to the relevant provisions. As such, the requirements of Article 6.2 of the DSU are satisfied.[40]

2.13. The co-complainants further argue that Indonesia misunderstands the difference between arguments and claims and they assert that the disputes referenced by Indonesia do not support the conclusion that the panel requests do not meet the standard of Article 6.2.[41] The co-complainants point out that in *EC – Tube or Pipe Fittings*, the panel found that the panel request did not identify claims under Articles 6.9, 6.13, 9.3, and 12.1 of the Anti-Dumping Agreement because it referred generally to Articles 6, 9, and 12, and those provisions contain multiple and diverse obligations that relate to subject-matters different from the obligations in Articles 6.9, 6.13, 9.3 and 12.1.[42] The co-complainants contrast the panel requests in this dispute, observing

[33] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 11.
[34] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 13.
[35] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 13.
[36] The co-complainants refer to the Panel Report, *Korea – Commercial Vessels*, paras. 7.2.28-7.2.29. Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 14.
[37] In support of this statement, the co-complainants quote the Panel Report, *China – Raw Materials*, para. 7.23; and the Appellate Body Report, *EC – Bananas III*, para. 145. Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 15.
[38] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 19.
[39] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 19.
[40] Co-complainants' joint comments on Indonesia's preliminary ruling request, paras. 19-23.
[41] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 24.
[42] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 25 (referring to Panel Report, *EC – Tube or Pipe Fittings*, para. 7.14).

that they cite the specific provisions in question, summarize the relevant obligations, and describe the aspects of the challenged measures relevant to the claim.[43]

2.14. The co-complainants contend that the facts in *China – Raw Materials* can be distinguished from the present instance because, in that dispute, the panel request listed 37 legal instruments followed by a wide-ranging list of obligations, such that the problems could not be discerned from the panel request given the number of possible combinations. The co-complainants argue that, in contrast, the panel requests in these proceedings describe the challenged measures in detail, including the problematic aspects of their operation, identify the legal instruments through which each measure was imposed, set out the provisions with which the measures are inconsistent, and summarize the relevant obligation.[44]

2.15. The co-complainants rely on Appellate Body reports in arguing that, where the provision with which a challenged measure is alleged to be inconsistent consists of a single paragraph, "a simple reference to that provision may be sufficient to meet the standard of Article 6.2"[45] and that, even where a provision contains multiple obligations, a reference to that provision, along with a "brief narration of the problem" caused by the challenged measure, is "sufficient" to meet the standard of Article 6.2 of the DSU.[46] The co-complainants observe that, in this dispute, each relevant provision consists of a single paragraph and the panel requests both identify the relevant provisions and summarize the relevant obligations, thus "more than" meeting the standard of Article 6.2.[47]

2.16. Regarding Indonesia's arguments that the alleged failure by the co-complainants to adequately identify their claims in their panel requests prejudiced Indonesia's ability to defend itself in this dispute, the co-complainants respond that the panel requests "contain the information necessary" to satisfy the legal standard in Article 6.2."[48] They contend that the evaluation of the sufficiency of a panel request is "based on the face of the panel request itself" and, therefore, it would "not also be necessary" to demonstrate that the responding party was prejudiced by the inconsistency.[49] The co-complainants also submit that, "aside from the fact that prejudice to the respondent is not relevant to the inquiry", Indonesia has not been prejudiced because Indonesia was made aware of the claims under Article 3.2 of Import Licensing Agreement and Article III:4 of the GATT 1994 in the panel requests as well as in the requests for consultations.[50] In the co-complainants' view, Indonesia has provided no details in support of its allegation of prejudice and suggest that this situation is analogous to that in *Korea – Dairy*, where the Appellate Body rejected Korea's claim that it had suffered prejudice on the basis that it had "assert[ed] that it had sustained prejudice, but offered no supporting particulars in its appellant's submission nor at the oral hearing."[51]

2.2 Main arguments of the third parties

2.17. Following the Panel's invitation to the third parties to comment on Indonesia's request for a preliminary ruling, comments were received from Australia and Brazil. No comments were received from Argentina, Canada, China, the European Union, India, Japan, Korea, Norway, Paraguay, Singapore, Chinese Taipei, or Thailand. We summarise below the arguments presented by Australia and Brazil.

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[43] Co-complainants' joint comments on Indonesia's preliminary ruling request, para 25.
[44] Co-complainants' joint comments on Indonesia's preliminary ruling request, para 26.
[45] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 27 (referring to Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.19; Appellate Body Report, *China – HP-SSST*, para. 5.22; and Appellate Body Report, *US – Products from China*, para. 4.21.
[46] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 27 (referring to Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.28; Appellate Body Report, *China – HP-SSST*, para. 5.34).
[47] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 27.
[48] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 28.
[49] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 29 (referring to Appellate Body Report, *China – Raw Materials*, para. 233).
[50] Co-complainants' joint comments on Indonesia's preliminary ruling request, paras. 29-30.
[51] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 31 (referring to Appellate Body Report, *Korea – Dairy*, para. 131).

2.2.1 Australia

2.18. Australia is of the view that the co-complainants' claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement were "sufficiently identified" in the panel requests to fall within the Panel's terms of reference.[52] Australia points out that it was aware of and understood the claims under these provisions.[53] For Australia, there is nothing in the text of Article 6.2 of the DSU that suggests that footnotes are not part of a panel request, nor that this provision imposes any formatting or structural requirements.[54] Referring to the Appellate Body Report in *US – Carbon Steel*, Australia explains that compliance with the requirements of Article 6.2 "must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances."[55] Australia further submits that it understood the claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement "to be complementary, alternative or additional claims to those contained in the body of the text" and hence it was "reasonable for the Complainants to include these claims in footnotes to their panel requests."[56]

2.19. Regarding Indonesia's argument that the claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement use "conditional and ambiguous language", Australia observes that the language of the panel requests "reasonably reflects" that these claims can be considered complementary, alternative or additional claims to those in the text.[57] Australia notes that in *Korea – Commercial Vessels*, the panel indicated that if a party wishes to pursue claims under multiple provisions, whether complementarily or alternatively, it is not only permitted by Article 6.2 to refer to these claims in its panel request, but it is required to do so.[58] According to Australia, by notifying Indonesia of the complementary, alternative or additional claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement, the co-complainants' panel requests "served to fully inform" Indonesia of the nature of their case.[59]

2.20. Australia disagrees with Indonesia's argument that the co-complainants' panel requests merely challenged some groups of measures as inconsistent with some groups of the listed WTO obligations and argues that the claims in each footnote disputed by Indonesia "clearly relate" to the measures in the section containing that footnote.[60] Australia also disagrees with Indonesia's position that the co-complainants have "only repeat[ed] treaty provisions" in the Panel request with the result that these provisions fall outside the Panel's terms of reference.[61] Australia argues that complainants are not required to set out the arguments supporting their claims in their panel requests and relies on the Appellate Body Report in *EC – Bananas III* referring to the distinction between claims and arguments and noting that Article 6.2 of the DSU requires that the claims, but not the arguments, be specified sufficiently in the panel request in order for the defending party and the third parties to know the legal basis of the complaint.[62] Australia also refers to the Appellate Body Report in *Korea – Dairy*, which stated that the "mere listing" of provisions alleged to have been breached "may be sufficient" to meet the requirements of Article 6.2, depending on whether the respondent's ability to defend itself was prejudiced.[63] Australia thus argues that the panel requests "have clearly exceeded the minimum requirements" because the claims are "linked to specific Indonesian measures, identify the specific articles that these measures violate, and also provide a brief explanation of why the measures violate the relevant articles."[64] For Australia, the information provided in the panel requests "clearly exceeds by a considerable margin" the standard articulated in *EC –Biotech Products* that a party is not required to explain, in the panel

[52] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 3.
[53] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 5.
[54] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, paras. 6-7.
[55] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 7 (referring to Appellate Body Report, *US – Carbon Steel*, para. 127).
[56] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 8.
[57] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 9.
[58] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 10 (referring to Panel Report, *Korea — Commercial Vessels*, para. 7.2).
[59] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 10.
[60] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 11.
[61] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 12.
[62] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, paras. 12-13. (referring to Appellate Body Report, *EC – Bananas III*, paras. 141-143).
[63] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 13 (referring to Appellate Body Report, *Korea — Dairy*, paras. 124 and 127).
[64] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 14.

request, the reasons for identifying particular treaty provisions, or whether all of the provisions listed are alleged to apply to the same aspect of a particular measure, or whether some provisions are alleged to apply to different aspects of the same measure.[65]

2.21. Regarding Indonesia's argument that it has suffered prejudice, Australia asserts that the co-complainant's panel requests fulfilled the due process objective of notifying Indonesia of the nature of the complaints and that Indonesia's ability to defend itself has not been prejudiced.[66] Australia recalls that in assessing a claim of prejudice in *Thailand – H-Beams,* the Appellate Body observed that "the fundamental issue in assessing claims of prejudice is whether a defending party *was made aware* of the claims presented by the complaining party, sufficient to allow it to defend itself."[67]According to Australia, Indonesia has not argued that it was unaware of the claims regarding Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement in the panel requests and it contends that the panel requests "fully notif[ied]" Indonesia of "all the claims" that the co-complainants could raise in their first written submissions.[68]

2.2.2 Brazil

2.22. Brazil asserts that nothing in the text of Article 6.2 of the DSU imposes a specific format for the presentation of claims in panel requests and, accordingly, the presentation of claims in footnotes "does not, by itself" violate the obligation under Article 6.2 of the DSU, "as long as the claim is clearly presented."[69] Brazil "fails to see" how the fact that the claims were presented in footnotes "would affect their nature or their clarity", and observes that there are several footnotes in WTO Agreements "that are crucial for the definition of the set of rights and obligations of the Members … and some of them are also essential for the interpretation of the extent of some multilateral obligations."[70] Brazil explains that a footnote provides "a piece of additional information" related to a specific issue such that a claim established in a footnote could be read as "in addition" to those established in the text of the panel request itself."[71] In Brazil's view, excluding a claim from the scope of a panel's jurisdiction based only on the fact that it was presented in a footnote would amount to endorsing "an overly formalistic approach that is contrary to the main objective of the DSU, which is to secure a prompt and positive solution to a dispute."[72] Thus for Brazil, the "fundamental question" before the Panel is whether the panel request, "be it in a footnote or elsewhere, satisfies the objective of providing notice to the Respondent and to third parties regarding the precise nature of the dispute."[73]

2.23. Brazil also argues that the fact that conditional language was used does not mean that the problem was not presented clearly. For Brazil, as long as the challenged measure is "discernible" in the panel request and "the legal basis of the complaint is clearly identified", there would be "no solid reason" to dismiss the panel request and "impede the procedure from taking its course with regard to those claims."[74] Brazil considers that the challenged measure is discernible in the panel request and the legal basis of the complaint is clearly identified.[75] In Brazil's view, the task before the Panel is to objectively assess whether the claims introduced by the co-complainants in the panel requests fulfill the requirements of Article 6.2 of the DSU, "regardless of the fact that they were presented in footnotes or in conditional language" which, according to Brazil, is "very common in WTO dispute settlement proceedings."[76]

2.24. Brazil relies on the Appellate Body Reports in *EC – Customs Matters* and *US – Continued Zeroing* in contending that, for the purposes of Article 6.2 of the DSU, it "suffices that the panel request sets out the 'claims' with enough precision to allow the responding party to understand

[65] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 15.
[66] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 18.
[67] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 19 (referring to Appellate Body Report, *Thailand – H-Beams*, para. 95). (emphasis original)
[68] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 20 (referring to Appellate Body Report, *Thailand – H-Beams*, para. 95).
[69] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 6.
[70] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 7.
[71] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 8.
[72] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 9.
[73] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 10.
[74] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 13.
[75] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 13.
[76] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 14.

with clarity" the alleged violations and, relying on *EC—Bananas III*, highlights that there is no obligation to develop in the panel request the legal arguments that support the claims or to provide a detailed explanation as to why and how the measures are inconsistent with the relevant WTO provisions.[77] Brazil considers that the requirements of Article 6.2 of the DSU were fulfilled in the current dispute because the specific measures at issue with regard to Article 3.2 of Import Licensing Agreement and Article III:4 of GATT 1994 "were duly identified" and the relevant provisions, including the specific obligations under each of them, "were indicated."[78] Furthermore, Brazil considers that there is "no ambiguity or lack of clarity" in the language of the panel requests, which is sufficient to "present the problem clearly."[79] In Brazil's view, "nothing in the way the panel requests were drafted jeopardized Indonesia's ability to identify the measures and claims" and to present its defence.[80]

3 EVALUATION BY THE PANEL

3.1 Introduction

3.1. The Panel is tasked with determining whether the co-complainants' claims pursuant to Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement are within the Panel's terms of reference. To do so, we need to examine whether the panel requests comply with the requirements set out in Article 6.2 of the DSU, which reads as follows:

> 2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

3.2. As recapped by the Appellate Body in *China – Raw Materials*, Article 6.2 of the DSU serves a "pivotal function" in WTO dispute settlement and sets out two key requirements that a complainant must satisfy in its panel request, namely, that it must (i) identify the specific measures at issue and (ii) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[81] According to the Appellate Body, these two elements constitute the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[82] If either element is not "properly identified", the matter would not fall within the panel's terms of reference.[83] Fulfilment of these requirements is "not a mere formality"[84]; on the contrary, as the Appellate Body has clarified, a panel request serves two essential purposes: (i) to define the scope of the dispute and (ii) to serve the due process objective of notifying the respondent and third parties of the nature of the complainant's case.[85]

3.3. Indonesia's objections refer to the adequacy of the panel requests in meeting the requirements of Article 6.2 with respect to two claims, namely, those pursuant to Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement. Thus Indonesia's objections do

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[77] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, paras. 15-17 and footnote 11 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 130, Appellate Body Report, *US – Continued Zeroing*, para. 169, and Appellate Body Report, *EC--Bananas III*, para. 141).

[78] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 18.

[79] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 20.

[80] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 21.

[81] Appellate Body Report, *China — Raw Materials*, para. 219. Article 6.2 of the DSU also requires that the request be made in writing and indicate whether consultations were held.

[82] Appellate Body Report, *EC and certain member States — Large Civil Aircraft*, para. 639 (referring to Appellate Body Report, *Guatemala – Cement I*, paras. 72 and 73; Appellate Body Report, *US – Carbon Steel*, para. 125; Appellate Body Report, *US – Continued Zeroing*, para. 160; Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; and Appellate Body Report, *Australia – Apples*, para. 416).

[83] Appellate Body Report, *China — Raw Materials*, para. 219 (referring to Appellate Body Report *US – Carbon Steel*, para. 125).

[84] Appellate Body Report, *China — Raw Materials*, para. 219 (referring to Appellate Body Report, *Australia – Apples*, para. 416).

[85] Appellate Body Report, *EC and certain member States — Large Civil Aircraft*, para. 639 (referring to Appellate Body Report, *US – Carbon Steel*, para. 126, in turn, referring to Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, 167, at 186; Appellate Body Report, *EC – Chicken Cuts*, para. 155; and Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108).

not raise issues under the first element; they concern only the second requirement of Article 6.2 of the DSU, i.e. to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. We recall that, for the purposes of Article 6.2 of the DSU, a claim refers to an allegation "that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement".[86]

3.4. The Appellate Body has underscored that, at a minimum, a panel request must list the article(s) of the covered agreement(s) claimed to have been violated.[87] Indeed, the "[i]dentification of the treaty provisions claimed to have been violated by the respondent is always necessary" if the legal basis of the complaint is to be "presented at all."[88] In addition, in order "to present the problem clearly", a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".[89]

3.5. It is also well settled that, while a panel request must set out the claims, there is no requirement in Article 6.2 that a complaining party include in its panel request arguments that seek "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision".[90] Hence a "brief summary" of the legal basis of the complaint "aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question"[91] and is to be distinguished from arguments in support of a particular claim." The Appellate Body has indicated that whether such a brief summary is "sufficient to present the problem clearly" is to be assessed on a case-by-case basis, keeping in mind the nature of the measure(s) at issue, and the manner in which it is (or they are) described in the panel request, as well as the nature and scope of the provision(s) of the covered agreements alleged to have been violated.[92]

3.6. As we explained above, Indonesia argues, *inter alia*, that the way that the co-complainants set out and later argued the two claims at issue prejudices its ability to defend itself in this dispute.[93] We agree with the Appellate Body that due process is an essential feature of the WTO dispute settlement system[94] and that, in addition to constituting the basis for a panel's terms of reference, a panel request serves the due process objective of notifying the respondent and third parties of the nature of the complainant's case.[95] We are mindful of the Appellate Body's clarification that due process "is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction".[96]

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[86] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.8 (referring to Appellate Body Report, *Korea – Dairy*, para. 139).

[87] Appellate Body Reports, *Korea – Dairy*, paras. 123 and 124 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *EC – Bananas III*, paras. 145 and 147; and *Indonesia – Patents (US)*, paras. 89, 92, and 93); *US – Carbon Steel*, para. 130. *See also* Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.8.

[88] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.8 (referring to Appellate Body Report, *Korea – Dairy*, para. 124 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *EC – Bananas III*, paras. 145 and 147; and *India – Patents (US)*, paras. 89, 92, and 93)).

[89] Appellate Body Report, *China — Raw Materials*, para. 220 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

[90] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.8 (referring to Appellate Body Report, *Korea – Dairy*, para. 139 (referring to Appellate Body Reports, *EC – Bananas III*, para. 141; *India – Patents (US)*, para. 88; and *EC – Hormones*, para. 156)).

[91] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (italics original; underlining added)). In *EC – Selected Customs Matters*, the Appellate Body also stated that "Article 6.2 of the DSU requires that the *claims* – not the *arguments* – be set out in a panel request in a way that is sufficient to present the problem clearly". (Ibid., para. 153 (referring to Appellate Body Reports, *EC – Bananas III*, para. 143; *India – Patents (US)*, para. 88; *Korea – Dairy*, para. 139; and *Dominican Republic – Import and Sale of Cigarettes*, para. 121)).

[92] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9.

[93] Indonesia's request for a preliminary ruling, para. 27.

[94] Indeed, "[d]ue process protection guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute". Appellate Body Report, *US – Continued Suspension*, para. 433.

[95] Appellate Body report, *US – Countervailing Measures (China)*, para. 4.6.

[96] Appellate Body Report*, EC and certain member States – Large Civil Aircraft*, para. 640. *See also* Appellate Body Report, *China – Raw Materials*, para. 233. *See also*, Appellate Body Report, *US – Countervailing Measures (China)*, footnote 435.

3.7. We shall therefore proceed to examine the panel requests to ascertain their conformity with the second key requirement of Article 6.2 of the DSU with respect to the claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement. There is considerable guidance in past panel and Appellate Body reports on how we should proceed with such an examination. Bearing this guidance in mind, we will carefully scrutinize the language used in the panel requests[97] and will be mindful that compliance with the requirements of Article 6.2 must be demonstrated on the face of the panel requests and be determined on the merits of this particular case, having considered the panel requests as a whole and in the light of attendant circumstances.[98] In doing so, we acknowledge that, although we may refer to the co-complainants' submissions in order to confirm the meaning of the words used in the panel requests[99], parties' submissions and statements during the panel proceedings cannot "cure" any defects in the panel requests.[100]

3.8. In the light of the foregoing, we proceed first to address Indonesia's contention that the claims pursuant to Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement fail to meet the requirements of Article 6.2 of the DSU and therefore fall outside our terms of reference. We will then approach Indonesia's contention that the fact that the United States did not provide argumentation on Article III:4 of the GATT 1994 in its first written submission is relevant under Article 6.2 of the DSU. Next, we will examine whether the manner in which the co-complainants have formulated their claims pursuant to Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement in their panel requests prejudices Indonesia's ability to defend itself and hence undermines its due process rights. Finally, we will address Indonesia's contention that the co-complainant's first written submissions have also failed to comply with Article 6.2 requirements.

3.2 Whether the claims pursuant to Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement fall within our terms of reference

3.9. The first question that we will address is whether, as Indonesia argues, the claims pursuant to Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement are not sufficiently identified in the co-complainants' panel requests, thus failing to meet the requirements of Article 6.2 of the DSU and falling outside our terms of reference. In particular, Indonesia argued that the claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement were not "properly and sufficiently"[101] identified because these provisions were only mentioned in footnotes to the panel requests and, to the extent the co-complainants refer to possible violations of these provisions by Indonesia, they do so in "conditional and ambiguous language".[102] Indonesia further argued that, should we consider that "putting the legal basis of a claim in the footnotes is acceptable"[103], those claims are not sufficiently identified because footnotes 5, 7, 8, 12 and 14 of the panel requests "only repeat treaty provisions" and thus contain "no proper or sufficient explanation" of how the measures at issue are inconsistent with Article III:4 of the GATT 1994 or Article 3.2 of the Import Licensing Agreement.[104]

3.10. The co-complainants responded that Indonesia offers no analysis as to why the use of footnotes in discussing the claims is, by itself, inconsistent with Article 6.2 of the DSU and contended that Indonesia's suggestion that placement in a footnote renders the language "not important"[105] goes against the general usage of footnotes in treaties and international agreements, including in the WTO.[106] Regarding Indonesia's contention that the language in such footnotes is

[97] Appellate Body Report, *China — Raw Materials*, para. 220 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 562).

[98] Appellate Body Report, *US —Carbon Steel*, paras. 127 (referring to Appellate Body Report, *Korea – Dairy*, paras. 124-127.

[99] Appellate Body Report, *China — Raw Materials*, para. 220.

[100] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 787 (referring to Appellate Body Reports, *EC – Bananas III*, para. 143; and *US – Carbon Steel*, para. 127). *See also* Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

[101] Indonesia's request for a preliminary ruling, paras. 10 and 14.

[102] Indonesia's request for a preliminary ruling, para. 10.

[103] Indonesia's request for a preliminary ruling, para. 14.

[104] Indonesia's request for a preliminary ruling, paras. 14-20.

[105] Co-complainants' joint comments on Indonesia's preliminary ruling request, paras. 9-10.

[106] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 10.

"conditional and ambiguous"[107], the co-complainants responded by arguing that Indonesia did not identify the specific language it found to be conditional and ambiguous or explained its reasons.[108] They submitted that raising complementary or alternative claims is "very common" in WTO dispute settlement[109] and that a party intending to pursue complementary or alternative claims must simply refer to each of the relevant provisions in its panel request pursuant Article 6.2 of the DSU.[110] The co-complainants further submitted that, to comply with Article 6.2 of the DSU, one need only provide the claim at issue and not detailed argumentation on the claim.[111]

3.11. We commence by examining whether the claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement were not sufficiently identified because they were set out in footnotes to the panel requests.[112] In support of this contention, Indonesia relied on the Oxford Advanced Learner's Dictionary. Indonesia thus argued that the meaning of "footnote" is "(1) an extra piece of information that is printed at the bottom of a page in a book or (2) (of an event or a person) that may be remembered but only as something/somebody *that is not important.*"[113] For Indonesia, the identification of the legal basis of the claims in a panel request is "very important" and not just an "extra piece of information"[114] as "it determines the terms of reference and jurisdiction"[115] of a panel. Consequently, Indonesia requested the Panel to rule that these claims are outside the Panel's terms of reference.[116]

3.12. The co-complainants responded that nothing in Article 6.2 of the DSU indicates that a complainant's claims are limited by the format in which those claims are presented. The co-complainants draw our attention to the Appellate Body's observation that "footnotes are part of the text of a panel request, and may be relevant to the identification of the measure at issue or the presentation of the legal basis of the complaint".[117]

3.13. We proceed to examine the wording of Article 6.2 of the DSU to ascertain whether there is any requirement regarding how claims are to be presented in panel requests. As we explained in Section 3.1 above, Article 6.2 of the DSU requires a complaining party to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. We agree with the co-complainants and the third parties[118] that, apart from the requirement that the panel request be made in writing, Article 6.2 does not include a requirement that such summary be presented in any particular form. In fact, as clarified by the Appellate Body, complying with this provision as far as the presentation of the legal claims is concerned, is achieved by listing the article(s) of the covered agreement(s) claimed to have been violated[119] with the necessary degree of precision depending on the obligation(s) contained in the given provision(s), and plainly connecting the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed.[120] We thus find no support in the wording of Article 6.2 of the DSU for Indonesia's interpretation that setting out the legal basis of a complaint in the footnotes of a panel request signals that the matter is considered unimportant or ancillary. Nor do we find any basis to

[107] Indonesia's request for a preliminary ruling, para. 10.
[108] Co-complainants' joint comments on Indonesia's preliminary ruling request, para 13.
[109] Co-complainants' joint comments on Indonesia's preliminary ruling request, para 14 (referring to Panel Report, *Korea – Commercial Vessels*, para. 7.2.28).
[110] Co-complainants' joint comments on Indonesia's preliminary ruling request, para 14. Panel Report, *Korea – Commercial Vessels*, para. 7.2.29.
[111] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 19 (referring to the Appellate Body Report, *China—HP–SSST*, para. 5.14*)*.
[112] Indonesia's request for a preliminary ruling, para. 10.
[113] Indonesia's request for a preliminary ruling, para. 11. (emphasis original)
[114] Indonesia's request for a preliminary ruling, para. 12. (underlining original)
[115] Indonesia's request for a preliminary ruling, para. 12. (underlining original)
[116] Indonesia's request for a preliminary ruling, para. 13.
[117] Co-complainants' joint comments on Indonesia's preliminary ruling request, para 11 (referring to Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para 4.39).
[118] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 11; Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, paras. 6-7; Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 6.
[119] Appellate Body Reports, *Korea – Dairy*, paras. 123 and 124 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *EC – Bananas III*, paras. 145 and 147; and *Indonesia – Patents (US)*, paras. 89, 92, and 93); *US – Carbon Steel*, para. 130. *See also* Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.
[120]Appellate Body Report, *China — Raw Materials*, para. 220 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

conclude that including claims in footnotes would result in such claims being "not properly and sufficiently described" as required by Article 6.2 of the DSU. We find no reason, nor does Indonesia offer one, to conclude that placing a claim in a footnote, as opposed to the body of the request, in and of itself, affects the clarity of the claim.

3.14. Our interpretation is in line with the Appellate Body's view that "footnotes are part of the text of a panel request, and may be relevant to the identification of the measure at issue or the presentation of the legal basis of the complaint".[121] We also find support for our approach in the general usage of footnotes in the covered agreements. As mentioned by the co-complainants[122] and Brazil[123], footnotes are important in establishing the nature and scope of the rights and obligations in the covered agreements. This is evident in footnote 1 to Article 4.2 of the Agreement on Agriculture, a provision relevant to this dispute, which serves to clarify the types of measures that fall under the scope of this provision. A similar argument could be made regarding footnotes found in other covered agreements, such as, for instance, footnotes 1 to 5[124] to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and footnotes 1 to 6[125] to the Agreement on Subsidies and Countervailing Measures (SCM Agreement).[126]

3.15. In sum, we find that nothing in the wording of Article 6.2 of the DSU precludes a complainant from setting out claims in footnotes to its panel request and the fact that the co-complainants have set out claims pursuant to Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement in footnotes 5, 7, 8, 12 and 14 of their panel requests does not render these requests inconsistent with the requirements of Article 6.2 of the DSU.

3.16. We now proceed to examine Indonesia's contentions pertaining to the language used in the relevant footnotes. In particular, we need to determine whether the co-complainants have failed to comply with Article 6.2 of the DSU because, as argued by Indonesia, footnotes 5, 7, 8, 12, and 14 contain conditional and ambiguous language and, by only repeating treaty provisions, provide no proper or sufficient explanation of how the measures at issue are inconsistent with Article III:4 of the GATT 1994 or Article 3.2 of the Import Licensing Agreement.[127] We understand that Indonesia considered that the panel requests do not meet the requirement in Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[128] As we explained in Section 3.1 above, the Appellate Body has clarified that a brief summary of the legal basis of the complaint "aims to explain succinctly *how* or *why* the measure at

[121] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para 4.39.

[122] Co-complainants' joint comments on Indonesia's preliminary ruling request, para 10.

[123] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, fn. 7.

[124] Footnote 1 of the SPS Agreement makes reference to Article XX(b), including also the chapeau of that Article. Footnote 2 describes the circumstances when there is scientific justification for the purposes of paragraph 3 of Article 3. Footnote 3 describes the circumstances when a measure is not more trade-restrictive than required for purposes of paragraph 6 of Article 5. Footnote 4 defines the terms "animal", "plant", "wild flora", "pests" and "contaminants". Footnote 5 sets out the scope of the sanitary and phytosanitary regulations covered under paragraph 1 of Annex B.

[125] Footnote 1 of the SCM Agreement describes measures that are not to be deemed a subsidy in accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of the SCM Agreement. Footnote 2 defines the terms "objective criteria or conditions" as used in Article 2. Footnote 3 sets out that, in considering other factors to assess whether a subsidy is specific, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered. Footnote 4 sets out that a subsidy is contingent in fact when, without having been made legally contingent upon export performance, it is in fact tied to actual or anticipated exportation or export earnings. It also establishes that the mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of Article 3 of the SCM Agreement. Footnote 5 set outs that measures referred to in Annex I of the SCM Agreement as not constituting export subsidies shall not be prohibited under Article 3.1(a) or any other provision of the SCM Agreement. Footnote 6 provides that any time periods mentioned in Article 4.4 may be extended by mutual agreement.

[126] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, fn. 7.

[127] Indonesia's request for a preliminary ruling, paras. 14-20.

[128] See also Indonesia's request for a preliminary ruling, para. 2, referring to Article 6.2.

issue is considered by the complaining Member to be violating the WTO obligation in question".[129] We also recall that, while a panel request must set out the claims, there is no requirement in Article 6.2 that a complaining party include in its panel request arguments that seek "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision".[130]

3.17. We observe that the co-complainants' panel requests, as set out in documents WT/DS477/9 and WT/DS478/9, are identical but for the references to each of the co-complainants' names. The panel requests are divided into three main sections referring to challenges relating to (i) horticultural products[131], (ii) animals and animal products[132], and (iii) the sufficiency of domestic production.[133] Sections I and II are in turn sub-divided into three subsections presenting the challenges to (i) "Indonesia's Trade-Restrictive Import Licensing Regime"[134]; (ii) the "Prohibitions and Restrictions … Made Effective Through Indonesia's Import Licensing Regime"[135], and (iii) the "Prohibitions and Restrictions on Importation Relating to the Use, Sale, Offering for Sale, Distribution, Storage, or Transportation … Made Effective Through Indonesia's Import Licensing Regime".[136] The panel requests include Annexes I and II listing the legal instruments through which Indonesia maintains the measures set out in the panel requests.

3.18. The co-complainants' claims under Article 3.2 of the Import Licensing Agreement are presented in footnotes 5 and 8, contained in Sections I(a) and II(a) of the panel requests, respectively. The co-complainants' claims under Article III:4 of the GATT 1994 are presented in footnotes 7, 12, and 14. Footnote 7 is contained in Section I(c), while footnotes 12 and 14 are found in Sections II(b) and II(c), respectively. We now turn to scrutinize the wording of the relevant footnotes to determine whether they meet the requirements of Article 6.2 of the DSU.

3.2.1 Footnotes 5 and 8

3.19. Footnote 5 provides as follows:

> To the extent that Indonesia's import licensing regime for horticultural products falls within the scope of the disciplines of Article 3 of the Import Licensing Agreement, [the United States][New Zealand] considers that the import licensing requirements and procedures, as described above and as set out in sections I(b) and I(c), would be inconsistent with Article 3.2 of the Import Licensing Agreement because they have trade-restrictive or trade distortive effects additional to those caused by imposition of the restriction, do not correspond in scope and duration to any measure they could be implementing, and are more administratively burdensome than absolutely necessary to implement any such measure. To the extent that Indonesia's import licensing regime falls within the scope of Article 2 of the Import Licensing Agreement, [the United States][New Zealand] considers that Indonesia's import licensing requirements and procedures, as described above and as set out in sections I(b) and I(c), would be inconsistent with Article 2.2(a) of the Import Licensing Agreement because they are administered in such a manner as to have restricting effects on imports.

3.20. As Indonesia's contention does not concern the claim pursuant to Article 2.2(a) of the Import Licensing Agreement, we will focus our analysis on the wording pertaining to the claim under Article 3.2 (that is, from the beginning of the footnote until "any such measure.").

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[129] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (italics original; underlining added)). In *EC – Selected Customs Matters*, the Appellate Body also stated that "Article 6.2 of the DSU requires that the *claims* – not the *arguments* – be set out in a panel request in a way that is sufficient to present the problem clearly". (Ibid., para. 153 (referring to Appellate Body Reports, *EC – Bananas III*, para. 143; *India – Patents (US)*, para. 88; *Korea – Dairy*, para. 139; and *Dominican Republic – Import and Sale of Cigarettes*, para. 121))

[130] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.8 (referring to Appellate Body Report, *Korea – Dairy*, para. 139 (referring to Appellate Body Reports, *EC – Bananas III*, para. 141; *India – Patents (US)*, para. 88; and *EC – Hormones*, para. 156)).

[131] Section I.

[132] Section II.

[133] Section III.

[134] Sections I(a) and II(a).

[135] Sections I(b) and II(b).

[136] Sections I(c) and II(c).

3.21. Footnote 5 begins with the phrase "[t]o the extent that Indonesia's import licensing regime for horticultural products falls within the scope of the disciplines of Article 3 of the Import Licensing Agreement". To us, the words "[t]o the extent that" signal that the co-complainants condition the claim on Indonesia's import licensing regime for horticultural products falling under the scope of Article 3 of the Import Licensing Agreement. In this respect, we note Indonesia's argument on the use of conditional language[137] and we agree that the claim presented in footnote 5 relating to Article 3.2 of the Import Licensing Agreement is expressed in conditional language. We nonetheless observe that nothing in Article 6.2 of the DSU proscribes the use of conditional language in the formulation of a claim. In fact, as the co-complainants[138], Australia[139] and Brazil[140] argue, raising complementary or alternative claims is a common feature in WTO dispute settlement. We thus find that the conditional nature of the claims does not render them outside our jurisdiction. Continuing our analysis, we observe that this part of the footnote does not provide the "*how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".[141]

3.22. The footnote then refers to the challenged measures themselves ("the import licensing requirements and procedures, as described above and as set out in sections I(b) and I(c)"). We do not find here, either, the "how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question". Turning to the last part of the relevant wording ("because they have trade-restrictive or trade distortive effects additional to those caused by imposition of the restriction, do not correspond in scope and duration to any measure they could be implementing, and are more administratively burdensome than absolutely necessary to implement any such measure"), the co-complainants provide their reasons for challenging the measures in question, stating that they would be inconsistent with Article 3.2 *because* they (i) "have trade-restrictive or trade distortive effects additional to those caused by imposition of the restriction", (ii) "do not correspond in scope and duration to any measure they could be implementing", and (iii) "are more administratively burdensome than absolutely necessary to implement any such measure". In using the word "because", the co-complainants signal that what follows are their reasons "why the measure at issue is considered by the complaining Member[s] to be violating the WTO obligation in question".

3.23. As pointed out by the respondent, these reasons cited by the co-complainants closely follow the language of Article 3.2 of the Import Licensing Agreement.[142] Indonesia takes issue with the fact that the co-complainants "only repeat treaty provisions"[143] and, as such, contends that the respective panel requests do not meet the requirements of Article 6.2 of the DSU. We do not agree, for we do not consider that closely following the wording of the provision allegedly violated is necessarily problematic. As we stated above, Article 6.2 requires a complainant to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. It does not specify any particular formula or language that must be followed to meet this criterion. Thus it may be possible, depending upon the wording of the provision in question, to satisfy this requirement simply by following closely the language of the provision in question. We are of the view that, given the specific content of Article 3.2 of the Import Licensing Agreement, referring to its different elements and stating that a measure does not meet them can suffice to provide a brief summary of the legal basis of a complaint. Upon reading footnote 5, it is clear that the co-complainants base their claims of violation on the fact that the measures in question have trade-restrictive or trade distortive effects additional to those caused by imposition of the restriction, do not correspond in scope and duration to any measure they could be implementing, and are more

[137] Indonesia's request for a preliminary ruling, para. 10.

[138] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 14 (referring to Panel Report, *Korea – Commercial Vessels*, paras. 7.2.28-7.2.29).

[139] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 10 (referring to Panel Report, *Korea — Commercial Vessels*, para. 7.2).

[140] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 14.

[141] Indonesia's request for a preliminary ruling, para. 10.

[142] We also observe that footnote 5 does not contain any precise arguments as to why the measures at issue are inconsistent with the alleged provision. As we discussed above, there is no requirement in Article 6.2 that a complaining party include in its panel request arguments that seek "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision". Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.8 (referring to Appellate Body Report, *Korea – Dairy*, para. 139 (referring to Appellate Body Reports, *EC – Bananas III*, para. 141; *India – Patents (US)*, para. 88; and *EC – Hormones*, para. 156)).

administratively burdensome than absolutely necessary to implement any such measure. As explained above, there is no requirement in Article 6.2 for a complaining party to go further and include in its panel request arguments that seek "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision".[144] Before concluding on this argument, we wish to underscore our view that other WTO provisions may not provide sufficient specificity or detail to lead to the same result as we have come to in this case. It may well be the case that reciting a WTO provision will not suffice to "explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".[145] This inquiry must be conducted on a case by case basis.

3.24. We finalize our analysis of footnote 5 by assessing Indonesia's argument that the language used to set out the claim under Article 3.2 of the Import Licensing Agreement is ambiguous. We begin by noting that, as argued by co-complainants[146], Indonesia did not identify the specific language it found to be ambiguous. Nonetheless, bearing in mind the due process objective of panel requests of notifying the respondent and third parties of the nature of the complainant's case[147], we proceed to examine whether Indonesia's contention has merit. For language to be ambiguous, it must lead to uncertainty or confusion about its meaning. In the context of an analysis under Article 6.2 of the DSU, the resulting uncertainties or confusion must have an effect on the compliance with requirements set forth in this provision. In the present case, we do not observe any ambiguities in the text of footnote 5 that would prevent the co-complainants from complying with Article 6.2 of the DSU. On the contrary, and as we have noted in the preceding paragraphs, footnote 5 explains succinctly *how* or *why* the measure at issue is considered by the co-complainants to be violating Article 3.2 of the Import Licensing Agreement. To us, the language used in footnote 5 to set out the claim under Article 3.2 is not ambiguous.

3.25. We thus conclude that, with respect to the claim under Article 3.2 of the Import Licensing Agreement set out in footnote 5 of the panel requests, the co-complainants provided a brief summary of the legal basis of their complaint that presents the problem clearly as required by Article 6.2 of the DSU.

3.26. We now turn to Footnote 8, which reads:

> To the extent that Indonesia's import licensing regime for animals and animal products falls within the scope of the disciplines of Article 3 of the Import Licensing Agreement, [the United States][New Zealand] considers that the import licensing requirements and procedures, as described above and as set out in sections II(b) and II(c), would be inconsistent with Article 3.2 of the Import Licensing Agreement because they have trade-restrictive or trade-distortive effects additional to those caused by imposition of the restriction, do not correspond in scope and duration to any measure they could be implementing, and are more administratively burdensome than absolutely necessary to implement any such measure. To the extent that Indonesia's import licensing regime falls within the scope of Article 2 of the Import Licensing Agreement, the [the United States][New Zealand] considers that Indonesia's import licensing requirements and procedures, as described above and as set out in sections II(b) and II(c), would be inconsistent with Article 2.2(a) of the Import Licensing Agreement because they are administered in such a manner as to have restricting effects on imports.

3.27. We observe that footnote 8 closely resembles footnote 5, the only difference being that the former addresses the import licensing regime for animals and animal products while the latter addresses that for horticultural products. Accordingly, our conclusion above that the co-

[144] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.8 (referring to Appellate Body Report, *Korea – Dairy*, para. 139 (referring to Appellate Body Reports, *EC – Bananas III*, para. 141; *India – Patents (US)*, para. 88; and *EC – Hormones*, para. 156)).

[145] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (italics original; underlining added)). In *EC – Selected Customs Matters*, the Appellate Body also stated that "Article 6.2 of the DSU requires that the *claims* – not the *arguments* – be set out in a panel request in a way that is sufficient to present the problem clearly". (Ibid., para. 153 (referring to Appellate Body Reports, *EC – Bananas III*, para. 143; *India – Patents (US)*, para. 88; *Korea – Dairy*, para. 139; and *Dominican Republic – Import and Sale of Cigarettes*, para. 121))

[146] Co-complainants' joint comments on Indonesia's preliminary ruling request, para 13.

[147] Appellate Body report, *US – Countervailing Measures (China)*, para. 4.6.

complainants provided a brief summary of the legal basis of their complaint that presents the problem clearly as required by Article 6.2 of the DSU also applies to the claims set out in footnote 8.

3.2.2 Footnotes 7, 12 and 14

3.28. The first footnote setting out the claims pursuant to Article III:4 of the GATT 1994 is footnote 7, which provides as follows:

> To the extent that these measures are measures affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, [the United States][New Zealand] considers that they would be inconsistent with Article III:4 of the GATT 1994 because Indonesia does not impose similar limitations on the internal sale, offering for sale, purchase, transportation, storage, distribution and use of like domestic products and, therefore, Indonesia's laws, regulations and requirements accord less favorable treatment to imported products than like domestic products.

3.29. We observe that, similarly to footnotes 5 and 8, footnote 7 starts with a condition that qualifies the claim by using the introductory words "[t]o the extent that". We refer to paragraph 3.21 above where we concluded that the conditional nature of the claims does not render them outside our jurisdiction. As we also found with footnotes 5 and 8, this first section of the footnote does not provide the explanation of the legal basis for the claim required by Article 6.2 of the DSU. Following our approach above, we look to the latter part of the footnote, following the word "because", which states as follows: "Indonesia does not impose similar limitations on the internal sale, offering for sale, purchase, transportation, storage, distribution and use of like domestic products, and therefore Indonesia's [measures] accord less favorable treatment to imported products than like domestic products". We note that the co-complainants have closely followed the language of Article III:4 of the GATT 1994 to explain how and why the challenged measures are inconsistent with this provision.[148] Nevertheless, as we have stated above, doing so does not mean necessarily that such formulation would result in a failure to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. An examination of the explanation in question would be required. In our view, using the word "because" in footnote 7 signals that what follows are the co-complainants' reasons why the measures at issue are considered to be in violation of Article III:4 of the GATT 1994. Moreover, the language employed by the co-complainants in footnote 7 following the word "because" explains succinctly *why* the measures referred to in Section I(C) are considered by New Zealand and the United States to be in violation of this provision. It states what Indonesia allegedly fails to do (impose similar limitations regarding domestic products) and identifies the perceived result of this alleged failure (accordance of less favourable treatment to imported products than like domestic products). It contends that this would result in a violation of Article III:4 of the GATT 1994. Reading this explanation, we are of the view that the respondent can understand what the co-complainants are complaining about and which violation is alleged to have occurred. As to their arguments in support, these do not need to be set forth in a request for the establishment of a panel.

