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INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS

REPORT OF THE PANEL

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Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97

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Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
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Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
Turkey – Rice	Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, p. 2151
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US – COOL	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Lamb	Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R, DSR 2001:IX, p. 4107
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755

Short Title	Full Case Title and Citation
US – Shrimp (Thailand) / US – Customs Bond Directive	Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008, DSR 2008:VII, p. 2385 / DSR 2008:VIII, p. 2773
US – Shrimp (Thailand)	Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R, DSR 2008:VII, p. 2539
US – Underwear	Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R, adopted 25 February 1997, as modified by Appellate Body Report WT/DS24/AB/R, DSR 1997:I, p. 31
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

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Canada – Provincial Liquor Boards (US)	GATT Panel Report, *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, DS17/R, adopted 18 February 1992, BISD 39S/27
EEC – Minimum Import Prices	GATT Panel Report, *EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, L/4687, adopted 18 October 1978, BISD 25S/68
Japan – Leather (US II)	GATT Panel Report*, Panel on Japanese Measures on Imports of Leather, L/5623,* adopted 15 May 1984, BISD 31S/94
Japan – Semi-Conductors	GATT Panel Report, *Japan – Trade in Semi-Conductors*, L/6309, adopted 4 May 1988, BISD 35S/116

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
ASEIBSSINDO	Indonesian association of horticultural product importers
Animal Law	Law of the Republic of Indonesia Number 18 of 2009 on Animal Husbandry and Animal Health
Animal Law Amendment	Law of the Republic of Indonesia Number 41 of 2014 Concerning Amendment of Law Number 18 of 2009 Concerning Husbandry and Animal Health
API	Importer Registration Number
API-U	Importer Registration Number for companies importing certain goods for trading purposes
API-P	Importer Registration Number for companies importing goods for their own consumption
BULOG	Indonesia's Logistics Agency
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Farmers Law	Law of the Republic of Indonesia Number 19 of 2013 Concerning Protection and Empowerment of Farmers
Food Law	Law of the Republic of Indonesia Number 18 of 2012 Concerning Food
GATT 1994	General Agreement on Tariffs and Trade 1994
Horticulture Law	Law of the Republic of Indonesia Number 13 of 2010 Concerning Horticulture
Import Licensing Agreement	Agreement on Import Licensing Procedures
INATRADE	Trade Licensing Services Using Electronic and Online System
INSW	Indonesia National Single Window
UPP	Trade Services Unit
MOA	Ministry of Agriculture
MOA 86/2013	Regulation of the Minister of Agriculture Number 86/Permentan/OT.140/8/2013 Concerning Import Recommendation of Horticulture Products, of 30 August 2013
MOA 139/2014, as amended	Regulation of the Minister of Agriculture Number 139/Permentan/PD.410/12/2014 Concerning Importation of Carcasses, Meats, and/or Their Processed Products into the Territory of the Republic of Indonesia, of 24 December 2014 amended by Regulation of the Minister of Agriculture Number 02/Permentan/PD.410/1/2015, of 22 January 2015
MOA Recommendation	Recommendation from the Ministry of Agriculture
MOT	Ministry of Trade
MOT 16/2013, as amended	Regulation of the Minister of Trade Number 16/M-DAG/PER/4/2013 Concerning Provisions on the Import of Horticultural Products, of 22 April 2013, amended by Regulation of the Minister of Trade Number 47/M-DAG/PER/8/2013 Concerning Amendment of Regulation of the Minister of Trade Number 16/M-DAG/PER/4/2013, of 30 August 2013
MOT 46/2013, as amended	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, of 30 August 2013, amended by Regulation of the Minister of Trade No. 57/M-DAG/PER/9/2013, of 26 September 2013 and by Regulation of the Minister of Trade 17/M-DAG/PER/3/2014, of 27 March 2014
MUI	Indonesian Council of Ulama
PI	Producer Importer of Horticultural Products
REIPPT	Export Import Recommendation for Certain Agricultural Products
RI	Registered Importer of Horticultural Products

Abbreviation	Description
RIPH	Horticultural Products Import Recommendation (*Rekomendasi Impor Produk Hortikultura)*
SPS Agreement	Agreement on Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade

1 INTRODUCTION

1.1 Complaints by New Zealand and the United States

1.1. On 8 May 2014, New Zealand and the United States (the co-complainants) requested consultations with Indonesia pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Article 19 of the Agreement on Agriculture, Article 6 of the Agreement on Import Licensing Procedures (Import Licensing Agreement), and Articles 7 and 8 of the Agreement on Preshipment Inspection concerning certain measures imposed by Indonesia on the importation of horticultural products and animals and animal products into Indonesia.[1]