3.30. Similar to our conclusion in paragraph 3.24 above, we do not observe in the text of footnote 7 any ambiguities, nor has Indonesia pointed to any, that would conflict with the requirements of Article 6.2 of the DSU. On the contrary, and as we have noted in the preceding paragraphs, footnote 7 explains succinctly *how* or *why* the measure at issue is considered by the co-complainants to be violating Article III:4 of the GATT 1994. To us, the language used in footnote 7 to set out the claim under Article III:4 of the GATT 1994 is not ambiguous.

3.31. We thus conclude that, with respect to the claim under Article III:4 of the GATT 1994 set out in footnote 7 of the panel requests, the co-complainants provided a brief summary of the legal basis of their complaint that presents the problem clearly as required by Article 6.2 of the DSU.

3.32. Turning now to footnote 12, it provides as follows:

> To the extent that the absorption requirement is a measure affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, [the United

[148] Concerning the absence in Article 6.2 of the DSU of a requirement to include arguments in support of a claim, *see* paragraph 3.5 and 3.23 above.

> States][New Zealand] considers that it would be inconsistent with Article III:4 of the GATT 1994 because it accords less favorable treatment to imported products than to like domestic products.

3.33. We observe that, although not identical, the language and structure of footnote 12 is similar to that of footnote 7. It thus starts with a condition that qualifies the claim by using the introductory words "[t]o the extent that". We refer to paragraph 3.21 above where we concluded that the conditional nature of the claims does not render them outside our jurisdiction. Once again, the co-complainants closely followed the language of the provision in question to explain the reason why the challenged measure is inconsistent with it. For reasons similar to those set forth above, we consider that the co-complainants explained succinctly *why* the measure in question is considered by New Zealand and the United States to be in violation of Article III:4 of the GATT 1994.[149] As with previous footnotes, we do not observe in the text of footnote 12 any ambiguities, nor has Indonesia pointed to any, that would conflict with the requirements of Article 6.2 of the DSU. On the contrary, and as we have noted in the preceding paragraphs, footnote 12 explains succinctly *how* or *why* the measure at issue is considered by the co-complainants to be violating Article III:4 of the GATT 1994. To us, the language used in footnote 12 to set out the claim under Article III:4 of the GATT 1994 is not ambiguous.

3.34. We thus conclude that, with respect to the claim under Article III:4 of the GATT 1994 set out in footnote 12 of the panel requests, the co-complainants provided a brief summary of the legal basis of their complaint that presents the problem clearly as required by Article 6.2 of the DSU.

3.35. Finally, we examine footnote 14, which provides as follows:

> To the extent that these measures are measures affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, [the United States][New Zealand] considers that they would be inconsistent with Article III:4 of the GATT 1994 because Indonesia does not impose similar limitations on the internal sale, offering for sale, purchase, transportation, storage, distribution and use of like domestic products and, therefore, Indonesia's laws, regulations and requirements accord less favorable treatment to imported products than to like domestic products.

3.36. We observe that the wording of footnote 14 is identical to that of footnote 7. The only difference is the paragraph of the panel requests where this footnote is placed, with the result that footnote 14 refers to measures different from those to which footnote 7 applies. This difference does not affect our reasoning regarding compliance with Article 6.2 of the DSU and hence we reach the same conclusion with respect to footnote 14. We thus conclude that, with respect to the claim under Article III:4 of the GATT 1994 set out in footnote 14 of the panel requests, the co-complainants provided a brief summary of the legal basis of their complaint that presents the problem clearly as required by Article 6.2 of the DSU.

3.37. Before concluding on this aspect of Indonesia's request for a preliminary ruling, the Panel wishes to address Indonesia's argument that the "situation" in the present dispute is "exactly the situation" present in *China – Raw Materials* where the complainants' panel requests were found wanting because, according to Indonesia, "the complainants merely 'challeng[ed] some (groups of) measures as inconsistent with some (groups) of the listed WTO obligations…".[150] The co-complainants responded that the facts in *China – Raw Materials* can be distinguished from the present instance and that, on the contrary, the panel requests in these proceedings describe the challenged measures in detail, including the problematic aspects of their operation, identify the legal instruments through which each measure was imposed, set out the provisions with which the measures are inconsistent, and summarize the relevant obligation.[151] We recall that in *China – Raw Materials*, the panel request listed 37 legal instruments followed by a "wide array of dissimilar obligations."[152] The Appellate Body found that, given the number of possible combinations that

[149] Concerning the absence in Article 6.2 of the DSU of a requirement to include arguments in support of a claim, *see* paragraph 3.5 and 3.23 above.

[150] Indonesia's request for a preliminary ruling, paras. 20-21.

[151] Co-complainants' joint comments on Indonesia's preliminary ruling request, para 26.

[152] Appellate Body Report, *China – Raw Materials*, para. 228 (referring to Appellate Body Report, *Korea – Dairy*, para. 124).

existed between the legal instruments listed and the multiple obligations challenged, it was not possible to discern the problems alleged to have been caused. The situation in that case is not comparable to that here. Contrary to the situation in *China — Raw Materials*, the panel requests do not "raise[] multiple problems stemming from several different obligations arising under various provisions".[153] Rather, footnotes 5, 7, 8, 12 and 14 of the panel requests before us allege violations only of Articles 2.2(a) (not relevant in this ruling) and 3.2 of the Import Licensing Agreement, as well as Article III:4 of the GATT 1994. The measures alleged to be in violation of these provisions were discussed in connection with each provision separately. Thus the difficulties in discerning the problem found in *China — Raw Materials* do not arise in this case.

3.38. In the light of the foregoing, we reject Indonesia's contention that the manner in which the co-complainants formulated their claims pursuant to Article 3.2 of the Import Licensing Agreement and Article III:4 of the GATT 1994 in their panel requests did not sufficiently identify their claims and thereby failed to comply with the requirements of Article 6.2 of the DSU.

3.2.3 Whether the fact that the United States did not provide argumentation on Article III:4 of the GATT 1994 in its first written submission is relevant under Article 6.2 of the DSU

3.39. We proceed to examine Indonesia's contention that the "confusion"[154] regarding the claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement "is compounded by the fact that the Complainants' panel requests are identical, but their (first written submissions) are different concerning these treaty provisions." Indonesia explained that while the United States' first written submission "only appeared to advance" a claim under Article 3.2 of the Import Licensing Agreement, New Zealand's first written submission "attempted to invoke" both Article III:4 of the GATT and Article 3.2 of the Import Licensing Agreement.[155]

3.40. The co-complainants responded that this argument lacks merit because the consistency of a panel request with the requirements of Article 6.2 of the DSU is based on the text of that "request … made in writing".[156] In their view, a complainant is not required to pursue all the claims referenced in its panel request, and a decision not to pursue a claim "has no bearing on the sufficiency of the text of the panel request under DSU Article 6.2."[157]

3.41. We recall that, as explained by the Appellate Body, "a complainant has the prerogative to narrow or abandon its claims, and thereby reduce the scope of its disagreement and dispute, at any stage of a proceeding".[158] Furthermore, "whether a complainant narrows or abandons its claims is an issue different from an assessment of the consistency of a panel request with the requirements under Article 6.2 of the DSU, which must be assessed in the light of the language used in the panel request as it stood at the time it was filed".[159]

3.42. We thus conclude that the fact that the United States has not pursued a claim included in its panel request, namely Article III:4 of the GATT 1994, within its first written submission is not relevant for purposes of assessing whether such a claim was adequately identified in the panel request at issue pursuant to Article 6.2 of the DSU. We also find that the fact that New Zealand chose a different strategy from its co-complainant and decided to pursue in its first written submission claims under both Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement does not undermine the adequacy of its panel request, for it simply followed through with what it set forth in its panel request. Therefore, we dismiss Indonesia's request that

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[153] Appellate Body Report, *China – Raw Materials*, para. 230.
[154] Indonesia's request for a preliminary ruling, para. 22.
[155] Indonesia's request for a preliminary ruling, para. 22.
[156] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 15 (referring to DSU Article 6.2).
[157] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 15.
[158] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.19 (referring to Appellate Body Report, *Japan – Apples*, para. 136).
[159] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.19 (quoting *US – Countervailing and Anti-Dumping Measures (China)* that "[s]ubsequently dropping claims does not add to, or detract from, an independent assessment of whether the remaining claims are identified in a manner that is sufficient to present the problem clearly, in accordance with Article 6.2 of the DSU." (Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China),* para. 4.49).

we find that the co-complainants' different approaches in their respective first written submissions resulted in the claims being insufficiently identified in their panel requests.

3.3 Whether Indonesia's due process rights have been impaired

3.43. We turn now to address Indonesia's contention that it has suffered prejudice because the "apparent claims"[160] under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement were not sufficiently identified in the panel requests. Indonesia submitted that the fact that these claims were only mentioned in footnotes and that the footnotes only repeated the legal provisions without explaining why the measures at issue violate these two provisions are "acts of WTO inconsistency"[161] that clearly prejudice Indonesia's ability to defend itself in this dispute.[162]

3.44. The co-complainants responded that the evaluation of the sufficiency of a panel request is "based on the face of the panel request itself" and therefore "it would not also be necessary to demonstrate that the responding party was prejudiced by the inconsistency."[163] They also reasoned that if a panel request meets the requirements of Article 6.2 of the DSU, "a responding party cannot, objectively, be prejudiced by that request".[164] The co-complainants submitted further that, in any event, Indonesia has not been prejudiced because the co-complainants made Indonesia aware of the claims under Article 3.2 of Import Licensing Agreement and Article III:4 of the GATT 1994 both in the panel requests which are in accordance with Article 6.2, and in the co-complainants' requests for consultations.[165] In the co-complainants' view, Indonesia was therefore "on notice from the commencement of this dispute"[166] of these claims. The co-complainants also argued that Indonesia provided no details in support of its allegation of prejudice and consequently its "unsubstantiated claim of prejudice" is analogous to that considered in *Korea – Dairy*, where the Appellate Body rejected Korea's claim that it had suffered prejudice on the basis that it had "assert[ed] that it had sustained prejudice, but offered no supporting particulars in its appellant's submission nor at the oral hearing".[167]

3.45. We recall that a panel request serves the due process objective of notifying the respondent and third parties of the nature of the complainant's case.[168] Thus a panel request that is in conformity with Article 6.2 of the DSU will identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, with the result that the respondent will be made aware of the nature of the complainants' case. Indonesia's contention that it has suffered prejudice is inextricably linked to and dependent upon its claim that the co-complainants failed to sufficiently identify the claims in the panel requests, contrary to Article 6.2 of the DSU.

3.46. Having rejected above Indonesia's contention that the manner in which the co-complainants formulated their claims pursuant to Article 3.2 of the Import Licensing Agreement and Article III:4 of the GATT 1994 in their panel requests did not sufficiently identify their claims and thereby failed to comply with the requirements of Article 6.2 of the DSU, we also reject Indonesia's contention that it suffered prejudice as a result of the formulation of those claims. In our view, Indonesia would have been on notice that the co-complainants were pursuing claims under Article 3.2 of the Import Licensing Agreement and Article III:4 of the GATT 1994 and hence Indonesia's due process rights were not affected by virtue of the content of the panel requests.

[160] Indonesia's request for a preliminary ruling, paras. 13, 14, 24, 27 and 28.
[161] Indonesia's request for a preliminary ruling, para. 27.
[162] Indonesia's request for a preliminary ruling, para. 27.
[163] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 29 (referring to Appellate Body Report, *China – Raw Materials*, para. 233).
[164] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 29 (referring to Appellate Body Report, *China – Raw Materials*, para. 233).
[165] Co-complainants' joint comments on Indonesia's preliminary ruling request, paras. 29-30.
[166] Co -complainants' joint comments on Indonesia's preliminary ruling request, para. 30.
[167] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 31 (referring to Appellate Body Report, *Korea – Dairy*, para. 131).
[168] Appellate Body report, *US – Countervailing Measures (China)*, para. 4.6.

3.4 Whether the co-complainants' first written submissions have failed to comply with Article 6.2 requirements

3.47. At the outset of its request, Indonesia requests the Panel to find, by means of a preliminary ruling, that the first written submissions of the United States and New Zealand are inconsistent with the requirements of the DSU.[169] In its closing section, Indonesia submits that it is seeking the following ruling from the Panel:

> (a) The Complainants' apparent claims under Article III:4 of the GATT and Article 3.2 of the [Import Licensing Agreement] in their [first written submissions] are outside the Panel's terms of reference; and
>
> (b) The Complainants' failure in their panel requests as well as their [first written submissions] to meet the requirements of Article 6.2 of the DSU has clearly prejudiced, and continues to prejudice, the preparation of Indonesia['s] defence, violating Indonesia's right to due process in these proceedings.

3.48. We understand the claim set forth in paragraph (b) to mean that Indonesia is requesting us to evaluate the consistency with Article 6.2 of the DSU not only of the co-complainants' panel requests, but *also* of their first written submissions. Indonesia's request is inapposite. Article 6.2[170] regulates the requirements for panel requests but does not speak to the requirements of first written submissions. Hence, the Panel declines to make such an evaluation.

4 CONCLUSION

4.1. With respect to Indonesia's contention that the claims pursuant to Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement are not sufficiently identified in the co-complainants' panel requests, thus failing to meet the requirements of Article 6.2 of the DSU, we find that:

a. Nothing in the wording of Article 6.2 of the DSU precludes a complainant from setting out claims in the footnotes to its panel request. Footnotes form part of the text of a panel request and may be relevant to the presentation of the legal basis of the complaint. The fact that the co-complainants have set out claims pursuant to Article 3.2 of the Import Licensing Agreement and Article III:4 of the GATT 1994 within footnotes 5, 7, 8, 12 and 14 of their panel requests does not render these requests inconsistent with the requirements of Article 6.2 of the DSU;

b. Indonesia has failed to demonstrate that the co-complainants have not sufficiently identified their claims pursuant to Article 3.2 of the Import Licensing Agreement and Article III:4 of the GATT 1994 because the language employed in footnotes 5, 7, 8, 12 and 14 of their panel requests is "conditional and ambiguous";

c. Indonesia has failed to demonstrate that the co-complainants have not sufficiently identified their claims pursuant to Article 3.2 of the Import Licensing Agreement and Article III:4 of the GATT 1994, by referring to the wording of these provisions when formulating the relevant claims in footnotes 5, 7, 8, 12 and 14 of the panel requests and by not providing a proper or sufficient explanation of how the measures at issue are inconsistent with Article III:4 of the GATT 1994 or Article 3.2 of the Import Licensing Agreement.

4.2. We therefore reject Indonesia's contention that the manner in which the co-complainants formulated their claims pursuant to Article 3.2 of the Import Licensing Agreement and Article III:4 of the GATT 1994 in their panel requests did not sufficiently identify their claims and thereby failed to comply with the requirements of Article 6.2 of the DSU.

4.3. We further find that the fact that a co-complainant, in this case the United States, has not argued a claim included in its panel request, in this case Article III:4 of the GATT 1994, within its

[169] Indonesia's request for a preliminary ruling, para. 1.
[170] See paragraph 3.1 above.

first written submission is not relevant for the purpose of assessing whether such a claim has been adequately identified in a panel request pursuant to Article 6.2 of the DSU.

4.4. In the light of our finding in paragraph 4.2 above, we reject Indonesia's contention that it suffered prejudice as a result of the formulation of those claims. In our view, Indonesia would have been on notice that the co-complainants were pursuing claims under Article 3.2 of the Import Licensing Agreement and Article III:4 of the GATT 1994 and hence Indonesia's due process rights were not affected by virtue of the content of the panel requests.

4.5. Concerning Indonesia's request that we evaluate the consistency with Article 6.2 of the DSU of their first written submissions, the Panel declines to make such an evaluation because Article 6.2 regulates the requirements that panel requests must satisfy but does not speak to the requirements of first written submissions.

4.6. Finally, we note that this preliminary ruling will become an integral part of our Final Report, subject to any changes that may be necessary in the light of comments received from the parties during the interim review.

ANNEX B-1

WORKING PROCEDURES OF THE PANEL

Adopted on 28 October 2015

1.1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

1.2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

1.3. Upon indication from any party, at the latest on the first substantive meeting, that it shall provide information that requires protection additional to that provided for under these Working Procedures, the Panel shall, after consultation with the parties, decide whether to adopt appropriate additional procedures. Exceptions to this procedure shall be granted upon a showing of good cause.

1.4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

1.5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

1.6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

1.7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the complainants request such a ruling, Indonesia shall submit its response to the request in its first written submission. If Indonesia requests such a ruling, the complainants shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

1.8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel

shall accord the other parties a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

1.9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. In exceptional circumstances, the Panel may grant an extension to this deadline upon good cause shown. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

1.10. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

1.11. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the parties could be numbered, respectively, NZL-1, NZL-2, etc., USA-1, USA-2, etc. or IDN-1, IDN-2 If the last exhibit in connection with the first submission was numbered, for example, NZL-5, the first exhibit of the next submission thus would be numbered NZL-6. Any joint exhibits submitted by the complainants shall be numbered JE-1, JE-2, etc.

Questions

1.12. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

1.13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

1.14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite New Zealand followed by the United States to present their opening statements first. Subsequently, the Panel shall invite Indonesia to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other parties the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the complainants presenting its statement first.

1.15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask Indonesia if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Indonesia to present its opening statement, followed by the complainants. If Indonesia chooses not to avail itself of that right, the Panel shall invite New Zealand followed by the United States to present their opening statements first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other parties the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other parties' written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

1.16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

1.17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

1.18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in

writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

1.19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

1.20. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of responses to questions. Each such executive summary shall not exceed 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

1.21. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

1.22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

1.23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other parties' written request for review.

1.24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

1.25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file three paper copies of all documents it submits to the Panel. Exhibits may be filed in four copies preferably in a USB key (CD-ROM or DVD also possible) and three paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a USB key, a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to *DSRegistry@wto.org*, with a copy to *****.****@wto.org*, *****.****@wto.org*, *****.****@wto.org*, and

****.****@*wto.org*. If a USB key, CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other parties (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

1.26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX C

ARGUMENTS OF THE PARTIES

NEW ZEALAND

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ANNEX C-1

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF NEW ZEALAND

INTRODUCTION

1. This dispute arises from Indonesia's prohibitions and restrictions on imports of animals, animal products and horticultural products. Indonesia's measures are imposed through complex import licensing regimes that underpin a publicised government strategy to reduce imports to encourage domestic agricultural production in the hope of achieving self-sufficiency in food.

I. FACTUAL BACKGROUND

2. Indonesia has enacted an overarching framework of laws that constitute import restrictions in their own right and provide the legislative basis for its import licensing regimes for animals, animal products and horticultural products.

3. Both regimes share similar features, including overarching framework legislation limiting agricultural imports to situations where domestic food production is deemed insufficient to fulfil domestic demand and laws and regulations that prohibit and restrict imports through a series of discrete requirements and as a whole.

A. FRAMEWORK LEGISLATION

4. At the core of Indonesia's import regime is legislation which expressly prohibits importation of animals, animal products, horticultural products and food in circumstances where domestic production is deemed sufficient to meet domestic demand. This is reflected, for example, through Article 36B(1) of the *Animal Law Amendment* which provides that "Importation of Livestock and Animal Product from overseas into the Territory of the Republic of Indonesia can be perform if domestic production and supply of Livestock and Animal Product has not fulfil public consumption", and Article 36(1) of the *Food Law* which provides that importation of food is only permissible "if the domestic Food Production is insufficient and/or cannot be produced domestically".

B. IMPORT LICENSING REGIMES

5. The framework legislative provisions which limit imports of agricultural products based on sufficiency of domestic production provide the framework for two separate but similar import licensing regimes for animals and animal products (on the one hand) and horticultural products (on the other hand).

(A) Animals and animal products

6. In order to import animals and animal products into Indonesia, regulations require importers to obtain an MOA Recommendation from the Ministry of Agriculture and an Import Approval from the Ministry of Trade. In addition, importers of bovine animals and animal products are required to obtain an Importer Designation from the Ministry of Trade.

(B) Horticultural products

7. Similarly, in order to import certain listed horticultural products into Indonesia, importers of horticultural products must also obtain an Importer Designation, a Horticultural Product Import Recommendation (RIPH) from the Ministry of Agriculture and an Import Approval from the Ministry of Trade.

8. It is through the process of issuing these documents, and the requirements which must be satisfied by importers in order to obtain them, that Indonesia restricts imports of animals and animal products and horticultural products. The specific prohibitions and restrictions made effective through these import licensing regimes are detailed below.

C. PROHIBITIONS AND RESTRICTIONS IMPOSED THROUGH INDONESIA'S IMPORT LICENSING REGIME FOR ANIMALS AND ANIMAL PRODUCTS

9. Importer Designations, MOA Recommendations and Import Approvals are the mechanism through which Indonesia imposes a number of prohibitions and restrictions on the importation of animals and animal products.

a. Prohibitions of certain animal and animal product imports: Indonesia prohibits the importation of certain animals and animal products that are not listed in the Appendices to *MOT 46/2013* or *MOA 139/2014*. In particular, bovine meat and offal products that are not listed in Appendix I, *MOA 139/2014* and Appendix I, *MOT 46/2013* are prohibited from importation. This includes all bovine offal products (except some cuts of tongue and tail), certain forms of manufacturing meat and, except in certain exceptional circumstances, all bovine secondary cuts and carcass;

b. Limited application windows and validity periods: MOA Recommendations and Import Approvals are valid for limited time periods, and may only be applied for during limited application windows;

c. Fixed Licence Terms: MOA Recommendations and Import Approvals together specify the type, quantity, country of origin, and port of entry for products that an importer may import during the validity period. This prevents importers from importing, during a Quarter, products of a different type, in a greater quantity, from another country, or through a different port than those specified in their MOA Recommendations and Import Approvals;

d. 80% realisation requirement: Importers are required to import, on an annual basis, 80% of the quantity of each type of product specified in their Import Approvals or face severe sanctions;

e. Restrictions on use, sale and distribution of imported bovine meat and offal: Bovine meat, carcass and offal is only permitted to be imported for use in hotels, restaurants, catering and industry and for a very limited range of other "special needs". Such products are therefore prohibited from being imported for certain uses and for sale or distribution through certain channels (including sale directly to consumers at modern and traditional markets, which are the primary consumer retail channels for bovine products in Indonesia);

f. Domestic Purchase Requirement: Importation of bovine meat is only permitted on the condition that importing entities have purchased ("absorbed") designated quantities of beef raised and slaughtered in Indonesia; and

g. Beef reference price: Importation of bovine animals and animal products is prohibited when the domestic market price of beef secondary cuts falls below a specified reference price.

10. These components of Indonesia's import licensing regime, both when viewed as distinct individual measures and as elements of a single overarching measure, are inconsistent with Indonesia's WTO obligations.

D. PROHIBITIONS AND RESTRICTIONS IMPOSED THROUGH INDONESIA'S IMPORT LICENSING REGIME FOR HORTICULTURAL PRODUCTS

11. Importer Designations, RIPH and Import Approvals are the mechanism through which Indonesia imposes a number of prohibitions and restrictions on the importation of horticultural products.

a. Limited application windows and validity periods: RIPH and Import Approvals may only be applied for during limited application windows and are valid for limited time periods;

b. Fixed Licence Terms: RIPH and Import Approvals together specify the type, quantity, country of origin, and port of entry for products that an importer may import during the validity period. This prevents importers from importing products of a different type, in a

greater quantity, from another country, or through a different port than those specified in their RIPH and Import Approvals;

c. 80% Realisation Requirement: Importers are required to import 80 percent of the quantity of each product specified in their Import Approvals for the applicable six month period or face severe sanctions;

d. Restrictions based on the Indonesian harvest period: Indonesia prohibits or restricts imports of certain horticultural products during Indonesian harvest periods;

e. Restrictions on storage ownership and capacity: Importers are required to own storage facilities of appropriate capacity and may only import volumes commensurate with that storage capacity;

f. Restrictions on use, sale and distribution: Importers are restricted in the use, sale and distribution of listed horticultural products. Registered Importers (RI) are prohibited from trading and/or transferring imported products directly to consumers or retailers. Producer Importers (PI) may only use imported products for processing and are prohibited from trading and/or transferring such products;

g. Reference prices for chili and shallots: Importation of chili and shallots is prohibited when the domestic market price of the product falls below a specified reference price; and

h. Six month harvesting requirement: Indonesia prohibits the importation of listed fresh horticultural products harvested more than 6 months previously.

12. These measures are inconsistent with Indonesia's WTO obligations, both when viewed as individual measures and when considered as part of a single overarching measure.

II. LEGAL DISCUSSION

A. ARTICLE XI:1 OF THE GATT 1994 AND ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

1. Obligation under Article XI:1 of the GATT 1994

13. WTO panels have repeatedly emphasised the broad scope of Article XI:1.[1] Article XI:1 prohibits WTO Members from instituting or maintaining prohibitions or restrictions other than duties, taxes, or other charges, on the importation, exportation, or sale for export of any product destined for another WTO Member.[2] The scope of Article XI:1 includes measures through which a prohibition or restriction is produced or becomes operative.[3]

14. The Appellate Body has confirmed that a "restriction" is a thing which "restricts someone or something, a limitation on action, a limiting condition or regulation" and as generally something that has a limiting effect.[4] A measure can have a "limiting effect" on importation for a wide variety of reasons. For example, the panel in *Argentina - Import Measures* applied a framework for assessing consistency with Article XI:1 which was based on restrictions that had been found by past panels to be covered by Article XI:1.[5] It came to the conclusion that measures have a limiting effect on imports and constitute an import restriction when they: (a) restrict market access; (b) create uncertainty as to an applicant's ability to import; (c) do not allow companies to import as much as they desire or need without regard to their export performance; and (d) impose a

[1] Panel Reports, *Argentina - Import Measures*, para. 6.251; *Colombia - Ports of Entry*, para. 7.233; *India - Quantitative Restrictions*, para. 5.128; *India - Autos*, para. 7.264; and *Dominican Republic - Cigarettes*, para. 7.248.
[2] Appellate Body Report, *Argentina - Import Measures*, para. 5.216.
[3] Appellate Body Report, *Argentina - Import Measures*, para. 5.218.
[4] Appellate Body Reports, *China - Raw Materials*, para. 319; *Argentina - Import Measures*, para. 5.217.
[5] Panel Report, *Argentina - Import Measures*, para. 6.454.

significant burden on importers that is unrelated to their normal importing activity.[6] The panel's framework in that case was not questioned by the Appellate Body.[7]

15. It is also clear that, for a measure to constitute a quantitative restriction, it is not necessary for the measure to have an adverse impact on trade flows. This was confirmed by the Appellate Body in *Argentina – Import Measures*, which stated that the limiting effect of a measure "need not be demonstrated by quantifying the effects of the measure at issue" but rather can be "demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context".[8] Although the Complainants have demonstrated that the trade impact of Indonesia's regime is severe, an adverse impact on trade flows is not a necessary component of the legal test for a quantitative restriction.

2. Obligation under Article 4.2 of the Agreement on Agriculture

16. Article 4.2 of the Agreement on Agriculture prohibits WTO Members from maintaining, reverting to, or resorting to measures of the kind which have been required to be converted into ordinary customs duties. The list of measures identified in the footnote to Article 4.2 is illustrative. It includes quantitative import restrictions and minimum import prices. It also includes "similar" border measures other than ordinary customs duties.

17. The Appellate Body in *Chile - Price Band System* viewed Article 4 of the Agreement on Agriculture "as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products".[9] Further, the Appellate Body stated that "Article 4.2 prevents WTO Members from *circumventing* their commitments on 'ordinary customs duties' by prohibiting them from 'maintaining, reverting to, or resorting to' measures other than 'ordinary customs duties'".[10]

18. While a measure that is inconsistent with Article XI:1 of the GATT 1994 would, to the extent it applies to agricultural products, be inconsistent with Article 4.2 of the Agreement on Agriculture, the reverse is not necessarily the case. As the Appellate Body indicated in *Chile - Price Band System*, the scope of measures prohibited by Article 4.2 extends beyond the "restrictions other than taxes, duties and charges" that are prohibited by Article XI:1 of the GATT 1994.[11]

3. Indonesia's import licensing regime for animals and animal products is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

19. New Zealand submits that each of individual components of Indonesia's import licensing regime for animals and animal products, and the regime viewed "as a whole" constitute "prohibitions" or "restrictions" that are inconsistent with Article XI:1 of the GATT 1994 and are a "quantitative import restriction" or "similar border measure" prohibited under Article 4.2 of the Agreement on Agriculture. The beef reference price measure is also inconsistent with Article 4.2 of the Agreement on Agriculture by virtue of constituting a "minimum import price", "quantitative import restriction" or "similar border measure".

(a) The prohibition on imports of certain animal products is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

20. Indonesia uses a "positive list" system to prohibit the importation of certain forms of meat, offal and carcass. In particular, any bovine meat, offal or carcass products that are not listed in both Appendix I of *MOA 139/2014* and Appendix I of *MOT 46/2013* are ineligible to obtain an MOA Recommendation (and therefore an Import Approval, which requires an MOA Recommendation as a prerequisite). As a consequence of being unable to obtain MOA Recommendations and Import Approvals, importers are prohibited from importing these

[6] Panel Report, *Argentina - Import Measures*, para. 6.474.
[7] Appellate Body Report, *Argentina - Import Measures*, paras. 5.287-5.288.
[8] Appellate Body Report, *Argentina – Import Measures*, para. 5.217.
[9] Appellate Body Report, *Chile - Price Band System*, para. 201.
[10] Ibid. para. 187.
[11] Appellate Body Report*, Chile - Price Band System*, para. 256.

products contrary to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

21. Indonesia claims that products not listed in *MOT Regulation 46/2013* are able to be imported freely without being subject to any import requirements.[12] However, this is directly contradicted by Article 59(1) of the *Animal Amendment Law* which provides that all importers of animal products must obtain an import licence from the Ministry of Trade after receiving a recommendation from the Minister for fresh animal products. It is also at odds with Indonesian regulations, reported statements by Indonesian officials, statements by exporters, media coverage, statements by other WTO Members and trade statistics.

22. Although importers are unable to apply for and obtain MOA Recommendations and Import Approvals for bovine carcass and beef secondary cuts, a limited exception applies that enables the Indonesian Government, acting through two Ministers, to direct Indonesian State-Owned Enterprises to conduct importation of these products where certain emergency circumstances are deemed to exist. These conditions are designed in a way which permits importation only in circumstances where there are shortages in domestic supply of these products, as evidenced through a lack of "food availability", high domestic prices for such products, disease outbreaks or natural disasters which affect levels of supply within Indonesia. This is consistent with Indonesia's overarching objective of preventing imports in circumstances where domestic supply is deemed sufficient to satisfy domestic demand.

(b) Limited application windows and validity periods are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

23. Indonesia limits the ability of importers to obtain MOA Recommendations and Import Approvals by prohibiting importers from applying for these documents outside four one-month periods, and specifying that Import Approvals are valid for only the three month duration of each Quarter.

24. Import orders are *unable to be finalised and shipped* until after an Import Approval is issued, as the health certificate issued by the exporting country is required to specify the number and date of issue of the Import Approval. As exporters need time to prepare, package and ship product, this restricts imports at the start of each Quarter. The limited validity period also means that imports are restricted at the end of each Quarter as product arriving after this date will be refused entry into Indonesia and re-exported.

25. These limited application windows and validity periods for MOA Recommendations and Import Approvals restrict imports by limiting the time periods during which exporters are able to access the Indonesian market and accordingly have a limiting effect on importation that is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

(c) Fixed Licence Terms are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

26. MOA Recommendations and Import Approvals collectively specify the type, quantity, country of origin and port of entry of animals and animal products permitted per Quarter. These Fixed Licence Terms restrict imports by imposing quarterly quantitative limits on bovine animals and animal products that may be imported into Indonesia and "lock in" the terms of the licence at the commencement of the relevant Quarter.

27. The inherent difficulty that exists in determining these variables prior to the commencement of a Quarter (when importers must finalise their applications for MOA Recommendations and Import Approvals) creates uncertainty for importers and affects their ability to plan and respond to market fluctuations during the course of each Quarter. These restrictions eliminate importers' flexibility to respond to changes in external factors that occur during a Quarter, and therefore limit an importer's ability to alter its import quantities during that period, in violation of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

[12] Indonesia's first written submission, paras. 34, 96-98.

28. Indonesia concedes that these terms are "static for the length of one validity period".[13] As a result, these requirements impose a quota on imports during that 3-month period. Indonesia seeks to distance itself from these measures by arguing that the terms are self-selected by private actors.[14] However, it is precisely because importers are required to "lock in" each term per period, while at the same time mandating that non-complying products will be re-exported, that Indonesia eliminates importer flexibility and restricts trade. This loss of flexibility is not a result of autonomous decisions by importers, but rather a direct consequence of the design, architecture and revealing structure of Indonesia's regulations.

(d) 80% realisation requirement

29. Upon being granted an Import Approval for bovine animals or animal products, an importer must import no less than 80% (and no more than 100%) of the quantity of each of the products specified in the Import Approval. This has the effect of inducing importers to reduce the quantities that they request in their quarterly MOA Recommendations and Import Approvals.

30. The limiting effect of the 80% realisation requirement is magnified when combined with the Fixed Licence Terms. The constraints imposed by the Fixed Licence Terms limits the flexibility available to importers to satisfy the 80% realisation requirement (for example by importing different meat cuts, from different countries, or into different ports), and therefore further induces importers to reduce the quantities they request in Import Approvals contrary to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

(e) Prohibitions and restrictions on the use, sale and distribution of imported animals and animal products

31. Indonesia prohibits the importation of animals and animal products for particular uses, and for sale and distribution through certain outlets. Specifically, bovine meat, permitted offal (i.e. tongue and tail) and carcass may only be imported into Indonesia for use by "industry, hotels, restaurant, catering, and/or other special needs", and may only be distributed or sold through these same channels. Accordingly, these products are prohibited from being imported for sale through both modern and traditional retail channels.

32. The effect of these measures is that bovine carcass, meat and offal are not permitted to be imported into Indonesia for any form of domestic use, or sold or distributed through consumer retail outlets. Importantly, it precludes imported beef from being sold at modern markets such as supermarkets and hypermarkets as well as traditional retail outlets such as wet markets, small stalls or shops and street carts. This substantially reduces the opportunities for imported products to reach Indonesian consumers who buy their household food products at these locations, and effectively precludes importation of bovine products for domestic consumption. Imports of other meat products are not restricted to the same extent, and sales of such products are expressly permitted for sale through modern markets, such as supermarkets or hypermarkets (but also excluding traditional markets).

33. Thus, Indonesia's restrictions on use, sale and distribution are designed in a way which directly restricts the importation of bovine meat and offal and therefore constitute a "restriction" on importation maintained in violation of Article XI:1 of the GATT 1994 and a "quantitative import restriction"or "similar border measure" maintained contrary to Article 4.2 of the Agreement on Agriculture.

(f) Domestic purchase requirement

34. In order to import beef for retail purposes, at least three percent of an importer's total beef purchases must be derived from Indonesian cows. This requirement forces importers to substitute imported beef with domestically-produced beef, and therefore directly limits the quantity of beef that importers could otherwise import.

35. Indonesia's Domestic Purchase Requirement is structurally akin to the local content requirement considered by the panel in *Argentina - Import Measures* and found, as part of a suite

[13] Indonesia's first written submission, para. 105.
[14] Indonesia's first written submission, paras. 104-106.

of trade related requirements, to be inconsistent with Article XI:1 of the GATT 1994. All beef importers are required to demonstrate that they have purchased a specified quantity of domestically produced beef in order to import any beef and therefore requires importers to substitute imported beef with beef that is domestically produced. This has a limiting effect on imports into Indonesia in breach of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

(g) Reference price for beef

36. Indonesia imposes a reference price system for bovine animals and animal products. *MOT 46/2013* provides that imports of bovine animals and animal products are suspended if the market price of beef secondary cuts in Indonesia falls below a specified "reference price". This measure has the effect of limiting imports by prohibiting the importation of bovine animals and animal products when the domestic market price of these products falls below a stipulated reference price, thereby constituting a prohibition or restriction on imports in breach of Article XI:1.

37. The beef reference price is functionally similar to a traditional "minimum import price", as both a minimum import price and the beef reference price have the effect of establishing a minimum price below which imported beef cannot enter the market. This is consistent with the use of the term "minimum import price" in *Chile - Price Band System*, which was said by the Appellate Body to "refer generally to the lowest price at which imports of a certain product may enter a Member's domestic market".[15]

38. Further, because it imposes a total prohibition on importation of bovine animals and animal products in circumstances where domestic prices fall below a specified level, the beef reference price is also a "quantitative import restriction" within the meaning of footnote 1 to Article 4.2.

39. Accordingly, the beef reference price constitutes both a "quantitative import restriction" or "similar border measure" and a "minimum import price" or "similar border measure" for the purposes of Article 4.2 of the Agreement on Agriculture.

4. Indonesia's import licensing regime for horticultural products is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

40. Indonesia's import licensing regime for horticultural products is similar in many respects to that for animals and animal products. New Zealand submits that each of individual components of Indonesia's import licensing regime for horticultural products, and the regime viewed "as a whole", constitute "prohibitions" or "restrictions" that are inconsistent with Article XI:1 of the GATT 1994. They are also measures of the kind which have been required to be converted into ordinary customs duties and maintained contrary to Article 4.2 of the Agreement on Agriculture.

(a) Limited application windows and validity periods are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

41. Importers of horticultural products may only submit applications for RIPHs and Import Approvals during limited windows and the RIPHs and Import Approval are only valid for limited periods. These requirements are structured in such a way that imports are severely restricted at the start and at the end of the validity period due to the delay between Import Approvals being issued and product being processed and shipped to Indonesia.

(b) Fixed licence terms are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

42. As is the case with the importation of animals and animal products, Importer Designations, RIPHs and Import Approvals set out the fixed terms for the importation of horticultural products into Indonesia. By determining the import terms at the start of a validity period, and not allowing those terms to be amended during the validity period of the import licences, Indonesia's restrictions remove the ability of importers to respond to market forces and external factors that occur during a validity period.

[15] Appellate Body Report, *Chile - Price Band System*, para. 236.

(c) 80% realisation requirement is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

43. Importers must "realise" 80% of the quantity of each type of horticultural product specified in the Import Approval or face severe sanctions. This produces a direct incentive for importers to conservatively estimate the quantities that they request in their Import Approval and accordingly has a limiting effect on imports. Accordingly, the measure is a quantitative restriction prohibited by Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

(d) Restrictions based on Indonesian harvest periods are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

44. Indonesia prohibits or restricts the importation of certain horticultural products according to Indonesian domestic harvest seasons. The measure protects domestic Indonesian horticultural products by eliminating imported competition at certain times of the year. As a prohibition or restriction on the import of horticultural products, the restriction based on the Indonesian harvest period is a quantitative restriction prohibited by Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

(e) The storage ownership and capacity requirement is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

45. Indonesia requires that horticultural importers own appropriate storage facilities for horticultural products and limits total imports during a six-month validity period to an importer's certified storage capacity. This assumes that importers have zero turnover of product over the six-month validity period. This has a significant limiting effect on the quantity of imports that importers are able to apply for in their Import Approvals as it is the storage capacity which dictates the quantity of product imported, not market conditions. The measure is therefore a quantitative restriction that is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

(f) Restrictions on use, sale and distribution of imported horticultural products are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

46. Indonesia's import licence regime places restrictions on the use, sale and distribution of imported horticultural products which cannot be imported for direct sale to consumers and retailers. This constrains the ability of importers to market imported product, reduces the opportunity for imported products to reach Indonesian householders and adds a distribution layer. Accordingly the measure has a limiting effect on imports contrary to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

(g) Reference prices for chili and shallots are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

47. The reference price for chili and shallots operates in a similar manner to the reference price for beef. If the price of chili or shallots in the domestic market is below a stipulated reference price, the importation of chili and shallots is "postponed" (i.e. prohibited) until the domestic price exceeds the reference price. As a result imports of fresh chili into Indonesia have essentially been non-existent since the end of 2012. The measure is designed to operate as a ceiling below which imports of chili and shallots cannot enter the domestic market and therefore falls within the meaning of "minimum import price" or a similar border measure contrary to Article 4.2 of the Agreement on Agriculture. As by its nature it has a limiting or restricting effect on trade, it is also a quantitative restriction prohibited by Article XI:1 of the GATT 1994.

(h) The six month harvesting requirement is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

48. Indonesia prohibits the importation of horticultural products that have been harvested more than six months previously. If an importer violates this requirement, it will not be granted an RIPH for one year. The six month harvesting requirement operates as an absolute prohibition on imports

of horticultural products contrary to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

5. Indonesia's import restrictions based on sufficiency of domestic production are quantitative import restrictions or similar measures inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

49. Indonesia's domestic insufficiency condition is set out in the *Animal Law*, *Animal Law Amendment, Horticulture Law*, *Food Law* and *Farmers Law*. These laws, both separately and collectively, restrict imports of certain animals, animal products and horticultural products by prohibiting importation of products in circumstances where domestic production is deemed sufficient to meet domestic demand.

50. The domestic insufficiency condition *independently* limits importation, as imported products are only given market access on the condition, and to the extent that, domestic supply is deemed insufficient to satisfy Indonesian needs. These measures constitute prohibitions or restrictions on importation under Article XI:1 of the GATT 1994, and quantitative import restrictions within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture, because they have a limiting effect on importation. This limiting effect is generated by (a) prohibiting importation in circumstances where domestic production is deemed sufficient to meet domestic demand; and (b) creating uncertainty for importers as to if, or when, imports of certain products will be permitted.

51. The domestic insufficiency condition also *provides the basis for more specific measures that operate to restrict imports*, including Indonesia's import licensing regime for animals and animal products, and for horticultural products. As described above, Indonesia's import licensing regimes are designed to restrict imports with a view to Indonesia achieving self-sufficiency in food. Just as the specific requirements of these import regimes have a limiting effect on imports, the legislative provisions based on sufficiency of domestic production that guide and enable the import licensing regimes, also have a limiting effect on imports.

52. Accordingly, Indonesia's import restrictions based on sufficiency of domestic production are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

B. ARTICLE III:4 OF THE GATT 1994

53. New Zealand considers that the Domestic Purchase Requirement for beef, and the restrictions on use, sale and distribution of animal products and horticultural products, constitute conditions on importation of these products that are applied at the border and are therefore contrary to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. However, insofar as these measures affect the "internal sale, offering for sale, purchase, transportation, distribution or use" of these products, New Zealand submits that they are also inconsistent with Article III:4 of the GATT 1994.

(a) The Domestic Purchase Requirement for beef is inconsistent with Article III:4 of the GATT 1994

54. The Domestic Purchase Requirement for beef "modifies the conditions of competition in the relevant market to the detriment of imported products" by according an advantage to the purchase of like domestically-produced products that is not accorded to imported product. The only characteristic differentiating domestic from imported beef for the purposes of the Domestic Purchase Requirement is the origin of the product, and accordingly, such products are "like" for the purposes of Article III:4 of the GATT 1994.

(b) Limiting the use, sale and distribution of imported bovine meat and offal is inconsistent with Article III:4 of the GATT 1994

55. The Indonesian regulations formally treat imported bovine meat and offal differently from their like domestic equivalents. Domestic bovine meat and offal are not restricted in the use to which they may be put in the Indonesian domestic market or to certain points of sale. By contrast, imported like products may only be used in industry, hotel, restaurant, catering or other special needs and may not be sold in modern or traditional markets.

56. This formally different treatment for like imported and domestic bovine meat and offal products therefore modifies the conditions of competition to the detriment of imported products and accords treatment that is "less favourable" to imported bovine meat and offal products. Accordingly, the measure is inconsistent with Article III:4 of the GATT 1994.

(c) Limiting the use, sale and distribution of imported horticultural products is inconsistent with Article III:4 of the GATT 1994

57. The Indonesian regulations formally treat imported horticultural products differently from their domestic equivalents. Domestic horticultural products are not restricted in the use to which they may be put, or the distribution channels that they must go through in the Indonesian domestic market. In contrast, imported like products may only be used in industrial production processes or else sold to distributors. This formally different treatment for like imported and domestic horticultural products affects the conditions of competition to the detriment of imported products and accords treatment that is "less favourable" to imported horticultural products. Accordingly, the measure is inconsistent with Article III:4 of the GATT 1994.

C. AGREEMENT ON IMPORT LICENSING PROCEDURES

58. New Zealand submits that the limited application windows and validity periods for MOA Recommendations and Import Approvals for animals and animal products and RIPH and Import Approvals for horticultural products are inconsistent with Article XI:1 of the GATT 1994. Furthermore, to the extent that the Panel finds that the limited application windows and validity periods for animals, animal products and horticultural products are non-automatic licensing procedures, New Zealand submits that they are inconsistent with Article 3.2 of the Agreement on Import Licensing Procedures.

59. The limited application windows and validity periods are "non-automatic import licensing procedures" within the meaning of Article 3.1 of the Agreement on Import Licensing Procedures. Applications for MOA Recommendations, RIPHs and Import Approvals may only be applied for and granted during limited time periods, and thus are not able to "be submitted on any working day prior to customs clearance" within the meaning of Article 2.1 of the Agreement on Import Licensing Procedures.

60. In addition, the limited application windows and validity periods for MOA Recommendations and Import Approvals create trade-restrictive and trade-distortive effects contrary to Article 3.2 of the Agreement on Import Licensing Procedures.

III. SPECIFIC ISSUES RAISED IN INDONESIA'S FIRST WRITTEN SUBMISSION

1. The measures challenged in this dispute are maintained by the Indonesian government, not private actors

61. Indonesia has sought to characterise the measures at issue as resulting purely from the "decisions of private actors".[16] However, simply because private actors have the ability to make limited decisions about their import needs, does not immunise Indonesia's measures from challenge. Private actors can only operate within the confines of Indonesia's laws and regulations and, as the Complainants have demonstrated, Indonesia's laws and regulations constrain the actions of private actors which necessarily has a limiting effect on imports. The measures challenged in this dispute are not the commercial decisions of private actors. Rather, the challenged measures are those reflected in Indonesia's laws and regulations. Those measures prevent importers from making ordinary commercial decisions and serve to limit imports.

62. The Complainants' position is supported by the jurisprudence. Panels have confirmed that measures which required importers to voluntarily accept certain conditions in order to import goods constituted governmental measures falling within the scope of Article XI:1.[17] Here, the limiting effect of Indonesia's measures derives not from autonomous decisions of private actors, but from the trade-restrictive framework within which Indonesia requires importers to operate.

[16] *See* Indonesia's first written submission, paras. 52, 67, 69, 74, 101, 102, 104, 119, 138.
[17] Panel Reports, *Argentina – Import Measures*, para. 6.177; and *India – Autos*, paras 7.252 – 7.253.

2. Indonesia's import licensing regimes are not "automatic"

63. Indonesia has argued that its import licensing regimes are "automatic import licensing procedures" because every application is granted and therefore, "by definition", the regime is excluded from the scope of Article 4.2 of the Agreement on Agriculture.[18] However, import licensing regimes, whether automatic or non-automatic, fall under the disciplines of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Further, the measures at issue have all been identified by the Complainants as trade-restricting and as quantitative import restrictions, which clearly fall within the scope of the footnote of Article 4.2.

3. Indonesia has not made a prima facie case that its measures are justified under Article XX of the GATT 1994

64. Indonesia's first written submission raises several arguments, expressed "in the alternative" to Indonesia's primary defences, that its measures are within one or more of the general exceptions in Articles XX(a), (b) or (d) of the GATT 1994. Indonesia has the burden of proving that its measures are necessary to achieve those objectives, and must do so in accordance with the two-tier test that is well established in WTO jurisprudence.

(a) Indonesia's defences under Article XX(a) – "necessary to protect public morals"

65. In relation to animals and animal products, Indonesia argues that its prohibitions on sale in traditional open-air markets are necessary to "prevent consumer deception regarding whether certain food products are Halal". The risk of this occurring is perceived to arise because there is no widely-used product labelling system in place in those markets. However, all relevant meat and offal products exported from New Zealand to Indonesia are certified in New Zealand as satisfying halal requirements, in accordance with Indonesian law.[19] This risk, therefore, does not arise.

66. In relation to horticultural products, Indonesia argues that its restrictions on use, sale and distribution are justified in order to prevent consumer deception regarding the halal status of such products. Yet to New Zealand's knowledge, Indonesia has no halal certification requirements for imported horticultural products and distributors are not, in fact, restricted from selling imported horticultural products in *traditional* markets.

67. Accordingly, Indonesia has not made a *prima facie* case that any of its measures are necessary to protect public morals in terms of Article XX(a).

(b) Indonesia's defences under Article XX(b) – "necessary to protect human, animal or plant life or health"

68. Indonesia claims that several of its measures relating to animals and animal products and horticultural products can be justified under Article XX(b). However it has provided little elaboration of such justification.

69. One concern of Indonesia relates to what it describes as the "extremely high risk of unsafe food handling that would result" if New Zealand animals and animal products were permitted to be sold in traditional Indonesian markets. However, an arbitrary ban on the sale of imported meat in traditional markets is not justified by such a concern. New Zealand meat is no less safe than Indonesian meat sold at such markets. Indeed, it is likely to be safer, as New Zealand meat processing and preparation processes up to export follow the highest sanitary standards in accordance with the CODEX Code of Hygienic Practice for Meat, and good operating practice.[20]

70. With respect to horticultural products, New Zealand also has a stringent food safety control system which meets Indonesia's requirements. In response to Indonesia's specific food safety concerns about storage of products with long shelf lives, such as apples and onions, New Zealand already has highly-regarded storage practices for long-life products.

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[18] Indonesia's first written submission, para. 51.

[19] *See* Animal Products (Overseas Market Access Requirements for Halal Assurances) Notice (No. 3) 2015, cls 6(1), 6(8) (Exhibit NZL-81); Indonesia, Meat and Meat Products Overseas Market Access Requirements, Part 2 (Exhibit NZL-82); Food Law, Article 97(3)(e) (Exhibit JE-2); MOT 46/2013, Article 19(2)(e), (Exhibit JE-21).

[20] CODEX Code of Hygienic Practice for Meat, CAC/RCP 58-2005.

71. The lack of detail provided by Indonesia underpinning these Article XX(b) defences means that Indonesia has failed to make a prima facie case.

(c) Indonesia's defences under Article XX(d) – necessary to secure compliance with laws or regulations…including those relating to customs enforcement

72. Indonesia claims that several of its measures can be justified under Article XX(d). The overall theme in Indonesia's first written submission in relation to its defence is that its restrictions are necessary for "customs enforcement".

73. In *Korea – Various Measures on Beef*, the Appellate Body held that, in order to establish provisional justification under Article XX(d), a Member has the burden of demonstrating two elements: "First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be 'necessary' to secure such compliance".

74. Indonesia has failed to identify the specific customs enforcement laws or regulations it claims its restrictions are designed to secure compliance with. Furthermore, Indonesia has provided no information that would allow the Panel to assess whether such laws or regulations are themselves consistent with the GATT 1994, or to what extent the restrictions are "necessary" to secure compliance with such laws or regulations.

75. For all these reasons, New Zealand considers that Indonesia's Article XX(d) defences do not meet the legal standard necessary to establish a *prima facie* case.

ANNEX C-2

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF NEW ZEALAND

INTRODUCTION

1. The measures at issue in this dispute all stem from Indonesia's objective to restrict certain agricultural imports when domestic product is deemed sufficient to fulfil domestic demand. New Zealand has demonstrated that they are all quantitative restrictions contrary to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. The reference prices for beef, chili and shallots also constitute "minimum import prices … or similar border measures" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture.

2. In response, Indonesia has challenged the existence or trade-restrictiveness of the measures at issue. It has pointed to Article XX of the GATT 1994 in an attempt to provide legal justification for the import restrictions. It has also emphasised recent changes to its regulations, which it contends have been made to address the concerns of the Complainants.[1] However Indonesia's new regulations have not materially changed Indonesia's import regime, as the core trade-restrictive measures at issue in this dispute remain in place.

I. ALL OF THE MEASURES AT ISSUE ARE INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994 AND ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

1 The obligations under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

(a) Trade effects need not be demonstrated in order for a measure to be inconsistent with Article XI:1 or Article 4.2

3. The Appellate Body has confirmed that the test for whether a measure constitutes a quantitative restriction is whether it has a "limiting effect" on importation.[2] The Appellate Body has also made clear that, in determining whether a measure has a "limiting effect" on importation, it is not necessary to show an adverse impact on trade flows.[3]

4. Indonesia's repeated assertions that, in order to demonstrate a breach of Article XI:1, a measure must impose an "absolute limit" on imports and that "a complainant is [not] excused from demonstrating that the measure has *some* effect on trade",[4] mischaracterise the relevant legal tests. A complainant need not quantify the effects of the measures at issue to make out a claim under Article XI:1. WTO jurisprudence is clear that the limiting effect of a measure can be demonstrated through its design, architecture and structure.[5]

5. The Complainants have demonstrated that Indonesia's regime is designed and structured in a manner which limits imports. While not a necessary part of the legal test, the Complainants have also provided evidence of the actual trade effects of these measures to illustrate the practical commercial importance of this dispute to its agricultural exporters. This is demonstrated, for example, by the 84 percent decline in New Zealand beef exports to Indonesia following the introduction of the measures of concern.[6]

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[1] Indonesia's second written submission, paras. 7 and 8.
[2] Appellate Body Reports, *China – Raw Materials*, para. 319; and *Argentina – Import Measures,* para. 5.217.
[3] Appellate Body Report, *Argentina – Import Measures,* para. 5.217.
[4] For example, Indonesia's second written submission, para. 24; and Indonesia's first written submission, paras. 54, 55, and 110.
[5] Appellate Body Report, *Argentina – Import Measures,* para. 5.217.
[6] New Zealand's first written submission, para. 4.

(b) The characterisation of a measure as "automatic" or "non-automatic" licensing is not relevant to the Panel's inquiry under Article XI:1 or Article 4.2

6. Indonesia has asserted that its import licensing regimes "as a whole" constitute "automatic" import licensing procedures within the scope of the Agreement on Import Licensing Procedures (ILA). On the basis of this assertion, Indonesia then submits that all the measures of concern are "excluded from the scope of Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994".[7]

7. However, with the exception of limited application windows and validity periods which are a quantitative restriction *as well as* a prohibited non-automatic licensing procedure, all of the other measures at issue in this dispute are not "administrative procedures used for the operation of import licensing regimes" within the scope of the ILA.

8. In this regard, WTO jurisprudence is clear that the ILA distinguishes between import licensing procedures, which are the administrative procedures used to implement an import licensing regime, and the underlying substantive rules that may be administered through import licensing procedures.[8] As New Zealand has argued, the measures at issue in this dispute are underlying substantive rules which are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture because they are "prohibitions or restrictions … made effective through … import … licences or other measures".[9]

9. Further, regardless of whether any of the measures at issue in this dispute constitute import licensing procedures, a measure is either consistent or not with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture according to the relevant legal standard under those provisions. Such an analysis cannot be conducted simply by assessing whether the licensing procedures used to implement the underlying restrictions are characterised as "automatic" or "non-automatic". It is the nature of the measure that is determinative, not the particular label a respondent has attached to it.

10. Accordingly, Indonesia's argument that its measures are all import licensing procedures, and therefore exempt from the disciplines of Article XI:1 and Article 4.2, ignores the critical distinctions in the Complainants' claims and WTO jurisprudence.

2 The measures at issue are inconsistent with Article XI:1 and Article 4.2

11. As elaborated in New Zealand's submissions,[10] Indonesia has failed to provide any credible evidence or argumentation to rebut the case established by New Zealand that the measures at issue are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. New Zealand does not repeat these arguments in this summary.

II. THE MEASURES AT ISSUE ARE NOT JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

1 The obligation under Article XX of the GATT 1994

(a) Indonesia has the burden of proving that its measures are justified under Article XX

12. Indonesia contends that its measures fall within one or more of the general exceptions in Articles XX(a), (b) or (d) of the GATT 1994. Jurisprudence is clear that Indonesia has the burden of proving its Article XX defences.[11]

13. In order to satisfy that burden, Indonesia must first demonstrate that a measure was adopted or enforced to protect or secure compliance with an objective identified in paragraphs (a), (b) or (d) of Article XX. The measure must "address the particular interest specified in that

[7] Indonesia's second written submission, para. 67.
[8] Appellate Body Report, *EC – Bananas III*, para. 197; Panel Report, *Korea – Various Measures on Beef*, para. 784; Panel Report, *EC – Poultry*, para. 254.
[9] Article XI:1 of the GATT 1994.
[10] See for example, New Zealand's first written submission, Sections IV.A and IV.B and Sections III:A and III:B of New Zealand's second written submission.
[11] See for example Appellate Body Report, *EC – Seal Products*, para 5.169.

paragraph" and there must be "a sufficient nexus between the measure and the interest protected".[12]

14. Indonesia must then demonstrate that the measure is necessary for the achievement of the particular objective. The standard of "necessity" is a high one, "located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'".[13] To be "necessary", there must be "a genuine relationship of ends and means between the objective pursued and the measure at issue".[14]

15. Appraisal under the chapeau to Article XX is also required. The burden again rests with the party invoking the exception to demonstrate that such a measure complies with the chapeau.[15]

(b) The relationship between Article XX of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

16. Indonesia raises a novel, but flawed, argument regarding the burden of proof under Article XX of the GATT 1994. Indonesia accepts that Article XX is an exception to Article XI:1 of the GATT 1994, and that ordinarily the burden is on the respondent to demonstrate that the exception applies. However, Indonesia contends that in the case of a claim of violation of Article 4.2 of the Agreement on Agriculture, the Article XX burden of proof is reversed and falls on the Complainants to demonstrate the absence of such a defence.[16] Indonesia seeks to turn the usual burden of proof in relation to Article XX on its head, contrary to the well-established principle that the burden of identifying and establishing affirmative defences under Article XX rests on the party asserting that defence.[17] However, there is no justification for shifting the normal burden of proof in this way. It would be contradictory if the same provision were an exception to Article XI:1 and not an exception to the obligation under Article 4.2 of the Agreement on Agriculture. The character of the Article XX defences is as an exception and such character should be maintained. In any case, it is not necessary for the Panel to consider this argument if it commences its analysis of the measures at issue with Article XI:1 of the GATT 1994.

2 Indonesia has failed to meet its burden under Article XX

(a) Import licensing regime for animals and animal products

(i) "Positive list" prohibition of certain imports

17. Indonesia initially did not raise a defence under Article XX of the GATT 1994 in respect of the underlying prohibition of certain beef and offal imports implemented through its "positive list", which it initially denied existed.[18] Instead, it only argued a defence under Article XX(b) in respect of the aspect of this measure that permits Ministers to exceptionally permit importation of bovine carcass and beef secondary cuts by state-owned enterprises (and only to the extent that certain emergency circumstances are deemed to exist). Indonesia claims this allows it to respond to a direct threat to the population caused by food scarcity.[19]

18. However, even this limited Article XX(b) defence does not make sense when considered in light of Indonesia's underlying import ban on all unlisted products. By prohibiting all imports of unlisted animals and animal products under ordinary circumstances, Indonesia *itself* has created the risk of food scarcity that this aspect of the measure is allegedly designed to address. If the underlying WTO-inconsistent positive list prohibition did not exist, then the emergency circumstances exception would not be required. Article XX(b) cannot therefore be invoked to justify the measure.

[12] Ibid.
[13] Appellate Body Report, *Korea – Various Measures on Beef*, paras. 161-162 and 164.
[14] Appellate Body Report, *EC – Seal Products*, para. 5.180, citing Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 145-147,
[15] Appellate Body Report, *US – Gasoline*, pp. 22-23.
[16] Indonesia's second written submission, para. 38.
[17] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[18] Indonesia's first written submission, paras. 96-99; Indonesia's first opening statement, para. 26.
[19] Indonesia's first written submission, para. 168.

19. Subsequently, Indonesia conceded that certain beef and offal products are prohibited from importation, but argued that this was justified under Article XX(b).[20] Indonesia offered very little elaboration of its Article XX(b) positive-list defence, however, apart from a few passing references to concerns about hormone-treated beef.[21]

20. In response, New Zealand has emphasised that its bovine meat and offal products are safe. They are exported widely around the world to developed and developing countries, and are consumed domestically in New Zealand.[22] No health issues have arisen warranting Indonesia's trade ban. Indonesia has presented no relevant evidence to the contrary and its exhibits do not support its reliance on Article XX(b).[23]

21. In particular, new Exhibits IDN-58, IDN-83, and IDN-84 do not explain why Indonesia bans the import of bovine offal and secondary cuts through the "positive list".[24] Rather, those exhibits are, respectively, a blog expressing concerns about hormones in milk and meat, a partisan summary of the *EC –Hormones* dispute, and a promotional article from the Organic Consumers Association encouraging its members to purchase organic beef.[25]

22. Furthermore, Indonesia's prohibition of certain beef and offal imports bears no rational relationship to the alleged concerns about hormone-treated beef. This is clear from the fact that imports of some beef products are permitted.[26] Yet there is again no reference to limits of imports of these products when the beef has been treated with hormones. Surely if Indonesia intended to protect its population from purported risks arising from hormones, it would impose measures that applied universally to all hormone-treated beef products, rather than just certain bovine offal and secondary cuts in certain circumstances. Finally, the positive list bans all unlisted products – not just hormone-treated beef. That is why New Zealand beef and offal is prohibited, even if it is not treated with hormones. Furthermore, none of the evidence publicising this measure made any reference to hormones.[27] For all these reasons, Indonesia's positive list restriction cannot be justified under Article XX(b).

(ii) Limited application windows and validity periods for MOA Recommendations and Import Approvals

23. Indonesia argues that Article XX(d) justifies its limited application windows and validity periods for MOA Recommendations and Import Approvals on the basis that these are a necessary element of its customs regime.[28]

24. Indonesia claims that its limited application windows and validity periods measures are "mandated because the products at issue are products that spoil easily. As such, data would be more accurate if it is closer to the import date".[29] However, the measures at issue require importers to provide information up to six months in advance of importation. If limited application windows and validity periods were removed, as New Zealand suggests should occur, Indonesia would be better placed to obtain more accurate data because it would be obtained closer to the time of importation.

25. Indonesia also acknowledges in its second written submission that its limited application windows apply only to certain animal products and only certain fresh horticultural products.[30] Indonesia's inconsistent application of this measure suggests that avoiding food spoilage or data collection is not its true objective.

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[20] Indonesia's second written submission, Section III.D.2(e), para. 206. Indonesia's responses to the Panel's questions after the second substantive meeting, Question 102, para 38.

[21] Indonesia's second written submission, paras. 110, 236.

[22] See, for example, "New Zealand Export Statistics to Indonesia 2010 - 2015" *Global Trade Atlas* (Exhibit NZL-5) and Meat Industry Association Statement (Exhibit NZL-12).

[23] Huffington Post "Hormonal Milk and Meat: A Dangerous Public Health Risk" (Exhibit IDN-58); "Hormones in Meat" (Exhibit IDN-83); "Growth Hormones Fed to Beef Cattle Damage Human Health" (Exhibit IDN-84).

[24] See New Zealand's first written submission, paras. 40-43.

[25] Indonesia's second written submission, paras. 110, 236.

[26] See New Zealand's first written submission, para. 43.

[27] See the exhibits listed at footnote 66 of New Zealand's first written submission.

[28] Indonesia's second written submission, paras. 241-242.

[29] Indonesia's second written submission, para. 242.

[30] Indonesia's second written submission, paras. 57 and 58.

26. Indeed, Indonesia has failed to demonstrate that customs enforcement is, in fact, the objective of its measure. Indonesia does not identify which specific parts of its customs enforcement laws and regulations are relevant. As the panel found in *Colombia – Ports of Entry*, general references to laws and regulations relating to customs enforcement would not satisfy the legal standard required in Article XX(d).[31]

27. WTO jurisprudence confirms that the Panel is not bound by Indonesia's assertion of the objective of its measures. Rather, a panel should look at all relevant evidence, including the text, structure and legislative history of the measure at issue.[32] Mere assertions concerning the purpose of a challenged measure are not sufficient to establish that it is designed to promote an objective in Article XX. In this instance, nothing in the sources referred to by Indonesia suggests the requisite connection between this measure and customs enforcement.[33]

(iii) Fixed Licence Terms

28. Indonesia argues that Article XX(d) applies in respect of the Fixed Licence Terms, however it has again failed to adequately demonstrate that customs enforcement is the objective of that measure. Indonesia has done nothing more than list a few titles of laws and regulations relating to customs, quarantine and food safety. Thus, Indonesia has failed to identify the specific customs enforcement laws and regulations it claims its restrictions are designed to secure compliance with.

29. Indonesia contends that the purpose of the Fixed Licence Terms is to "oblige importers to include information such as port of entry, volume, etc. in order for the customs officials to assess customs classification and import eligibility" and to "gather information for statistical purposes".[34] However, Indonesia has failed to show that the measure is "necessary" to achieve that objective. Indeed, Indonesia could readily obtain better information from other sources, providing data on what importers actually import, rather than just what they apply to import. As New Zealand has previously explained, there are existing processes used for information gathering purposes.

(iv) 80% realisation requirement

30. Indonesia's defence in respect of the 80% realisation requirement is based on Articles XX(b) and XX(d).[35]

31. With respect to **Article XX(d)**, Indonesia asserts its realisation requirement is necessary for customs enforcement as it serves as a "safeguard against importers grossly overstating their anticipated imports".[36] However, Indonesia has failed to identify the specific provisions of the "laws or regulations" with which the 80% realisation requirement is "necessary to secure compliance" or that customs enforcement is the objective of the measure.

32. Further, even if Indonesia were correct that importers would "overestimate" anticipated imports in the absence of the 80% realisation requirement, Indonesia ignores the fact that any such overestimation would only occur as a consequence of other restrictive and WTO-inconsistent aspects of Indonesia's import licensing regime – namely limited application windows and validity periods and Fixed Licence Terms.

33. Furthermore, Indonesia has not demonstrated that the measure is necessary for the fulfilment of that objective. The trade-restrictiveness of the measure, inducing importers to limit the quantities they import rather than breach the 80% realisation requirement, outweighs any contribution it makes towards the objective in Article XX(d).

[31] Panel Report, *Colombia Ports of Entry*, paras. 7.516-7.525.
[32] Appellate Body Report, *EC – Seal Products*, para. 5.144.
[33] See for example New Zealand's second written submission, Section III.A(b)(iii); and New Zealand's second opening statement, paras. 62 - 63.
[34] Indonesia's second written submission, para. 243.
[35] Indonesia's first written submission, para. 107, referring to paras. 78-81; Indonesia's responses to the Panel's questions after the first substantive meeting, Question 16, para. 12.
[36] Indonesia's first written submission, para. 79.

34. Indonesia also appears to contend, in vague terms, that the 80% realisation requirement is justified under **Article XX(b)**.[37] Again, however, Indonesia has failed to show that the measure makes any contribution to its stated objective of protecting human life or health. Specifically, Indonesia has not provided any evidence demonstrating that "overstatement" of imports was occurring in the absence of the 80% realisation requirement. Nor has Indonesia presented any evidence, or explained in any detail, why even if overstatement of imports did occur, that this would present a risk to human health.

(v) Prohibitions and restrictions on the use, sale and distribution of imported animals and animal products

35. Indonesia's defence in respect of the use, sale and distribution restrictions is based on Articles XX(a) and (b). Indonesia's arguments do not meet the standard required for a defence under either of these paragraphs.

36. Indonesia's defence based on **Article XX(a)** is that the measure is necessary to protect public morals because it prevents consumers from "mistakenly purchasing animals or animal products that do not conform to Halal requirements".[38]

37. However, New Zealand has demonstrated that all relevant animal products that are exported from New Zealand to Indonesia are certified as halal. This requirement is reflected in both Indonesian and New Zealand law. Indonesia has formally recognised that New Zealand's slaughter and meat processing practices comply with Indonesia's halal requirements. Accordingly, the measures at issue do not contribute to the objective cited by Indonesia, as other mechanisms already ensure this objective is satisfied.

38. This means that the trade-restrictiveness of the measure easily outweighs the purpose Indonesia claims for it and cannot be regarded as "necessary" to protect public morals.

39. Indonesia also claims, in respect of **Article XX(b)**, that imported animals and animal products are not permitted to be sold in traditional Indonesian markets because of the dangers that arise from freezing and thawing meats.[39]

40. However, Indonesia has produced no relevant evidence that protecting human health was the reason for Indonesia's restrictions on sales of imported meat in traditional markets, or that imported meat sold in traditional markets poses a greater risk to human health than locally-slaughtered meat. Indeed, Indonesia's own Exhibit IDN-79 shows that frozen meat is safe provided it was safe when frozen. When thawed, microbes will become active and multiply, but at the same rate as in fresh meat.[40]

41. Furthermore, Exhibit IDN-57 produced in support of Indonesia's defence of its measure, titled "The effect of Freezing and Thawing on Technological Properties of Meat" relates to food quality not food safety.[41] Indonesia's repeated arguments based on "meat quality and texture"[42] are not only unsubstantiated but also irrelevant to an Article XX(b) defence.

42. Finally, Indonesia has not provided any evidence that it prevents domestically produced frozen meat from being sold in traditional markets. In fact, there is evidence before the Panel that Indonesian state-owned purchasing company BULOG has itself distributed frozen meat to traditional markets in Jakarta in an effort to lower the price of beef.

[37] Indonesia's responses to the Panel's questions after the first substantive meeting, Question 16, para. 11-12.

[38] Indonesia's first written submission, para. 166.

[39] Indonesia's second written submission, para. 110.

[40] "Rules of Thawing and Refreezing Meat" (Exhibit IDN-79).

[41] Corina Gambuteanu, Daniela Borda and Petru Alexe, "The Effect of Freezing and Thawing on Technological Properties of Meat: Review" (Exhibit IDN-57).

[42] Indonesia's second written submission, paras. 109 ("establish quality… requirements"), 110, 193 and 225.

(vi) Domestic Purchase Requirement

43. Indonesia has made little effort to demonstrate that its Domestic Purchase Requirement was adopted to protect the objectives identified in Article XX(b). There is nothing in the design or structure of the measure indicating that was the measure's purpose. Rather, the measure itself seems to have been designed as an additional form of protection for domestic beef producers from competition from imported beef.

44. This objective does not correspond with the protection of human life or health in terms of Article XX(b). If it did, Members could simply prohibit imports on the basis that doing so was necessary to stimulate local production.

(vii) Beef reference price

45. Indonesia has also failed to produce any credible evidence showing its reference price requirements contribute to the protection of human, animal or plant life or health under Article XX(b). The design and structure of this measure does not indicate that it is necessary to protect Indonesian citizens from public health threats.[43]

46. Indonesia has produced neither any evidence of any oversupply of these products, nor of any prospect of "immediate crisis" or "immediate threats to the Indonesia food supply",[44] including in the exhibit Indonesia produced on its "food security plan".[45] To the contrary, Indonesia's answers to questions from the Panel, and its exhibits, point to chronic undersupply of food, with persistent threats of food insecurity and under-nutrition in Indonesia's poorer communities, as demonstrated by chronic malnutrition.[46] The evidence shows instead that Indonesia needs additional safe, high-quality, protein, as explained by the strong growth in New Zealand beef and beef offal exports to Indonesia in the first decade of this millennium before the measures at issue were introduced.[47]

(b) Import licensing regime for horticultural products

47. Indonesia's argumentation under Article XX in respect of limited application windows and validity periods, Fixed Licence Terms, the 80% realisation requirement and reference prices is substantially the same for both animals and animal products, and horticultural products. New Zealand has addressed each of these arguments in detail in its second written submission, and shown that Indonesia has not demonstrated that these measures are justified under Article XX.[48] This section therefore focusses on the measures that are specific to horticultural products, namely: prohibitions and restrictions based on Indonesian harvest periods, storage ownership and capacity requirements, prohibitions and restrictions on use, sale and distribution of imported products and the six-month harvesting requirement.

(i) Prohibitions and restrictions based on Indonesian harvest periods

48. Indonesia claims that its prohibitions and restrictions based on harvest periods are justified under Article XX(b) on the basis that oversupply of horticultural products during harvest periods could constitute a public health threat.

49. However, Indonesia has not demonstrated that public health is the objective of its measure. Nothing about the design or structure of the measure indicates that it was adopted or enforced to protect human health. Indonesia has produced no evidence that "stockpiles of rotting horticultural

[43] Compare Indonesia's second written submission, para. 240.

[44] Indonesia's responses to the Panel's questions after the first substantive meeting, Question 18, para. 20.

[45] Ministry of Agriculture, "Agency for Food Security, 'at a Glance'" (Exhibit IDN-25). And see also Indonesia's responses to the Panel's questions after the first substantive meeting, Questions 17, 18, 27.

[46] Indonesia's responses to the Panel's questions after the first substantive meeting, Question 18, para. 19. See also "Indonesia Retail Report Update 2013 by Global Agricultural Information" (Exhibit IDN-78); "The Indonesian Consumer Behaviour, Attitudes and Perceptions Toward Food" (Exhibit IDN-51) at p. 14; "Rural Poverty in Indonesia", Rural Poverty Portal (Exhibit IDN-4).

[47] See e.g. Meat Industry Association (New Zealand), Statement in relation to Indonesia's beef import restrictions, 11 November 2015 (Exhibit NZL-12).

[48] See for example New Zealand's second written submission, Sections III.B(a)(iii), III.B(b)(iii) and III.B(c)(iii). See also, the summary of these measures in the context of animals and animal products in Sections I.2(a)(i) - I.2(a) (iii) of this Second Executive Summary.

products" have resulted, or would result, from imports during domestic harvest seasons or that this was the reason for the measure's introduction. Rather, the evidence presented by New Zealand suggests that the real reason for the measure is to protect domestic farmers from import competition.

50. Indonesia has also failed to demonstrate that the measure is "necessary" to protect human health. Indonesia has not established that the measure contributes to that objective at all, let alone that it makes a material contribution to that objective as is required when a measure produces restrictive effects on international trade as severe as those resulting from an import ban.

(ii) Storage ownership and capacity requirement

51. Indonesia contends that its storage ownership and capacity requirement is justified under Articles XX(a), (b) and (d).

52. In relation to **Article XX(a)**, New Zealand's challenge to Indonesia's storage ownership and capacity requirement is confined to horticultural products (which are inherently halal). Thus, Indonesia's public morals arguments under Article XX(a) is without substance and should be rejected.

53. In relation to **Article XX(d)** and **Article XX(b)**, Indonesia's attempts to justify its ownership and storage capacity requirements for horticultural products do not address the claims made by New Zealand. Specifically, New Zealand's challenge relates exclusively to the requirements that importers *own* storage facilities with capacity equalling the quantity of product imported over a six-month period in a *one-to-one ratio*.

54. None of Indonesia's evidence or argumentation supports the need for a requirement that importers *own* their storage. There is no reason why "ownership" as opposed to leasing of storage facilities shows a greater "commitment" to provide food that is safe for consumption or would facilitate customs enforcement. Nor is it clear why there is no allowance for product turnover during a validity period. Keeping storage facilities empty for several months after the products in them have been sold, but before the next validity period, makes no contribution to the objectives in Articles XX(b) and XX(d).

(iii) Prohibitions and restrictions on use, sale and distribution of imported horticultural products

55. Indonesia's defence to its measure restricting the use, sale and distribution of imported horticultural products is based on Articles XX(a), (b) and (d).

56. In relation to **Article XX(a)**, Indonesia argues that this measure is necessary to protect public morals by aiming to ensure that non-halal foods are kept out of traditional Indonesian markets.[49] However, there is no reference to halal in the relevant legal instruments through which the measure is implemented and Indonesia has produced no evidence of halal certification requirements for imported horticultural products. Indonesia has not explained why the measures are "necessary to protect public morals" or demonstrated that the objective of the measure is to protect public morals or the religious beliefs of the Indonesian people.

57. In relation to **Article XX(d)**, Indonesia has not demonstrated that the restrictions on use, sale and distribution have the objective of ensuring compliance with food safety requirements. Indonesia has not provided any specificity either on the laws and regulations with which this measure is designed to ensure compliance, or on the specific provisions of those laws and regulations.

58. Indonesia has also failed to demonstrate that the restrictions have the objective of protecting human health under **Article XX(b)**. There is no evidence from the text of the regulations or their operation that the restrictions have the objective of protecting human health. Nor is there evidence that the requirements would reduce the spread of pathogens into the food supply of the general public and thereby contribute to the objective of human health. The requirements add an extra distribution layer for fresh horticultural products imported for consumption. This would seem to add to the difficulties of tracking pathogens in the food supply.

[49] Indonesia's first written submission, para. 187.

(iv) Six month since harvesting requirement

59. Indonesia claims, based on Article XX(b) of the GATT 1994, that the purpose of its six month harvesting requirement for fresh horticultural products is to ensure that horticultural products are fresh, nutritious, chemical and preservative-free, safe and of good quality.[50] However, this measure cannot be "necessary" for the achievement of that objective as it makes no distinction based on factors such as the storage life of particular horticultural products, many of which have a storage life greater than six months. For example, as acknowledged by Indonesia in its first written submission,[51] apples and pears can be stored for longer than six months under controlled atmosphere conditions that use low oxygen and high carbon dioxide levels to slow down respiration.[52] Onions too have a storage life greater than six months.[53] Moreover, New Zealand does not accept that the purpose of the six month harvesting requirements is to protect against "hazardous chemicals" as these are regulated separately by way of Indonesian regulations that are not at issue in this dispute.[54]

(c) Import licensing regimes as a whole

60. Indonesia has also sought to justify its import licensing regime for animals and animal products "as a whole" and its import licensing regime for horticultural products "as a whole" under Articles XX(a), (b) and (d) of the GATT 1994.

61. In relation to **Article XX(a)**, Indonesia states, in very general terms, that each of its import licensing regimes *as a whole* "fall under the scope of public morals".

62. In seeking to justify its regime Indonesia has merely referred to five overarching laws and then concluded, without any further elaboration, that its import licensing regime as a whole is required to protect public morals. However, it is not enough for Indonesia to argue that some aspects of the overarching laws pursuant to which its regulations are implemented may touch on matters concerning public morals. To sustain an Article XX(a) defence, Indonesia must show that each specific measure identified by the Complainants has an underlying public morals objective as evidenced by its design, architecture and revealing structure. It has not done so.

63. Furthermore, New Zealand has described the comprehensive arrangements that are in place to ensure that all relevant animal product exports to Indonesia are halal.[55] These arrangements remove the risk of Indonesians mistakenly purchasing non-halal animal products. Further, Article XX(a) does not justify Indonesia's restrictions on imports of horticultural products. Indonesia's own submissions, exhibits and laws imply that horticultural products are inherently halal. Thus, Indonesia's measures at issue do not contribute to the objective of public morals.

64. In respect of **Article XX(b)**, Indonesia refers to the *Food Law* and by implication concludes that its entire import licensing regime "falls within the range [of] policies designed to protect human, animal or plant life [or] health".[56]

65. However, just because one of the objectives set out in the *Food Law* relates to food safety does not demonstrate that each specific measure at issue in this dispute has a food safety objective. As the Appellate Body stated in *EC – Seal Products*, there must also be "a sufficient nexus between the measure and the interest protected". Indonesia must therefore prove that an objective of each discrete trade restriction at issue in this dispute is the protection of life or health. A mere reference to the *Food Law* does not establish this nexus at a sufficient level of granularity.

66. Indonesia also frequently conflates the concepts of food safety and "food security".[57] It is questionable whether the objective of "food security", as used by Indonesia, would fall under the

[50] Indonesia's second written submission, para. 110.
[51] Indonesia's first written submission, para. 150.
[52] Dianne M. Barrett, "Maximizing the Nutritional Value of Fruits & Vegetables <http://www.fruitandvegetable.ucdavis.edu/files/197179.pdf, p. 40-41 (Exhibit IDN-54).
[53] Kitinoja, Lisa, and Adel Kader, "Section 7: Storage of Horticultural Crops" FAO Corporate Document Repository, Agriculture and Consumer Protection (Exhibit IDN-73).
[54] New Zealand's second opening statement, para. 84.
[55] New Zealand's second written submission, paras, 115-117; New Zealand's first opening statement, paras. 45-51.
[56] Indonesia's second written submission, paras. 105-124.
[57] See, e.g. Indonesia's second written submission, paras. 123, 207(b), section III.D.2

Article XX(b) exception. For Indonesia, "food security" appears to equate to protecting local producers rather than ensuring people have safe food.

67. Furthermore, Indonesia has not explained how the measures at issue contribute to the objectives of food security, even if it was relevant. To the contrary, Indonesia's import-limiting measures appear to have had the effect of exacerbating food shortages, driving up prices and causing flow-on effects on nutrition.

68. In respect of **Article XX(d)**, Indonesia argues its import licensing regimes *as a whole* are designed to secure compliance with customs laws and regulations.

69. Indonesia's lack of specificity in its Article XX(d) defence is problematic. Indonesia has provided a list of titles of laws relating to customs, quarantine and food safety that it said are included among "[t]he WTO-consistent laws and regulations" providing the justification for its various measures.[58] However, it has not provided most of those legal instruments as exhibits or identified which specific provisions of them are relevant. This lack of specificity makes it challenging for the Complainants to respond to Indonesia's vague Article XX(d) defence.

70. For instance, Indonesia has noted that some of its agriculture and trade regulations contain references to the *Customs Law*. However, this alone is insufficient to demonstrate that each specific trade-restrictive measure before this Panel is designed to secure compliance with the *Customs Law*. Even if they were aimed at this objective, there are far less trade-restrictive ways by which Indonesia could gather data relating to imports for statistical purposes. Many of these mechanisms already exist independently in Indonesia. Thus, Indonesia has provided no credible reason why its measures, that have a limiting effect on importation, are necessary.

(d) Import restrictions based on "sufficiency" of domestic production

71. Indonesia asserts that restrictions based on "sufficiency" of domestic production are justified under Article XX(b).[59] However, Indonesia has provided no argumentation or evidence to demonstrate that the protection of human, animal or plant life or health is an objective pursued by the measure, nor has it demonstrated that the measure is "necessary" for the achievement of that objective. Indeed, New Zealand has shown that the true objective of the domestic insufficiency condition is to limit imports when domestic production is deemed sufficient to meet domestic demand.

3 Indonesia has not demonstrated that any of its measures comply with the chapeau to Article XX

72. As Indonesia has failed to provisionally justify its measures in terms of the paragraphs of Article XX, the Article XX chapeau is not reached. In any event, Indonesia has also failed to show that its measures are applied consistently with the chapeau.

73. In its second written submission, Indonesia argues, based on the first element of the chapeau, that its measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[60]

74. This argument should be rejected. The Appellate Body has confirmed that one of the most important factors in the assessment of arbitrary or unjustifiable discrimination is whether the discrimination can be reconciled with, or is rationally related to, the policy objective with which the measure has been provisionally justified under the paragraphs of Article XX. Indonesia has failed to show that any of its measures can be reconciled with or is rationally connected to the policy objectives in Article XX.

75. Indonesia also argues that, because its measures are not hidden but are "publicly announced", they are not disguised restrictions on trade.[61] This argument, based on the second element of the chapeau to Article XX, should also be dismissed. The Appellate Body has held that a "*concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of 'disguised restriction'" under the chapeau. Rather, in *US – Gasoline* the Appellate Body

[58] Indonesia's additional responses to the Panel's questions after the first substantive meeting, para. 46.
[59] Indonesia's first written submission, para. 161.
[60] Indonesia's second written submission, paras. 148.
[61] Indonesia's second written submission, paras. 157 and 250.

confirmed that "'disguised restriction', whatever else it covers, may properly be read as embracing restrictions… taken under the guise of a measure formally within the terms of an exception listed in Article XX".[62] This broader reading of "disguised restriction" is consistent with the purpose of "avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX". Accordingly, as New Zealand has demonstrated, Indonesia's measures are "disguised restrictions".

III. THE MEASURES AT ISSUE ARE NOT JUSTIFIED UNDER ARTICLE XI:2(C) OF THE GATT 1994

76. In its second written submission, Indonesia raised an entirely new defence under Article XI:2(c)(ii) of the GATT 1994 in respect of its reference price restrictions for beef, chili and shallots, and the domestic harvest season restrictions for horticultural products.[63]

77. However, the availability of Article XI:2(c)(ii) as a defence to Article XI:1 of the GATT 1994 has been removed with respect to agricultural products following the entry into force of the Agreement on Agriculture. Footnote 1 to Article 4.2 of the Agreement on Agriculture sets out an illustrative list of measures that have been required to be converted into ordinary customs duties, except for measures maintained "under other general, non-agriculture-specific provisions of the GATT 1994". Article XI:2(c) is an exception for certain "import restrictions on any agricultural or fisheries product". Therefore in respect of agricultural products, Article XI:2(c) is not a "general, non-agriculture-specific provision" of the GATT 1994. Thus it cannot be an exception to measures which have been required to be converted to ordinary customs duties under Article 4.2, including quantitative restrictions.