1.2. The co-complainants held consultations with Indonesia in Jakarta on 19 June 2014 but failed to resolve the dispute.[2]

1.2 Panel establishment and composition

1.3. On 18 March 2015, the co-complainants requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[3] At its meeting on 20 May 2015, the Dispute Settlement Body (DSB) established a single panel pursuant to the requests of the co-complainants, in accordance with Article 9.1 of the DSU.[4]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by New Zealand in document WT/DS477/9, and the United States in document WT/DS478/9, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. On 28 September 2015, the co-complainants requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. On 8 October 2015, the Director-General accordingly composed the Panel as follows:

Chairman: Mr Cristian Espinosa Cañizares

Members: Mr Gudmundur Helgason

Ms Angela María Orozco Gómez

1.6. Argentina; Australia, Brazil, Canada, China, the European Union, India, Japan, Korea, Norway, Paraguay, Singapore, Chinese Taipei, and Thailand reserved their rights to participate in the panel proceedings as third parties.[6]

1.3 Panel proceedings

1.3.1 General

1.7. On 28 October 2015, after consultation with the parties, the Panel adopted its Working Procedures[7] and timetable. The timetable was subsequently revised on 12 December 2015.

[1] New Zealand's request for consultations (WT/DS477/1); United States' request for consultations (WT/DS478/1).
[2] New Zealand's request for the establishment of a panel (WT/DS477/9) (hereafter New Zealand's Panel Request); United States' request for the establishment of a panel (WT/DS478/9) (hereafter United States' Panel Request).
[3] New Zealand's Panel Request; United States' Panel Request.
[4] *See* the Minutes of the Meeting of the DSB held in the Centre William Rappard on 20 May 2015 WT/DSB/M/361.
[5] WT/DS477/10, WT/DS478/10, para. 2.
[6] WT/DS477/10, WT/DS478/10, para. 5.
[7] *See* the Working Procedures of the Panel in Annex B.

1.8. The Panel held a first substantive meeting with the parties on 1 and 2 February 2016. A session with the third parties took place on 2 February 2016. The Panel held a second substantive meeting with the parties on 13 and 14 April 2016.

1.9. On 26 May 2016, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 12 July 2016. The Panel issued its Final Report to the parties on 5 July 2016.

1.3.2 Request for enhanced third-party rights

1.10. On 2 December 2015, Australia, Brazil, Canada and the European Union jointly requested the Panel to exercise its discretion under Article 12.1 of the DSU to modify its Working Procedures. The requesting third parties asked the Panel to grant them additional rights to those provided in Article 10 of the DSU, in particular: (i) "to receive an electronic copy of all submissions and statements of the parties, including responses to Panel questions, up to the issuance of the interim report"[8]; and (ii) "to be present for the entirety of all substantive meetings of the Panels with the parties".[9]

1.11. Responding to the Panel's invitation to present their views on this request, both the United States[10] and Indonesia[11] opposed the granting of enhanced rights to third parties in these proceedings. New Zealand supported the request.[12]

1.12. On 20 January 2016, the Panel issued a communication where it declined Australia, Brazil, Canada and the European Union's joint request for enhanced third party rights in these proceedings.

1.3.3 Request for a preliminary ruling

1.13. 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 DSU.[13]

1.14. 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. 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. Only Australia and Brazil took advantage of this opportunity and submitted to the Panel their comments on Indonesia's preliminary ruling request on 6 January 2016.

1.15. In the light of Indonesia's wish that the Panel rule on its request before the first substantive meeting, the Panel decided to communicate its conclusions on Indonesia's request on 27 January 2016, as early as possible before its first substantive meeting. At that time, the Panel indicated that, following prior practice[14] and in the interest of the efficiency of the 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.[15] The Panel issued its preliminary ruling to the parties, with a copy to the third parties, on 5 July 2016. The Panel's preliminary ruling of 5 July 2016 is an integral part of this panel Report and is included in Annex A-1.