78. In any case, even if it were available as a defence, Indonesia has failed to satisfy its burden of establishing that the measures meet the legal requirements of Article XI:2(c)(ii).

IV. LIMITED APPLICATION WINDOWS AND VALIDITY PERIODS ARE INCONSISTENT WITH THE AGREEMENT ON IMPORT LICENSING PROCEDURES

79. Limited application windows and validity periods are the only measures which New Zealand has argued are inconsistent with the ILA, as they are the only measures that constitute "administrative procedures" within the scope of that Agreement. To the extent that the Panel finds that such measures fall within the scope of the disciplines of Article 3 of the ILA, they are inconsistent with Article 3.2 of that Agreement.

80. New Zealand has demonstrated that limited application windows and validity periods do not constitute "automatic" licensing procedures under Article 2.1 of the ILA. This is because, *inter alia*, they do not allow for applications to be "submitted on any working day prior to customs clearance" as required by Article 2.2(a)(ii) of the ILA. Accordingly, the measures constitute non-automatic licensing procedures under Article 3.1 of the ILA.

81. New Zealand has demonstrated that limited application windows and validity periods are inconsistent with Article 3.2 of the ILA, because they have unnecessary trade-restrictive effects on imports. In particular, limited application windows and validity periods cause declines in imports at the start of each quarter due to the delay between import licences being issued and imports being certified and shipped to Indonesia and at the end of each quarter due to the risk of re-export.[64]

82. Indonesia contends that limited application windows and validity periods cannot be prohibited by Article 3.2 of the ILA and argues that in order to give effect to Article 1.6, Article 2.2(a)(ii) of the ILA must be read in a way whereby "applications for licenses [need not] be submitted on any working day".[65] However, Indonesia's novel interpretation of Article 2.2(a)(ii) takes Article 1.6 out of context and is not supported by the words in Article 2.2. Indeed it would, in fact, rob all meaning from that provision.

[62] Appellate Body Report, *US – Gasoline*, p. 25.
[63] Indonesia's second written submission, Section III.E.
[64] See for example, New Zealand's first oral statement, Figure 8.
[65] Indonesia's second written submission, para. 65.

V. CERTAIN MEASURES AT ISSUE ARE INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994

83. New Zealand has demonstrated that three measures: use, sale and distribution restrictions on bovine meat, carcass and offal; use, sale and distribution restrictions on horticultural products; and the Domestic Purchase Requirement for beef; are inconsistent with Article III:4 of the GATT 1994.

(a) Use, sale and distribution restrictions for bovine meat, carcass and offal

84. Indonesia has not rebutted the case made by New Zealand that the prohibitions on the use, sale and distribution of imported bovine meat, carcass and offal are inconsistent with Article III:4 of the GATT 1994.

85. Indonesia asserts that its "end use limitations for animal products – specifically, the restriction on sales of imported meat products in traditional Indonesian markets – applies uniformly to imports and domestic products".[66] However, Indonesia's assertion is unsupported by evidence, and is factually incorrect. Furthermore, Indonesia fails to address the prohibition on imports of bovine meat and offal products for sale in "modern markets" (such as supermarkets).

86. Accordingly, by prohibiting the sale of imported beef, carcass and offal in modern and traditional markets, in circumstances where no comparable restrictions are applied to domestically-produced beef, carcass and offal, Indonesia's measure is inconsistent with Article III:4 of the GATT 1994. Furthermore, Indonesia has failed to discharge its burden of proving that an Article XX exception applies to the measure.

(b) Use, sale and distribution restrictions for horticultural products

87. Indonesia does not appear to contest that the restrictions on the use, sale and distribution of imported horticultural products fall within the scope of Article III:4 of the GATT 1994.[67] Rather it seeks to rely on defences under Articles XX(a) and XX(b). However, Indonesia has not demonstrated that the use, sale and distribution restrictions have the objective either of protecting public morals or religious beliefs, or of protecting human health, let alone are "necessary" to achieve these objectives.

(c) Domestic purchase requirement

88. Indonesia claims that the Domestic Purchase Requirement is not inconsistent with Article III:4 of the GATT 1994 because it "has never been used to prevent the issuance of an import license". Irrespective of whether the Domestic Purchase Requirement has been explicitly referred to as the basis to reject a request for an import licence, it accords less favourable treatment to imports over domestic products. Indeed, a measure that is in force but has not yet been enforced may still be challenged as being inconsistent with a Member's obligations.

CONCLUSION

89. Throughout its submissions, Indonesia has argued that its regime does not "restrict or limit" imports and that importers "can import as much as they like".[68] However, as the Complainants have demonstrated, Indonesia does prevent importers from importing as much as they like. In reality, imports are restricted because, among other things:

a. importers are prohibited from importing certain products (such as bovine offal and secondary cuts);

b. for permitted products, importers cannot import more than the quantity specified in their Import Approval per validity period;

c. importers are prohibited from importing different products, into different ports or from different countries of origin per validity period;

d. importers must be conservative in estimating the quantity of products that they request per validity period, or risk having their ability to import revoked;

[66] Indonesia's first written submission, para. 188.
[67] Indonesia's first written submission, para. 187.
[68] See Indonesia's second written submission, paras. 29, 180, 186, 190, 238.

e. importers are prevented from importing certain products during the domestic harvest season, or when the domestic price is above a certain level, or when harvested earlier than a certain period before importation;

f. importers cannot import certain products for the purpose of sale to consumers through modern or traditional markets;

g. horticultural importers cannot import more than their owned storage capacity in any six-month period; and

h. importers must satisfy a domestic purchase requirement in order to import beef.

90. For all of these reasons, and those set out in the Complainants' submissions, Indonesia's measures are inconsistent with its WTO obligations.

ANNEX C-3

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. FIRST WRITTEN SUBMISSION

1. Indonesia imposes numerous prohibitions and restrictions on imports through laws and regulations governing the importation of *horticultural products* and of *animals and animal products*, and, in particular, through its import licensing regimes for those products. In addition, Indonesia *prohibits* the importation of all horticultural products and animals and animal products when the government deems domestic production of such products sufficient to satisfy domestic demand. These prohibitions and restrictions are flatly contrary to WTO rules, and the resulting trade distortions not only affect foreign suppliers and Indonesian importers, but raise costs and reduce choices for Indonesian consumers.

I. FACTUAL BACKGROUND

2. Indonesia pursues a policy of "self-sufficiency" in food. The goal of this policy is to increase reliance on domestic producers by "gradually reduc[ing]" and ultimately halting imports of agricultural products. To further this goal, Indonesia has deliberately and systematically restricted imports of agricultural products in order to protect domestic producers. Indonesia has done so by imposing regimes of complicated, burdensome, and non-market-oriented import licensing requirements on horticultural products and animals and animal products.

A. Indonesia's Laws and Regulations Governing the Importation of Horticultural Products

3. In 2010, Indonesia passed Law 13 Concerning Horticulture, which established the framework for Indonesia's policy to protect domestic producers from competition from imported products. Indonesia reinforces this policy through Law 18/2012 Concerning Food ("Food Law") and Law 19/2013 Concerning the Protection and Empowerment of Farmers ("Farmers' Law"). Indonesia implements this policy through its import licensing regulations. Under the current regime, importers of the thirty-nine covered horticultural products must receive the following approvals: (1) designation either as a RI or PI from the Ministry of Trade; (2) an RIPH from the Ministry of Agriculture; and (3) for RIs, an Import Approval from the Ministry of Trade.

4. *Application Windows and Validity Periods of Required Import Documents*. Importation of horticultural products is divided into two semesters – January to June and July to December. For the first semester, RIs must obtain RIPHs in November and Import Approvals in December; for the second, RIs must obtain the RIPHs in May and Import Approvals in June. Import Approvals are issued "at the beginning of the semester" and are valid only for that semester. Products imported during a semester cannot be shipped from their country of origin until after the Import Approvals are issued, and they must arrive in Indonesia and clear customs before the semester's end. Indonesia will destroy or re-export horticultural products if they fail to clear customs before their Import Approval expires. The application windows, validity periods, and requirement that products be shipped and clear customs within a semester, effectively preclude imports of horticultural products during the beginning and end each of semester.

5. *Fixed License Terms*. When applying for an RIPH, an importer must indicate the type, country of origin, and the port of entry of the products it seeks to import. Once issued, the importers cannot amend the RIPH within the import period, and they are prohibited from importing products other than those specified on their RIPHs. RIs must also obtain an Import Approval. The validity periods of Import Approvals correspond to those of RIPHs. The Ministry of Trade issues Import Approvals twice a year, and RIs can apply for Import Approvals only during the month prior to the start of a period. Once Import Approvals are issued, RIs may not amend them or apply for another Import Approval until the next period. Thus, upon issuance, Import Approvals lock in the type, quantity, country of origin, and port of entry of the horticultural products allowed to be imported during the next semester.

6. *Import Realization Requirement*. For each semester, RIs are required to import at least 80 percent of the quantity specified for each type of horticultural product listed on their Import Approval. RIs must report its realized imports during the semester by submitting an Import Realization Control Card every month to the Ministry of Trade. The Ministry of Trade sanctions RIs that fail to meet the 80 percent realization requirement or fail to file the Import Realization Control Card. The realization requirement compels RIs to lower the quantities they request in their Import Approval applications in order to avoid situations in which they either must import products at a loss to reach 80 percent or have their RI designation suspended.

7. *Harvest Period Restrictions*. Indonesia limits the importation of horticultural products based on the domestic harvest season. MOA 86/2013 provides that horticultural products "are imported outside of the pre-harvest, harvest, and post-harvest periods" and grants the Minister of Agriculture the authority to decree the time period when importation is permitted. The Ministry implements this limitation through the RIPH process. RIs must submit a plan as to when and where they will distribute imports for the semester. The Ministry checks this against Indonesia's harvest seasons for the same products, and it bans or limits importation of horticultural products during the harvest season of those products through the RIPH approval process.

8. *Storage Capacity Requirement*. Indonesia limits the quantity of imported horticultural products by requiring RIs to prove that they own storage facilities with sufficient capacity to hold the quantity requested on their Import Approval application. Specifically, the Ministry of Trade limits the quantity specified on an RI's Import Approval to the total cold storage capacity of the RI's facility at the ratio of one to one. This means the quantity specified on the Import Approval does not account for inventory turnover during the six-month semester.

9. *Use, Sale, and Transfer Requirements*. Indonesia limits importation of covered horticultural products based on their use, sale, and transfer. MOT 16/2013 stipulates that an RI can only "trade and/or transfer imported Horticultural Products to a Distributor" and not "directly to consumers or retailers." Similarly, PIs can only "import Horticultural Products as raw materials or as supplementary materials for the needs of its industrial production process." They are prohibited from "trading and/or transferring these Horticultural Products."

10. *Reference Price Requirement for Chilies and Shallots*. Indonesia prohibits the importation of chilies and fresh shallots when their market prices fall below the "Reference Prices" set by the Ministry of Trade. MOT 16/2013 stipulates that importation of chilies and fresh shallots must "observe" the Reference Prices for those products. If the market prices of chilies or fresh shallots fall below their respective Reference Prices, the regulation requires that their importation be "postponed until the market price again reaches the Reference Price."

11. *Six Month Requirement*. Indonesia prohibits the importation of fresh horticultural products harvested more than six month previously. To obtain the RIPH, MOA 86/2013 requires RIs to submit a statement that they will not import any products that were harvested more than six months previously. If the applying RI fails to include such statement as part of its RIPH application, the Ministry of Agriculture will declare the application incomplete and reject it.

B. Indonesia's Laws and Regulations Governing the Importation of Animals and Animal Products

12. In 2009, Indonesia enacted Law Number 18 on Animal Husbandry and Animal Health, establishing that "[i]mport of animals or cattle and animal products . . . shall be done if local production. . . is not sufficient to fulfill consumption needs." The Food Law and the Farmer's Law reinforce this policy. Indonesia has pursued this goal through its regime for the importation of these products. Under this regime, importers of the bovine products listed in Appendix I of MOT 46/2013 and MOA 139/2014 must obtain (1) designation as a registered importer ("RI") from the Ministry of Trade, (2) a Recommendation from the Ministry of Agriculture, and (3) an Import Approval from the Minister of Trade. Importers of the non-bovine products listed in Appendix II must obtain: (1) a Recommendation, and (2) an Import Approval.

13. *Positive List*. Indonesia allows the importation of only the animals and animal products listed in the appendices to the relevant regulations. Unlisted animals and animal products are banned. Article 2 of MOT 46/2013 states explicitly that "the types of Animals and Animal Products that can

be imported are included in Appendix I and Appendix II." The titles of MOT 46/2013 Appendix I and Appendix II confirm this rule. Similarly, Article 8 of MOA 139/2014 states that the bovine meats and the non-bovine carcasses, meats, and processed products "that can be imported" are listed in Appendices I and II. Further, because both a Recommendation and an Import Approval are required for importation, for products falling within the scope of MOA 139/2014, the product must be listed in the appendices of both regulations for importation of that product to be permitted.

14. *Application Windows and Validity Periods*. Import Approvals are valid for one three month period, and they are issued on a date "at the beginning" of each period. Imports must be shipped, arrive, and clear customs during the period for which the Import Approval is valid. Specifically, each Import Approval specifies that the "number and date" of the importer's Import Approval must be written on the Certificate of Health issued by the product's country of origin. This means that the Certificate of Health *cannot be issued*, and thus the goods *cannot ship*, until after the Import Approvals for that period have been issued. And imports must clear customs in Jakarta before the end of the period for which the Import Approval is valid or they will be re-exported. As a result, during each validity period, exporters cannot start shipping until after a validity period begins and must stop shipping long enough before the period's end for their goods to arrive in Indonesia and clear customs by the last day.

15. *Fixed License Terms*. During each validity period, importers are not permitted to import animal products other than those specified on their Recommendations and Import Approvals. Under MOA 139/2014, as amended, importers are "prohibited from importing types/categories of carcasses, meat, and/or their processed products other than what is included in their Recommendation." They are also prohibited from requesting changes to the elements specified on their Recommendations. Under Article 30 of MOT 46/2013, imports "whose quantity, type, business unit, and/or country or origin is not in accordance with their Import Approval . . . will be re-exported," with the cost being borne by the importer. Importers who do not comply with MOT 46/2013 are subject to sanction. Consequently, importers are required to predict in advance precisely the products that they will want to import during the subsequent three-month import period, and they are unable to make any adjustments once the period begins.

16. *Realization Requirement*. Under MOT 46/2013, RI designees (i.e., importers of cattle and bovine products) are required to import "at least 80%" of the products covered by their Import Approvals for each year. To implement this requirement, RI designees are required to submit monthly "Import and Export Realization Reports." An RI designee that does not fulfill the 80% realization requirement, or does not file the import realization report three times, has its RI designation suspended. If an importer does not fulfill the realization obligation twice, its RI designation is revoked, and it cannot reapply for at least two years. This requirement gives importers a powerful incentive to ensure that they do not apply for import approvals for greater quantities of products than they are *certain* they can actually import.

17. *End-Use Requirements*. MOT 46/2013 states that importation of Appendix I products (cattle and bovine products) is permitted only "for the use and distribution of manufacturing, hotels, restaurants, catering, and/or other special needs." Importation for sale to consumers (in modern grocery stores or traditional markets) is prohibited. MOA 139/2014 establishes the same requirement for Appendix I products and also restricts the purposes for which Appendix II products (non-bovine animal products) may be imported, providing that they may be imported for the same purposes as Appendix I products and, additionally, for sale in "modern markets" (i.e. supermarkets or convenience stores). However, importation for sale in traditional markets, where the majority of Indonesian consumers do their food shopping, is still not permitted.

18. *Domestic Purchase Requirement*. Under MOA 139/2014, importers of import beef meat are required to "absorb" (i.e., purchase) a certain amount of beef from local slaughterhouses in order to import beef into Indonesia. Specifically, beef importers must purchase beef from local slaughterhouses equivalent to three percent (by volume) of the beef that they import. Local beef purchases are limited to specific abattoirs and only male cattle qualify toward the requirement, which has made it difficult for importers to find and purchase Indonesian beef equivalent to three percent of the quantity that they would otherwise import.

19. *Reference Price Requirement*. MOT 46/2013, states that if the market price of secondary cuts of beef is below a certain "Reference Price," imports of Appendix I products are "postponed"

until the market price again reaches the Reference Price. MOT 46/2013 sets the Reference Price at Rp 76,000.00/kg, but this can be revised at any time by a Beef Price Monitoring Team. Thus, if the Indonesian market price of secondary cuts of beef falls below that figure, importation of all cattle, beef meat (primary as well as secondary cuts), and beef offals will not be allowed until the price of secondary cuts rises about Rp 76,000.00 per kg.

II. LEGAL DISCUSSION

A. Indonesia's Import Licensing Regime for Horticultural Products Is Inconsistent with Article XI:1 of the GATT 1994

1. The Application Windows and Validity Periods Are Inconsistent with Article XI:1

20. Indonesia's application window and validity period requirements are "restrictions" within the meaning of Article XI:1 because the structure of these requirements causes a period of several weeks each semester when products *cannot* be exported to Indonesia. Shipping of horticultural products for a semester cannot begin until after Import Approvals are issued because exporters must have a valid Import Approval in order to have their products inspected and verified in the country of origin. Further, the products must arrive in Indonesia and clear customs before the end of the semester, when Import Approvals expire. Because it takes four to six weeks to ship products from the United States to Indonesia, exporters must stop shipping well before a semester's end to ensure their products can arrive and clear customs by the last day. Consequently, at the end of each semester, there is a period of several weeks when exporters cannot ship for the current period because the goods cannot arrive in time but cannot start shipping for the next semester because Import Approvals have not been issued.

21. Thus the application windows and validity periods of RIPHs and Import Approvals impose limiting conditions on importation and have direct limiting effects on imports. First, they necessarily reduce the total time and opportunity available for an RI to import horticultural products during a year. Second, they create additional uncertainty and impose additional costs on the RIs in Indonesia and their exporter partners, who bear the risk of having their horticultural products re-exported or destroyed if their shipments are delayed and arrive in Indonesia after the expiration of the RIPH and Import Approval. Therefore, the application windows and validity periods of RIPHs and Import Approvals are a restrictions under Article XI:1.

2. The Fixed License Terms Are Inconsistent with Article XI:1

22. A measure is a "restriction" if it imposes "a limitation on importation, a limiting condition on importation, or has a limiting effect on importation." Where a measure allows only certain imports, that measure is a restriction. During a semester, the only horticultural products permitted to be imported are those that conform to the products listed on importers' RIPHs and Import Approvals. Therefore, (1) imports of certain products are effectively banned until the next period; (2) only a specified quantity of each type of product can be imported; (3) products from other WTO Members are restricted to the amounts originally requested by importers (and may be set at zero for the period); and, (4) if the original port of entry is no longer available or commercially feasible for use, the products cannot enter through a different port of entry.

23. Previous panels have similarly found that measures imposing limits of this kind are restrictions under Article XI:1. For example, in *India – Autos*, the panel considered a measure that imposed a trade balancing requirement that companies' exports be at least equivalent in value to their imports. The panel found that the measure was a restriction contrary to Article XI:1 because "an importer [was] not free to import as many restricted kits or components as he otherwise might so long as there is a finite limit to the amount of possible exports." Thus, although the measure "[did] not set an absolute numerical limit on the amount of imports," imports were restricted in reality because there was a limit to the amount of products that companies would have the "desire and ability to export," and this would limit the quantity of products that they would be permitted to import.

3. The Realization Requirement Is Inconsistent with Article XI:1

24. Indonesia's 80 percent import realization requirement is a "restriction" under Article XI:1 because it is a limitation or limiting condition on importation, or has a limiting effect on importation. First, importers are subjected to the requirement as a condition for being allowed to import, and failure to meet the requirement may result in ineligibility to import in the future. Further, the requirement creates a powerful inducement to importers to lower the amounts for which they seek permission to import. Because an RI will lose its designation if it fails to meet the realization figure by the end of a semester, the RI must select an import amount for its Import Approval application that would avoid a situation in which it must continue importing products, even at a loss, to reach 80 percent. To mitigate this risk, each RI must lower the quantity it requests in its Import Approval application to less than the amount it would request otherwise.

25. Previous panels have found that measures imposing limits of this kind are restrictions under Article XI. The *India – Autos* panel found that India's requirement that importers balance the value of imported auto kits and components with the value of their exports from India "induced [an importer] . . . to limit its imports of the relevant products" in relation to the importers' "concern[] about its ability to export profitably." This was an import restriction because "a manufacturer is in no instance free to import, without commercial constraint, as many kits and components as it wishes without regard to its export opportunities and obligations." Similarly, the realization requirement causes importers to limit the amount that apply to import, which, in turn, restricts the quantity of products they are allowed to import.

4. The Restriction on the Importation of Horticultural Products Based on the Indonesian Harvest Period Is Inconsistent with Article XI:1

26. The harvest season requirement is inconsistent with Article XI:1 because it imposes limitations or limiting conditions on importation, or has a limiting effect on importation. Under MOA 86/2013, the Ministry of Agriculture establishes periods of time during which it restricts or prohibits the importation of certain horticultural products to protect domestic products during their harvest periods. Because importers must obtain RIPHs to import horticultural products, restrictions through the RIPHs issued for certain fruits during Indonesia's harvest period directly limits the types and quantities of imported products entering Indonesia during the entire six-month period. Indeed, Indonesia's import data for the relevant horticultural products points to the real world impact of Indonesia's restrictions based on harvest periods.

27. The panel in *Turkey – Rice* examined, in the context of Article 4.2 of the Agreement on Agriculture, Turkey's suspension of issuing import permits during local harvest periods to ensure the absorption of local rice production. It found that such measure "restricted the importation of rice for periods of time" and was thus a quantitative import restriction. Similarly, Indonesia's requirement based on the Indonesian harvest periods imposes a limitation on imported horticultural products, and has a limiting effect on the quantity allowed into Indonesia.

5. The Storage Capacity Restriction Is Inconsistent with Article XI:1

28. Indonesia's requirement that an importer own its storage facility and that the quantity specified in the Import Approval cannot exceed the capacity of its storage facility is a "restriction" within the meaning of Article XI:1. First, this requirement limits the quantity of imported products because it operates as an artificial ceiling on the quantity an RI can import during each semester. Fresh fruits and vegetables inventory can undergo multiple turnovers during a six month semester. Without such a restriction, an importer might be able to fill its facility multiple times during a semester. And without the ownership requirement, the importer might be able to fill many such facilities multiple times over each semester. Second, the ownership requirement also adversely affects the competitive opportunities of imported products by creating burdensome and even prohibitive storage costs. This requirement precludes RIs importing horticultural products from seeking alternative, more economical storage arrangements, including leasing or renting capacity.

6. The Use, Sale, and Transfer Restrictions Are Inconsistent with Article XI:1

29. Indonesia's restrictions impose direct limitations and limiting conditions on importers and their use of imported horticultural products and thereby increase the costs associated with

importation. The restriction on RIs means that retailers cannot import horticultural products themselves and cannot buy directly from RIs. The requirement adds a level in the supply chain by forcing importers to rely on distributors and thus increases the costs associated with imported products. For PIs, the restriction on their sale and transfer of imported horticultural products creates waste and increases unnecessarily the cost of using imported products. If a PI does not use all of its imported horticultural products during its production, it is forced either to destroy the excess products or incur the cost of storing them. PIs are thus required to predict precisely the quantity of imported products that they will use in their production for each period.

30. Previous panels have found that measures imposing limits of this kind are restrictions under Article XI:1. The panel in *India – Quantitative Restrictions* considered an import regime that included a use restriction, namely that goods could be imported only by the "actual user." The panel found this requirement to be "a restriction on imports because it precludes imports of products for resale by intermediaries, i.e. distribution to consumers who are unable to import directly for their own immediate use is restricted." Indonesia's use, sale, and transfer restrictions operate in a similar manner. Thus, these restrictions on importers and their sale, transfer or use of the products they import are a "restriction" within the meaning of Article XI:1 of the GATT 1994, and Indonesia breaches Article XI:1 by instituting or maintaining these requirements.

7. The Reference Price Requirement Is Inconsistent with Article XI:1

31. Indonesia's Reference Price requirement for chilies and fresh shallots is a restriction under Article XI:1 because it limits importation of these products to periods when market prices remain above a government-determined level and is a prohibition for those periods when market prices fall below those levels. The Reference Price requirement is similar to a minimum import price requirement, which previous panels have found to be restriction under Article XI:1. As the panel in *China – Raw Materials* recognized, the "applicability of Article XI:1 to minimum price requirements" was addressed by two GATT panels, both of which concluded that such requirements were "restrictions" under Article XI:1. The Reference Price requirement is even more categorical than the minimum import or export prices found to be restrictions by those previous panels because it prohibits *any* imports of chilies and shallots once the Reference Price has been reached, not only imports sold at prices below that Reference Price. Accordingly, the Reference Price requirement is limitation or limiting condition on importation, or has limiting effects, and Indonesia breaches Article XI:1 by instituting or maintaining this requirement.

8. The Restriction on the Importation of Horticultural Products Harvested More than Six Months Previously Is Inconsistent with Article XI:1

32. The requirement that importers not import products that have been harvested more than six months previously is a limitation or limiting condition on importation, or has a limiting effect on importation. Certain horticultural products are stored in controlled atmosphere conditions after harvest where they remain fresh for more than six months; consequently, they can be shipped year-round to global markets. Under the six-month harvest requirement, however, RIs are effectively prohibited from importing apples from the United States into Indonesia from April to October (October being the most common month of harvest in North America). The importer may not import products according to commercial considerations, but only those products meeting the requirement. And failure to satisfy the requirement may further lead to the importer losing the right to import horticultural products for one year.

33. The panel in *Turkey – Rice* found, in the context of Article 4.2 of the Agreement on Agriculture, that limiting the issuance of import permits based on specified harvest periods restricted importation and is a quantitative import restriction. Similarly, Indonesia's requirement imposes a limitation based on the time certain imported horticultural products were harvested, and has a limiting effect on the quantity allowed into Indonesia, and Indonesia breaches Article XI:1 by instituting or maintaining this requirement.

9. Indonesia's Import Licensing Regime for Horticultural Products, As a Whole, Is Inconsistent with Article XI:1

34. Indonesia imposes numerous restrictions and prohibitions on importation of horticultural products through its import licensing regime. An importer must comply with all aspects of the

regime to import, and importation is not undertaken according to commercial considerations but in relation to the requirements and conditions imposed by the regime that distort or frustrate those commercial considerations. These various requirements, when operating in combination, have the effect of both directly limiting imports and creating disincentives for importers to import the type and amount of horticultural products they otherwise would if acting according to their commercial considerations. The design and structure of these requirements ultimately aims to achieve the policy goals set forth in the statutory framework: to "provide protection for national horticultural farmers, business players, and consumers" and to prohibit importation "when the availability of domestic Agricultural Commodities is sufficient." Thus, when Indonesia's import licensing regime for horticultural products is considered as a whole, the regime constitutes a restriction inconsistent with Article XI:1.

B. Indonesia's Import Licensing Regime for Horticultural Products Is Inconsistent with Indonesia's Obligations Under Article 4.2 of the Agreement on Agriculture

35. Indonesia's import licensing regime for horticultural products and its constituent prohibitions or restrictions are "measures of the kind which have been required to be converted into ordinary customs duties" within the meaning of Article 4.2 of the Agreement on Agriculture. Footnote 1 to Article 4.2 provides that such measures include, *inter alia*, "quantitative restrictions," "minimum import prices," and "similar border measures" other than ordinary customs duties. Where a measure of the type listed in footnote 1 constitutes a "prohibition or restriction" (other than duties, taxes or other charges) in breach of Article XI, that measure also would run afoul of the prohibition in Article 4.2. The United States considers that Indonesia's import licensing regime for horticultural products – as a whole and in its constituent parts – breaches Article 4.2 for the same reasons that it breaches Article XI:1 of the GATT 1994.

C. Indonesia's Import Licensing Regime for Animals and Animal Products Is Inconsistent with Indonesia's Obligations under Article XI:1 of the GATT 1994

1. The Prohibition on the Importation of Animals and Animal Products Not Listed in Indonesia's Regulations Is Inconsistent with Article XI:1

36. Indonesia's positive list for the animals and animal products that can be imported is a prohibition within the meaning of Article XI:1. Numerous types of animals and animal products are not listed in the appendices to the regulations, including chicken cuts and parts and secondary cuts of beef. Applications for Import Approvals to import these products will not be granted, and importers are prohibited from importing products not specified on a valid Import Approval. Trade data for products that were removed from the list of permitted products with the issuance of MOA 139/2014 illustrate the limiting effect of the ban on importation of unlisted products.

37. Panels in previous disputes have found that measures that operate as bans on the importation of particular products are inconsistent with Article XI:1. The panel in *US – Poultry (China)* based its conclusion that the challenged measure was a prohibition inconsistent with Article XI:1 on the fact that the measure prohibited the administering agency from "us[ing] appropriated funds to 'establish' or 'implement' a rule allowing the importation of poultry products from China," which "had the effect of prohibiting the importation of poultry products from China." Similarly, the panel in *Brazil – Retreaded Tyres* found that the challenged measure "operate[d] so as to prohibit the importation of retreaded tyres" and, therefore, fell within the scope of Article XI:1. Indonesia's positive list of animals and animal products and consequent ban on importation of unlisted products thus constitutes a "prohibition" under Article XI:1.

2. The Application Windows and Validity Periods Are Inconsistent with Article XI:1

38. As discussed above in the context the analogous restriction on horticultural products, these requirements impose a limitation on importation or have a limiting effect on imports, and therefore constitute a "restriction" under Article XI:1. For animal product imports to be accepted into Indonesia, the Import Approval number must be written on the Certificate of Health issued in the products' country of origin. Importers thus cannot place orders for any period until after Import Approvals have been issued. Moreover, all animal products imported during a validity period must arrive in Indonesia and clear customs prior to the end of the period. This means that exporters in the United States must stop shipping to Indonesia four to six weeks before the end of the period.

Consequently, there is at least one month at the end of each period when Indonesian importers seeking to import animal products are *precluded* from choosing U.S. products due to the structure of the application window and validity period requirements.

39. Previous panels have found that measures imposing similar restrictions are inconsistent with Article XI:1. The *Colombia – Ports of Entry* panel found that a measure restricting imports to two Colombian ports had a limiting effect" on imports because "uncertainties . . . and the likely increased costs that would arise for importers operating under the constraints of the port restrictions, limit competitive opportunities for imports." Indonesia's application window and validity periods are far more restrictive in that they wholly exclude U.S. animals and animal products from entering Indonesia for four to six weeks each quarter.

3. The Fixed License Terms Are Inconsistent with Article XI:1

40. During each three-month period, Indonesia limits the imports of animals and animal products to products of the type, quantity, country of origin, and port of entry listed on the Recommendations and Import Approvals for that period. Once an import period begins, importers cannot apply for new permits to import different or additional products, and imports are strictly limited to the products specified on outstanding permits. As described above in discussing the analogous restriction on horticultural products, previous panels have found that measures with similar restrictive effects were restrictions under Article XI:1.

4. The Realization Requirement Is Inconsistent with Article XI:1

41. Indonesia requires that importers who are licensed to import Appendix I products must import at least 80 percent of the products listed on their Import Approval(s). This requirement is a restriction within the meaning of Article XI:1 because it is a condition on importation that induces importers to reduce the quantity of products that they request permission to import and may render the importer ineligible to import products if that condition is not met. As discussed above, previous panels have confirmed that measures imposing limits of this kind are "restrictions" under Article XI:1.

5. The Restriction on the Importation of Animals and Animal Products Other Than for Certain Limited Purposes Is Inconsistent with Article XI:1

42. Indonesia's use requirements for imported animal products are a "restriction" under Article XI:1 of the GATT 1994 because they are a condition on importation that limits the opportunities of imported products, and thus limits the quantity of imports. For beef products, the permitted purposes do not include any retail sale, either in modern markets or in traditional markets. For non-beef products, the permitted purposes exclude sale in traditional markets. Indonesian consumers still do at least half of their food shopping at traditional retail outlets. Thus, the use restrictions for Appendix II products bar imports from competing for a significant portion of the sales in the Indonesian market, while the restrictions for Appendix I products exclude imports from the retail market altogether. The requirements also render the importer ineligible to import in the future if the condition is not met. As described above, previous panels have found that measures imposing limits of this kind are restrictions under Article XI:1.

6. The Domestic Purchase Requirement Is Inconsistent with Article XI:1

43. Indonesia's domestic purchase requirement for beef imports is a "restriction" under Article XI:1 because it is a condition on importation that may render the importer ineligible to import if it is not met and that has a limiting effect on imports. First, the domestic purchase requirement is designed to substitute imports with domestic products. It compels importers to purchase locally produced goods before they can import foreign products, such that at least a portion of the products that otherwise would have been imported are replaced with domestically-produced goods. Second, the requirement ties the permissible quantity of beef imports to the supply of local beef that is available for purchase towards the requirement. Consequently, importers are forced to reduce their planned imports and request lower quantities in their Recommendations and Import Approvals applications than they would in the absence of the requirement. Third, the domestic purchase requirement adds unnecessarily to the costs of importation by requiring importers to purchase local beef without any business purpose.

44. Previous panels have found that measures imposing limits of this kind are restrictions under Article XI:1. The panel in *Argentina – Import Measures* considered a similar measure and found: "The required increase of local content . . . has a direct limiting effect on imports, because the measure is designed to force the substitution of imports." The panel also found that the measure had a restrictive effect because it "may result in costs unrelated to the business activity of the particular operator." The panel in *India – Autos* made a similar finding concerning a trade balancing requirement. Thus the domestic purchase requirement is a measure that is a limitation or limiting condition on importation or has a limiting effect on importation and is, therefore, a "restriction" within the meaning of Article XI:1.

7. The Reference Price Requirement Is Inconsistent with Article XI:1

45. As described in the context of the analogous restriction for horticultural products, this requirement is similar to a minimum import price requirement, which previous panels have considered under Article XI:1, although it is even broader than the measures previously found to be "restrictions." Further, it also has a limiting effect on imports at other times because the threat of such a broad restriction reduces the incentives for importation of these products overall. Because the Reference Price requirement restricts importation of Appendix I products to periods when the market price is above the government-set level, and prohibits importation during periods when it is not, the Reference Price requirement is a limitation or limiting condition on importation, or has a limiting effect on importation. Additionally, the requirement is a prohibition, within the meaning of Article XI:1, during certain periods.

8. Indonesia's Import Licensing Regime for Animals and Animal Products, As a Whole, Is Inconsistent with Article XI:1

46. Indonesia's import licensing regime imposes numerous limitations and limiting conditions on importation and has various limiting effects on the importation of animals and animal products. First, all these restrictions working together lead importers to reduce, sometimes dramatically, the quantities of imports they request to import at the start of each validity period. And, of course, once an import period starts, imports are limited to the types and quantities specified on outstanding Recommendations and Import Approvals. Second, Indonesia's import licensing regime further limits importation by imposing additional, non-business costs on imports. Thus, Indonesia's import licensing regime serves as a limitation or limiting condition on importation, or has a limiting effect on importation. And due to the way the requirements of the regime interact with and reinforce each other, the limitations or limiting effect of the regime as a whole is greater than the sum of its individual components.

D. Indonesia's Import Licensing Regime for Animals and Animal Products Is Inconsistent with Indonesia's Obligations Under Article 4.2 of the Agreement on Agriculture

47. Indonesia's import licensing regime for animals and animal products and its constituent prohibitions or restrictions are "measures of the kind which have been required to be converted into ordinary customs duties" within the meaning of Article 4.2 of the Agriculture Agreement. Indonesia's import licensing regime for animals and animal products – as a whole and in its constituent parts – breaches Article 4.2 for the same reasons that it breaches Article XI:1.

E. Indonesia's Restriction on Imports Based on the "Insufficiency" of Domestic Production Is Inconsistent with Indonesia's Obligations under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

48. Indonesia's domestic insufficiency requirement is a limitation or limiting condition on importation, or has a limiting effect on importation, and thus is a "restriction" within the meaning of Article XI:1. First, the domestic sufficiency requirement places a limiting condition on importation in that imports are allowed only on the condition that domestic production is deemed by the government not "sufficient" to fulfill domestic demand. If importation is permitted, the requirement still places a limitation on importation, as it is allowed only to the extent of the "domestic shortfall" that the Indonesian government identified. Second, the lack of transparency and predictability in the implementation of the domestic insufficiency requirement itself has a limiting effect on imports. The Government does not announce how or when the sufficiency of

domestic production to satisfy Indonesian consumers' needs will be determined or how the degree of the shortfall (if any) will be calculated. As a result, importers are unable to anticipate whether and when imports of a particular product will be prohibited, or what level of imports will be permitted to make up for a shortfall in domestic production.

49. Previous panels have confirmed that measures that limit the market access and competitive opportunities of imported products are "restrictions" under Article XI:1. Because the domestic insufficiency condition limits market access directly by placing a limiting condition on importation and limiting import volumes, and has further limiting effects by creating uncertainty as to whether, and at what levels, imports will be permitted at any given time, the requirement is a "restriction" within the meaning of Article XI:1. For similar reasons, these provisions are also inconsistent with Article 4.2 of the Agreement on Agriculture because they operate as a "quantitative import restriction" within the meaning of footnote 1 to Article 4.2.

V. CONCLUSION

50. The United States respectfully requests the Panel to find that the prohibitions and restrictions imposed by Indonesia's import licensing regimes, operating individually and as whole regimes, and the provisions of Indonesia's laws conditioning importation on the insufficiency of domestic demand, are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

EXECUTIVE SUMMARY OF U.S. OPENING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

51. Indonesia has imposed numerous restrictions on the importation of horticultural products and animals and animal products. With one exception, Indonesia does not contest the existence of the measures described by the co-complainants. Instead, Indonesia attacks the complainants' claims based on arguments that either misinterpret the obligations and exceptions of GATT 1994 and the Agreement on Agriculture or mischaracterize the way the measures at issue operate.

I. Order of Analysis

52. Indonesia asserts that the Panel must begin with Article 4.2 because the Agriculture Agreement is, per se, more specific with respect to agricultural products than the GATT 1994. The complainants' claims each relate to prohibitions or restrictions imposed by Indonesia on the importation of horticultural products and animals and animal products. Prohibitions and restrictions on importation are addressed specifically under Article XI:1 of the GATT 1994. Therefore, the measures and claims at issue in this dispute are dealt with specifically under Article XI:1 and not dealt with more specifically under the Agreement on Agriculture.

53. Furthermore, Indonesia has defended the challenged prohibitions and restrictions under Article XX of the GATT 1994. Indonesia raises this defense regarding the claims under both Article XI:1 and Article 4.2. In doing so, Indonesia's own argument establishes that the Agreement on Agriculture is not more specific to the claims at issue in this dispute. That is, the applicability of Article 4.2 in this dispute would turn on whether each measure is justified under the GATT 1994. Thus, under Indonesia's own logic, the GATT 1994 is the agreement that deals more specifically, and in detail, with the matter raised.

II. INDONESIA'S ARGUMENTS UNDER ARTICLE XI:1 OF THE GATT 1994 AND ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE ARE BASED ON FLAWED INTERPRETATIONS

A. Trade Effects Are Not Required To Demonstrate a Breach Under Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture

54. Indonesia responds to many of the co-complainants' claims by asserting that the co-complainants had not established a *prima facie* case because they have not proven that the challenged measure has an "impact on trade flows." This argument is untenable. Complainants are not obligated to quantify the trade effects of a challenged measure in order to make a *prima facie* case under Article XI:1. The ordinary meaning of "restriction" is "[a] thing which restricts someone

or something, a limitation on action, a limiting condition or regulation." The term "restrictions" under Article XI:1 thus refers to measures "that are limiting, that is, those that limit the importation or exportation of products." The text of Article XI:1 does not suggest that a complaining Member must prove, in quantified terms, the effects of a measure on trade flows.

55. The Appellate Body confirmed this interpretation in *Argentina – Import Measures*, finding that a challenged measure's "limitation" on importation "need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context." Previous panels have found that Article XI:1 protects competitive opportunities of imports and that, therefore, proving trade effects is not necessary to establish that a challenged measure is inconsistent with Article XI:1. As the co-complainants demonstrated in their first written submissions, the limiting effect on importation of the challenged measures is evident from their design, architecture, and revealing structure. Further, although doing so is not required, the co-complainants have, in fact, presented evidence demonstrating the challenged measures' negative effects on trade flows.

B. Indonesia's Measures Also Breach to the Extent They Force Market Actors To Make Choices that Restrict Imports, and Indonesia Misstates the Content of Its Measures

56. Indonesia also argues that certain measures cannot be challenged because they are the result of choices by private actors. This argument rests on an incorrect interpretation of Article XI:1 and Article 4.2 that previous panels have rejected. The panels in *India – Autos* found that the challenged measure was a "restriction" under Article XI:1 because it "induced [an importer] . . . to limit its imports of the relevant products" in relation to its "concern[] about its ability to export profitably." The panel in *Argentina – Import Measures* also found that a measure had a negative effect on importation because it meant that private actors "[could] not count on a stable environment in which to import and…accordingly reduce their expectations as well as their planned imports." To the extent that Indonesia's measures operate by influencing private choices, they force importers to self-restrict in the same way as the measures considered in these previous disputes. Further, Indonesia overstates the extent to which the challenged measures operate through the choices of private actors, rather than as direct restrictions on importation.

III. INDONESIA HAS NOT ESTABLISHED THAT ANY OF THE CHALLENGED MEASURES ARE JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

57. Indonesia asserts a defense under Article XX(d) with respect to most of the claims advanced by the co-complainants. In order to make out an Article XX(d) defense, Indonesia must establish: (1) that the challenged measure is "designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994"; and, (2) that the measure is "necessary to secure such compliance." Indonesia has not done either. First, Indonesia has not identified any "laws and regulations" with which the challenged measures are designed to secure compliance, as required by Article XX(d). Because Indonesia has not satisfied the first element, it is not possible to begin the analysis of whether the measure is "necessary to secure compliance" with another WTO-consistent law or regulation.

58. Indonesia also seeks to justify many of the measures at issue under Article XX(b) by arguing that they are necessary to protect human health. To succeed in such a defense, Indonesia must show: (1) that the challenged measure's objective is "to protect human, animal or plant life or health"; and (2) that the measure is "necessary" to the achievement of its objective. Indonesia has not met this standard with respect to any of the challenged measures.

59. For example, Indonesia claims that the storage capacity requirement is necessary because of its "equatorial climate" and its "limited capacity to store fresh horticultural products." It is unclear how this restriction would contribute to Indonesia's stated objective of keeping horticultural products fresh. An importer's *ownership* of storage facilities has little relationship with the *sufficiency* of storage capacity. A readily available, less trade-restrictive measure would be to allow importers to *lease* storage capacity or simply allow importers to transfer the products directly to the distributor's warehouse. Thus, Indonesia has not even attempted to explain how the requirement to *own* storage capacity is necessary to protect human health.

60. Indonesia also asserts that "[a]nimals and animal products are not permitted to be sold in traditional Indonesian markets because of the extremely high risk of unsafe food handling." However, Indonesia does not explain why the challenged measure would make a contribution to that objective, let alone meet the "necessary" standard. Indonesia has offered no evidence that imported frozen or thawed meat in traditional markets poses any greater risks to human health than those associated with freshly slaughtered local meat under the same conditions. Indeed, the Indonesian government has demonstrated that frozen beef poses no particular food safety problem, as Bulog relieves domestic shortages *by selling imported frozen beef* in traditional markets. Further, Indonesia's explanation relating to traditional markets has no relevance to the prohibition on importation for all retail sale (including in modern markets) of beef products.

61. Finally, Indonesia asserts that the restrictions on the importation of horticultural products and animal products to certain limited purposes is "necessary to protect public morals" under Article XX(a), specifically Islamic law concerning permissible ("halal") foods. To make out a successful defense Indonesia must show (1) "that it has adopted or enforced [the] measure `to protect public morals"; and, (2) "that the measure is `necessary' to protect such public morals."

62. With respect to horticultural products, given that the instruments through which Indonesia imposes these restrictions do not refer to halal standards, and that Indonesia has not identified any halal standard, it is difficult to see how the measure might be adopted to protect the population from non-halal foods. Even were the panel able to discern that the measures at issue are directed at and contribute to the stated objective, it is not clear how any contribution to the same would warrant the requirements' high degree of trade-restrictiveness. Indonesia prohibits importers of fresh horticultural products from selling directly to consumers or retailers. In defending these measures, Indonesia claims that consumers assume that all products sold in traditional markets comply with halal standards, and that implementing a labelling system to warn consumers about non-halal products would be impossible. However, the measure at issue limits the *persons* to whom imported horticultural products can be sold, not the products' ultimate destination. Imported fresh horticultural products can, and presumably are, sold in traditional and other markets. Indonesia has justified the wrong requirement.

63. With respect to animal products, Indonesia asserts that its end-use restrictions on importation are "necessary to protect public morals . . . because it prevents consumers from mistakenly purchasing animals or animal products that do not conform to Halal requirements." But this argument ignores the fact that, with the exception of pork, all the animal products imported into Indonesia must conform to Indonesia's Halal standards and must be labeled as such. Thus, Indonesia's end-use restrictions are not "necessary" to protect public morals in the form of Halal standards because, with the exception of pork, all imports of animal products into Indonesia *already meet Indonesia's Halal standards*. Further, to the extent that Indonesia seeks to justify the entire challenged measure, its statements concerning traditional markets would not address the prohibition on all retail sale with respect to Appendix I (beef) products.

ANNEX C-4

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF UNITED STATES

EXECUTIVE SUMMARY OF U.S. SECOND WRITTEN SUBMISSION

1. The United States challenged fifteen prohibitions and restrictions imposed through Indonesia's licensing regimes governing the importation of horticultural products and animals and animal products, as well as the regimes as a whole and a related restriction. These measures are manifestly inconsistent with Indonesia's WTO obligations. With one exception, Indonesia does not contest that any of the measures exist or operate in the way the co-complainants describe. Instead, Indonesia advances flawed legal arguments in an attempt to show that the measures are, nevertheless, not inconsistent with the covered agreements. Indonesia has failed to rebut the *prima facie* case established by the co-complainants, and also has failed to show that any of these measures is justified under Article XX of the GATT 1994.

I. INDONESIA'S IMPORT LICENSING REGIMES ARE INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

A. Indonesia's Argument That Co-Complainants Have Not Established a *Prima Facie* Case Because They Have Not Proven Actual Trade Effects Is Incorrect

2. Indonesia's argument that co-complainants have not made a *prima facie* case because they did not prove that import volumes decreased due to the challenged measures is incorrect.

1. Article XI:1 Does Not Require Demonstration of Actual Trade Effects

3. Article XI:1 refers to "restrictions . . . on the importation" of products. The ordinary meaning of "restriction" is "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation." The Appellate Body in *China – Raw Materials* and *Argentina – Import Measures* found that the term thus refers to measures "that are limiting, that is, those that limit the importation or exportation of products." The text of Article XI:1 therefore does not suggest that a Member must prove, in quantified terms, a challenged measure's actual effect on trade flows to demonstrate that such measure is a "restriction" under Article XI:1.

4. The Appellate Body affirmed this interpretation in *Argentina – Import Measures*, finding that a measure's limiting effect "need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effect can be demonstrated through the design, architecture, and revealing structure of the measure considered in its relevant context." Thus complainants can demonstrate a measure's inconsistency with Article XI:1 by showing that its design, structure, and operation impose limitations on importation (actual or potential).

2. The United States Has Established That the Challenged Measures Are Restrictions on Importation under Article XI:1

5. Under the correct legal standard described above, the United States has demonstrated that each of the challenged measures, is a restriction on importation under Article XI:1.

6. *Application Windows and Validity Periods*. Products cannot be shipped until after Import Approvals are issued at the start of each import and must clear customs before the last day of the period. Therefore, there is a period of five to six weeks during each period when U.S. exporters cannot ship to Indonesia. Thus, based on their design, structure and operation, the Indonesian measures restrict the importation of products in breach of Article XI:1. In addition, the United States submitted evidence demonstrating the effect of this no-shipment period on imports.

7. *Realization Requirements*. By requiring importers to import at least 80 percent of the products listed on their permits, on penalty of becoming ineligible to import, the realization

requirements give importers an incentive to ensure they do not obtain permits for more products than they are certain they can profitably import. This compels them to apply for lower quantities than they would if the 80 percent requirement did not exist, which limits overall quantities of imports. Based on the design, structure and operation of the Indonesian regulation, therefore, the realization requirement has a limiting effect on importation in breach of Article XI:1. The co-complainants also presented evidence demonstrating that the realization requirements have had an adverse impact on imports. This evidence is not "anecdotal conjecture" but reflects the experience of actors who operate in Indonesia's import licensing regime, who know how the realization requirement works, and who can attest to its limiting effect on imports.

8. *Seasonal Restrictions on Horticultural Products*. Under MOA 86/2013, the Ministry of Agriculture establishes periods of time within each six-month semester (or covering the entire semester) during which it restricts or prohibits the importation of certain horticultural products, to protect domestic producers of those products during the products' harvest periods. The Ministry of Agriculture has imposed seasonal bans or restrictions on bananas, durian, melons, papaya, and pineapples, *inter alia*, including for the entire year. Thus, contrary to Indonesia's assertions, the restrictive effect of this measure is clear from its text, structure and operation.

9. *Storage Capacity Requirements for Horticultural Products*. Indonesia limits the total quantity of products that an importer can receive permission to import during a semester to the storage capacity owned by that importer. This requirement limits the quantity of products that can be imported because it does not take into account that horticultural product inventory typically undergoes multiple turnovers in a semester. It also means that importers cannot rent or lease storage capacity, which limits imports and increases the cost of importation. The United States has also introduced evidence demonstrating that, in practice, the storage capacity restrictions adversely affect import volumes. Also, contrary to Indonesia's arguments, the claim against the storage capacity requirement is in no way "at odds with the Complainants' claim" against the 80 percent realization requirement. Both requirements force importers to restrict their Import Approval applications and thereby limit horticultural product imports into Indonesia.

10. *Use, Sale, and Transfer Restrictions for Horticultural Products*. Horticultural products imported for consumption *must* be sold through distributors, and horticultural products imported for production *cannot* be sold or transferred to another entity. The first restriction mandates an unnecessary level in the supply chain and therefore additional costs. The second creates waste and unnecessarily increases the cost of imports because PIs must predict precisely the quantity of products that they will use in their production process for each period. It is a basic rule of economics that if the costs of an input product increase, supply of that product will decrease. A recent report published by the World Economic Forum confirmed that if supply chain barriers such as these were eliminated, trade would increase dramatically. Thus, these restrictions have a limiting effect on imports of horticultural products.

11. *Reference Price Requirements for Chilies and Shallots*. The Reference Price requirements impose an absolute prohibition on importation of chilies and shallots if the Indonesian market prices of these products fall below their Reference Prices. The restrictive effect of such a prohibition is obvious. The Reference Price also has a restrictive effect at all times because the threat of the prohibition reduces the incentives for importation. Indonesia attempts to argue against this by presenting a chart showing that imports of chilies and fresh shallots into Indonesia were below the level of Import Approvals issued in 2013 and 2014. But Indonesia's logic is inverted. If the Reference Price prohibition were triggered, imports of chilies and shallots would be stopped cold; consequently, imports for that period *would be* below the quantity of products listed on Import Approvals. Thus, even if accurate, Indonesia's data provides no support for the claim that the Reference Price requirements do not restrict imports.

12. *Six-Month Harvest Requirement for Horticultural Products*. Indonesia prohibits the importation of horticultural products that do not meet the six-month harvest requirement and penalizes importers that fail to comply with it. It is uncontested that certain fresh horticultural products – apples are one example – can be safely stored and remain fresh for consumption for more than six months. These products, although harvested over a period of a few months, can be shipped year round. Under the six-month requirement, imports into Indonesia are restricted in the second half of the crop year. Thus, the United States has demonstrated that the six-month requirement has a limiting effect on importation and, additionally, on import volumes.

13. *End-Use Restrictions for Animal Products*. It is uncontested that the animal products listed in Appendix II to MOT 46/2013 and MOA 139/2014 (non-beef meats and edible offals) cannot be imported for sale in traditional markets and that the animal products listed in Appendix I to MOT 46/2013 and MOA 139/2014 (beef meat, and edible beef offals) cannot be imported for any retail sale. The co-complainants have provided evidence demonstrating that Indonesian consumers still do at least half their food shopping at traditional retail outlets. This number is even higher for animal products. Thus, imported animal products are completely denied access to at least half and as much as 70 percent of the Indonesian consumer market, and the restrictions on Appendix I products are even more extensive. The restrictive effect on importation is clear.

14. *Domestic Purchase Requirement for Beef Products*. Indonesia requires importers to purchase local beef equal to three percent of their beef imports. Based on the text of the measure and other sources, co-complainants have shown that this requirement limits the permissible quantity of beef imports based on the supply of local beef that can count towards the requirement that is available for purchase. Co-complainants also demonstrated the practical effect of the requirement, showing that compliance is burdensome because domestic beef is in short supply in Indonesia and importers have difficulty finding and purchasing local beef amounting to three percent of the quantity of beef they wish import. Importers are, therefore, forced to reduce the quantity of products they apply to import. Additionally, the requirement further reduces imports by adding a significant and unnecessary cost to the importation of beef products.

15. *Import Licensing Regimes as a Whole*. Due to the combined operation and interaction of the different requirements, the regimes, as a whole, are more restrictive than their components, taken singly. In particular, the regimes include requirements that cause importers to reduce the products they apply to import, while the fixed license terms requirement then strictly limits imports in any period to the products listed on importers' permits for that period. The fixed license terms and application window and validity period requirements further restrict imports by preventing importers from responding to market forces by importing different products, or on a different time schedule, than they had foreseen. And, contrary to Indonesia's assertions, the co-complainants have also submitted copious evidence demonstrating that the regimes "operate[] to restrict the quantity of imports" of the covered products, although this is not necessary to show a breach of Article XI:1.

16. *Sufficiency of Domestic Supply Requirement*. The legal provisions establishing this requirement explicitly make all importation conditional on the government determining that domestic production is insufficient to satisfy domestic demand. The limiting effect of this requirement is clear on its face. Additionally, the co-complainants have submitted evidence demonstrating the domestic sufficiency requirement's limiting effect on imports.

3. Trade Data Confirms Restrictive Effect of the Challenged Measures

17. Although evidence of actual trade effects is not required to establish a breach of Article XI:1, the available trade data confirms that the challenged measures have a limiting effect on Indonesian imports of the covered products. The challenged measures concerning horticultural products went into effect in 2012 and 2013. In those years, imports of *every one* of the twenty-one fresh horticultural products subject to the import licensing regime – with the single exception of lemons – declined sharply, and remained below peak levels in 2014 and 2015. Trade data on Indonesian imports of most of the fifteen processed horticultural products subject to the challenged measures exhibit a similar pattern. The data on animal products also confirm the limiting effect of the challenged measures. Indonesian imports of unlisted products (*e.g.*, poultry cuts and edible offal) have been essentially zero since the original import licensing regulations became effective in 2011. Imports of listed animals dropped steeply in 2011 and 2012, when the import licensing regimes became effective, and remaining below peak levels for 2013-2015.

B. Indonesia's Argument that Certain Measures Are Not "Maintained" by Indonesia Is Based on an Incorrect Legal Premise and Is Factually Incorrect

18. Indonesia asserts that many of the co-complainants' claims fall outside the scope of Article XI:1 because the measures are "self-imposed" by private actors and are not "instituted or maintained" by Indonesia. The legal premise of this argument is incorrect. The Appellate Body in

Korea – Beef considered this argument under Article III:4 of the GATT 1994 and found that "the intervention of some element of private choice does not relieve [a Member] of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product." Previous panels have found that this principle applies to Article XI:1. Further, Indonesia's assertion that the measures are "decisions of private actors" is inaccurate.

19. Regarding the *application windows and validity periods*, Indonesia is wrong that importers *decide* not to ship their products after a certain date. Under Indonesia's regulations, imported products that arrive after the end of the period for which their import approval is valid will not be accepted. Thus, exporters must stop shipping far enough in advance of the end of the period for their goods to clear customs by the last day. Importers do not "choose" to stop importing at the end of one validity period and the beginning of another, or to reduce their imports accordingly. That choice is *forced* on them by Indonesia's regulatory requirements.

20. With respect to the *fixed license terms*, Indonesia's assertion that permit terms "are at the complete discretion of the importers" is incorrect. The restrictions imposed by Indonesia's import licensing regime severely curtail the ability of importers to determine the terms included in their permit applications. Further, the co-complainants are challenging not the specific terms of any importer's license but the inability of importers, once a validity period has begun, to respond to market conditions by importing products different than those specified on their import permits. This inability is the result of the requirements maintained in Indonesia's regulations.

21. Indonesia is also wrong that the *realization requirement* is "a function of importers' own estimates." Importers must import 80 percent of the products on their Import Approval or lose eligibility to import. The threat of ineligibility for future permits incentivizes importers to be conservative in the quantities of products that they apply to import, which reduces total imports during any import period, compared to normal market conditions. Thus, importers' decision to reduce the quantities they apply for is a forced response to the realization requirement.

22. Indonesia's claim that any limitation caused by the *storage capacity requirement* "is self-imposed" also fails. Importers seeking to import horticultural products for sale are allowed to apply to import only up to the capacity of the storage facilities that they own, on a 1:1 ratio. This means that they are required to *own* enough storage to hold, at one time, all of the products that they will import for the entire semester. Under market conditions, fruit and vegetable inventories turn over many times during a semester, such that importers would fill, empty, and refill their facilities multiple times. Thus, Importers do not *choose* to limit the products they apply to import to their owned storage capacity; their decision is a compelled by Indonesia's measure.

II. INDONESIA'S IMPORT LICENSING REGIMES ARE INCONSISTENT WITH INDONESIA'S OBLIGATIONS UNDER ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

23. The United States has demonstrated that all of the challenged measures are inconsistent with Indonesia's obligations under Article 4.2 of the Agreement on Agriculture. Indonesia's arguments in response are legally and factually incorrect.

24. First, Indonesia's argument that its import licensing regimes are "automatic" and, as such, are outside the scope of Article 4.2 is based on an incorrect legal premise. Article 4.2 covers "any measures of the kind which have been required to be converted into ordinary customs duties." The only measures that are *excluded* from Article 4.2 are "ordinary customs duties"; all other types of measures are potentially covered. The Appellate Body confirmed the broad scope of Article 4.2 in *Chile – Price Band System*, stating that Article 4.2 was the "legal vehicle" for the conversion of all "market access barriers" into ordinary customs duties. Further, the text of Article XI:1 of the GATT 1994 is explicit that "import or export licenses" *can* impose restrictions on importation within the meaning of Article XI:1.

25. Additionally, as a factual matter, Indonesia's import licensing regimes are not "automatic." Indonesia's argument is based on an incorrect definition of "automatic" that, if accepted, would mean Members could impose, through import licensing, *any* substantive restriction on importation, as long as import licensing agents could not exercise discretion in issuing licenses and licenses eventually were granted after all legal requirements were met. This definition of "automatic" has no support in the text of any of the covered agreements. Further, the suggestion that licensing

regimes such as Indonesia's are immune from scrutiny would undermine the prohibitions of Articles XI:1 and 4.2, because it would allow Members to impose substantive restrictions on importation under the guise of legitimate licensing procedures.

26. Second, Indonesia's argument that the Reference Price requirements are not "minimum import price[s]" is incorrect. The requirements clearly fall within the definition of a "minimum import price" because they prohibit all importation when prices are below a set level. Moreover, Indonesia's Reference Price requirements also are inconsistent with Article 4.2 because they are "quantitative import restrictions" or "similar border measures." Thus, Indonesia has not rebutted the *prima facie* case that the Reference Price requirements are inconsistent with Article 4.2.

27. Indonesia's other arguments under Article 4.2 are essentially the same as its arguments under Article XI:1 of the GATT 1994 and, therefore, fail for the same reasons.

III. INDONESIA HAS FAILED TO ESTABLISH A DEFENSE UNDER ARTICLE XX OF THE GATT 1994 WITH RESPECT TO ANY OF THE CHALLENGED MEASURES

A. None of the Challenged Measures Is "Necessary To Secure Compliance with" Any GATT-Consistent Indonesian Law or Regulation

28. To establish that one of the challenged measures is justified under Article XX(d), Indonesia must show that the measure is "designed to 'secure compliance' with laws or regulations" that are not themselves GATT-inconsistent and is "necessary to secure such compliance." Indonesia asserts that the application windows and validity periods, fixed license terms, realization requirements, and storage capacity restrictions are "necessary" for "customs enforcement" and the use, sale, and transfer restrictions on horticultural products are "necessary" to secure compliance with food safety requirements. All of Indonesia's defenses fail.

29. First, Indonesia has not identified a GATT-consistent law or regulation with which any of the challenged measures is necessary to secure compliance. Indonesia named three legal instruments, as well as ten "other relevant regulations" as being *among* the "WTO-consistent laws and regulations" with which the measures are "designed to secure compliance." But Indonesia did not submit the relevant laws or regulations for the record, did not specify what aspects of these laws were relevant to the Panel's analysis, and provided no explanation as to why any of the challenged measures were necessary to secure compliance with these laws.

30. Appellate Body reports show this is insufficient. In *Thailand – Cigarettes (Philippines)*, the Appellate Body found that Thailand's Article XX(d) defense failed because Thailand did not "identify precisely the 'laws or regulations' with which the measure . . . purportedly secures compliance. "Thailand had referred to its value-added tax law, "Chapter 4" of its Revenue Code," and "reporting requirements of its VAT and other tax laws." The Appellate Body found these references were insufficient to identify a WTO-consistent rule under Article XX(d), noting that they "encompass a myriad of provisions . . . addressing various matters." Indonesia's references are even less precise and thus fail to meet the Article XX(d) standard.

31. However, even if Indonesia identified a law or regulation on customs enforcement, its defenses would still fail because none of the measures is "to secure compliance" with such a rule. None of the regulations establishing the restrictions mentions customs enforcement as one of its purposes. Further, the import licensing regimes are administered by the Ministries of Trade and Agriculture and are distinct from Indonesia's customs regime, which is administered by the Finance Ministry. Additionally, as the co-complainants have shown, it is clear from the text, structure, and history of the import licensing regulations and their framework legislation that their actual purpose is to protect domestic producers from competition from imports.

32. But even if the Panel found that a challenged measure is "to secure compliance" with some WTO-consistent law or regulation, the "necessary" standard still would not be met.

33. With respect to the *application windows and validity periods*, Indonesia asserts that they "contribute to Indonesia's ability to allocate resources effectively" among its ports. But it is not clear that the measure would make any contribution at all in this regard. Importers do not tie their imports to a particular port. Therefore, Indonesian officials would know at the beginning of the

period only the maximum permitted imports for that period and the ports where such imports could possibly be brought in. It is unclear how resources could be allocated based on this information. Further, a less trade-restrictive way to achieve the objective of "providing advance notice of expected import volumes" would be a truly automatic import licensing regime where importers could apply on any day prior to the customs clearance of goods and receive permission to import goods of the type and quantity requested through the port specified. Such a regime could be administered in the same way as the current regime, and would, therefore, be "reasonably available." It would provide more accurately and timely notice of planned imports, and, as such, would *better* assist Indonesia in allocating resources.

34. Indonesia asserts that the *fixed license terms* also allow customs authorities "to allocate their limited resources," but it is difficult to see how this could be the case. The requirement does not provide a schedule of what products will be imported when and where; it merely places overall restrictions on the products that can be imported in a period. Any minimal contribution the measure could make to customs enforcement is not in proportion to its high level of trade-restrictiveness. Further, if Indonesia wanted information about import volumes and locations, a reasonably available alternative measure would be a truly automatic licensing system. Allowing importers to apply to import products of whatever type, quantity, and country of origin they choose and to amend or update this information would provide timely, accurate information based on which resources could be allocated.

35. Indonesia's claim that the *realization requirement* is necessary for customs enforcement because it serves as a "safeguard against importers grossly overstating their anticipated imports" similarly fails. First, Indonesia has not provided any evidence that a problem with importers overstating their anticipated imports exists or explained how, if it did exist, it would impose a burden on customs officials. Second, Indonesia's argument concerning "misallocation of limited resources" is based on the assumption that the import licensing requirements provide customs officials with relevant information about planned imports. But this is not the case. Importers are *not* required to provide details on when and where products will be imported. Third, Indonesia's argument ignores the fact that any over-estimation problem would not exist without the application windows and validity periods and the fixed license term requirements. Further, any marginal contribution the realization requirement could make to saving customs resources would be outweighed by the severe trade-restrictiveness of the measure.

36. Indonesia asserts that the *storage capacity restriction* is also necessary for customs enforcement due to Indonesia's limited resources. But Indonesia has not explained how importers' ownership of storage capacity is relevant to enforcement of its customs laws. Even assuming that problems relating to inadequate storage could arise, they would presumably do so after the products had cleared customs in Indonesia. Further, Indonesia provides no justification for the two most trade-restrictive aspects of the requirement, the *ownership* requirement and the one-to-one ratio of owned storage capacity and *total* imports allowed entry during a semester.

37. In defense of its *use, sale, and transfer restrictions*, Indonesia asserts that this measure is necessary "to secure compliance with Indonesia's food safety requirements." Indonesia does not identify any WTO-consistent law or regulation with the restrictions are necessary to secure compliance, nor does it present any evidence that the challenged measure is designed to secure compliance with such a law or regulation. Even if Indonesia had done so, the measure would not meet the "necessary" standard, as Indonesia did not explain how the distributor requirement for products imported for consumption would allow importers to better track bacteria in the food supply. And Indonesia advanced no explanation at all for the prohibition on PIs transferring or selling products not used in their own production process. Indonesia also ignores the fact that it *also* has health and sanitary and phytosanitary requirements that apply to horticultural products. Because the use, sale, and transfer requirements make no demonstrated contribution to food safety, a less trade-restrictive alternative would be to eliminate the requirements and continue to rely instead on these other requirements, which relate specifically to the objective of food safety.

38. With respect to its defense of the regimes "as a whole," Indonesia provides no further explanation. We assume that Indonesia's defense of the regime is derivative of its defenses of the regime's individual components. Thus, Indonesia's defense must fail for the same reasons as its defenses of the individual measures. Moreover, any small contribution that the regimes might make to one of these objectives would have to be "necessary" even in light of the extremely trade-restrictive effect of the regimes as a whole, which Indonesia has not shown. Elimination of the

underlying restrictions, imposition of an automatic import licensing regime and continued reliance on other more relevant measures related to food safety would provide reasonably available alternative measures Indonesia could take to remediate the inconsistencies with Articles XI:1 and 4.2.

B. None of the Challenged Measures Is "Necessary" To Protect Human Health

39. To establish that one of the challenged measure is preliminarily justified under Article XX(b), Indonesia must establish that: (1) "the objective pursued by" the measure is "to protect human, animal or plant life or health"; and, (2) the measure is "necessary" to the achievement of its objective. Indonesia has not met either element with respect to any of its defenses.

40. With respect to the *seasonal restrictions* on importation of horticultural products, Indonesia's argument that they are necessary to protect human health because oversupply of such products could have disastrous consequences" lacks merit. First, Indonesia has not shown that protection of human health is an "objective pursued by" the measure. Indonesia asserted that the measure's objective is protecting human health, but introduced no evidence supporting the assertion. Further, co-complainants have demonstrated that the actual purpose of the measure is protecting domestic producers from competition. Indonesia also has not met the "necessary" standard, as it has not presented any evidence that oversupply occurs or poses risks to human health. Thus it is not clear that the measure would make any "contribution" to its purported objective. And even if the measure made some contribution, several less trade-restrictive alternative measures are available, including confining harvest period restrictions to those regions in which the harvest was occurring. Another alternative would be to eliminate the seasonal restrictions and allow market forces to resolve any oversupply problem.

41. Indonesia's argument that the *storage capacity restrictions* for horticultural products are justified because Indonesia's limited capacity to store such products and its "equatorial climate," create a "heightened risk of spoilage" also lacks merit. Indonesia presented no evidence that the measure's objective is the protection of human health, while the co-complainants' evidence suggests that the objective of Indonesia's import licensing regime is protecting domestic producers from competition. Further, even if the measure pursued human health, it does not meet the "necessary" standard. An importer's *ownership* of storage facilities has no relationship with the *sufficiency* of storage capacity, as importers commonly lease storage. Further, importers generally empty and refill storage space several times during a semester, so requiring importers to own enough storage to hold *all* the horticultural products that they would import for the entire semester is not necessary to ensure refrigeration of an importer's products. A significantly less trade-restrictive way to achieve that objective would be to remove the ownership and one-to-one ratio requirements and to allow importers to lease storage capacity as is needed at any time.

42. Indonesia's claim that the *use, sale, and transfer restrictions* on horticultural products satisfy Article XX(b) because they limit "distribution channels" so that "Indonesian officials are better able to track the origin of products that contain pathogenic bacteria" also fails. Again, Indonesia did not point to any evidence that "the objective pursued by" the measure is the protection of human health. And even if the measure did pursue that objective, no contribution to it has been shown, and certainly not one that meets the "necessary" standard. The measure limits the *persons* to whom imported horticultural products can be sold, not the products' final destination. Imports can be sold in open air markets, provided they are *first* sold to a distributor. The requirement simply lengthens the supply chain (likely making tracking more difficult). Also, Indonesia advanced no justification of the prohibition on PIs transferring products not used in their production. Thus, because the measure makes no contribution to the objective, a less trade-restrictive alternative would be for Indonesia to eliminate the requirement and continue to rely on its health and SPS requirements for preventing the spread of pathogenic bacteria.

43. Indonesia's argument that *six-month restriction* on fresh horticultural products is "necessary for the protection of human, plant, or animal life or health" also lacks merit. The first element of Article XX(b) is not met because, as with the other challenged measures, Indonesia has presented no evidence to suggest that this measure pursues the objective of food safety. The second element is not satisfied because Indonesia has not shown how the measure would make any contribution to food safety. Indeed, Indonesia has not even asserted that the requirement is "necessary" to food safety, merely stating that authorities would "prefer" products to be stored locally. Finally, Indonesia ignores the fact that it has health and SPS requirements for horticultural products,

including the requirement that all imports be accompanied by health and SPS certificates. Since all horticultural product imports are certified as meeting Indonesia's health and SPS standards prior to their being shipped, a less trade-restrictive alternative measure would be to continue to rely on these requirements and not impose the six-month requirement, which is highly trade-restrictive and makes no contribution to food safety.

44. Similarly, with the *Reference Price* requirements, Indonesia has not referred to anything suggesting that the "objective pursued" is the protection of human health. The one exhibit Indonesia presented on its food security plan makes no mention of the Reference Price, any over-supply problem, or Indonesia's import licensing regimes. Even if human health were the objective of the measures, Indonesia has presented no evidence that the Reference Price requirements make any contribution to that objective. Indeed, Indonesia presents no evidence that an oversupply problem exists and even acknowledges that food scarcity and under-nutrition are persistent problems. Further, even if the requirement did make a contribution to human health, such contribution would not outweigh the significant trade-restrictiveness of the measure.

45. With respect to Indonesia's *end-use restrictions* on animal products, Indonesia presented no evidence that food safety is the objective for which the restrictions were imposed. Indonesia also does not explain how the end-use restrictions are "necessary" to protect human health. Indonesia, presented no evidence suggesting that imported frozen or thawed meat sold in traditional markets poses any greater risks to human health than freshly slaughtered local meat sold in those markets. Finally, to the extent that Indonesia is asserting a defense of the whole measure, the explanation relating to traditional markets has no relevance to the prohibition on importation for all retail sale (including in modern markets) of beef products.

46. Indonesia's assertion that the *domestic purchase requirement* for Appendix I products is "an integral part of Indonesia's food safety and security plan" is the entirety of Indonesia's Article XX(b) defense of this requirement. Indonesia presented no evidence to support its assertion and no evidence suggesting that the requirement makes any contribution to food safety. Indeed, it is not clear what the connection there could be between the requirement and food safety. Further, even if a small contribution could be demonstrated, it would have to be weighed against the trade-restrictiveness of the measure, which is significant.

47. Indonesia asserts that its import licensing regimes, *as a whole*, fall within the scope of Article XX(b). Indonesia does not explain or present evidence in support of these defenses. Assuming that Indonesia's defenses of the regimes as a whole derive from its defenses of the individual measures, they must fail for the same reasons. Moreover, any small contribution the regimes might make to the protection of human health would have to be weighed against the trade-restrictiveness of the regimes as a whole. The contribution would have to be significant in order to outweigh this level of restrictiveness, and Indonesia has not made such a showing.

48. Finally, Indonesia's Article XX(b) defense of the *domestic sufficiency requirement* should also fail. Beyond a bare assertion, Indonesia provides no further evidence or argumentation in support of its defense under Article XX(b). Indonesia has put forward no evidence that the objective pursued by the laws setting out the domestic sufficiency requirement is "to protect human . . . health" or that the measure makes any contribution to that objective. Further, the co-complainants have shown that the explicit goal of the laws establishing the domestic sufficiency requirement is to protect farmers from foreign competition and reduce (and eventually cease) imports. Indonesia has not rebutted this showing.

C. None of the Challenges Measures Is "Necessary to Protect Public Morals"

49. To establish that a measure is preliminarily justified under Article XX(a), Indonesia must demonstrate that "it has adopted or enforced the measure to 'protect public morals' and that the measure is 'necessary' to protect such public morals." Indonesia has not met either element with respect to any of its Article XX(a) defenses.

50. Indonesia asserts that the *use, sale, and transfer* restrictions on horticultural products are necessary to protect consumers from purchasing non-Halal horticultural products at traditional markets. While the United States agrees that upholding the Halal food requirements in Indonesia is a "public moral" under Article XX(a), Indonesia has not demonstrated that restrictions relate to

this objective. The texts of the legal instruments setting forth the restrictions contain no reference to Halal requirements at all. Moreover, Indonesia fails to provide any other evidence showing connection between the restrictions and any Indonesian Halal requirements.

51. Even if Indonesia could show that the protection of Halal requirements is an objective of the use, sale, and transfer restrictions, the restrictions are not necessary to this objective. The restrictions limit the *person* to whom the imported horticultural products may be sold upon entry, not the products' ultimate *point of sale*. Restricting the initial sale to distributors does not relate to consumers' ability to distinguish Halal products in the markets. Indonesia's argument that its measures operate by limiting imported horticultural products to "uses that naturally require some degree of labelling" is also inapposite, since no evidence suggests that distributors are subject to a stricter Halal labeling requirements. Because these restrictions bear minimal, if any, connection to the protection of Halal requirements and make no contribution to achieving that objective, a reasonably available alternative would be to remove the requirements.

52. Indonesia contends that the *end-use* restrictions on animal products are necessary to protect public morals because they "prevent[] consumers from mistakenly purchasing animals and animal products that do not conform to Halal requirements." However, other than this assertion, Indonesia has not presented any evidence to show that the objective of the end-use restrictions is to protect Halal. An even if protecting Halal requirements were an objective of the measure, the restriction fails the "necessary" standard. It is not necessary to restrict the outlets in which imported animal products can be sold, because all imported animal products, with the exception of pork, must conform to Indonesia's Halal standards and be so labeled. Thus, Indonesia's end-use restrictions are not "necessary" to protect Halal because, with the exception of pork, all imports of animal products into Indonesia *already meet Indonesia's Halal standards and labelling requirements*. Further, to the extent that Indonesia seeks to justify the entire measure, its statements concerning traditional markets do not address the prohibition on all retail sale (including in modern markets) with respect to Appendix I products.

53. Indonesia asserts that its import licensing regimes *as a whole* fall within the scope of Article XX(a). As with the Article XX(b) and XX(d) defenses of the regimes as a whole, Indonesia has failed to explain or present any evidence in support of its assertion of defense. Although the United States accepts that protection of Halal standards may constitute a public moral, Indonesia has not established that it has adopted or enforced the import license regimes to "protect public morals" or that the regimes are "necessary" to doing so.

D. The Challenged Measures Are Inconsistent with the Article XX Chapeau

54. The challenged measures are not consistent with the Article XX chapeau because they arbitrarily or unjustifiably discriminate by imposing restrictions on imports that bear no relation to the policy objectives with respect to which Indonesia seeks to justify the measures.

55. With respect to Article XX(a), the end-use and use, sale and transfer restrictions result in arbitrary and unjustifiable discrimination. The restrictions are not rationally related to the objective of protecting consumers from non-Halal food, and, without the underlying justification, they serve only to impose burdens on importation that do not exist for domestic products.

56. This is also the case with respect to Indonesia's assertions regarding Article XX(b). Indonesia's restrictions based on the domestic harvest period, importers' storage capacity, the use, sale and transfer of imported products, and the time since products were harvested, as well as the Reference Price and domestic purchase requirements, constitute arbitrary and unjustifiable discrimination. Each of these restrictions bears little, if any, relationship to the objective of protecting human, animal, and plant life or health. Because they lack any rational connection to the objective, the result of these restrictions is only to impose burdensome costs and limitations on the importation of horticultural and animal products.

57. Finally, with respect to Article XX(d), Indonesia has shown no connection between the application windows and validity periods, fixed license terms, realization requirements, storage capacity requirements, and use, sale, and transfer restrictions and the objective of securing compliance with customs laws. Because none of these restrictions relate to achieving their

purported objective, these restrictions exist solely to restrict imports and protect the domestic industry and, therefore, result in arbitrary and unjustifiable discrimination.

IV. CONCLUSION

58. The United States respectfully requests that the Panel find that the prohibitions and restrictions imposed by Indonesia's import licensing regimes, operating individually and as whole regimes, and the provisions of Indonesia's laws conditioning importation on the insufficiency of domestic production to satisfy domestic demand, are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

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59. Indonesia imposes numerous prohibitions and restrictions on the importation of certain horticultural products and of animals and animal products that are, on their face, inconsistent with Indonesia's WTO obligations. For the most part, Indonesia does not contest the existence of the measures, as described by the co-complainants. Instead, Indonesia asserts that its measures are insulated from review by the Panel and, in the alternative, that the evidence submitted by the co-complainants is insufficient to meet the co-complainants' burden of proof.

I. EACH OF THE CHALLENGED MEASURES IS INCONSISTENT WITH ARTICLES XI:1 AND 4.2

A. Indonesia's Argument That Its Import Licensing Measures Are "Automatic" and, as Such, Are Outside the Scope of Article XI:1 and Article 4.2, Is in Error

60. Indonesia's assertion that "automatic" import licensing procedures are outside the scope of Article XI:1 of the GATT 1994 and 4.2 of the Agreement on Agriculture is refuted by the text of both provisions. The text of the *Agreement on Import Licensing Procedures* ("ILA") also contradicts this argument. Article 2(a) does not "expressly permit" automatic import licensing; it merely states that automatic licensing that has "restricting effects on imports" is *not* permitted. Other provisions of the ILA confirm that import licensing procedures, including automatic procedures, are not excluded from Members' obligations under the covered agreements.

61. Further, Indonesia's argument assumes that all of its import licensing measures are "import licensing procedures" under the ILA; they are not. The ILA distinguishes between "procedures" used to operate import licensing regimes, which the ILA covers, and the substantive rules, as the Appellate Body confirmed in *EC – Bananas III*. Indonesia's import licensing regimes *include* procedures for administering the regimes but the challenged measures are much broader. Thus, Indonesia is wrong that its substantive import licensing measures fall within the scope of the ILA at all. Finally, Indonesia's import licensing regimes are, in any event, not "automatic." They impose numerous substantive restrictions on importation.

B. Indonesia's Argument that the Co-Complainants Have Not Established a *Prima Facie* Case under Article XI:1 Rests on an Incorrect Interpretation of that Provision

62. In its second written submission, Indonesia asserts that that the co-complainants have not made a *prima facie* case because they "failed to present sufficient pre- and post-implementation import data" to support their Article XI:1 claims. Indonesia's argument is incorrect. First, Article XI:1 does not require a demonstration of trade effects. The co-complainants have met the standard of Article XI:1 with respect to the challenged measures, demonstrating that each imposes a "limiting condition" or "limitation on action" with respect to importation and thus has a "limiting effect" on importation. Further, although not legally required, the co-complainants also have presented extensive evidence demonstrating the quantitative effect of Indonesia's import licensing measures on imports of the covered products.

II. INDONESIA HAS NOT ESTABLISHED THAT ANY OF THE CHALLENGED MEASURES IS JUSTIFIED UNDER ARTICLE XI:2 OF THE GATT 1994

63. In its second written submission, Indonesia asserts that the Reference Price and domestic harvest period restrictions are justified under Article XI:2(c)(ii) of the GATT 1994. However, Indonesia has not provided any evidence to show that its restrictions conform to all the elements of Article XI:2(c)(ii). Moreover, Indonesia cannot avail itself of Article XI:2(c)(ii) because the obligations of the GATT 1994 apply "subject to" the obligations of the Agreement on Agriculture. Thus, the exclusion of certain measures from the obligation in Article XI:1 could not create an implicit limitation on the scope of a provision of the Agreement on Agriculture covering similar matters. These obligations would apply cumulatively. Therefore, Indonesia cannot seek to justify restrictions not consistent with Article 4.2 under Article XI:2(c)(ii).

III. INDONESIA HAS NOT ESTABLISHED THAT ANY OF THE CHALLENGED MEASURES IS JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

64. One fatal flaw pervading Indonesia's defenses is that its claims that the challenged measures meet the first element of the subparagraphs consist almost *entirely* of unsupported assertions. Indonesia submits no evidence suggesting that the challenged measures were adopted in pursuit of the covered objectives. The Appellate Body made clear in *EC – Seal Products* that mere assertion does not satisfy the first element of the Article XX subparagraphs. And Indonesia does not address the evidence submitted by the co-complainants demonstrating that the objective of Indonesia's import licensing measures is to protect domestic producers from competition. Another critical failing is that, without exception, the exhibits Indonesia has submitted to show each measure's contribution to its purported objectives do not support the points for which they are cited. Indeed, they often serve to *confirm* the evidence and argumentation submitted by the co-complainants that the challenged measures do *not* meet the standard of Article XX.

65. Indonesia asserts that several of its import licensing measures are justified under Article XX(a). But, with respect to horticultural products, Indonesia has not even identified any relevant halal standards that the import licensing measures could protect. Further, nothing in the text, structure, or history of the instruments establishing the horticultural products measures even mentions halal, let alone suggests that the objective of the regime is to uphold halal standards. And other than unsupported and vague assertions, Indonesia has not explained *how* any of its measures contribute to the protection of halal requirement, much less shown that their contribution is approaching "indispensable" on the continuum of assessing necessity.

66. With respect to its Article XX(b) defenses, Indonesia similarly does not demonstrate that any of the measures pursues the objective of food safety. Indonesia asserts that the fact that the import licensing regulations refer to the Food Law shows that the challenged measures are food safety measures, but this is incorrect. The Food Law is broad statute that covers a variety of topics. Chapter IV, Part 5 covers "Import of Food" and its title, text, and structure, as well as the operation of Indonesia's import licensing regimes and statements by Indonesian officials, all show that this is the section relevant to Indonesia's import licensing regimes. Food safety is covered in Chapter VII, and no evidence ties the import licensing regimes to that part of the law.

67. Further, none of the evidence put forward by Indonesia suggests that the challenged measures could meet the "necessary" standard. Indonesia asserts that its regimes, as a whole, will ensure imports "are stored properly" but presents no evidence or argument as to how this would be the case. With respect to the six-month restriction, Indonesia's new evidence confirms that the measure is not "necessary" for food safety because it shows that some horticultural products can be safely stored for more than six months. Concerning the use restrictions on animal products, Indonesia's defense continues to reflect a mischaracterization of the measure, and none of its evidence suggests that frozen meat poses any greater health risk than fresh meat under the conditions in a traditional market. Finally, with respect to the positive list, neither of Indonesia's exhibit distinguishes between the prohibited and listed beef products or discusses non-beef products at all, and Indonesia provides no more explanation or support for this defense.

68. Indonesia's Article XX(d) defenses also fail. Indonesia has not adequately identified the WTO-consistent laws and regulations purportedly enforced by the import licensing measures. Indonesia identified 13 legal instruments whose compliance is allegedly secured by its import

licensing regimes, but the mere listing of legal instruments and cursory references to general provisions fall short of identifying the relevant rule under Article XX(d). Indonesia put forward almost *no* evidence that any of the challenged measures were taken "to secure compliance" with the Customs Law or any other listed legal instrument. With respect to the necessity element, Indonesia did not explain how its import licensing measures contribute to *securing compliance with* any requirement of a customs or food safety law or regulation. Merely asserting that the import licensing regimes "contributed to the monitoring of the flow of goods" is not sufficient.