2 FACTUAL ASPECTS

2.1 Introduction

2.1. The co-complainants challenged 18 separate measures that Indonesia imposed on the importation of horticultural products, animals and animal products. Most of these measures

[8] Joint letter from the requesting third parties dated 2 December 2015.
[9] Joint letter from the requesting third parties dated 2 December 2015.
[10] Letter from the United States dated 11 December 2015, para. 13.
[11] Letter from Indonesia dated 14 December 2015.
[12] Letter from New Zealand dated 11 December 2015, para. 2.
[13] Indonesia's request for a preliminary ruling, para. 1.
[14] *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.
[15] Conclusions of the Preliminary Ruling by the Panel, 27 January 2016, para. 1.3.

constituted distinct elements or components of Indonesia's import licensing regimes for horticultural products, on the one hand, and animals and animal products, on the other. Two of the challenged measures concern the import licensing regimes "as a whole", defined as these distinct elements operating in conjunction. In addition, the co-complainants challenged Indonesia's requirement conditioning the importation of horticultural products and animals and animal products on Indonesia's determination of the sufficiency of domestic production to fulfil domestic demand.

2.2. In this section of the Report, the Panel will describe Indonesia's legal framework for the importation of horticultural products, animals and animal products; the relevant import licensing application and issuance procedures and the measures at issue in this dispute.

2.3. The Panel notes that the parties disagree on a number of factual issues. To the extent that it is necessary for the Panel to resolve those disputed factual issues, it will do so in its Findings.

2.2 Indonesia's legal framework for the importation of horticultural products, animals and animal products

2.2.1 Overarching legislative framework

2.2.1.1 Food Law

2.4. The Law of the Republic of Indonesia Number 18 of 2012 Concerning Food (Food Law)[16] deals with national food production, planning and management. It emphasizes the importance of sovereignty[17] and independence[18] in food policy-making. While instituting an overarching principle of sufficiency of domestic production, its provisions define the scope and objectives of, *inter alia*, national food production, management, planning, availability, affordability, distribution, consumption and trade. Indonesia's Food Law also delineates the role of government institutions in managing food supply and distribution as well as price stabilization.[19] It prioritizes domestic food production and national food reserves as the main sources of food supply, with importation to be considered only in case of food shortages.[20] It enshrines the government's overall responsibility in formulating food import regulations that are supportive of sustainable farming and foster farmer and consumer welfare.[21] The Food Law also addresses the implementation and monitoring of halal requirements.[22]

2.2.1.2 Farmers Law

2.5. The Law of the Republic of Indonesia Number 19 of 2013 Concerning Protection and Empowerment of Farmers (Farmers Law)[23] aims at assisting farmers to cope with numerous production and marketing challenges (infrastructure, risk-management, capacity-building, finance, etc.). Indonesia's Farmers Law applies to agricultural commodities[24] and echoes the fundamental principles of sufficiency and prioritization of domestic agricultural production (and consumption), while citing price stabilization objectives. To enforce adherence to the sufficiency principle, the Farmers Law prohibits the importation of agricultural commodities when domestic supply or government food reserves are deemed sufficient.[25] In order to meet national food requirements, "import arrangements" must be planned by the government "according to the harvest season and/or domestic consumption requirement", with relevant inter-ministerial coordination.[26] The Farmers Law further requires all agricultural imports to come into Indonesia through government-stipulated entry points.[27] It broadly establishes import licensing procedures for agricultural products[28] as well as stipulating criminal penalties for not conforming to the

[16] Exhibits JE-2 and IDN-6.
[17] Article 1(2) of the Food Law, Exhibit JE-2.
[18] Article 1(3) of the Food Law, Exhibit JE-2.
[19] *See*, for example, Articles 13 and 55-57 of the Food Law, Exhibit JE-2.
[20] Articles 14 and 36 of the Food Law, Exhibit JE-2.
[21] Article 39 of the Food Law, Exhibit JE-2.
[22] *See*, for instance, Article 69 (food safety); Article 95 (general implementation of the national guarantee system); Articles 97 and 101 (labelling); or Article 105 (advertising) of the Food Law (Exhibit JE-2).
[23] Exhibits JE-3 and IDN-7.
[24] Article 1(5) of the Farmers Law, Exhibit JE-3.
[25] Article 30 of the Farmers Law, Exhibit JE-3.
[26] Article 15 of the Farmers Law, Exhibit JE-3.
[27] Articles 25, 28 and 29 of the Farmers Law, Exhibit JE-3.
[28] Articles 31(1) to (3) of the Farmers Law, Exhibit JE-3.

designated entry points[29] and for importing agricultural commodities when domestic supply is sufficient.[30]

2.2.1.3 Horticulture Law

2.6. The Law of the Republic of Indonesia Number 13 of 2010 Concerning Horticulture (Horticulture Law)[31] lays down general rules regarding planning, development, research, finance, investment, marketing (including distribution) and imports. Indonesia's Horticulture Law also enshrines the principle of sufficiency and prioritization of domestic production with respect to horticultural products.[32] In addition to food safety, quality, packaging and labelling requirements, importation under the Horticulture Law is subject to criteria such as the "availability of domestic horticultural products" and the "established production and consumption targets".[33] It also contains the generally applicable import licensing requirements (namely, a recommendation from the Ministry of Agriculture; an import permit from the Ministry of Trade; and the mandated use of government-designated entry points[34]) subject to the issuance of supplementary specific regulations.[35] It provides that the Minister of Agriculture determines the types of horticultural products whose exit and/or entry from and to Indonesia's territory "requires permit".[36] This Law makes the Government and/or local governments along with business actors collectively responsible for balancing national supply and demand for horticultural products, *inter alia* by controlling imports and exports.[37]

2.2.1.4 Animal Law

2.7. The Law of the Republic of Indonesia Number 18 of 2009 on Animal Husbandry and Animal Health (Animal Law)[38] as revised by 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)[39] constitutes the legal foundation for the organization of husbandry and preservation of animal health (i.e. prevention of animal disease and zoonosis). Indonesia's Animal Law applies to animals[40] and animal products.[41] This Law mirrors the concepts of food sovereignty, sufficiency, independence, and food security that are found in the above Laws.[42] As far as manufacturing is concerned, the Animal Law prioritizes "domestic raw material utilization".[43] It also specifically regulates the importation of animals and animal products. Importation is only permitted if "domestic production and supply of Livestock and Animal Product has not fulfil[ed] public consumption".[44] The Animal Law requires central and regional government agencies to ensure that all animal products, whether locally produced or imported, are halal and comply with quality and safety regulations during the entire supply chain.[45] Only animal products that have been certified as halal[46] and safe may be distributed.[47] Additionally, processed food of animal origin "must comply with the provision of the regulating legislation in the food sector".[48] The Ministry of Trade is the competent body to issue import licences for animal products (fresh and

[29] Article 100 of the Farmers Law, Exhibit JE-3.
[30] Article 101 of the Farmers Law, Exhibit JE-3.
[31] Exhibits JE-1 and IDN-5.
[32] Article 1 of the Horticulture Law, Exhibit JE-1. For instance, it provides that "big" processors "shall be obligated to absorb local horticultural products" (Article 71). The prioritization of domestic production equally applies when marketing and promotion services are extended to horticultural products (Articles 74(2) and 92(1)).
[33] Article 88(1) of the Horticulture Law, Exhibit JE-1.
[34] Articles 88(2)-(3) of the Horticulture Law, Exhibit JE-1.
[35] Article 88(5) of the Horticulture Law, Exhibit JE-1.
[36] Article 89(2) of the Horticulture Law, Exhibit JE-1.
[37] Article 90 of the Horticulture Law, Exhibit JE-1.
[38] Exhibits JE-4 and IDN-13.
[39] Exhibit JE-5.
[40] Article 1(3) of the Animal Law Amendment, Exhibit JE-5.
[41] Article 1(13) of the Animal Law Amendment, Exhibit JE-5.
[42] See, for instance, para.(a) of the Preamble and Article 1(2) of the Animal Law Amendment, Exhibit JE-5. *See also* Article 76(4) of the Animal Law, Exhibit JE-4.
[43] Article 37(1) of the Animal Law Amendment, Exhibit JE-5.
[44] Article 36B(1) of the Animal Law Amendment, Exhibit JE-5
[45] Articles 58(1)-(3) of the Animal Law Amendment, Exhibit JE-5.
[46] Specific slaughtering guidelines are provided for in Article 61 of the Animal Law, Exhibit JE-4.
[47] Articles 58(4)-(5) of the Animal Law Amendment, Exhibit JE-5.
[48] Article 58(8) of the Animal Law Amendment, Exhibit JE-5.

processed), after the applicants have obtained a "recommendation" from the relevant governmental agencies.[49]

2.2.2 Importation-related regulations adopted by Indonesia's Ministries of Trade and Agriculture in force at the time of the establishment of the Panel

2.8. The Horticulture, Animal, Food and Farmers Laws provide the basis and rationale for the import licensing regimes for horticultural products on the one hand, and animals and animal products on the other.[50] Although these two separate regimes share common features, the applicable importation rules and procedures differ and are set out in two distinct sets of regulations adopted by the Ministry of Trade and the Ministry of Agriculture: (i) MOT 16/2013, as amended[51], and MOA 86/2013[52] set out Indonesia's import licensing regime for horticultural products in force at the time of the establishment of the Panel[53]; and (ii) MOT 46/2013, as amended[54], and MOA 139/2014, as amended[55], set out Indonesia's import licensing regime for animals and animal products in force at the time of the establishment of the Panel.[56]