69. Additionally, Indonesia cannot show that its measures meet the requirements of the chapeau of Article XX. Regarding Article XX(a), the challenged measures at issue are restrictions on *imported* products only. Indonesia offered no arguments to address the arbitrary and unjustifiable nature of these restrictions. Regarding Article XX(b), Indonesia asserts that its "distinctions . . . between imported and domestic products are not in any way more onerous than necessary" but provides no evidence or explanation of what distinctions exist or how these distinctions apply to the measures it seeks to justify. Finally, with respect to Article XX(d), Indonesia has not addressed at all the fact that Indonesia's regimes do result in discrimination against imported products vis-à-vis domestic products. Finally, Indonesia has not put forward any explanation of how the discrimination arising from the measures it seeks to justify is rationally related to the purported objectives of the measures.

ANNEX C-5

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

I. INTRODUCTION

1. New Zealand and the United States ("Complainants") have challenged Indonesia's import licensing regime for certain horticultural products, animals, and animal products. The Complainants allege that Indonesia has put in place a labyrinth of rules and regulations whose main, if not sole, purpose is to protect domestic producers from import competition. The Complainants allege that these measures effectively restrict or limit imports originating in their territories.

2. Indonesia has the right to safeguard the health and safety of its food supply chain. The responsibility to achieve these goals falls heavily upon the Government. The challenged measures do so in a manner that takes into account the unique circumstances faced by Indonesia: (i) a developing country, (ii) thousands of miles from most of the major agricultural production centers and exporters of the world, (iii) located on or near the equator, (iv) whose population is predominantly Muslim. Rather than restrict or limit imports, the challenged measures seek to ensure a safe, reliable, and in some cases Halal-consistent supply of horticultural, animals, and animal products from the Complainants and other WTO Members.

II. FACTUAL BACKGROUND

3. This dispute touches upon one of the most sensitive issues faced by any WTO Member, which is food safety and security. Indonesia has a population of over 250 million people with most living in rural areas spread across a vast archipelago. Adequate knowledge among consumers about food ingredients, food labels, and food storage are often lacking in Indonesia. As the largest Muslim country, Indonesia faces another challenge because most of its citizens consume only food that is certified as Halal.

4. As explained in our first written submission, Indonesia's import licensing regime can be understood in terms of requirements for horticultural products and requirements for animals and animal products.[1] The requirements for horticultural products are slightly different with respect to fresh horticultural products, chilies and fresh shallots, and processed horticultural products. The requirements for animals and animal products are different with respect to products listed in the relevant regulation and those that are not listed. Although each set of requirements has distinct features, they are clearly published and very straightforward. Indonesia's online application portal streamlines the process, making it easy for importers to meet all administrative requirements to obtain the appropriate import license for their products.

5. Importation of horticultural products is regulated under Law Number 13 of 2010 Concerning Horticulture ("Law 13/2010"), which implements various provisions of Indonesia's 1945 Constitution, particularly Articles 20, 20(1), 21, and 33. Pursuant to Law 13/2010, Indonesia's Ministries of Agriculture ("MOA") and Trade ("MOT") have adopted two sets of regulations: MOA Regulation No. 86/2013 ("MOA 86/2013"), which describes the requirements for obtaining a recommendation to import horticulture products from the MOA ("RIPH"), and second, MOT Regulation No. 71/2015 ("MOT 71/2015"), which describes the requirements for obtaining an "Import Approval" from the MOT.

6. Importation of animals and animal products is regulated under Law Number 18 of 2009 concerning Animal Husbandry and Animal Health ("Law 18/2009"), as amended by Law Number 41 of 2014 ("Law 41/2014"). Pursuant to Law 18/2009, Indonesia's MOA and MOT have adopted two sets of regulations: MOA Regulation No. 139/2014 ("MOA 139/2014"), which describes the requirements for obtaining a recommendation from the MOA, and MOT Regulation No. 46/2013 ("MOT 46/2013"), which describes the requirements for obtaining an "Import Approval" and designation as a Registered Importer ("RI") of Animals and Animal Products from the MOT.

[1] Indonesia's First Written Submission paras. 16 – 38.

7. None of the laws and regulations mentioned above, are intended to limit or prohibit the importation of horticultural products, animals and animal products into Indonesia. On the contrary, Indonesia seeks to encourage the importation of food and related items through a transparent and automatic licensing system.

III. LEGAL CLAIMS

A. Order Of Analysis

8. This Panel should begin its examination with an analysis of the World Trade Organization ("WTO") Agreement on Agriculture ("Agriculture Agreement") before moving on to the GATT 1994, because a panel should start its examination with the claims arising under the agreement that "deals specifically, and in detail" with the matter at issue.[2] Moreover, in *Chile – Price Band System*, the Appellate Body noted that "if we were to find first that Chile's price band system is inconsistent with Article 4.2 of the Agreement on Agriculture, we would not need to make a separate finding" with respect to whether the measure is inconsistent with the GATT 1994.[3] Indeed, the panel in *Chile – Price Band System* observed that the scope of Article 4.2 of the Agriculture Agreement is necessarily broader than the scope of restrictions included in GATT Article XI:1.[4]

9. The Panel should therefore begin its analysis in this case with an examination of the Complainants' claims arising under Article 4.2 of the Agriculture Agreement, as it is more specific to the products at issue than the GATT 1994 and this order of analysis offers the greatest opportunity to exercise judicial economy.

B. The Challenged Measured Are Not Inconsistent With Article 4.2 Of The Agreement On Agriculture

10. Footnote 1 to Article 4.2 of the Agriculture Agreement provides a list of measures that have been required to be converted to ordinary customs duties in accordance with the GATT 1994. This provision largely mirrors the language of GATT Article XI:1, which prohibits quantitative restrictions on imports "other than duties, taxes or other charges". In order to succeed on a claim under Article 4.2, the Complainants must demonstrate that (i) the challenged measures are maintained, resorted to, or reverted to by Indonesia; and (ii) the challenged measures are "of the kind which have been required to be converted into ordinary customs duties", such as the measures mentioned in footnote 1 to Article 4.2, or are "similar border measures".

11. As a preliminary matter, automatic import licensing procedures are by definition excluded from the scope of Article 4.2 of the Agriculture Agreement. Indonesia's import licensing regime is automatic (i.e. not discretionary), therefore it falls outside the scope of Article 4.2 of the Agriculture Agreement. The Complainants have not advanced any evidence that persons or entities that fulfill all the legal requirements to import products are denied import licenses under Indonesia's current import licensing regime. Further, a plain reading of the relevant statutes and regulations reveals that Indonesia does not permit its agents to exercise discretion in the issuance of import licenses at any stage in the administrative process.

12. To the extent that the Panel finds that the challenged measures constitute a non-automatic import licensing regime and fall within the scope of Article 4.2 of the Agriculture Agreement, the Complainants have failed to establish that these measures constitute "quantitative restrictions", "minimum import prices", or "similar border measures" *as a matter of law*. The following analysis of the design, structure, and implementation of the challenged measures underscores the Complainants' failure to discharge their burden of proof in the first instance.

13. First, with respect to the application windows and validity periods. The application windows are typically one month long, are announced in advance, and, because of Indonesia's online system, submitting applications is quick and easy. The validity periods for import licenses cover

[2] Appellate Body Report, *EC – Bananas III*, para. 204. See also Panel Report, *Chile – Price Band System*, para. 7.12 (citing the same); Appellate Body Report, *Chile – Price Band System*, para. 184 (citing the same).

[3] Appellate Body Report, *Chile – Price Band System*, para. 190.

[4] Panel Report, *Chile – Price Band System*, para. 7.30 ("The 'restrictions other than' referred to in Article XI:1 of GATT 1994 constitute a narrower category than the 'similar border measures other than' in footnote 1 to the Agreement on Agriculture".).

the entire calendar year, and there is no period of time during which imports are restricted as a function of the lapse in validity periods. Further, a temporary "slowdown" of imports for a limited amount of time is not enough to establish that a measure constitutes a quantitative restriction on imports. The Complainants have not placed on the record any evidence that net import volumes have decreased as a result of the application windows or validity periods for import licenses. In fact, it appears that imports for several key products have increased as a percentage of the total market in recent years[5], which shows a growing market for imported food products in Indonesia.

14. Second, concerning the self-selected terms of import licenses, Indonesia notes that, first, importers are free to alter their terms of importation from one license application to the next. This means that the "terms" are only static for one validity period at a time. Having to project trade volumes a few months out is hardly the equivalent of a quantitative restriction or similar border measure, and incorrect estimates can be easily corrected before the start of a validity period with another application or in subsequent license applications for the next validity period. Second, Indonesia does not place any limitations on the terms identified by importers other than the 80 percent realization requirement, which was removed with the adoption of MOT 71/2015.

15. Third, the realization requirement served as a safeguard against importers grossly overstating their anticipated imports. Indonesia is a developing country with limited resources to devote to import administration. It is therefore important for Indonesia to have a rough idea of expected trade volumes for each validity period. Indonesia recognizes the need for flexibility in these estimates to account for exigencies in the global supply chain. That is why the realization requirement only asked importers to achieve 80 percent of their anticipated imports for the relevant validity period.[6] However, as noted above, this WTO-consistent requirement has now been removed.

16. Fourth, concerning the storage capacity requirement, the Complainants argue that importers are unable to import as much as they like, while at the same time they say they are struggling to import 80 percent of their anticipated import volumes. In fact, Indonesia does not place a limit on the amount of storage capacity an importer may acquire, just as it does not limit the amount of goods and importer may import during a particular validity period. Any limitations placed on an importer's ability to import are self-imposed. Indonesia's requirement that importers obtain adequate refrigerated storage capacity for products that require cold storage is merely a food-safety measure, and does not limit trade.

17. Fifth, concerning the requirement that imports of fresh horticultural products not be harvested more than six months from the date of importation, this is necessary to ensure food safety.

18. Sixth, with respect to Indonesia's reference price system for chilies and fresh shallot, this is an integral part of Indonesia’s food safety and security plan, which is determined by Indonesia's Food Security Council. These goals and objectives are implemented through a multi-agency taskforce that includes the Ministry of Agriculture's Agency for Food Security and the Ministry of Trade. The reference price system for chillies and shallots is one tool that Indonesia uses to protect against (i) harmful oversupply of perishable food items in equatorial heat; and (ii) the consequences of extreme price volatility on the availability of a continuous supply of fresh chillies and shallots in Indonesia's food supply. Indonesia also notes that the reference price system is not continuously in effect. When the reference price system is activated, it is always on a temporary basis in response to an immediate crisis. It is not a measure designed to restrict imports or insulate the domestic market from world market price fluctuations in a form of "minimum import price".

[5] With respect to horticulturan products: the market share of US-origin imports of oranges increased from 11 percent in 2012, to 15 percent in 2013, and to 19 percent in 2014. Similarly, the market share of US-origin lemons increased from 10 percent in 2012, to 13 percent in 2013, and to 22 percent in 2014. With respsect to processed horticultural products, the market share for US-origin frozen sliced potatoes increased from 33 percent in 2012, to 48 percent in 2013, and to 48 percent in 2014. Remarkably, market share for US-origin grapefruit juice increased from 11 percent in 2012, to 56 percent in 2013, to an astonishing 85 percent in 2014.

[6] Which gives proper balance between incentivizing importers to provide realistic estimates of anticipated imports on the one hand, and allowing for a reasonable margin of error before penalties were applied, on the other hand.

19. Seventh, concerning the alleged "positive list" with respect to animals and animal products, the importation of all animals and animal products not appearing in Appendix I or Appendix II of MOT 46/2013 and MOA Appendix I and II 139/2014 are not necessarily prohibited. Animals and animal products not listed in Appendix I and II are simply exempted from the requirements of that regulation and generally permitted to be imported into Indonesia unless expressly prohibited by another instrument or agency determination. Therefore Appendix I and Appendix II of MOT 46/2013 are not "positive lists" of all animals and animal products, as alleged by Complainants

20. Eighth, concerning end-use limitations, Indonesia limits the end uses of certain products to certain retail uses[7] and in the production of other products. Certain products are not permitted to be sold in traditional Indonesian markets because: (i) of the extremely high risk of unsafe food handling; (ii) the lack of resources to monitor food safety practices in these markets and (iii) religious constraints on food consumption that impacts the vast majority of Indonesians. This measure does not place an absolute limit on the amount of animals and animal products that can be imported for permitted end uses, and thus it is not a "quantitative restriction" on imports or "similar border measure[]" within the meaning of Article 4.2.

C. The Challenged Measures Are Not Inconsistent With Article XI:1 Of The GATT 1994

21. Article XI:1 of the GATT 1994 covers those prohibitions and restrictions that have a *limiting effect* on the quantity or amount of a product being imported or exported. In order to succeed on a claim under Article 4.2, the Complainants must demonstrate that (i) the challenged measures are not duties, taxes, other measures; (ii) a prohibition or restriction on imports is made effective through the challenged measures; and (iii) the prohibition or restriction on imports made effective by the challenged measures are instituted or maintained by Indonesia. The Complainants have failed to establish that Indonesia's import regime for horticultural products, animals, or animal products violates Article XI:1 of the GATT 1994 for the same reasons that they have failed to make a *prima facie* claim of violation under Article 4.2 of the Agriculture Agreement, therefore their claim under this provision should fail.

D. The Challenged Measures Are Excepted Under Article XX Of The GATT 1994

22. For the foregoing reasons, Indonesia argues that the challenged measures are (i) outside the scope of Article 4.2 of the Agriculture Agreement and Article XI:1 of the GATT 1994 because they constitute an *automatic* import licensing regime; and (ii) in the alternative, if they are within the scope of Articles 4.2 and XI:1, that the Complainants have failed to present a *prima facie* case of inconsistency with those provisions. As a second alternative argument, Indonesia asserts that the challenged measures are, in fact, excepted under Article XX of the GATT 1994. Specifically, Indonesia asserts that its measures fall within the exceptions included in subparagraphs (a), (b), and (d) of Article XX.

23. Under Article XX(a) Members are granted broad discretion to determine their own public morals and to implement measures necessary for the protection of those public morals. Under Article XX(b), a Member may adopt a nonconforming measure that is "necessary to protect human, animal or plant life or health". Thus, where considerations of food safety and security, and animal and plant life and health are concerned, subparagraph (b) guarantees Members the ability to address these concerns in a nondiscriminatory manner that is not a disguised restriction on trade. Finally, the necessity contemplated under subparagraph (d) may arise from the logistical, economic, or administrative constraints that make customs enforcement nearly, if not actually, impossible without certain limitations that would otherwise be prohibited by the GATT 1994.

24. With respect to the application windows and validity periods, the self-selected import license terms, and the prior 80 percent realization requirement – these measures are or were a necessary component of Indonesia's customs regime and, therefore, are covered under subparagraph (d) of Article XX. As a developing country, Indonesia has limited resources to devote to the control of its borders and the processing of food imports across its borders.

[7] For example, hotels, restaurants, and supermarkets.

25. With respect to the requirement that imports of fresh horticultural products not be harvested more than six months from the date of importation and the storage capacity requirement, these measures are necessary for the protection of human, plant, or animal life or health in accordance with Article XX(b) of the GATT 1994. In Indonesia's equatorial climate, proper food handling and storage is of utmost importance to ensure the safety of Indonesia's food supply.

26. With respect to the domestic harvest period limitations, Indonesia asserts that this measure is also necessary to protect human, animal, or plant life or health in accordance with subparagraph (b) of Article XX of the GATT 1994. Oversupply of fresh horticultural products could have disastrous consequences. Indonesia's equatorial climate accelerates the rate at which fresh horticultural products deteriorate, and the spread of certain pathogenic bacteria from rotten produce is a serious health concern for Indonesia. In the absence of Indonesia's coordination of imports with domestic harvest times, stockpiles of rotting fresh horticultural products are likely to result in serious public health threats. Indonesia is taking a proactive approach to protecting its population from disease with this measure.

27. With respect to Indonesia's end-use limitations, this measure is necessary for several reasons: (i) to protect public morals; (ii) to protect human, animal, or plant life or health; and (iii) to secure compliance with laws and regulations not inconsistent with the GATT 1994. This measure is necessary to protect public morals as it protects the people of Indonesia from horticultural products that do not conform to the religious beliefs of the vast majority of its population, i.e., the Halal requirements. While most Halal requirements pertain to the production and consumption of animal products, there are also strict requirements for storage and transportation that apply to all food products. This measure is also necessary to protect human, animal, and plant life or health, and to secure compliance with Indonesia's food safety requirements. By limiting the distribution channels available to certain imports, Indonesian customs and health officials with limited resources are better able to track the origin of products that contain potentially pathogenic bacteria and therefore reduce the spread of such bacteria into the food supply of the general public.

28. As the above examples illustrate, to the extent that any of the challenged measures are inconsistent with Indonesia's obligations under the WTO agreements, which we submit they are not, are nonetheless justified under the general exceptions included in Article XX of the GATT 1994.

E. The Challenged Measures Are Not Inconsistent With Article 3.2 Of The Agreement On Import Licensing Procedures

29. As an initial matter, Indonesia’s import licensing regime is not inconsistent with Article 3.2 of the Agreement on Import Licensing Procedures because: (i) the challenged measures are outside the scope of Article 3.2 and (ii) they are not trade-restrictive.

30. An automatic import licensing system *cannot* be inconsistent with Article 3.2 of the Import Licensing Agreement because such measures are outside the scope of Article 3.2. Indonesia's import licensing regime is automatic (i.e. not "discretionary") and is, therefore, outside the scope of Article 3 of the Import Licensing Agreement. The Complainants have failed to demonstrate that *any* importer that has met all of the legal requirements of Indonesia's import licensing regime has ever been denied an import license. Any importer that meets the clearly-defined legal requirements is automatically granted an import license by Indonesian authorities. MOT 71/2015 and MOA 86/2013 are the controlling regulations for Indonesia's import licensing regime for horticulture products. There is no discretion granted to the agency under either regulation to reject an application has met all the published legal requirements.[8]

31. Further, because Indonesia's import licensing regime is applied in a manner that does not produce trade-restrictive effects, it is *expressly permitted* by Article 2.2 of the Agreement on

[8] In 2013-2015, no applications that fulfilled all legal requirements were rejected by the regulating authority. For example, in 2015 there were 271 applications for RIPHs, and MOA issued RIPHs for all 271 applications. In the same year, there were 161 applications to MOT for Import Approvals for horticulture products, and MOT issued161 Import Approvals. With respect to animals, in 2015 there were 239 applications for Import Approvals, and MOT issued 239 Import Approvals. Also in 2015 there were 1,126 applications for Import Approvals related to animal products, and all 1,126 applicants were granted Import Approvals.

Import Licensing procedures. In the present case there is no causal link between the implementation of the import licensing regime and a declinein market share complained about by the Complainants, as would be expected in the case of a trade-restrictive measure. In fact, the market share of the Complainants with respect to certain food products has increased, as mentioned previously.

32. The second sentence of Article 3.2 of Import Licensing Agreement provides that non-automatic licensing procedures shall correspond in scope and duration to the measure they are used to implement, and shall be no more administratively burdensome than absolutely necessary to administer the measure. Again, Indonesia's import licensing regime for horticultural products, animals, and animal products has a slightly different scope and duration depending on whether the importers used the imported products for raw materials or if the importers are traders. For horticulture products, there are different provisions for importing fresh horticulture products, processed horticulture products, or chilies and shallot. Similarly, for animals and animal products there are different categories with different provisions. The duration of validity for each import license can be different depending upon the products. Therefore, Indonesia's import licensing procedures correspond in scope and duration to the measure used to implement.

33. For the foregoing reasons, the Complainants' claims arising under Article 3.2 of the Import Licensing Agreement must fail.

F. The Challenged Measures Are Not Inconsistent With Article III:4 of the GATT 1994

34. In order to establish a *prima facie* case of inconsistency with Article III:4, the complainant must demonstrate that (i) the imported and domestic products are "like"; (ii) the challenged measures are "laws, regulations, or requirements" of a Member; (iii) the challenged measures affect the internal sale, offering for sale, transportation, distribution, or use of imported like products; and (iv) imported products are accorded "less favorable" treatment than like domestic products. In this case, New Zealand has failed to establish a *prima facie* case that Indonesia’s import licensing procedure are inconsistent with Article III:4 of the GATT 1994 because first, the domestic purchase requirement for animal products has never been used to prevent the issuance of an import license. Additionally, this requirement falls within the general exceptions included in Article XX of the GATT 1994 because it is an integral component of Indonesia's food safety and security plan.

35. Second, the end use limitation for imported fresh horticultural products is necessary for the protection of human, plant, or animal life or health within the meaning of Article XX(b) and for the protection of public morals under Article XX(a) of the GATT 1994.

36. Third, Indonesia's end use limitations for animal products – specifically, the restriction on sales of imported meat products in traditional Indonesian markets, applies uniformly to imports and domestic products. The measure does not, therefore, accord "less favorable treatment" to imports than to like domestic products within the meaning of Article III:4. Moreover, the measure is necessary for the protection of human, plant, or animal life or health within the meaning of Article XX(b) and for the protection of public morals under Article XX(a) of the GATT 1994.

IV. CONCLUSION

37. For the foregoing reasons, Indonesia respectfully requests this Panel to reject the Complainants' claims in their entirety.

ANNEX C-6

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

I. INTRODUCTION

1. Indonesia's import licensing regime, including the measures challenged by the Complainants, is designed to address special circumstances that are unique to Indonesia. Indonesia is home to the largest Muslim population in the world, is spread across over 17,500 islands, and is a developing country Member with many health and public safety concerns related to its food supply. Indonesia is challenged to provide a safe and adequate food supply for its population for several reasons. First, Indonesia's majority Muslim population requires a reliable supply of Halal food, even when point-of-sale food labelling to direct consumers to Halal food is not available. Second, ensuring food safety is problematic in Indonesia give inadequate knowledge among consumers about proper food safety and food storage practices, especially among Indonesians living below the poverty line.

2. Indonesia has adopted an import licensing regime that balances its responsibility to maintain a safe and adequate food supply with upholding its WTO obligations. Indonesia notes that the Complainants have failed to present a *prima facie* case that Indonesia's import licensing regime for horticultural products, animals, and animal products is inconsistent with Articles III:4 and XI:1 of the General Agreement on Tariffs and Trade ("GATT") 1994, Article 4.2 of the Agreement on Agriculture, or Article 3.2 of the Agreement on Import Licensing Procedures.

II. FACTUAL INFORMATION FOR PURPOSES OF REBUTTAL, ANSWERS TO QUESTIONS, AND COMMENTS ON ANSWERS PROVIDED BY COMPLAINANTS

3. Indonesia's import licensing regime can be understood in terms of requirements for horticultural products and requirements for animals and animal products.[1] The requirements for horticultural products are slightly different with respect to fresh horticultural products, chillies and fresh shallots, and processed horticultural products. The requirements for animals and animal products are different with respect to products listed in the relevant regulation and those that are not listed. Regardless, they are clearly published and very straightforward. Indonesia's online application portal streamlines the process, making it easy for importers to meet all administrative requirements to obtain the appropriate import license for their products.

4. As part of Indonesia's deregulation and de-bureaucratization initiatives, the Registered Importer ("RI") and Producer Importer ("PI") designations[2] and the 80% realization requirement have been eliminated.[3] The first of these initiatives was implemented in January 2015, and Indonesia's Ministry of Trade ("MOT") has issued numerous MOT Regulations which are relevant to this case.[4] The new MOT Regulations for horticultural products, animals, and animal products are aimed at liberalizing the import-licensing regime.[5] In 2016 MOT enacted a new regulation (MOT 5/2016) to further liberalize the import licensing regime for the products at issue in this dispute. This ongoing effort demonstrates Indonesia's commitment to its trading partners and to achieving greater trade liberalization.[6]

[1] Indonesia's first written submission paras. 16 – 38.
[2] Indonesia's responses to Panel questions, paras. 1 and 21.
[3] Indonesia's responses to Panel questions, para. 10.
[4] MOT Regulation 70/2015 on Importer Identification Number/*Angka Pengenal Impor* ("API"), MOT Regulation 71/2015 on Import Provisions on Horticultural Products, and MOT Regulation 5/2016 concerning Export and Import Provisions on Animals and Animal Products, See Exhibit IDN-39.
[5] See Exhibit IDN-35.
[6] Indonesia's second written submission, para. 4.

5. The first package was implemented in January 2015, and the MOT has issued numerous MOT Regulations which are relevant to this case.[7] The new MOT Regulations for horticultural products, animals, and animal products are aimed at liberalizing the import-licensing regime.[8]

6. Indonesia wishes to reiterate that it has not, as alleged by the Complainants, "simply replaced trade-restrictive measures with equally (if not more) trade-restrictive measures in an attempt to stay "one step ahead of the law"".[9] Indonesia has tried to address the concerns of the Complainants by revoking or amending measures that were alleged to be WTO inconsistent and replaced them with measures that are fully consistent with Indonesia's legitimate interest in halal compliance, food safety and security, as well as for customs and import administration.[10]

III. LEGAL ISSUES AND CLAIMS

A. Proper interpretation of the terms "prohibitions or restrictions" under Article XI:1 of the GATT 1994 and Article 4.2 of the Agriculture Agreement

7. Complainants have repeatedly argued that various aspects of Indonesia's import licensing regime for horticultural products, animals, and animal products are "prohibitions" or "restrictions" on imports within the meaning of Article XI:1 of the GATT 1994.11

8. In essence, the Complainants argue that Article XI:1 and, by extension, Article 4.2, prohibits every conceivable "restriction" on imports – including *any* measure impacting trade that is not a duty, tax, or other charge. In their submissions to this Panel, the Complainants relied heavily on the Appellate Body report in *Argentina – Import Measures* to support their interpretation. In that dispute the Appellate Body stated that the "limiting effect" of a "restriction" under Article XI:1 "need not be demonstrated by *quantifying* the effects of the measure at issue".12 After trying to saddle Indonesia with precisely the opposite position, Complainants leap to the conclusion that they do not have to show *any effect on trade at all.* However, a complainant *must* demonstrate that a measure has a limiting effect on the quantity or amount of importation itself. Just because Article XI:1 and Article 4.2 do not require precise quantification of the trade effects of a challenged measure does not mean a complainant is excused from demonstrating that the measure has *some* effect on trade. These provisions are, after all, concerned with quantitative restrictions and prohibitions.[13]

9. Indonesia supports the position as stated in EU's third party submission, in which the EU urged this Panel to use caution when drawing the "line between those measures which have a limiting effect on the quantity or amount of importation itself, and those measures which just have a negative impact on imports in any way".[14] As the EU correctly explained, "the word 'quantitative' in the title of Article XI informs the meaning of 'prohibition' and 'restriction'". It "suggests that this Article refers only to those prohibitions and restrictions 'that limit the quantity or amount of a product being imported or exported'".[15] This is consistent with the Appellate Body's explanation in *Argentina – Import Measures* that "not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products".[16]

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[7] MOT Regulation 70/2015 on Importer Identification Number/*Angka Pengenal Impor* ("API"), MOT Regulation 71/2015 on Import Provisions on Horticultural Products, and MOT Regulation 5/2016 concerning Export and Import Provisions on Animals and Animal Products, See Exhibit IDN-39.

[8] See Exhibit IDN-35.

[9] See, e.g. United States' first written submission, para. 6.

[10] Indonesia's second written submission, para. 8.

[11] See, e.g. United States' first written submission, paras. 151-216, 255-326; New Zealand's first written submission, paras. 129-298; United States' opening statement, paras. 11-15; New Zealand's opening statement, paras. 36-39.

[12] Appellate Body Report, *Argentina – Import Measures*, para. 5.217.

[13] Indonesia's second written submission, paras. 7-8.

[14] EU third party submission, para. 35.

[15] EU third party submission, para. 18.

[16] Appellate Body Report, *Argentina – Import Measures*, para. 5.217.

B. The relevance of Article XX to Article 4.2 of the Agriculture Agreement

10. As largely agreed by the Complainants, measures consistent with Article XX may "remedy" or "justify" a violation of Article XI:1 or Article III:4 of the GATT 1994, and that measures consistent with Article XX are *excluded* from the scope of Article 4.2 of the Agreement on Agriculture. And as Norway correctly noted in its third party submission, "such measures would therefore not constitute a violation of Article 4.2".[17]

C. The Complainants have failed to discharge their burden of proof

11. It is a settled principle of WTO jurisprudence that the "burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense". The complaining party in any given case should establish a *prima facie* case of inconsistency of a measure with a provision of the WTO covered agreements, before the burden of showing consistency with that provision or defending it under an exception is to be undertaken by the defending party.[18] Thus, the Complainants must establish that the challenged measures are inconsistent with Indonesia's WTO obligations *as a matter of law* before the burden of proof shifts to Indonesia to refute their claims. In the context of a GATT Article XI:1 claim, the burden of proof rests upon the Complainants to establish a *prima facie* case that Indonesia's import licensing regime is inconsistent with that provision because it is an impermissible "restriction or prohibition" on trade – in a *quantitative* manner.

12. In the context of a claim under Article 4.2 of the Agriculture Agreement, the exact scope of the Complainants' burden of proof is less apparent. The question before the Panel is whether it is possible to present a *prima facie* case that Article 4.2 has been violated by a Member without offering *any* evidence or argumentation that the challenged measure is not justified under Article XX of the GATT 1994. The Complainants could not possibly make a *prima facie* case showing that Indonesia has violated Article 4.2 without presenting at least some evidence or argumentation that the challenged measures are not justified under Article XX of the GATT 1994. And without such evidence or argumentation, the Panel cannot – as a matter of law – rule in Complainants' favour under Article 4.2 of the Agreement on Agriculture.

D. Order of Analysis

13. This Panel should begin its examination with an analysis of the Agriculture Agreement before moving on to the GATT 1994, the restrictions imposed by Article 4.2 of the Agreement on Agriculture are broader than the restrictions imposed by Article XI:1 of the GATT 1994 and this order analysis offers the greatest opportunity to exercise judicial economy.[19]

E. Indonesia's import licensing regime for horticulture products and for animals and animal products as a whole is automatic and therefore does not violate Article XI:1 of the GATT 1994, Article 4.2 of the Agreement on Agriculture or Article 3.2 Import Licensing Agreement

14. Under the ILA, there are only two types of import licensing: automatic import licensing and non-automatic import licensing. The definition of automatic import licensing is provided in ILA Article 2, while the definition of non-automatic import licensing is provided in ILA Article 3. Indonesia submits that its import licensing regime for certain horticulture products and for certain animals and animal products meets all criteria of automatic import licensing as provided in Article 2 of the ILA.

15. As provided in Indonesia's second written submission, Indonesia's import licensing for certain horticulture products and for certain animals and animal products implemented through RIPH/MOA-R and IAs have been granted in all cases pursuant to Article 2.1 of ILA.[20] The Complainants have failed to submit any evidence indicating that an application of RIPH/MOA-R or IA was rejected when all legal requirements are fulfilled. The only argument put forward by the

[17] Norway's third party submission, para. 6.

[18] Panel Report, *Argentina – Import Measures*, para. 6.27 (citing Appellate Body Report, *US – Wool Shirts and Blouses*, para. 14).

[19] Indonesia's second written submission, paras. 39 and 41.

[20] Indonesia's second written submission, para. 48.

Complainants to demonstrate that Indonesia's import licensing is not automatic is that applications cannot be submitted on any working day prior to the customs clearance of the goods.[21]

16. In relation to the application window, according to the Complainant's broad interpretation of Article 2.2(a)(ii) of the ILA, an import license application must be accepted on any working day prior to customs clearance, with indefinite time. We strongly believe that this broad interpretation is incorrect. Article 1.6 of the ILA clearly acknowledges that an application window for import licensing application procedures is allowed under the ILA. Indonesia allows 15 working days (21 calendar days) for the application window to apply for RIPH for horticultural products, a 1 month application window to apply for MOA-R for animal products, and a 1 month application window for IA applications. All applications for RIPH, MOA-R or IAs can be submitted online at INATRADE[22] (Trade Licensing Services Using Electronic and Online System) and *Rekomendasi Ekspor Produk Pertanian Tertentu* (Export Import Recommendation for Certain Agricultural Products) ("REIPPT"),[23] as parts of Indonesia National Single Window ("INSW"). This system – including the published application windows – is consistent with Article 1.6 of the ILA.[24]

F. Indonesia's import licensing regime for horticulture products and for animals and animal products is not a "quantitative restriction" and therefore does not violate Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

17. Indonesia's import licensing regime for horticultural products, animals, and animal products is completely automatic. The relevant agencies have no discretion to reject import applications that fulfil the legal requirements, which are publicly available and broadly communicated well before they are implemented. All applications can be submitted online and are processed within less than 10 working days. In fact, all complete applications submitted in the period of 2013 – 2015, both for MOA-R and import approval from MOT were granted.[25] Automatic import licensing is expressly permitted under Article 2.2(a) of ILA and therefore, it is excluded from the scope of Article 4.2 of the Agreement on Agriculture and Article XI:1 of GATT 1994.[26]

18. Even if this Panel determines that Indonesia's import licensing regime for horticulture products and for animals and animal products falls within the scope of Article 4.2 of the Agreement on Agriculture or Article XI:1 of GATT 1994, the design, architecture, and revealing structure of Indonesia's import licensing regime as a whole supports the conclusion that it is not a "quantitative restriction".

G. Indonesia's import licensing regime for horticulture products and for animals and animal products is not similar to a border measure and therefore does not violate Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture

19. A determination that Indonesia's import licensing regime for horticultural products, animals, and animal products has similarity with one of the specific categories of measure listed in footnote 1 cannot be made in the abstract. It necessarily involves a comparative analysis and must be approached on an empirical basis.[27] That analysis can be undertaken by comparing the measures at issue with at least one of the listed measures which, by definition, have characteristics different from the characteristics of an ordinary customs duty.[28]

20. Indonesia disagrees with the Complainants' argument that it can be at the same time a "similar border measure" within the meaning of footnote 1. The Complainants have failed to discharge their burden of proof to demonstrate that Indonesia's import licensing regime even remotely shares the common "object and effect" of restricting volumes of imports or distorting

[21] Indonesia's second written submission, para. 51.
[22] http://inatrade.kemendag.go.id.
[23] http://reippt.pertanian.go.id.
[24] Indonesia's second written submission, para. 65.
[25] In 2013 there was 1 IA out of 555 IA applications for horticultural products and 8 IA out of 1440 IAs applications for animals and animal products that were rejected. These applications were rejected because the importers submitted incomplete and/or incorrect information in their applications.
[26] Indonesia's second written submission, para. 67.
[27] Appellate Body Report, *Chile — Price Brand System*, para.163.
[28] Appellate Body Report, *Chile — Price Brand System*, para.167.

prices shared by the border measures listed in footnote 1 and also have failed to satisfy their burden of proof to explain how an import licensing regime generally, and automatic import licensing specifically, can be at same time classified as import licensing and a "similar border measure" to those listed in footnote 1.

H. Assuming *arguendo* that Indonesia's import licensing regime for horticulture products and for animals and animal products violates XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, it is justified under Article XX (a), (b) and/or (d) of the GATT 1994

21. Under Article XX(a) Members are granted broad discretion to determine their own public morals and to implement measures necessary for the protection of those public morals. Under Article XX(b), a Member may adopt a nonconforming measure that is "necessary to protect human, animal or plant life or health". Thus, where considerations of food safety and security, and animal and plant life and health are concerned, subparagraph (b) guarantees Members the ability to address these concerns in a nondiscriminatory manner that is not a disguised restriction on trade. Finally, the necessity contemplated under subparagraph (d) may arise from the logistical, economic, or administrative constraints that make customs enforcement nearly, if not actually, impossible without certain limitations that would otherwise be prohibited by the GATT 1994.

22. To the extent that any of the challenged measures are inconsistent with Indonesia's obligations under the WTO agreements, which Indonesia submits they are not, such measures are nonetheless justified under the general exceptions included in Article XX of the GATT 1994.

23. The chapeau of Article XX by its express terms addresses the manner in which a particular measure is applied.[29] The chapeau has been considered to embody the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the rights of a Member to invoke an exception of Article XX with the substantive rights of the other Members under GATT 1994.[30] In the present case, Indonesia's import licensing regime complies with the requirements of the chapeau of Article XX since it does not constitute arbitrary or unjustifiable discrimination, nor does it amount to a disguised restriction of international trade.

24. Indonesia submits that its import licensing regime does not result in discrimination, as the same legal, technical and administrative requirements are applied on all trading partners importing into Indonesia. However, the fact that customs enforcement measures understandably do not apply to domestic products as they are, by definition, border measures. However, for halal assurance as well as for food safety concerns, Indonesia applies these requirements on a non-discriminatory basis. Indonesia has also fulfilled the third element in proving that it is not a disguised restriction as Indonesia implements its regulations in a transparent manner. There is no lack of transparency as Indonesia publishes all the requirements and all responses to applications.

25. The specific measures challenged by the Complainants are justified under one or more subparagraphs to GATT Article XX, to wit:

- The application windows and validity periods for import licenses are justified under Article XX, subparagraphs (b) and (d);
- The importers' self-selected license terms (including port of entry and type of product) are justified under Article XX, subparagraphs (b) and (d);
- The 80 per cent realization requirement (which is no longer in effect) is justified under Article XX, subparagraphs (b) and (d);
- The Indonesian harvest period limitations are justified under Article XX, subparagraphs (b) and (d);
- The storage ownership and capacity requirements are justified under Article XX, subparagraphs (a), (b), and (d);

[29] Appellate Body Report, *US – Gasoline*, p. 22.
[30] Appellate Body Report, *US – Shrimp*, para. 156.

- The reference price systems for chilli and fresh shallots for consumption and for beef are justified under Article XX, subparagraph (b);

- The six-month from harvest time requirement is justified by Article XX, subparagraph (b);

- The prohibition of certain beef and offal products, except in emergency circumstances, is justified under Article XX, subparagraphs (a), (b), and (d);

- The use, sale, and distribution limitations on imported bovine meat and offal are justified under Article XX, subparagraphs (a), (b), and (d);

- The domestic purchase requirement for beef is justified under Article XX, subparagraphs (a) and (d);

- The goal of sufficiency of domestic production to fulfil domestic demand included in Indonesia's legislation is justified under Article XX, subparagraph (b); and

- Indonesia's import licensing regimes for horticultural products and for animals and animal products, as a whole, are justified under Article XX, subparagraphs (a), (b), and (d).

I. The Reference Price System and Specified Time Period Requirements are Justified Under Article XI:2 of the GATT

26. Indonesia maintains a reference price system for the importation of chillies, shallots and beef as a tool to protect against harmful oversupply of these highly-perishable food items to prevent spoilage.

27. Similarly, concerning the domestic harvest period limitation, the intention is to prevent oversupply of only certain fresh horticultural products that could have disastrous consequences. As Indonesia is largely an agricultural country, in certain periods of time, a particular agricultural product is abundant in Indonesia.

28. On the reference price system and domestic harvest period limitations, Indonesia notes that this system is not continuously in effect and is not automatically activated. When this system is indeed activated, it is always on a temporary basis in response to an immediate crisis. Moreover, the reference price system for beef has in fact never been activated. Thus, Indonesia submits that these requirements are also justified under Article XI:2(c)(ii) because they are necessary to remove a temporary surplus of certain horticultural products, animals and animal products in Indonesia's domestic market.

J. Article 3.2 of the Agreement on Import Licensing Procedures

29. Indonesia argues that its import licensing system is automatic, and thus falls outside the scope of Article 3 of the ILA, as it only applies to non-automatic licenses. In this vein, the Complainants have failed to demonstrate that *any* importer that has met all of the legal requirements of Indonesia's import licensing regime has ever been denied an import license.

30. In the case that the Panel concludes that the regime is non-automatic, its implementation is in compliance with Article 3.2 of the ILA. The provision calls that the licensing procedures be no more administratively burdensome than absolutely necessary to administer the measure. Complainants have not demonstrated that any administrative inconveniences rise to the level of being "trade restrictive" or creating "distortive effects".

K. Article III:4 of the GATT

31. New Zealand claims that several measure are inconsistent with Article III:4 of the GATT, as it concerns "like" products, is a law, regulation or requirement affecting the internal sale, purchase

or use of bovine meat and offal,[31] and it accords less favourable treatment to imported products than to the like domestic products.[32]

32. The first claim is in regards to domestic purchase requirement for beef. However, the Complainant has failed to establish a *prima facie* case given that the requirement has never been used to reject an import license application. Secondly, in regards to end-use limitations for animal products, the measure does not accord "less favourable treatment" to imports than to like domestic products within the meaning of Article III:4 as it applies uniformly to imports and domestic products. Thirdly, the end-use limitation for horticultural products falls under the scope and is necessary within the meaning of Article XX(a) and Article XX(b) of the GATT. As a result, there is no inconsistency with Article III:4 of the GATT.

IV. CONCLUSION

33. For the foregoing reasons, Indonesia respectfully requests this Panel to reject the Complainants' claims in their entirety.

[31] New Zealand's first written submission, paras. 401-402.
[32] New Zealand's first written submission, paras. 404-408.

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

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ANNEX D-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA*

INTRODUCCIÓN

1. Argentina considera que las medidas cuestionadas por los reclamantes podrían afectar la comercialización de productos hortícolas que Argentina exporta a Indonesia, especialmente, productos frutales, lácteos, plantas y productos de floricultura y subraya la importancia de la correcta interpretación de las normas contenidas en el Acuerdo sobre la Agricultura y el GATT de 1994.

EL ARTÍCULO 4.2 DEL ACUERDO SOBRE LA AGRICULTURA

2. Argentina enfatiza el valor de las disciplinas sobre acceso a los mercados consagrados en la Parte III del Acuerdo sobre la Agricultura, en particular el párrafo 2 del artículo 4 y su Nota y considera que la función de esa disposición es garantizar un marco de transparencia y previsibilidad para los exportadores de productos agrícolas.

3. Asimismo Argentina recuerda, como señaló el Órgano de Apelación, que "…el artículo 4 del Acuerdo sobre la Agricultura es el vehículo jurídico para exigir la conversión en derechos de aduana propiamente dichos de ciertos obstáculos al acceso a los mercados que afectan a las importaciones de productos agropecuarios [...]"[1] y sostiene que los derechos de aduana propiamente dichos deben ser la única forma de protección en frontera.

LAS MEDIDAS CUESTIONADAS Y SU CONSISTENCIA CON EL PÁRRAFO 2 DEL ARTÍCULO 4 DEL ACUERDO SOBRE AGRICULTURA.

4. Argentina considera que las medidas que restringen la importación de productos bovinos y limitan la importación de esqueletos bovinos y cortes secundarios de carne, al constituir restricciones cuantitativas o medidas similares de frontera, podrían resultar incompatibles con las medidas enumeradas en la nota 1 del párrafo 2 del artículo 4 del Acuerdo sobre la Agricultura, dado que los importadores ven limitados el tipo y cantidad de producto a importar y complejizado su acceso al mercado.