2.9. An element common to both regimes is that all importers of goods, whatever their nature, must obtain an importer registration number or API, which is further differentiated in two sub-categories, depending on the intended end-use of the goods being imported[57]; namely, API-U, which is granted only to companies importing certain goods for trading purposes[58]; and API-P, which is only delivered to companies importing goods for their own consumption and that are thus prohibited from trading or transferring such goods to other parties.[59]

2.2.2.1 Import licensing procedures for horticultural products

2.10. The import licensing application and issuance procedures that relate to certain horticultural products are described below. Annex E-1 contains a graphical representation of these procedures.

2.2.2.1.1 Application process and related requirements

2.11. Prior to importation, applicants must complete the following steps:

[49] Article 59 of the Animal Law Amendment, Exhibit JE-5.

[50] Specifically, Article 88 of the Horticulture Law (Exhibit JE-1), Article 36B of the Animal Law Amendment (Exhibit JE-5), Article 99 of the Farmers Law (Exhibit JE-3), and Article 40 of the Food Law (Exhibit JE-2), provide for the enactment of implementing regulations by the relevant government authorities.

[51] Regulation of the Minister of Trade Number 16/M-DAG/PER/4/2013 Concerning Provisions on the Import of Horticultural Products, of 22 April 2013 (MOT 16/2013), Exhibit JE-8, amended by Regulation of the Minister of Trade Number 47/M-DAG/PER/8/2013 Concerning Amendment of Regulation of the Minister of Trade Number 16/M−DAG/PER/4/2013, of 30 August 2013 (MOT 47/2013), Exhibit JE-9, (hereafter, MOT 16/2013, as amended), Exhibit JE-10.

[52] Regulation of the Minister of Agriculture Number 47/Permentan/OT.140/4/2013 Concerning Import Recommendation of Horticulture Products, of 19 April 2013 (MOA 47/2013) Exhibit JE-14, replaced by Regulation of the Minister of Agriculture Number 86/Permentan/OT.140/8/2013 Concerning Import Recommendation of Horticulture Products, of 30 August 2013 (MOA 86/2013), Exhibit JE-15.

[53] New Zealand's first written submission, para.71; United States' first written submission, para. 34; Indonesia's response to Panel question No. 90

[54] 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, of August 30 2013 (MOT 46/2013), Exhibit JE-18. MOT 46/2013 was amended by Regulation of the Minister of Trade No. 57/M−DAG/PER/9/2013, of 26 September 2013 (MOT 57/2013), Exhibit JE−19 and by Regulation of the Minister of Trade 17/M−DAG/PER/3/2014, of 27 March 2014 (MOT 17/2014) (hereafter MOT 46/2013, as amended), Exhibit JE-21.

[55] Regulation of the Minister of Agriculture Number 139/Permentan/PD.410/12/2014 Concerning Importation of Carcasses, Meats, and/or Their Processed Products into the Territory of the Republic of Indonesia, of 24 December 2014 (MOA 139/2014) (Exhibit JE-26). MOA 139/2014 was amended by Regulation of the Minister of Agriculture Number 02/Permentan/PD.410/1/2015, of 22 January 2015 (MOA 2/2015) (Exhibit JE-27), hereafter MOA 139/2014, as amended, Exhibit JE-28.

[56] New Zealand's first written submission, para. 20; United States' first written submission, para. 97; Indonesia's response to the Panel questions after the second substantive meeting, fn. 2.

[57] Article 2 of MOT 27/2012, Exhibit IDN-12. *See also* Indonesia's responses to Panel questions No. 11 and 21. The APIs are valid as long as companies remain in business and must be renewed every 5 years. Article 15 of MOT 27/2012, Exhibit IDN-12.

[58] Article 4 of MOT 27/2012, Exhibit IDN-12.

[59] Article 5 of MOT 27/2012, Exhibit IDN-12.

a. Obtain a "Horticultural Products" designation from the Ministry of Trade.[60] This designation differs depending on end-use: (i) If the applicant wishes to import horticultural products for *human consumption*, a designation as a Registered Importer of Horticultural Products (RI) must be obtained[61]; (ii) If the applicant wishes to use imported horticultural products as *raw materials in a production process*, a designation as a Producer Importer of Horticultural Products (PI) must be obtained[62];

b. Obtain a Horticultural Products Import Recommendation (*Rekomendasi Impor Produk Hortikultura* or RIPH) from the Ministry of Agriculture[63],

c. Obtain an Import Approval (*Surat Persetujuan Import*) from the Ministry of Trade[64], and

d. Undergo a technical inquiry[65], carried out by a Surveyor[66] at the port of origin.

2.12. The above steps can differ in sequence, depending on the intended use of the imported horticultural product. If the product is destined for *human consumption*, the applicant needs to obtain the RI recognition first. Once registered, the RI may proceed to request an RIPH, followed by an Import Approval.[67] If the product is intended to be used as *raw material in a production process*, the applicant needs to obtain the RIPH first. Only then may the applicant seek recognition as a PI.[68]

2.2.2.1.2 Recognition either as an RI or PI by the Ministry of Trade

2.13. The application process, documentary requirements and validity periods relating to the recognition as an RI or PI are regulated by MOT 16/2013, as amended. As mentioned above, pursuant to Article 3 of MOT 16/2013, as amended, a designation either as a PI or and RI is a mandatory preliminary step. All applications are submitted electronically[69] to the Trade Services Unit (UPP), and addressed to the UPP Coordinator and Implementer, who manages the licensing service.[70]

2.2.2.1.2.1 Recognition as an RI

2.14. This is the *first* step for importers seeking to import horticultural products for human consumption. Importers holding an RI designation can import horticultural products for human consumption but are prohibited from trading or transferring products directly to consumers or retailers.[71] Importers holding an RI designation may only trade and/or transfer such imports to a "distributor" and cannot therefore sell the imported products directly to consumers.[72] RI applications may be submitted at any time electronically.[73] The documentation submitted is then verified for completeness[74], after which, an "Assessment Team"[75] checks its veracity and conducts a field inspection.[76] Both the document verification and the field inspection are "conducted no later than" three working days from the date an application is deemed complete, and "conducted in no more than" three working days.[77] If the results of the inspection process are satisfactory, the UPP Coordinator grants the RI designation within the next two working days; otherwise the application

[60] Article 3 of MOT 16/2013, as amended, Exhibit JE-10.
[61] Article 1(7) of MOT 16/2013, as amended, Exhibit JE-10.
[62] Article 1(6) of MOT 16/2013, as amended, Exhibit JE-10.
[63] Articles 1(4) and 4 of MOA 86/2013, Exhibit JE-15.
[64] Articles 1(13), 11 and 12 of MOT 16/2013, as amended, Exhibit JE-10.
[65] Articles 21 and 22 of MOT 16/2013, as amended, Exhibit JE-10, Exhibit IDN-92.
[66] Articles 1(16) and 1(17) of MOT 16/2013, as amended, Exhibit JE-10.
[67] Articles 3, 11 and 12 of MOT 16/2013, as amended, Exhibit JE-10; Exhibit IDN-92.
[68] Articles 3 and 5(1)g. of MOT 16/2013, as amended, Exhibit JE-10; Exhibit IDN-92.
[69] Article 16 of MOT 16/2013, as amended, Exhibit JE-10.
[70] Articles 1(18) and 1(21) of MOT 16/2013, as amended, Exhibit JE-10.
[71] Article 15 of MOT 16/2013, as amended, Exhibit JE-10.
[72] Article 15 of MOT 16/2013, as amended, Exhibit JE-10.
[73] Article 8(1) of MOT 16/2013, as amended, Exhibit JE-10; Exhibit IDN-92.
[74] Article 8(2) of MOT 16/2013, as amended, Exhibit JE-10.
[75] Article 10 of MOT 16/2013, as amended, Exhibit JE-10.
[76] Article 8(3) of MOT 16/2013, as amended, Exhibit JE-10.
[77] Article 8(4) of MOT 16/2013, as amended, Exhibit JE-10.

is rejected.[78] Once issued, the validity period for the RI designation is two years starting from the date of issuance.[79]

2.2.2.1.2.2 Recognition as a PI

2.15. This is the *second* step for importers seeking to import horticultural products as raw materials as they need to obtain an RIPH first. An importer who obtains a PI-designation can only import fresh or processed horticultural products as raw materials or auxiliary materials for its industrial production processes and is prohibited from trading and/or transferring these horticultural products.[80] PI applications may be submitted at any time electronically.[81] The verification process is identical to that applying to the RI designation.[82] The validity period for the PI designation "will correspond with the validity period of a[n] RIPH" starting from the date of the PI issuance.[83]