5. En segundo lugar, Argentina entiende que una medida que dispone de ventanas de aplicación y periodos de validez para la importación de productos hortícolas, al establecer periodos temporales para la importación, puede condicionar la cantidad de productos a importar y esto puede afectar particularmente importaciones de Miembros cuyos productos necesitan de largos tiempos de embarque para arribar a puerto importador.

6. En este mismo tenor, Argentina nota que una medida que condicione el ingreso de mercadería al periodo de cosecha local puede ser similar a una restricción cuantitativa de importación en tanto la restricción temporal de importación restringe la cantidad de productos que pueden ser importados en el curso ordinario de las operaciones comerciales. Argentina advierte especialmente respecto de aquellas situaciones en las que el período de cosecha local fuese determinado de manera discrecional por la autoridad local.

7. Adicionalmente, Argentina considera que los términos fijos de una licencia de importación por los cuales se establezca una cuota especifica que el importador pueda importar durante un trimestre puede constituir una restricción cuantitativa o medida similar de frontera en los términos de la nota 1 del párrafo 2 del artículo 4 del Acuerdo sobre la Agricultura al limitar la cantidad de producto a importar en un determinado período. En ese mismo sentido, la facultad de vedar toda importación que exceda lo permitido en los términos fijos de la licencia de importación tiene el efecto de impedir el incremento de la cantidad de producto a importar.

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* Original Spanish.

[1] Informe del Órgano de Apelación, *Chile - Sistema de bandas de precios*, párrafos 200 y 201.

8. Argentina también estima que una medida que condicione la flexibilidad del importador al habilitar solamente la importación de determinado producto por un determinado puerto puede ser considerada una restricción cuantitativa o medida similar de frontera al tener un efecto condicionante y restrictivo que puede incidir no sólo en la cantidad de producto a importar, sino incluso en la decisión de hacerlo.

9. Por otra parte, una licencia que exigiera un elevado porcentaje (80%) de realización de la misma puede constituir una restricción cuantitativa o medida similar de frontera en los términos de la Nota 1 del párrafo 2 del artículo 4 del Acuerdo sobre la Agricultura dado que puede instar a los importadores a adoptar una actitud por demás conservadora cuyo efecto sea el de limitar la cantidad de producto a importar.

10. Asimismo, una medida que prohíba o restrinja el uso o venta del producto a importar según fines específicos determinados podría conformar una restricción cuantitativa o medida similar de frontera inconsistente en los términos de la nota 1 del párrafo 2 del artículo 4 del Acuerdo sobre la Agricultura.

11. Con respecto a una medida que exigiera a los importadores un requisito de compra domestica como contrapartida para importar carne y productos cárnicos podría constituir una restricción cuantitativa o medida similar de frontera en los términos de la nota 1 del párrafo 2 del artículo 4 del Acuerdo sobre la Agricultura por cuanto desincentiva al importador que se ve forzado a comprar carne y productos cárnicos en el mercado doméstico limitando, en consecuencia, la cantidad de producto que puede ser importada.

12. Adicionalmente, Argentina considera que una medida que establezca un precio de referencia de la carne por debajo del cual no pudieran ingresar animales ni productos animales bovinos, puede constituir un precio mínimo de importación en los términos de la Nota 1 del párrafo 2 del artículo 4 del Acuerdo sobre la Agricultura. Análogamente, una medida similar aplicada a los productos hortícolas acarrearía las mismas inconsistencias.

13. Así también, una restricción a la importación basada en la capacidad de almacenamiento puede constituir una restricción cuantitativa o similar medida de frontera y podría no ser consistente con el párrafo 2 del artículo 4 del Acuerdo sobre la Agricultura pues tal medida podría distorsionar el precio de los productos hortícolas importados y afectar la estructura de negocios y logística comercial, al imponer costos innecesarios a los importadores.

14. Argentina advierte que una medida que imponga como requisito de importación de productos hortícolas una fecha de cosecha de 6 meses previos a la importación sin distinguir siquiera entre los productos a importar ni sus condiciones de almacenamiento puede constituir una restricción cuantitativa o medida similar de frontera en los términos párrafo 2 del artículo 4 del Acuerdo sobre la Agricultura y su Nota 1 al tener como efecto el limitar el acceso del producto al mercado local.

15. Por otra parte, Argentina entiende que una medida cuya naturaleza sea distinta de un derecho de aduana, impuesto u otra carga que prohíba o restrinja la importación de productos, o incluso tenga un efecto limitativo que afecte a la importación de productos propiamente dicha en función de los períodos de cosecha doméstica de determinados productos, podría configurar también una "restricción a la importación" en el sentido del Artículo XI:1 del GATT de 1994.

16. Por último, Argentina ha señalado que medidas como las descriptas, en caso de no encuadrarse como restricciones cuantitativas o como precios mínimos de importación, podrían, en su caso, encuadrarse bajo el criterio de "medidas similares en frontera". Por ello, en caso que el Grupo Especial considere que alguna de las medidas cuestionadas comparte un número suficiente de características con al menos una de las categorías específicas de las medidas enumeradas en la nota 1 del párrafo 2 del artículo 4 del Acuerdo sobre la Agricultura, podría determinar que se trata de "medidas similares aplicadas en la frontera".

ANNEX D-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. AUSTRALIAN INTERESTS IN THIS DISPUTE

1. Australia has both systemic and commercial concerns about Indonesia's trade restrictions on imports of horticultural products, animals and animal products. Agricultural products made up over 48 per cent of Australian goods and services exports to Indonesia in 2014. Indonesia is Australia's largest export market for cattle, and cattle and bovine meat products were Australia's second and fourth largest goods exports to Indonesia in 2014 respectively. Indonesia is also an important market for Australian horticultural exports. Bilateral trade in these products is important to Australian businesses, and to Indonesian businesses and consumers. Removing limitations on this trade would be of benefit to both countries.

2. Given our substantial trade interests in this dispute, Australia, Brazil, Canada and the European Union requested that the Panel exercise its discretion to grant enhanced third party rights under Article 12.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Australia considers the Panel would have been justified in granting the additional third party rights that were requested, particularly given their limited and passive nature.

II. APPLICATION OF IMPORT LICENSING REGIME TO CATTLE

3. Australia has been particularly affected by Indonesia's import licensing regime for animals and animal products as it is applied to cattle. Under Indonesia's "positive list" of permissible animal and animal product imports, "Feeder cattle" with a maximum weight of 350 kilograms are the only type of live bovine animal permitted for importation. Imports of "Ready to Slaughter cattle" are currently prohibited.[1]

4. As is the case for other animals and animal products, importers of feeder cattle are subject to fixed licence terms, and are only permitted to import the quantity of cattle specified in their import approval. The Indonesian Government has regularly acknowledged that these fixed licence terms enforce an import quota – a maximum permissible volume of imports – on feeder cattle. For the first quarter of 2016, for example, the Indonesian Government has announced an import quota of 200,000 head of cattle.[2]

5. Quotas on feeder cattle imports are evidenced by a large number of media articles and public statements by Indonesian officials.[3] In addition to imposing fixed limits on the number of feeder cattle that can be imported, quarterly import quotas have imposed considerable uncertainty

[1] "Feeder cattle" are the only type of live bovine animal listed as permitted for import in Appendix 1 of the version of *Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013 Concerning Provisions on the Import and Export of Animals and Animal Products* (MOT 46/2013) provided by Indonesia. (Appendix 1, MOT 46/2013 (Exhibit IDN-14).) While ready to slaughter cattle are listed as permitted for import in the complainants' version of MOT 46/2013 (Exhibit JE-18), the *Law of the Republic of Indonesia Number 41 of 2014 Concerning Amendment of Law Number 18 of 2009 Concerning Husbandry and Animal Health* (Animal Law Amendment) also requires that imported livestock "must be in the form of feeder". (Article 1(11), Animal Law Amendment (Exhibit JE-5).) In addition, in September 2015, Indonesia issued *Regulation of the Minister of Agriculture Number 48/Permentan/ PK.440/8/2015 Regarding Importation of Feeder Cattle and Production Heifer into the Territory of the Republic of Indonesia* (MOA 48/2015), which states that "importation of ready-to-slaughter cattle is no longer applicable", and does not include ready to slaughter cattle in the list of permissible imports in its Appendix. (Preamble, para. b, Appendix, MOA 48/2015 (Exhibit AUS-2).)

[2] Y. Winosa and D. Bisara, "Govt Relying on Rice, Sugar, Soybean, Cattle Imports to Plug Q1 Shortage", *Jakarta Globe*, 1 January 2016, http://jakartaglobe.beritasatu.com/business/govt-relying-rice-sugar-soybean-cattle-imports-plug-q1-shortage/, accessed 4 January 2016 (Exhibit AUS-9).

[3] For example, New Zealand's first written submission, para. 132; "Achieving self-sufficiency, government keep importing live cattle", *Lensa Indonesia*, 31 March 2015, http://www.lensaindonesia.com/2015/03/31/swasembada-daging-pemerintah-terus-impor-sapi-bakalan.html, accessed 16 September 2015 (Exhibit NZL-23); Reuters, 'Indonesia may raise Q3 cattle import quota after evaluating supplies", *Investing.com*, 15 July 2015, http://m.au.investing.com/news/commodities-news/indonesia-may-raise-q3-cattle-import-quota-after-evaluating-supplies-1261, accessed 30 November 2015 (Exhibit AUS-7).

and economic costs on importers and exporters. Australian exporters have had to find alternative markets for cattle at short notice when quotas have been significantly lower than expected, and incur additional costs when quotas are not set until after the start of the quarter.[4] Quarterly import quotas on feeder cattle have also led to reductions in supply and higher prices for Indonesian consumers.[5]

III. INCONSISTENCY OF MEASURES WITH WTO OBLIGATIONS

A. GATT 1994 ARTICLE XI:1

6. Australia considers that each of the challenged measures that form part of Indonesia's import licensing regimes for horticultural products, and for animals and animal products, is clearly inconsistent with Article XI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), which forbids "prohibitions or restrictions other than duties, taxes or other charges" on imports, whether through "quotas, import … licences or other measures".

7. Indonesia's import licensing regimes include *outright prohibitions* on imports of certain products, including ready to slaughter cattle and certain types of bovine offal and secondary cuts, through Indonesia's positive list of permissible imports of animals and animal products. They also include prohibitions on imports of fresh horticultural products harvested more than six months previously, and on animal products that have been stored for more than three or six months between slaughter and arrival in Indonesia. These bans on imports of particular products are clearly "prohibitions" on the import of a product within the meaning of Article XI:1, defined as a "legal ban on the trade or importation of a specified commodity".[6]

8. Indonesia's import licensing regimes also include *prohibitions on imports of certain products in certain circumstances*. These include prohibitions on imports of:

(a) food and agricultural products when domestic production is deemed sufficient;

(b) certain bovine secondary cuts and carcasses except by State Owned Enterprises and Regional State Enterprises in the event of beef shortages due to a disease outbreak or natural disaster, or to control prices and prevent inflation;

(c) bovine animals and animal products, and chilies and shallots, when the market price for these products falls below a set reference price; and

(d) horticultural products based on Indonesian harvest periods.

9. These measures are clearly "prohibitions" on imports when the relevant circumstances are deemed to apply for each product. Furthermore, these measures are also "restrictions" on imports, which have been defined by the Appellate Body as measures that act as a "limiting condition"[7] or have "a limiting effect"[8] on imports. Indonesia's prohibitions on imports in certain circumstances also create considerable uncertainty for importers and exporters as they do not know when the Indonesian Government will declare the relevant circumstances to exist, and therefore are unable to make business plans with any confidence. The panel in *Argentina – Import Measures* confirmed that "uncertainties can constitute 'restrictions' under Article XI:1 of the GATT 1994",[9] as uncertainty "negatively impacts business plans of economic operators who cannot count on a

[4] New Zealand's first written submission, para. 47; United States' first written submission, para. 114; T. Allard, "Indonesia increases cattle permits amid soaring beef prices", *The Sydney Morning Herald*, 11 August 2015, http://www.smh.com.au/national/indonesia-prepares-to-increase-cattle-permits-amid-soaring-beef-prices-20150810-giw1xp.html (Exhibit US-61); J. Nason, "Indo permit debacle: Exporters diverting cattle to other markets", *Beef Central*, 9 July 2015, http://www.beefcentral.com/live-export/indo-permit-debacle-exporters-diverting-cattle-to-other-markets/, accessed 14 January 2016 (Exhibit AUS-8).

[5] New Zealand's first written submission, paras. 24-25, Figure 1 and Figure 2; United States' first written submission, para. 304.

[6] Appellate Body Reports, *China –Raw Materials*, para. 319 and *Argentina – Import Measures*, para. 5.217.

[7] Appellate Body Reports, *China – Raw Materials*, para. 319 and *Argentina – Import Measures*, para. 5.217.

[8] Appellate Body Reports, *China – Raw Materials*, para. 319 and *Argentina – Import Measures*, para. 5.217.

[9] Panel Reports, *Argentina – Import Measures*, para. 6.260.

stable environment in which to import and who accordingly reduce their expectations as well as their planned imports".[10]

10. In addition, Indonesia's import licensing regimes include the imposition of *numerical limits on imports*. Import licences with fixed terms specify the quantity of each product that can be imported in a given import period, and additional permits cannot be sought during that period. This effectively establishes a fixed numerical limit, or quota, for that import period and prevents importers from responding to any changes in the importing or exporting market during an import period. Explicit quotas are set for imports of feeder cattle, which are then enforced by assigning fixed quantities to each importer under the import approval system. An annual quota system has been introduced for horticultural imports, which are also limited in each import period to the storage capacity owned by an importer. These numerical limits clearly act as limiting conditions on imports and are "restrictions" contrary to Article XI:1.

11. Furthermore, Indonesia's import licensing regimes include measures *which affect the "competitive situation"*[11] *of importers*. Limited licence validity periods and application windows effectively prevent imports at the beginning and end of each import period, prevent long term planning and contractual arrangements, and impose additional costs on importing when the issuance of licences is delayed. Eighty per cent realisation requirements have encouraged importers to limit the quantities in their import licence applications. Rules preventing the sale of imported meat products in modern and traditional markets, and importers from selling horticultural products directly to consumers and retailers, reduce the commercial opportunities for imported goods and impose additional distribution costs on imports.

12. In addition to acting as a minimum import price, reference price rules also limit the ability of imports of bovine animals and animal products, and chilies and shallots, to compete with like domestic products on price. Laws requiring operators of markets to prioritise the sale of local horticultural products further affect the competitive position of imports. Requirements for importers of bovine meat to purchase local beef require importers to substitute imports with domestic products, limit imports according to the availability of local beef and increase the costs of importing. The requirement for imported cattle to be fed for four months in Indonesia not only effectively prohibits the importation of ready to slaughter cattle (in conjunction with Indonesia's positive list licensing regime), but also places a restriction on the use of imported feeder cattle that affects their competitive position against local cattle. These measures are clearly "restrictions" on imports which "create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly",[12] which the panel in *Colombia – Ports of Entry* held would have "implications on the competitive situation of an importer"[13] contrary to the requirements of Article XI:1.

13. Panels have consistently held there is no requirement for complainants to demonstrate "a causal link between the measure and its effects on trade volumes".[14] The limiting effects of Indonesia's measures are evident in their design, structure and operation. Furthermore, Indonesia's measures are part of a broader policy to restrict agricultural imports and promote food self-sufficiency, and should be considered in that context.

14. Australia considers that all of these measures operate individually as "quotas, import … licences or other measures" to prohibit or restrict imports contrary to Article XI:1. Furthermore, Indonesia's import licensing regimes as a whole impose an even greater restriction on imports than their individual components. We therefore agree that the Panel should also consider the effect of these import licensing regimes as a whole, in which the various prohibitions and restrictions reinforce and amplify one another, and "contribute in different combinations and degrees … towards the realization of common policy objectives"[15] of food self-sufficiency and the promotion of domestic production, similar to the situation in *Argentina – Import Measures.*[16]

[10] Panel Reports, *Argentina – Import Measures*, para. 6.260.
[11] Panel Report, *Colombia – Ports of Entry*, para. 7.240.
[12] Panel Report, *Colombia – Ports of Entry*, para. 7.240.
[13] Panel Report, *Colombia – Ports of Entry*, para. 7.240.
[14] Panel Report, *Colombia – Ports of Entry*, para. 7.252; see also Panel Report, *Korea – Various Measures on Beef*, para. 627.
[15] Panel Reports, *Argentina – Import Measures*, para. 6.228.
[16] Panel Reports, *Argentina – Import Measures*, para. 6.228.

B. AGREEMENT ON AGRICULTURE ARTICLE 4.2

15. Indonesia's measures, and its import licensing regimes as a whole, are "measures of the kind which have been required to be converted into ordinary customs duties" that are prohibited under Article 4.2 of the Agreement on Agriculture. These individual measures and the regimes as a whole are also "quantitative import restrictions … minimum import prices … and similar border measures" 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 render them inconsistent with Article XI:1 of GATT 1994.

16. Australia considers that a measure on agricultural imports that breaches Article XI:1 of the GATT 1994 will also breach Article 4.2, to the extent it is among those measures listed in footnote 1.[17] As all of Indonesia's measures have been challenged by the complainants as quantitative restrictions under both Article XI:1 and Article 4.2, it is appropriate to consider the consistency of Indonesia's measures with Article XI:1 of the GATT 1994, as the more specific provision on quantitative restrictions, before considering their consistency with the broader provision in Article 4.2.

17. While Indonesia's reference price requirements do not impose additional duties, Indonesia's approach is actually more trade-restrictive than other minimum import price systems, by completely banning imports when the market price falls below a set threshold. These requirements should therefore be considered minimum import prices or similar measures under Article 4.2, as well as quantitative import restrictions.

C. GATT 1994 ARTICLE III:4

18. Australia agrees with New Zealand that Indonesia's requirement for importers of bovine animal products to purchase domestic beef, and restrictions on the sale and distribution of imported animal and horticultural products, are also inconsistent with Article III:4 of the GATT 1994, which provides that imported products "shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

D. AGREEMENT ON IMPORT LICENSING PROCEDURES ARTICLE 3.2

19. As Indonesia's import licensing procedures limit the time periods in which applications can be submitted and import licences are issued, they do not satisfy the definition of automatic import licensing procedures in Articles 2.1 and 2.2(a) of the Agreement on Import Licensing Procedures.[18]

20. To the extent the Panel considers that Indonesia's limited application windows and validity periods 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, their trade-restrictive effects, including on long-term business planning and the flow of goods at the beginning and end of each import period, must be considered "additional" and "more administratively burdensome than absolutely necessary".

IV. AMENDMENTS TO INDONESIA'S IMPORT LICENSING REGIMES

21. Since the Panel's establishment, Indonesia's Minister of Agriculture has issued a new regulation governing the importation of animal products.[19] Indonesia's Minister of Trade has also

[17] See Panel Reports, *Korea – Various Measures on Beef*, para. 762 and *India – Quantitative Restrictions*, paras. 5.238-5.242.

[18] To qualify as automatic licensing under the Agreement on Import Licensing Procedures, Article 2.2(a)(ii) requires that applications "may be submitted on any working day prior to the customs clearance of the goods", and Article 2.2(a)(iii) requires that applications be approved "within a maximum of 10 working days".

[19] *Regulation of the Minister of Agriculture Number 58/Permentan/PK210/11/2015 Regarding Importation of Carcass, Meat, and/or its Derivatives into the Territory of the Republic of Indonesia*, 7 December 2015 (unofficial English translation) (MOA 58/2015) (Exhibit AUS-1).

issued a new regulation on the importation of horticultural products.[20] However, these new regulations do not alter the essential requirements of Indonesia's import licensing regimes, which remain inconsistent with Indonesia's WTO obligations, and actually impose additional restrictions on imports.[21]

22. Indonesia's regular amendments to its import licensing regimes should not enable it to avoid its WTO obligations. Indonesia's frequent amendments to its regulations over many years, often without notification and with no or limited opportunity for consultation with trading partners, have not reduced their WTO-inconsistencies. These amendments have instead served to further increase uncertainty for Indonesian importers and consumers and overseas exporters, limiting the development of long-term trading relationships and deterring investment.

V. ARTICLE XX OF THE GATT 1994

23. 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, which allow for measures "necessary to protect public morals", "necessary to protect human, animal or plant life or health" or "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement…". Indonesia provides no 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.

[20] *Regulation of the Minister of Trade Number 71/M-DAG/PER/9/2015 Regarding Horticultural Product Import Provision,* 28 September 2015 (MOT 71/2015) (Exhibit JE-12).

[21] For example, MOT 71/2015 adds further restrictions on horticultural imports, including a formal annual quota setting process. (Article 3, MOT 71/2015 (Exhibit JE-12).)

ANNEX D-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil welcomes the opportunity to present its views on some of the fundamental issues that were raised in these panel proceedings. In its Executive Summary Brazil will address four topics of systemic relevance referred to in this case.

(i) The order of analysis of claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

2. Brazil does not take a position in this dispute regarding which order of analysis the Panel should necessarily follow. Brazil would like to emphasize, however, two specific points related to this discussion. First, Brazil would like to recall that the existence of similarities between the two provisions – Article XI:1 of GATT 1994 and Article 4.2 of the Agreement on Agriculture – should not prevent the Panel from carrying out a separate analysis for each claim. Although both provisions deal with a general prohibition of resorting to unduly restrictions to trade, there is a difference in scope between them that may require a different assessment by a Panel.

3. In *Chile – Price Band System*, the Panel has already stressed this difference in scope when it ruled that "the 'restrictions other than' referred to in Article XI:1 of the GATT 1994 constitute a narrower category than the 'similar border measures other than' in footnote 1 to [Article 4.2 of] the Agreement on Agriculture"[1]. Being broader in scope, the measures listed in footnote 1 to Article 4.2 should not *a priori* be considered as strictly equivalent to those within the meaning of Article XI:1.

4. Second, in Brazil's view the Panel should be very cautious when considering the parties' suggestions to exercise judicial economy. In the current situation, the exercise of judicial economy could lead to a partial solution of the matter, which, in turn, may affect the ability of the DSB "to make sufficiently precise recommendations and rulings so to allow for prompt compliance by a Member"[2].

(ii) The standard for assessing an overarching measure

5. Brazil considers important to reinforce that the combined interaction of different individual measures may constitute, on its own, a violation of the Covered agreements regardless of the specific impact of each constitutive element of that overarching measure. In this context, such a measure is to be viewed as a single, self-standing "measure at issue" in the sense of Article 6.2 of the DSU, and the claims of inconsistency with WTO obligations should be scrutinized by the Panel independently of, and in addition to, the analysis of claims regarding individual measures.

6. In Brazil's view, the rulings on the claims regarding the individual measures do not necessarily resolve *a* priori the matter under dispute, as the combined effect of the individual elements could still result in restrictive policies inconsistent with WTO obligations, regardless of the specific impact of each individual measure. Brazil does not dispute that in order to determine the existence and functioning of an overarching measure, understood as a single, self-standing measure, it is important to scrutinize its constitutive elements and the interaction between them. Yet, this can only be assessed as "part of a holistic analysis" to be undertaken by the Panel, as the Appellate Body has confirmed.[3]

7. The jurisprudence of *Argentina – Import Measures* appears to be relevant to the current dispute. In that case, the Appellate Body upheld the Panel's decision that, since the different measures at issue were framed for the fulfillment of an official trade policy objective extensively

[1] Panel Report, *Chile – Price Band System*, para. 7.30.
[2] *Idem*.
[3] Appellate Body Report, *Argentina – Import Measures*, para. 5.126.

announced by public statements of high-ranking Argentine government officials,[4] their combined operation could be considered an overarching measure.

(iii) Import licensing regimes under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

8. In Brazil's view, one of the key issues under discussion in the present dispute is precisely whether and how Article XI:1 of the GATT 1994 and Article 4.2 should inform the analysis of a Member's import licensing regime. Both provisions are broad in scope and encompass "prohibitions" or "restrictions", which should not be maintained or resorted to by WTO Members. In *Brazil – Retreaded Tyres*, the Panel concluded that the term "prohibitions" in Article XI:1 means that "Members shall not forbid the importation of any product of any other Member into their markets."[5] Thus, if any type of licensing procedure adopted by a Member impedes or bans the importation of any product from another Member, then a prohibition in the sense of Article XI:1 is at hand.

9. The term "restrictions" in Article XI:1 has also been interpreted in a broad manner. The Panel in *India – Quantitative Restrictions* considered that there is a restriction if a measure imposes a "limiting condition" or a "limitation on action" in relation to imports[6] and the Appellate Body in China – *Raw Materials* found that "restriction" refers to "something that has a limiting effect".[7] As a consequence of the restriction, the importation will be "more onerous than if the condition had not existed, thus generating a disincentive to import."[8]

10. For Brazil, it is clear from both the wording and purposes of this provision that import licensing regimes, automatic and non-automatic alike, may fall under the purview of Article XI:1 of the GATT 1994, as long as they are applied in a manner that result in a prohibition or restriction on the importation of products. As the Panel in *China – Raw Materials* indicated, it does not matter whether the import licensing regime qualify as "automatic" or "non-automatic", but rather whether this regime, by its design and structure, has a "'limiting' or 'restrictive' effect."[9]

11. For Brazil, any "prohibition" or "restriction" on the importation may be a violation of Article XI:1 of the GATT 1994, as long as it may have "limiting effects on the importation."[10] Thus, if the importation of the product is only allowed under certain conditions or even only to certain uses the relevant measure may fall under the purview of Article XI:1.

12. In light of the broad scope of Article XI:1, the fact that a specific measure does not totally prevent the imports from entering the market or does not encompass the application of prohibited additional duties[11] does not mean *per se* that there is no violation of that provision. Likewise, a violation of Article XI:1 may occur even when there is no specific threshold established limiting imports or exports.

13. In Brazil's view, the specific features of Indonesia's import licensing regime, as described by the Complainants in the present dispute, undoubtedly seem to impose, by "its design and structure", a legal ban or a limiting condition in relation to imports. Furthermore, many of the requirements in Indonesia's import licensing regime mentioned in the present dispute, such as limited application windows and validity periods, fixed license terms, realization requirements, domestic purchase requirements, and reference prices, seem to fall exactly in the category of WTO-inconsistent measures, constituting an excessive burden for the importers and consequently a disincentive to import. According to the panel in *China – Raw Materials*, the potential to limit trade is sufficient to constitute a "restriction" within the meaning of Article XI:1 of the GATT.[12]

14. As regards Article 4.2 of the Agreement on Agriculture, the Appellate Body in *Chile – Price Band System* has stated that an "inconsistency with Article 4.2 can be established when it is

[4] Appellate Body Report, *Argentina – Import Measures*, para. 5.131.
[5] Panel Report, *Brazil – Retreaded Tyres*, para. 7.11.
[6] Panel Report, *India – Quantitative Restrictions*, para. 5.128.
[7] Appellate Body Report, *China – Raw Materials*, para. 319.
[8] Panel Report, *India – Autos*, para. 7.269.
[9] Panel Reports, *China - Raw Materials*, para. 7.915.
[10] Appellate Body Reports, *Argentina – Import Measures*, para. 6.363.
[11] Indonesia's first written submission, para. 154.
[12] Panel Reports, *China – Raw Materials*, para. 7.1081.

shown that a measure is a border measure similar to one of the measures explicitly identified in footnote 1."[13] As previously indicated, Brazil believes that many of the measures challenged by the Complainants in the current dispute – related to Indonesia's import licensing regime – limit the access of the products at issue into the country's market and, as such, are covered by Article 4.2. They can actually be considered similar to the measures identified in footnote 1, constituting, as such, a violation of Article 4.2 of the Agreement on Agriculture.

(iv) The requirements of Article XX of the GATT 1994

15. For Brazil it is undisputable that WTO rules do not prevent its Members from adopting the measures necessary to protect human, animal or plant life, nor from protecting other legitimate policies objectives, as long as "such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination […] or a disguised restriction on international trade".[14] This kind of balance can also be found in Articles 2.1 and 2.3 of the SPS Agreement, in Articles 2.1 and 2.2 of the TBT Agreement and in Article 3 of the TRIMs Agreement, among others.

16. Given the central role of Article XX in ensuring the proper balance between WTO rights and obligations, it is also well established, from the very beginning, that in order to resort to the general exceptions established therein, the party invoking the provision has the burden of proving that it has fulfilled the conditions necessary for invoking the exception[15], which are: first, whether the domestic measure in question is justified within at least one of the paragraphs of Article XX (paragraphs (a) to (j)); and second, whether the application of these domestic measures meets the requirements of the provision's *chapeau*.[16]

17. As the Appellate Body has indicated, these exceptions "are not positive rules establishing obligations in themselves. They are in the nature of affirmative defenses. It is only reasonable that the burden of establishing such a defense should rest on the party asserting it."[17]

18. Therefore, in the current dispute, it would be for Indonesia to present the necessary evidence to prove its arguments of defense under Article XX and demonstrate that: (i) its policy, in respect of the measures for which the provision was invoked, fell within the range of policies designed to protect human, animal or plant life or health; (ii) the inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objective; and (iii) the measures were applied in conformity with the requirements of the introductory clause of Article XX.[18]

19. Brazil appreciates the opportunity to comment on the issues at stake in this proceeding and expects that the elements introduced above may assist the Panel in examining the matter before it.

[13] Appellate Body Report, *Chile – Price Band System*, para. 171.

[14] Article XX of the GATT 1994. For example, this balance can be found in Articles 2.1 and 2.3 of the SPS Agreement, in Articles 2.1 and 2.2 of the TBT Agreement, and in Article 3 of the TRIMs Agreement, among others.

[15] Panel Report, *US – Underwear*, para. 7.16. Brazil is aware that as a general rule of law, when initiating a dispute at the WTO, the Complaining Member has the burden to establish a *prima facie* case by presenting sufficient evidence to raise a presumption in favour of its claim. The amount of evidence required to establish the *prima facie* case may vary and shall be determined by the Panel on a case-by-case basis. Once the Panel is convinced the *prima facie* case was established, then it is for both Parties to provide sufficient evidence/proof supporting their respective claims. Since Indonesia is invoking Article XX of the GATT 1994, it must adduce the necessary evidence to support its defense.

[16] Appellate Body Report, *US-Gasoline*, para. 22.

[17] Appellate Body Report, *US – Wool Shirts and Blouses*, page 16.

[18] Panel Request, *US – Gasoline*, para. 6.20.

ANNEX D-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. Canada is concerned about the issues in this dispute as a major exporter of animals, animal products and horticultural products, and on a systemic basis with respect to the interpretation of Articles XI:1 and XX of the GATT 1994 and Article 4.2 of the *Agreement on Agriculture*.

2. Indonesia's measures, such as the domestic insufficiency condition for imports, strict application windows and short validity periods for import licences and end-use requirement can be assessed for consistency under both Article XI:1 of the GATT 1994 and Article 4.2 of the *Agreement on Agriculture*.

II. PROHIBITIONS AND RESTRICTIONS UNDER GATT ARTICLE XI:1

A. Other Measures

3. Under Article XI:1 of the GATT 1994, Members are obliged not to impose prohibitions or restrictions other than customs duties, taxes or other charges. This obligation applies to prohibitions or restrictions made effective through, among other things, import licences or other measures.

4. The term "other measures" has been interpreted as a broad residual category of measures that encompasses measures other than those that take the form of duties, taxes or other charges. Indonesia's measures, in particular the domestic insufficiency condition, strict application windows and short validity periods and end-use requirements are "other measures" within the meaning of Article XI:1.

B. Prohibition or Restriction on Imports from another Member

5. The meaning of the term "restriction" in Article XI:1 includes not only a measure that results in actual adverse effects on imports, but also a measure that, based on its design and structure, negatively affects the competitive opportunities for imported in market of the importing Member.

6. Therefore, measures that restrict market access, create uncertainties and affect investment plans or increase transaction costs to an extent that creates a disincentive to import, constitute restrictions within the meaning of GATT Article XI:1.

7. If Indonesia's measures have these types of effects on import quantities or competitive opportunities in the Indonesian market, those measures will constitute prohibited restrictions under Article XI:1.

III. THE NECESSITY TEXT UNDER GATT ARTICLE XX IS A TWO-STEP TEST

8. The necessity test, which is a common element in GATT Article XX(a), (b), and (d) is a two-step test.

9. First a panel must make a preliminary determination of necessity by weighing and balancing relevant factors such as: the relative importance of the common interests or values that the measure aims to protect; the extent to which the measure contributes to the realization of the policy objective; and the trade-restrictiveness of the measure.

10. Generally, the more important or vital the interests or values; the greater the contribution of the measure to the objective; and the less trade restrictive the measure is, the more likely it is that the measure will be found to be necessary.

11. If this weighing and balancing results in a preliminary determination of "necessity", then this determination must be confirmed by comparing the measure in issue with a less trade restrictive alternative measure.

12. In an assessment of Indonesia's measures under Article XX(a), (b) or (d), the Panel should first make a preliminary determination of necessity by weighing and balancing the relative importance of the common interests or values that the measure aims to protect, the extent to which the measure contributes to the achievement of the policy objective; and the degree of trade-restrictiveness of the measure. Only if a preliminary determination of necessity has been made, should the Panel then check that determination by assessing the measure against a less trade-restrictive alternative measure. The measure should only be found necessary if a preliminary assessment of necessity has been made and there is no less trade-restrictive alternative measure that would make an equivalent contribution to the achievement of the objective.

IV. ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE: QUANTITATIVE IMPORT RESTRICTION, DISCRETIONARY IMPORT LICENSING, OR SIMILAR BORDER MEASURES

13. Under Article 4.2 of the *Agreement on Agriculture*, WTO Members are obliged not to maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties.

14. Footnote 1 to Article 4.2 provides examples of prohibited non-tariff measures, such as quantitative import restrictions and discretionary import licensing, as well as a residual category of similar border measures other than ordinary customs duties. If a Member adopts or maintains a non-tariff measure listed in footnote 1 that Member is in violation of Article 4.2.

15. Following the approach in *Turkey – Rice,* Indonesia's domestic insufficiency condition should be assessed to determine if it constitutes a quantitative import restriction by prohibiting or restricting imports of specific products if the domestic insufficiency condition is not met.

16. The domestic insufficiency condition can also be assessed to determine if it constitutes an impermissible discretionary import licence by not providing any criteria for determining domestic insufficiency.

17. If the domestic insufficiency condition is not determined to be a quantitative import restriction or discretionary import licence, it can be assessed to determine if it is a "similar" measure by having a sufficient likeness or resemblance to a quantitative import restriction or discretionary import licence.

18. Similarly, the strict application windows and short validity periods, and end-use requirements can be assessed to determine if they are quantitative import restrictions or "similar" measures by having a limiting effect on the quantity of imports.

ANNEX D-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF EUROPEAN UNION

I. ARTICLE XI:1 OF THE GATT 1994

1. Article XI:1 of the GATT 1994 contains one of the fundamental principles of the GATT/WTO legal system,[1] the general prohibition of quantitative restrictions.

2. Article XI:1 foresees the elimination of import and export restrictions or prohibitions other than duties, taxes or other charges.

3. The Appellate Body has relied on a definition of the term "prohibition" as a "legal ban on the trade or importation of a specified commodity".[2]

4. In the same disputes, the Appellate Body referred to the term "restriction" as "'[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation' and, thus, generally, as something that has a limiting effect".[3]

5. The use of the word "quantitative" in the title of Article XI suggests that this Article refers only to those prohibitions and restrictions "that limit the quantity or amount of a product being imported or exported".[4] "This provision […] does not cover simply *any* restriction or prohibition".[5] So the word "quantitative" in the title of Article XI informs the meaning of "prohibition" and "restriction". The Appellate Body underlines that it must be a prohibition or restriction "on the importation … or on the exportation or sale for export". In the view of the Appellate Body, "not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products".[6] The European Union shares the Appellate Body's understanding that the impact of a restriction "need not be demonstrated by quantifying the effects of the measure at issue". Rather, the "design, architecture, and revealing structure … considered in its relevant context"[7] should in the view of the European Union reveal a discernible quantitative dimension, in the form of a limiting effect on the quantity or value of a product being imported/exported.

6. In assessing whether the measure at issue is consistent with Article XI:1, a substance over form approach should be taken.[8] This implies that such a restriction can be imposed *de jure* or *de facto*.[9]

7. In the view of the European Union, Indonesia operates a set of measures which – in different forms - are inconsistent with Article XI:1 of the GATT 1994. Some of the measures constitute outright prohibitions. Some other measures by Indonesia prohibit imports of certain products under certain circumstances. Some of the Indonesian measures impose numerical limits on imports. In the view of the European Union, all these three types of measures clearly are "prohibitions" or, respectively, "restrictions" for the purposes of Article XI:1. Yet another type of measures affects the competitive situation of importers. These are also inconsistent with Article XI:1 to the extent that they have a *discernible quantitative dimension*, in the form of a limiting effect on the quantity or value of a product being imported/exported.

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[1] Panel Report, *Turkey – Textiles*, para. 9.63.
[2] Appellate Body Reports, *Argentina – Import Measures*, para. 5.217, referring to Appellate Body Reports, *China – Raw Materials*, para. 319 (quoting Shorter Oxford English Dictionary, 6th edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 2, p. 2363).
[3] Appellate Body Reports, *Argentina – Import Measures*, para. 5.217, referring to Appellate Body Reports, *China – Raw Materials*, para. 319 (quoting Shorter Oxford English Dictionary, 6th edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 2, p. 2553).
[4] Appellate Body Reports, *Argentina – Import Measures*, para. 5.217, referring to Appellate Body Reports, *China – Raw Materials*, para. 320.
[5] Appellate Body Reports, *Argentina – Import Measures*, para. 5.217.
[6] Appellate Body Reports, *Argentina – Import Measures*, para. 5.217.
[7] Appellate Body Reports, *Argentina – Import Measures*, para. 5.217.
[8] Panel Report, *India – Autos*, para. 7.271.
[9] Panel Report, *Argentina – Hides and Leather*, para. 11.17.

II. ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

8. To the extent that a measure is one of a kind listed in footnote 1 to Article 4.2 of the Agreement on Agriculture, a border measure which imposes prohibitions or restrictions inconsistent with Article XI:1 of the GATT 1994 results also in a breach of Article 4.2.[10] This parallelism between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, however, seems only adequate if Article XI:1 of the GATT 1994 is not being interpreted excessively broad, i.e. if Article XI:1 is understood in a way so that not just *any* condition on importation is capable of falling under Article XI:1.

9. If that is so and parallel considerations apply, then measures that are covered by Article 4.2 may be distinguished from those that are not by considering similar arguments as discussed above, with respect to Article XI:1 of the GATT 1994.

III. IMPORT REGIME AS A WHOLE

10. In order to determine whether five trade-related requirements operate in a manner such that they constitute a *single* measure, the Panel in *Argentina – Import Measures* took into account three factors: (a) the manner in which the complainants have presented their claims in respect of the concerned measures; (b) the respondent's position; and (c) the manner in which these requirements operate and are related to each other, in order to determine whether they can be considered to be autonomous or independent.[11] The Panel found that those requirements at issue constitute a single measure. The Panel's finding that these requirements are related to each other was primarily based on two considerations. The first of these considerations was that "in many cases for which there is evidence", the WTO Member has imposed a combination of requirements on economic operators.[12] This, in the view of the Panel, was an indication for "a single global measure".[13] Such an indication is in the view of the Panel not contradicted by the fact that the requirements *can* be imposed separately.[14] The second key aspect for the Panel was that "it appears that the requirements constitute different elements that contribute in different combinations and degrees – as part of a single measure – towards the realization of common policy objectives that guide [that WTO Member's trade policy]. A separate consideration of each of the [restrictions] would therefore go against the nature of the measure, drawing an artificial segmentation that would not reflect accurately the way in which the measure operates in practice. Moreover, an individual consideration of the requirements would not capture some of the main features of the […] measure, namely, its flexibility and versatility."[15]

11. Having considered the evidence submitted by the complainants and the respondent, the European Union notes that the proclaimed objectives of Indonesia are those of food self-sufficiency and the promotion of domestic production. Each individual component of the Indonesian import licensing regime is permeated by this objective. The European Union agrees with the complainants[16] and Australia as a Third Party[17] that these import licensing regimes as a whole impose an even greater restriction on imports of animals and animal products on the one side, and on horticultural products on the other side, than their individual components. Drawing an artificial segmentation between the different elements applied to imports would not reflect accurately the way in which the import licensing regime operates in practice with respect to animals and animal products on the one side, and with respect to horticultural products on the other side. In the view of the European Union, in addition to the individual requirements that form part of the regime, the Panel should also consider the effect of Indonesia's import licensing regime on imports of animals and animal products as a whole, and it should also consider the effect of Indonesia's import licensing regime on horticultural products as a whole.

[10] E.g. Panel Report, *Korea – Various Measures on Beef,* para. 762.
[11] Panel Reports, *Argentina – Import Measures*, para. 6.222.
[12] Panel Reports, *Argentina – Import Measures*, para. 6.225.
[13] Panel Reports, *Argentina – Import Measures*, para. 6.227.
[14] Panel Reports, *Argentina – Import Measures*, para. 6.227.
[15] Panel Reports, *Argentina – Import Measures*, para. 6.228.
[16] New Zealand FWS, paras. 198-202; 271-277: US FWS, paras. 210-216; 250-254; 317-326; 359-364.
[17] Australia, Third Party Written Submission, para. 60.

IV. TRADE EFFECTS

12. In paragraph 71 of its First Written Submission, Indonesia notes that the "Complainants have not placed on the record any evidence that *total* import volumes have decreased as a result of the application windows or validity periods for import licences" (emphasis original). Indonesia makes similar such statements throughout its Submission. The European Union agrees with the Panels in *Colombia – Ports of Entry* and *Argentina – Import Measures* that "to the extent that a complainant is able to demonstrate a violation of Article XI:1 based on the measure's design, structure, and architecture, 'it would not be necessary to consider trade volumes or a causal link between the measure and its effects on trade volumes'".[18] In the view of the European Union, the limiting effect of the Indonesian measures follows from the design of these measures. There was just no need for the complainants to provide evidence of the effect on trade volumes. This notwithstanding, the complainants have actually submitted substantial quantitative evidence.

V. ARTICLE XX OF THE GATT 1994

13. Indonesia relies on three exceptions under Article XX of the GATT 1994, lit. (a), (b), and (d), in order to justify its measures.