2.2.2.1.3 Obtaining an RIPH

2.16. After having obtained the RI designation, this is the *second* step for importers of horticultural products for human consumption; and the *first* step for importers seeking to import horticultural products as raw materials, i.e. prospective PI applicants. The issuance of the RIPH is also a pre-requisite to the issuance of an Import Approval in the case of RIs.[84] The application process is open twice a year for 15 working days, i.e. in November and in May[85], and applications are submitted electronically.[86] A maximum timeframe of seven working days is foreseen for the verification and issuance process to be completed, after which the RIPH is issued.[87] The RIPH letters are issued twice a year, with a six-month validity period, i.e. from January to June, and from July to December.[88] However, in the case of chillies and fresh shallots for consumption, RIPHs are issued for three-month periods and on the basis of reference prices pursuant to Article 5.[89]

2.2.2.1.4 Obtaining an Import Approval

2.17. As a *third* step, importers of horticultural products for human consumption holding an RI designation and an RIPH must also obtain an Import Approval from the Ministry of Trade.[90] The application must be addressed electronically[91] to the UPP Coordinator attaching the RIPH and the confirmation as RI-Horticultural Products. The UPP Coordinator then issues the Import Approval "no more than" two working days after the application is deemed complete and accurate.[92] The timing for the submission of such applications is specifically regulated. Hence, the application windows are of one-month duration, twice a year. For imports of fresh and processed horticultural products listed in Appendix I that are scheduled for the period from January to June, "applications can only be submitted in the month of December"; and for imports planned for the period from July to December, "applications can only be submitted in the month of June."[93] The Import Approvals are issued "at the beginning of each semester"[94] and remain valid for that same semester.[95]

[78] Article 8(5)-(6) of MOT 16/2013, as amended, Exhibit JE-10.
[79] Article 9 of MOT 16/2013, as amended, Exhibit JE-10.
[80] Article 7 of MOT 16/2013, as amended, Exhibit JE-10.
[81] Article 5(1) of MOT 16/2013, as amended, Exhibit JE-10.
[82] Article 5 of MOT 16/2013, as amended, Exhibit JE-10.
[83] Article 6 of MOT 16/2013, as amended, Exhibit JE-10.
[84] Article 12 of MOT 16/2013, as amended, Exhibit JE-10; Article 4 of MOA 86/2013, Exhibit JE-15; Exhibit IDN-92.
[85] Article 13(2) of MOA 86/2013, Exhibit JE-15.
[86] Articles 10 and 11 of MOA 86/2013, Exhibit JE-15.
[87] Article 12 of MOA 86/2013, Exhibit JE-15.
[88] Article 13(1)-(3) of MOA 86/2013, Exhibit JE-15.
[89] Article 5(4) of MOA 86/2013, Exhibit JE-15; Article 14 of MOT 16/2013, as amended, Exhibit JE-10
[90] This step is mandatory for RIs. Article 11(1) and 12 of MOT 16/2013, as amended, Exhibit JE-10 and IDN-92.
[91] Article 13(1) of MOT 16/2013, as amended, Exhibit JE-10.
[92] Article 13(2) and 13(3) of MOT 16/2013, as amended, Exhibit JE-10.
[93] Article 13A(1) of MOT 16/2013, as amended, Exhibit JE-10.
[94] Article 13A(1)-(2) of MOT 16/2013, as amended, Exhibit JE-10.
[95] Article 14 of MOT 16/2013, as amended, Exhibit JE-10.

2.18. For chillies and fresh shallots for consumption, applications "can be submitted at any time".[96] Import Approvals remain valid for three months.[97]

2.2.2.1.5 Technical inquiry at the port of origin

2.19. Once the Import Approval has been issued, all imports of fresh and processed horticultural products, whether by RIs or PIs, "must first undergo verification or technical inquiry at the port of origin".[98] These mandated "technical inquiries" are carried out by Surveyors appointed by the Ministry of Trade.[99] Once such inspections are completed, actual shipments may take place.[100]

2.2.2.2 Import licensing procedures for animals and animal products

2.20. The import licensing application and issuance procedures that relate to animals and animal products are described below. Annex E-2 contains a graphical representation of these procedures.