14. First, the "public morals" exception. Indonesia claims that in order "to prevent consumer deception regarding whether certain food products are Halal"[19], it limits "imported horticultural products to uses that naturally require some degree of labelling"[20]. The EU understands that the system works in the way that importers must transfer horticultural imports to a distributor, whereas distributors are allowed to sell them in traditional markets. If that is so, then Indonesia has not explained why these restrictions which apply specifically to importers should be justified. When it comes to imported animal products, the EU understands that Indonesia requires imported animal products to be Halal (with the exception of products from swine slaughter houses).[21] On this basis, the EU wonders in what respect consumers should be deceived if those products are being sold in traditional markets.

15. Second, Indonesia claims that some of its measures are "necessary to protect human, animal or plant life or health", Article XX(b) of the GATT 1994. There is neither evidence that the Indonesian measures are "necessary", nor does Indonesia seem to have considered less trade-restrictive alternatives. Indonesia's references to Article XX(b) should be dismissed.

16. Third, Indonesia relies on Article XX(d) for some of its measures. The European Union fails to see which particular law or regulation Indonesia claims that its measures are designed to secure compliance with. The European Union also considers that Indonesia's evidence and consideration of "necessity" and "reasonably available alternatives" is lacking.

17. With regard to all three alleged grounds of justifications (lit. (a), (b), and (d)), it must also be noted that they fail the chapeau of Article XX because, in the view of the EU, the measures constitute part and parcel of the proclaimed food self-sufficiency policy, and are hence a disguised restriction on international trade.

[18] Panel Reports, *Argentina – Import Measures*, para. 6.264, quoting Panel Report, Colombia – *Ports of Entry*, para. 7.252.
[19] Indonesia, FWS, para. 159.
[20] Indonesia, FWS, para. 159.
[21] Australia, Third Party Written Submission, para. 93.

ANNEX D-6

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. Measures with Limiting Effects Under Article XI:1 of the GATT 1994

1. Japan considers that Article XI:1 of the GATT 1994 does not impose a high threshold with respect to the limiting effects that a measure must have in order to constitute a "restriction". Rather, a measure may be found to have limiting effects when it *limits competitive opportunities for imported products*[1] *by limiting the opportunities for importation*[2].

2. This understanding is consistent with previous cases that have found limiting effects deriving from a wide range of perspectives and features of the measure at issue. Such features are not limited to explicit numerical limits on imports, but also include uncertainties as to whether the imports are permitted, not allowing importers to import as much as they desire or need, etc.[3]

3. The following three considerations also support a broad understanding of the concept of "limiting effects" and accordingly of the term "restriction" in Article XI:1 of the GATT 1994, as argued above. First, it is a fundamental principle of the GATT 1994 that tariffs, to be reduced through reciprocal concessions and applied on MFN basis, are the sole preferred and acceptable means of border protection, whereas the other types of trade-restrictive measures are prohibited unless expressly excluded under Article XI:2 or justified by the explicit exceptions in Article XX of the GATT 1994.[4]

4. Second, the measures that are excluded from the prohibition under Article XI:1 are specifically stipulated in Article XI:1 itself ("duties, taxes or other charges") and in Article XI:2. These express exclusions suggest that all other measures with limiting effects were intended to be prohibited under Article XI:1.

5. Third, application of a high threshold for the limiting effects could result in circumvention of GATT disciplines by allowing measures that limit the competitive opportunities for the imported products through limitations for importation, but that have no justifiable underlying policy objectives. On the contrary, an import measure (including procedures or formalities to import) that has the effect of limiting opportunities for importation but serves legitimate public policy purposes (such as verifying health/environmental risks of certain import products) could be justified under the general exceptions provided in Article XX of the GATT, as long as the other specific requirements under that provision (such as the chapeau or the necessity/relation requirements under each subparagraph) have been met. Thus, import restrictions which serve justifiable policy objectives could be properly addressed under the GATT disciplines, and it is not the case that legitimate trade-restrictions are unreasonably prohibited by a broad understanding of the concept of limiting effects.

6. With regard to the Complainants' argument that import licensing procedures used to implement an underlying restriction and that have an additional limiting or restrictive effect may be inconsistent with Article XI:1 of the GATT 1994 and Article 3.2 of Agreement on Import Licensing Procedures[5], Japan understands that such import licensing procedures, which are inconsistent with Article XI:1 of the GATT 1994, could be justified under Article XX (d) of the

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[1] Panel Report, *Argentina – Hides and Leather*, WT/DS155/R, February 16, 2001, para. 11.20 (emphasis added), citing Appellate Body Report, *Japan- Alcoholic Beverages II*, WT/DS8/10/11/AB/R, October 4, 1996, p.16 and Appellate Body Report, *Korea-Alcoholic Beverages*, WT/DS75/84/AB/R, January 18, 1999, paras. 119-120 and 127. This finding is referred to in Panel Report, *Colombia – Ports of Entry*, WT/DS366/R, April 27, 2009, para. 7.236.

[2] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, WT/DS/302/R, November 26, 2004, para. 7.261.

[3] Panel Report, *Colombia – Ports of Entry*, para. 7.240, Panel Report, *Argentina – Import Measures*, WT/DS438/444/445/R, June 26, 2014, para. 6.474 (not reversed by the Appellate Body).

[4] See, Appellate Body Report, *India – Additional Duties*, WT/DS360/AB/R, June 26, 2014, para. 159, noting also Panel Report, *Turkey – Textiles*, WT/DS34/R, May 31, 1999, para. 9.63.

[5] United States' first written submission, paras. 381-384 and New Zealand's first written submission, para. 420 (citing Panel Report, *China- Raw Materials*, paras. 7.955 and 7.957.).

GATT 1994, so long as their underlying measure is not inconsistent with the GATT, and to the extent the licensing procedures fulfill all the other requirements under the chapeau and subparagraph (d) of Article XX of the GATT 1994. The availability of Article XX(d) in these circumstances also supports a broad understanding of the concept of "limiting effects" and therefore of the scope of measures prohibited as "restrictions" under Article XI:1.

7. Japan would also like to make comments on two specific arguments regarding the limiting effect by Indonesia. First, Indonesia seems to emphasize that the limiting effect should be "quantitative"[6] to the extent that it argues that the effects need to be quantified.[7] Indonesia also seems to argue that demonstration of an actual trade effect is required to establish the limiting effect when it asserts that "the Complainants have not presented any evidence that the realization requirement has had an adverse impact on trade flows".[8] However, the Appellate Body clarified that "this limitation need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context".[9] Therefore, the need to establish trade effects under Article XI:1 has been clearly rejected. Furthermore, Japan understands that it is enough for the measure to have *effects on the opportunities for importation*, and also enough *for the limitation on the quantity or amount to be demonstrated qualitatively through* an examination of *the measure's structure.*

8. Second, Indonesia also argues that measures need to be "the direct result of government action, and not dictated by the actions of private parties".[10] Japan observes, however, that measures with limiting effects constitute "restrictions" even when there are some actions of private parties, provided that the private actors are induced to take certain actions in response to the limitation on the opportunities for importation, given the measure's design, architecture and structure. In this case, the measures identified by the complainants are undoubtedly attributable to Indonesian government, and the actions of private parties alleged by Indonesia are the inevitable result caused because of the design, architecture, and revealing structure of these measures.

II. Indonesia's Invocation of Article XX of the GATT 1994

9. A respondent's burden of demonstrating that the challenged measure meets all of the requirements of Article XX[11] includes not only the burden of invoking the provision, but also of substantiating its defense with argumentation and evidence sufficient to make a *prima facie* case.[12] Japan wonders whether what Indonesia presents in its first written submission regarding Article XX is sufficient to establish a *prima facie* case, and to overcome Indonesia's ultimate burden under Article XX. Indonesia effectively makes only passing references to Article XX, without providing specific argumentation on the elements that it must establish under that provision.

10. Indonesia's invocation of subparagraphs (a), (b) and (d) lacks specificity. For example, Indonesia does not identify the GATT-consistent laws or regulations with which the challenged measures allegedly seek to secure compliance in accordance with subparagraph (d).

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[6] *Indonesia's* first written submission, para. 116.
[7] Indonesia's first written submission, paras. 135, 152, 156 and 165.
[8] Indonesia's first written submission, para.141. See also, para. 161.
[9] Appellate Body Report, *Argentina – Import Measures*, para. 5.217.
[10] Indonesia's First Written Submission, para.119.
[11] See e.g., Appellate Body Report, *US – Gasoline*, pp. 22-23; Appellate Body Reports, *US – Shrimp (Thailand) /US – Customs Bond Directive*, para. 300.
[12] Appellate Body Report, *US – Gambling*, para. 323; Appellate Body Reports, *US – Shrimp (Thailand) /US – Customs Bond Directive*, para. 300; Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 180.

11. Nor does Indonesia provide support for its allegation that the challenged measures are "necessary". Although the WTO case law has identified three factors that must be weighed and balanced under the "necessity" test, namely, (i) the importance of the policy objective pursued, (ii) the trade-restrictiveness of the measure and (iii) the contribution of the measure to the policy objective[13], Indonesia has not provided arguments or evidence that would allow an assessment especially for the latter two factors.

12. For example, regarding the end use limitations, Indonesia claims justification under subparagraph (a) based on the alleged Halal regulations. Indonesia adds that an alternative measure of labelling is not feasible, and that the best way to achieve the objective is to limit the uses and the channels of distribution of imported products to the ones with a greater opportunity for sellers to provide reliable information to the end use (e.g. listing food items on restaurant menus).[14] However, the end-use requirement is highly trade-restrictive because it prohibits any direct transfer of any imported products to consumers and retailers regardless of whether the imported products actually are Halal-consistent or not, while there are no parallel restrictions on the channels for domestic products because of the assumption that the consumers are able to choose Halal-consistent foods properly without governmental intervention in the market. Therefore, Japan has doubts whether the measure is "necessary" for the stated objective to prevent consumers' misunderstanding on whether or not the food is Halal-consistent.

13. Considering that the purpose of Article XX is not only to protect the right of a Member to pursue certain non-trade objectives, but also to balance this right with the duty of that same Member to respect the treaty rights of the other Members,[15] Japan believes it is of fundamental importance that a Member invoking Article XX identifies the policy objective with sufficient specificity, and that it provides sufficient evidence and argumentation to confirm that the measure is necessary to achieve the specifically identified objectives by weighing and balancing the above-mentioned factors, and does not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

III. Indonesia's Arguments based on the developing country status or its limited resources

14. Indonesia refers several times to its status as a developing country and its limited resources, particularly in the context of its invocation of Article XX for the purpose of the justification of its measures.[16] However, there is no basis to apply Article XX more flexibly or to relax the burden of proof because of the limited resources or a developing country status of a Member who invokes the defense. Rather, the Appellate Body has recognized that, in the context of the assessment of "necessity", a Member's capacity may be relevant in considering whether an alternative measure is reasonably available.[17] Thus, in the context of Article XX of the GATT 1994, a developing country status and its limited resources could be properly addressed and taken into account in weighing and balancing the relevant factors and the burden to prove the satisfaction of the requirements of Article XX should not be lowered by a mere invocation of a developing country status.

15. Japan also notes that Indonesia puts particular stress on its limited financial, human, and other resources.[18] In this respect, Japan agrees with Australia that "[Indonesia's] explanation would suggest that these measures are designed to serve a resource allocation purpose", and "WTO-consistent measures of enforcement do not involve [an] onerous shifting of enforcement costs [to imported goods and retailers of imported goods] which ordinarily are borne by the Member's public purse."[19]

[13] Appellate Body Report, *Korea –Various Measures on Beef*, paras. 162-165; Appellate Body Report, *Brazil – Retreated Tyres*, para. 178.
[14] Indonesia's first written submission, paras. 158-159 and 166.
[15] Appellate Body Report, *US–Shrimp*, paras. 156 and 159.
[16] Indonesia's first written submission, paras. 4, 9, 136, 140, and 142.
[17] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 171.
[18] Indonesia's first written submission, paras. 4, 136, 140 and 142.
[19] Australia's third party's submission, paras.88-89 (citing Appellate Body Report, *Korea – Various Measures on Beef*, para. 181).

IV. The Issue of "Moving Target"

16. Japan shares the United States' concern for a so-called "moving target" issue. As "Indonesia, *again and again*, has made changes to import licensing regimes"[20], the United States recalled the goal of the WTO dispute settlement system, that is to say, "to secure a positive solution to a dispute", and stressed that "Indonesia may not avoid scrutiny under the DSU of its import licensing regimes and constituent prohibitions and restrictions *by continually amending or replacing its regulations*."[21]

17. The Appellate Body observed, in *Chile – Price Band System*, that legal instruments which are amended or replaced *during* panel proceedings could be subject to findings by a panel, to the extent that the measure *remains essentially the same.*[22] There may be other circumstances which may justify allowing panels to make findings on post-establishment measures. This kind of flexible approach is useful in avoiding circumvention and contributes "*to secur[ing] a positive solution*" to the dispute"[23] and a "prompt settlement" of the matter.[24] Thus, Japan considers that if the regulations which underlie the import licensing regimes at issue are amended or replaced by the respondent *during* this panel proceeding and such import licensing regimes remain essentially the same, the panel could properly address the measures.

[20] United States' first written submission, para. 5. (emphasis added)
[21] United States' first written submission, para. 6. (emphasis added)
[22] Appellate Body Report, *Chile – Price Band System*, WT/DS207/AB/R, September 23, 2002, para. 139.
[23] Article 3.7 of the DSU. (emphasis added)
[24] Article 3.3 of the DSU.

ANNEX D-7

EXECUTIVE SUMMARY OF THE ARGUMENTS OF KOREA

1. Korea believes that WTO Members have the right to pursue legitimate domestic regulatory and public policy objectives including public health. This right to regulate should be protected as a sovereign right of all Members, and is sufficiently reflected in the GATT 1994, as well as the Agreement on Agriculture.

2. At the same time, Korea is mindful of the other pillar of the WTO trading system, which is to ensure that "trade flows as smoothly, predictably, and freely as possible." Striking the right balance between pursuing public health objectives, on the one hand, and securing free trade, on the other, is important to resolving this dispute.

3. Indonesia employs what it says is a transparent and automatic import licensing regime that is consistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. However, Korea notes that under Indonesia's regulations, applications for import approvals can only be submitted when certain strict restrictions are met. Such restrictions include ownership of storage capacity and transportation equipment, and a six month window from the time of harvest to import fresh horticultural products. We ask the Panel to consider, when reviewing Indonesia's claim that its import licensing regime is transparent, automatic and WTO-consistent, the practicality and feasibility for applicants to meet these requirements.

4. Indonesia states that the reference price for chillies and shallots, which prohibits the importation of these products when the market price in Indonesia falls below the threshold price, has little or no impact on the issuance of Horticulture Product Import Recommendations (HPIRs), and accordingly falls outside the scope of Article 4.2 of the Agreement on Agriculture. In this regard, the Panel needs to once again make a factual determination on what effect the reference price has in determining the import quantity of chillies and shallots into Indonesia. Korea's assessment is that the reference price requirement acts not only as an outright import ban when prices are low, but also as a trade deterrent and source of uncertainty for importers when prices are above the threshold.

5. Additionally, Indonesia states that the requirement it imposes on importers to indicate the port of entry is hardly onerous – and thus falls outside the ambit of Article 4.2 of the Agriculture Agreement. Indonesia argues that importers are free to choose among multiple designated ports. However, our experience is that the relevant measure, the Ordinance of the Ministry of Agriculture (No.42/Permatan/OT.140/6/2012) issued on September 2012, has significantly reduced the number of available ports of entry – from the previous eight to the current three, in addition to one airport. The Ordinance has also resulted in strengthened inspections and the adoption of a quota system at these ports of entry.

6. We agree with the European Union that Article XI:1 of the GATT 1994 does not bar any and every condition that burdens or negatively impacts imports. At the same time, previous findings of the Appellate Body have stated that a measure may be in violation of Article XI:1 of the GATT even absent numerical limits on imports, such as when competitive opportunities for imported products have been adversely impacted. In this case, Korea believes that the detrimental effects of Indonesia's measures on imports leave little room for ambiguity or doubt as to whether any threshold set by Article XI:1 of the GATT has been met.

7. In sum, we consider that the cumulative effects of Indonesia's measures at issue – the limited time windows within which importers can apply for import permits, the restriction of port of entry options for importers, the requirement to own storage capacity, the reference price system – rise to the level of placing what are effectively quantitative restrictions on imports. This, we believe, violates Article XI:1 of the GATT 1994 and, in turn, Article 4.2 of the Agreement on Agriculture.

ANNEX D-8

EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. THE GATT 1994 ARTICLE XI:1 AND FIXED LICENCE TERMS

1. There is apparently no disagreement between the Parties to the dispute that the term "restriction" in the GATT 1994 Article XI:1 must be interpreted as something that has a "*limiting effect*", which has also been confirmed by numerous panels.[1] Furthermore, the Parties seem to agree that the only measures excluded from the scope of the provision are those that take the form of "duties, taxes, or other charges".[2]

2. Indonesia states in its first written submission that "[m]easures are 'instituted or maintained' by a Member when they are the direct result of government action, and not dictated by the actions of private parties".[3] Indonesia appears to perceive that the Complainants argue that importers may not identify their own terms of importation in their import licence in line with the GATT 1994 Article XI:1.[4] According to Indonesia, such "self-imposed terms of importation" are not measures "instituted or maintained" by Indonesia, which is one of the requirements for something to qualify as a restriction within the meaning of Article XI:1.[5] Indonesia's argument appears to rely on the fact that the regime provides that importers initially define the terms by setting out in their import licence applications the specific type of products to be imported, the country of origin of the products, and the port of entry through which the products will enter Indonesia. In Norway's view, this appears to be a misconstruction of the Complainants' arguments, and not pointing to the *measure* at issue.

3. As Norway reads the first written submissions of New Zealand and the United States respectively, their argument is that the fact that the licence terms, as set out in the Horticultural Product Import Recommendations (RIPHs) and Import Approvals, are *fixed*, and *may not be altered* during a semester that constitutes the restriction as any derogation from these terms is prohibited.[6] In this regard, it is important to bear in mind that both the RIPHs and Import Approvals are issued with a validity period of six months. As stressed by the Complainants, previous panels have found that measures imposing the same kind of limits as those found in Indonesia's import regime violate GATT 1994 Article XI:1.[7] E.g., the panel in *Colombia - Ports of Entry* concluded that restrictions limiting imports from Panama to two ports of entry in Colombia limit "competitive opportunities", and consequently had a limiting effect on imports arriving from Panama contrary to Article XI:1.[8] Furthermore, in *India – Autos*, the panel found that a measure which in reality has the consequence that an importer would not be "free to import [as much] as he otherwise might" constituted a restriction.[9] Hence, Norway agrees with the Complainants that the fact that the importers are prevented from responding to market fluctuations and other factors that normally affect importation during the validity periods, as well as taking into consideration factors related to importation that they did not predict at the start of the validity period, will have a limiting effect on trade. The measure challenged is therefore not "*private parties determining import the terms of import licences*, as put by Indonesia,[10] but rather the measure limiting what importers may import.

4. The importers being "free to alter their terms of importation from one license application to the next"[11] does not change the fact that this limitation has a limiting effect in a set semester of

[1] See, e.g. Appellate Body Reports, *China - Raw Materials*, para. 319; *Argentina - Import Measures*, para. 5.217.
[2] New Zealand's First Written Submission, para. 207; United States' First Written Submission, para. 142; Indonesia's First Written Submission, paras. 118-120.
[3] Indonesia's First Written Submisson, para. 119.
[4] Indonesia's First Written Submission, para. 137.
[5] Indonesia's First Written Submission, para. 138.
[6] New Zealand's First Written Submission, para. 221; United States' First Written Submission, para. 161.
[7] New Zealand's First Written Submission, para. 227; United States' First Written Submission, paras. 165-166.
[8] Panel Report, *Colombia - Ports of Entry*, para. 7.274.
[9] Panel Report, *India – Autos*, para. 7.320.
[10] Indonesia's First Written Submission, para. 138.
[11] Indonesia's First Written Submission, para. 139.

six months. Moreover, one must also bear in mind that import opportunities as regards availability of products etc. may change from semester to another. It not given that what a company has the "desire and ability to export"[12] at one point in time would also be desired and available many months later. In any event, this will be a restriction on trade contrary to Article XI:1 of the GATT 1994.

II. THE AVAILABILITY OF THE GATT 1994 TO ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

5. From the outset, the chapeau of the GATT 1994 Article XX explicitly refers back to the GATT itself, by underlining that "nothing in this Agreement shall be construed to prevent the adoption or enforcement" of the specific measures listed in the provision. However, the Appellate Body has held that Article XX could be invoked as a defence in relation to non-GATT provisions as well.[13]

6. Certain covered agreements contain a cross-reference to Article XX, such as the TRIMS Agreement, which explicitly incorporates the right to invoke all exceptions of the GATT 1994. In this regard, Norway notes that the panel in *Raw Materials* stated that "the legal basis for applying Article XX exceptions to TRIMs obligations is the text of the incorporation of the TRIMs Agreement, not the text of Article XX of the GATT 1994".[14] Other covered agreements include their own exceptions or provide for their own flexibilities, such as the GATS, TRIPS, the TBT Agreement and the SPS Agreement.

7. In its first written submission, Indonesia invokes Article XX of the GATT 1994 as an exception to the Agreement on Agriculture Article 4.2.[15] According to Indonesia, this interpretation was confirmed by the panel in *Chile – Price Band Systems*.

8. WTO case law provides limited guidance as regards the relationship between Article XX of the GATT 1994 and the Agreement on Agriculture, and Norway would welcome clarifications from the Panel on this issue. It is also a matter of importance as both Article XI of the GATT and Article 4.2 of the Agreement on Agriculture deal with quantitative restrictions.

9. We note that the Agreement on Agriculture contains neither general exceptions clauses nor a cross-reference to the GATT 1994 exceptions as in the TRIMS Agreement. We agree with Indonesia that footnote 1 to Article 4.2 provides guidance on the scope of the article. However, we do not necessarily read the footnote as providing for Article XX being a *legal basis* for an exception that a WTO Member may invoke *as such* to justify violations of Article 4.2. In *Chile – Price Bands*, the panel referred to footnote 1 of Article 4.2 as "excluding from the scope of Article 4.2 those measures which Members are allowed to maintain in accordance with the provisions in GATT 1994 laying down exceptions to the general obligations of GATT 1994"[16]. In light of this, it is in our view possible to interpret footnote 1 to clarify the flexibilities that exist in Article 4.2 itself. As measures covered by the exceptions provisions of the GATT 1994 are *excluded from the scope* of Article 4.2, Article 4.2 does not impose an obligation for Members not to resort to such measures. In other words, such measures would therefore not constitute a violation of Article 4.2.

III. THE PRINCIPLE OF JUDICIAL ECONOMY

10. Indonesia requests that the Panel should exercise judicial economy with respect to claims under Article XI:1 of the GATT 1994 if it finds no violation of Article 4.2 of the Agreement on Agriculture.[17] The Appellate Body has noted that the principles of judicial economy "allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute".[18] From a systemic perspective, we acknowledge that exercising judicial economy can

[12] Panel Report, *India – Autos*, para. 7.268.
[13] See, e.g., Appellate Body Report, *China – Publications and Audiovisual Products,* WT/DS363/AB/R, para 233.
[14] Panel Report, *Raw Materials*, para. 7.153.
[15] Indonesia's First Written Submission, paras. 61-62.
[16] Panel Report, *Chile – Price Band Systems*, para. 7.71.
[17] Indonesia's First Written Submission, paras. 45-46.
[18] Appellate Body Report, *Canada – Wheat Exports and Grain Exports*, para. 133.

also be a useful tool in addressing challenges related to the comprehensive delays and heavy workload that the WTO dispute settlement system is facing.

11. However, as stated by the Appellate Body, "[t]he principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute'".[19] Hence, the doctrine of judicial economy does not permit a panel to refrain from addressing claims when this would lead to only a partial resolution of the matter. Such failure would constitute false exercise of judicial economy and an error of law.[20] Like Brazil in its third party submission,[21] Norway points out that the difference in scope between Article XI of the GATT 1994 and Article 4.2 of the Agreement on Agriculture may require different assessments by a Panel of the two provisions.

[19] Appellate Body Report, *Australia – Salmon*, para. 223.

[20] Appellate Body Report, *Australia – Salmon*, para. 223; Appellate Body Report, *Canada – Wheat Exports and Grain Exports*, para. 133.

[21] Brazil's Third Party Submission, para. 6.

ANNEX D-9

EXECUTIVE SUMMARY OF THE ARGUMENTS OF PARAGUAY[*]

1. Paraguay agradece al Grupo Especial la oportunidad de presentar sus puntos de vista en la presente controversia.

2. La decisión de participar en calidad de tercera parte resulta principalmente del interés sistémico que tiene el Paraguay en cuanto a una correcta interpretación de las disposiciones invocadas por las partes reclamantes.

3. En ese sentido y considerando el impacto de las medidas impugnadas sobre una gran cantidad de productos agrícolas, que constituyen además las principales exportaciones del Paraguay, nos referiremos, en primer lugar, al Artículo XI del GATT. En segundo lugar, comentaremos brevemente la decisión del grupo especial sobre el pedido de ampliación de los derechos de los terceros.

4. En lo relativo al Artículo XI del GATT, nos gustaría insistir en el rol crucial que cumple esta disposición para el sistema multilateral de comercio, ya que establece una prohibición general en cuanto al uso de restricciones cuantitativas, debido a los efectos negativos que tienen este tipo de medidas, principalmente para los bienes agrícolas, al crear sistemas poco transparentes y con efectos distorsivos para el comercio.

5. Con el fin de asegurar una correcta interpretación y aplicación del Artículo XI del GATT, la jurisprudencia de la OMC ha establecido ciertos parámetros que nos gustaría recordar, tal como la interpretación amplia del término "restricción", el hecho de que no es necesario demostrar una disminución real de las importaciones, así como la obligación de salvaguardar las oportunidades de competencia de los productos importados.

6. El enfoque adoptado por grupos especiales en el pasado se basó además en demostrar una infracción del Artículo XI del GATT teniendo en consideración el diseño, la estructura y la arquitectura de las medidas impugnadas.

7. Desde la perspectiva del Paraguay, estos son algunos de los elementos que deberían guiar al grupo especial encargado de examinar la presente disputa.

8. Con respecto al pedido hecho el 2 de diciembre de 2015, referente a la ampliación de los derechos de las terceras partes, Paraguay manifiesta su adhesión a los motivos expuestos por Australia, Brasil, Canadá y Unión Europea, tanto en su calidad de productor y exportador de bienes agrícolas, como por su condición de País en Desarrollo Sin Litoral, que aboga a favor de mejoras en acceso a los mercados y la aplicación de medidas en conformidad a las obligaciones resultantes de los acuerdos OMC.

9. La aceptación de esta solicitud hubiese representado una oportunidad importante para equilibrar los derechos de las partes con la efectiva y significativa participación de los terceros, con miras a permitir procedimientos de solución de diferencias más eficientes, sin incurrir en cargas adicionales para ninguno de los involucrados. Particularmente para Paraguay, puesto que también manifestamos nuestro interés de participar como tercera parte en la disputa DS 484: Indonesia — Medidas relativas a la importación de carne de pollo y productos de pollo, y estamos evaluando participar en otros casos en los que tengamos un interés sustancial.

[*] Original Spanish. Paraguay's oral statement is being considered as its executive summary.

ANNEX D-10

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINESE TAIPEI

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, taking into account the restrictive nature of Indonesia' import measures for certain fresh horticultural products and in support of the relevant claims made by the Complainants in their first written submissions, considers Indonesia's import licensing measures to be inconsistent with (1) Article 4.2 of the Agriculture Agreement, (2) Article XI:1 of the GATT 1994, (3) Article III:4 of the GATT 1994, and (4) Article 3.2 of the Import Licensing Agreement.

ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

2. Article 4.2 of the Agreement on Agriculture prohibits Members from maintaining, resorting to, or reverting to any measures of the kind that have been required to be converted into ordinary customs duties. This obligation, as the Appellate Body *Chile - Price Band System*[1] explained, means that any measures that were required to be converted from the date of entry into force of the WTO Agreement but were not, would be in violation of Article 4.2.

3. Thus, we are of the view that, as long as Indonesia's restrictive import licensing measures for fresh horticultural products have not been included in its Tariff Schedules Section I-B of Part I, they should be considered in violation of Article 4.2 of the Agriculture Agreement.

ARTICLE XI:1 OF THE GATT 1994

4. Article XI:1 of GATT 1994 prohibits "prohibitions or restrictions" made effective through quotas, import or export licenses or other measures. In the present case, we consider Indonesia's relevant import licensing measures applying to certain fresh horticultural products to be inconsistent with GATT 1994 Article XI:1 for the following reasons:

5. First, the import licensing measures constitute trade "restrictions" as they add unreasonable burdens to the importers and effectively limit importation of the products. Previous case law reinforcing this observation demonstrates that the wording of Article XI:1 is comprehensive and the scope of measures referred to in Article XI:1 is very broad.[2]

6. Second, it has been established by WTO precedents[3] that, even if a discretionary import licensing measure does not contain any specific restrictive wordings on import volume or value, such a measure may still constitute a *de facto* restriction. In this case, Indonesia permits imports of certain fresh horticultural products only when, and to the extent that, domestic supply of those products is deemed insufficient to meet the demand. Otherwise, the imports are prohibited.[4] Thus, Indonesia's measure clearly constitutes a restriction on imported products, even without explicit restrictive wordings.

7. Finally, Indonesia, through the import licensing measures, imposes restrictions, *inter alia*, on the port of entry through which the products can be imported. In addition, Indonesia limits the import licenses' application windows and the length of their effective periods. All of these measures have significantly increased the importers' cost of operation, as well as negatively

[1] Appellate Body Report, *Chile — Price Band System*, paras 201, 206, 207.

[2] Panel Report, *India – Quantitative Restrictions*, para. 5.128; Panel Report, *India – Autos*, paras. 7.269-70; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.261; see also Appellate Body Reports, *Argentina – Import Measures*, para. 5.217; Panel Reports, *Argentina – Import Measures*, para. 6.455.

[3] Panel Report, *India – Quantitative Restrictions*, paras. 5.130-5.131. (emphasis added); Panel Report, *Argentina – Hides and Leather*, para. 11.17; GATT Panel Report, *EEC–Import Restrictions*, para. 31; GATT Panel Report, *Japan –Semi-conductors*, para. 118.

[4] Article 36B(1) of the *Law of the Republic of Indonesia Number 18 of 2009 on Animal Husbandry and Animal Health Law (Animal Law) (Exhibit JE-4)*; Articles 14, 36(1), 36(2) and 36(3) of the *Law of the Republic of Indonesia Number 18 of 2012 Concerning Food (Food Law) (Exhibit JE-2)*; Articles 30 and 101 of the *Law of the Republic of Indonesia Number 19 of 2013 Concerning Protection and Empowerment of Farmers (Farmers Law) (Exhibit JE-3).*

impacting their competitiveness. The same conclusion was reached by the panel in *Colombia – Ports of Entry.*[5]

ARTICLE III:4 OF THE GATT 1994.

8. Next, we consider Indonesia to be maintaining an import regime that accords less favorable treatment to imported fresh horticultural products than to domestic like products. For one, importers are required to own storage facilities of appropriate capacity, and may only import volumes commensurate with that storage capacity.[6] Furthermore, importers also have to comply with restrictions on the use, sale and distribution of the imported products.[7] There are no similar restrictive measures on domestic like products.

9. The precedents show that requirements that imported and domestic like products be treated differently, such as a dual retail system for imports and exports or a requirement for imported products to be distributed through in-state wholesalers, result in "treatment ... less favorable than that accorded to like products" from domestic producers, which is inconsistent with Article III:4.[8] Therefore, we are of the view that these measures create unfair conditions for imports, and are therefore inconsistent with Article III:4 of the GATT 1994.

ARTICLE 3.2 OF THE AGREEMENT ON IMPORT LICENSING PROCEDURES

10. In its first written submission,[9] Indonesia argued that the import licensing regime is an automatic one because any importer that meets the clearly defined legal requirements would be automatically granted an import license, which makes the measures at issue fall outside the scope of Article 3.2 of the Agreement on Import Licensing Procedures. However, under these measures, certain substantial requirements and restrictions are imposed on the importers as pre-conditions to apply for Ministry of Agriculture ("MOA") Recommendations and Import Approval. For example, importers are required to demonstrate storage and transportation capacities. They are also required to comply with certain requirements such as restrictions on the use, sale and distribution of the imported products. Importers not meeting these requirements will not be able to apply for MOA Recommendations and Import Approval. Furthermore, the granting of MOA Recommendations and Import Approval is dependent on the Indonesian authorities' determination on whether all of these requirements are satisfied. Based on the above, we consider all of these prerequisite requirements as constituting a "non-automatic" import licensing procedure, resulting in the prohibition of and restrictions on imports.

11. Moreover, to establish a violation of Article 3.2, the *EC – Poultry*[10] confirms that there must be a causal link between trade distorting effect and the licensing procedures and requirements, and in this case we can see that fresh horticultural trade distortive effects are clearly attributable to Indonesia's import licensing procedures.

12. Lastly, Article 3.2 requires that a non-automatic licensing shall be no more administratively burdensome than "absolutely necessary" to administer the measure. Since the subject import licensing procedures are for quantitative restriction purposes, as the panel noted in *EEC – Import Restrictions*,[11] we believe that Indonesia's import licensing procedures are not consistent with the requirement of "absolutely necessary", as provided under Article 3.2 of the Agreement on Import Licensing Procedures.

CONCLUSION

13. In conclusion, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu supports New Zealand and the United States in their claims against Indonesia's import regime, and

[5] Panel Report, *Colombia – Ports of Entry*, paras. 7.273-75.
[6] Article 8(e) of MOT 16/2013 (Exhibit JE-8), Article 8(2)(c) of MOA 86/2013 (Exhibit JE-15), Article 13(4) of MOT 40/2015(Exhibit JE-11).
[7] Articles 7 and 15 of MOT 16/2013 (Exhibit JE-8).
[8] GATT Panel Report, *United States —Malt Beverages,* para 5.32; See also Appellate Body Report, *Korea – Beef (US)*, para 186(e).
[9] Indonesia's first written submission, paras. 175-176.
[10] Appellate Body Report, *EC - Poultry*, para 121.
[11] Panel Report, *EC —Tariff Preferences*, para 7.211.

submits that its licensing measures for fresh horticultural products are inconsistent with Article 4.2 of the Agreement on Agriculture, Article XI:1 of the GATT 1994, Article III:4 of the GATT 1994 and Article 3.2 of the Agreement on Import Licensing Procedures.[12]

[12] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's third party submission, para 22.

ANNEX E

IMPORT LICENSING PROCEDURES FOR HORTICULTURAL PRODUCTS AND FOR ANIMALS AND ANIMAL PRODUCTS

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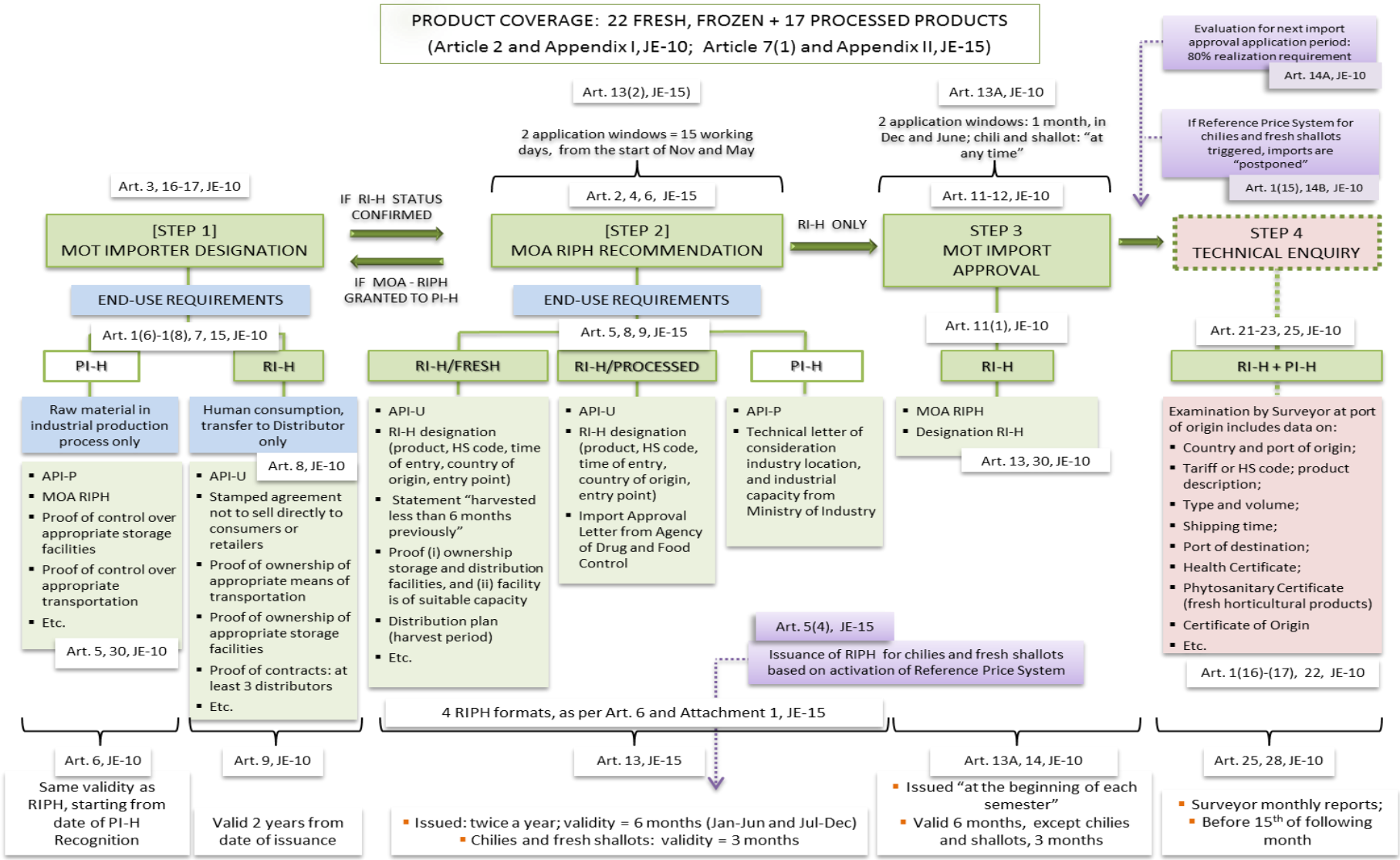
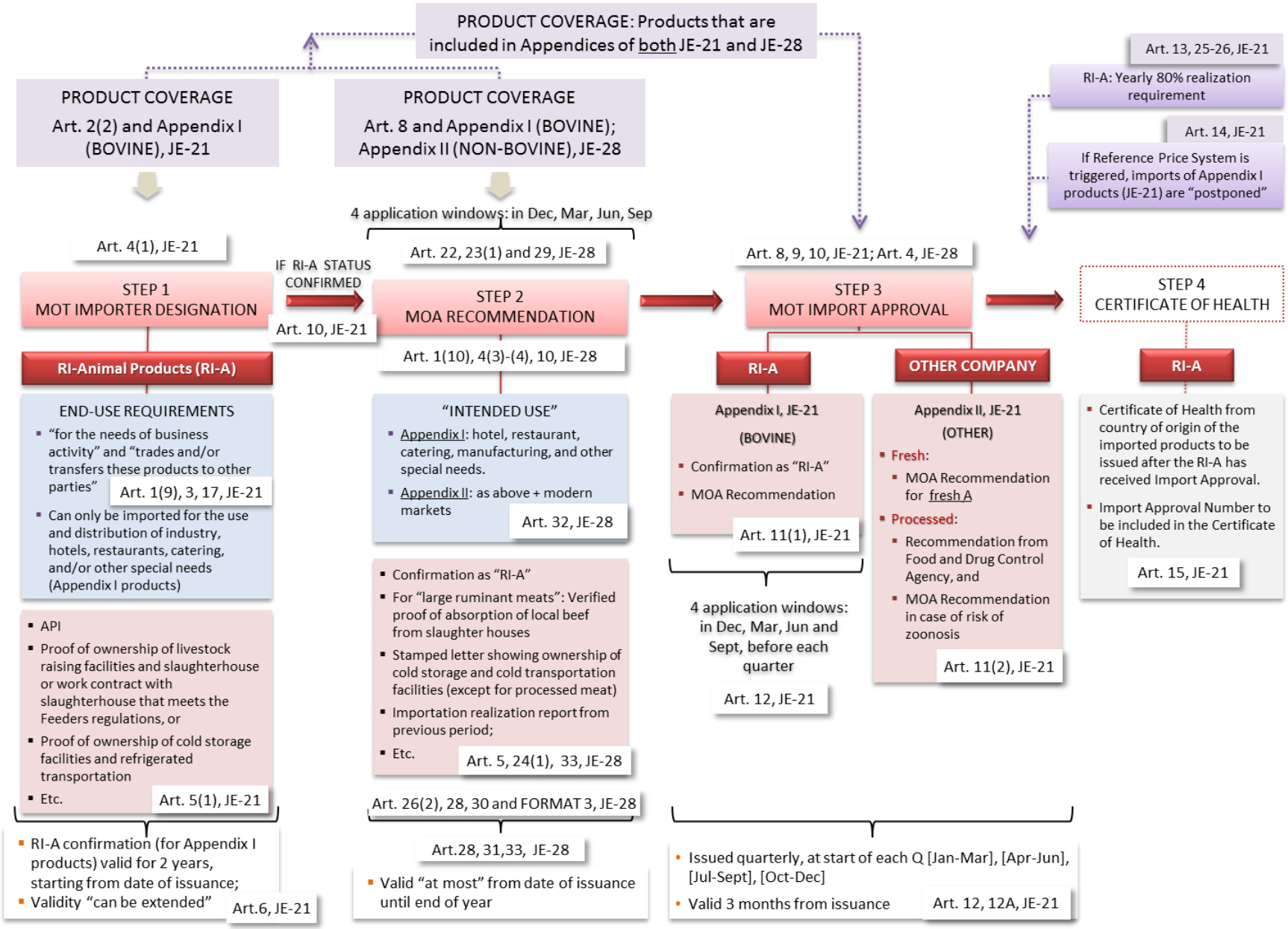
ANNEX E-1



Sources: Based on MOT 16/2013 as amended by MOT 47/2013 (JE-10) and MOA 86/2013 (JE-15).

ANNEX E-2



Sources: Based on MOT 46/2013, as amended by MOT 57/2013 and MOT 17/2014 (JE-21); and MOA 139/2014, as amended by MOA 2/2015 (JE-28)