2.2.2.2.1 Application process and related requirements

2.21. Importers must obtain similar approvals to those required when importing horticultural products, albeit with a number of procedural differences. The approvals required to import animals and animal products depend on whether the product is listed in Appendix I or II of MOT 46/2013, as amended, and MOA 139/2014, as amended:

a. For the importation of cattle and beef meat and offals listed in Appendix I of MOT 46/2013, as amended, and MOA 139/2014, as amended, *three* approvals are required in the following sequence: (i) Recognition as an RI from the Ministry of Trade[101]; (ii) Recommendation from the Ministry of Agriculture ("MOA Recommendation")[102]; and (iii) Import Approval from the Ministry of Trade[103];

b. For importation of the non-bovine animals, meat and offals listed in Appendix II of MOT 46/2013, as amended, and MOA 139/2014, as amended, *two* approvals are required in the following sequence: (i) MOA Recommendation[104]; and (ii) Import Approval from the Ministry of Trade.[105]

2.2.2.2.2 Recognition as an RI

2.22. Obtaining recognition as an RI is the *first* step for importers seeking to import cattle and beef meat and offals listed in Appendix I of MOT 46/2013, as amended. This step is not foreseen in the case of products listed in Appendix II of MOT 46/2013, as amended.[106] As in the case of horticultural products, all applications are submitted electronically to the UPP and addressed to the UPP Coordinator and Implementer. The UPP Coordinator then conducts document and field inspections to investigate the correctness of the application materials[107], in a similar manner and within identical timelines as those described above in paragraph 2.14 above with respect to horticultural products. RI designations are valid for two years from the date of issuance and "can be extended".[108]

[96] Article 13A(2) of MOT 16/2013, as amended, Exhibit JE-10.
[97] Article 14 of MOT 16/2013, as amended, Exhibit JE-10. As explained in Section 2.3.2.7 below, imports of chili and fresh shallots for consumption are subject to a reference price system.
[98] Article 21(1) of MOT 16/2013, as amended, Exhibits JE-10 and IDN-92.
[99] Articles 21-23 and 25 of MOT 16/2013, as amended, Exhibit JE-10.
[100] Article 21(1) of MOT 16/2013, as amended, Exhibit JE-10.
[101] Article 4(1) of MOT 46/2013, as amended, Exhibit JE-21.
[102] Article 10 of MOT 46/2013, as amended, Exhibit JE-21; Article 4 of MOA 139/2014, as amended, Exhibit JE-28.
[103] Article 8(1) of MOT 46/2013, as amended, Exhibit JE-21.
[104] Article 10 of MOT 46/2013 as amended, Exhibit JE-21; Article 4 of MOA 139/2014, as amended, Exhibit JE-28.
[105] Article 9(1) of MOT 46/2013, as amended, Exhibit JE-21.
[106] *See* Indonesia's response to Panel question No. 103, para. 39; Exhibit IDN-93.
[107] Article 5(2)–5(6) of MOT 46/2013, as amended, Exhibit JE-21.
[108] Article 6 of MOT 46/2013, as amended, Exhibit JE-21.

2.2.2.2.3 Obtaining an MOA Recommendation

2.23. Obtaining the MOA Recommendation is the *second* step for recognized RIs wishing to import products listed in Appendix I of MOT 46/2013, as amended, and MOA 139/2014, as amended; and the *first* step for companies wishing to import the products listed in Appendix II of MOT 46/2013, as amended, and MOA 139/2014, as amended.[109] Obtaining an MOA Recommendation is also a mandatory step prior to applying for an Import Approval.[110]

2.24. To obtain an MOA Recommendation, eligible applicants[111] have four windows, i.e. in December, March, June and September, to submit an electronic application to the Ministry of Agriculture.[112] It is foreseen that the outcome is notified within seven working days.[113] MOA Recommendations are issued four times a year in March, June, September, and December (for the following year).[114] They remain valid at the latest until the end of the year to which they apply.[115] Importers of carcasses, meat, and/or their processed products are prohibited from requesting changes to the country of origin, point of entry, type/category of carcasses, meat, and/or their processed products in already issued Recommendations.[116]

2.25. In emergency circumstances, MOA 139/2014, as amended, provides that state-owned enterprises may be tasked by the Minister of State-Owned Enterprises to import carcasses and/or secondary cuts of meat in order to address food availability, price volatility, anticipated inflation or natural disasters.[117] The same exception is mirrored in MOT 46/2013 as amended, allowing BULOG, Indonesia's Logistics Agency, to import the animals and animal products listed in Appendix I of the same regulation, for food security or price stabilization purposes. In that instance, BULOG would also be exempted from seeking RI registration. Attaching an MOA Recommendation when applying for an Import Approval would suffice.[118]

2.2.2.2.4 Obtaining an Import Approval

2.26. As previously outlined in paragraph 2.21 above, obtaining an Import Approval is the *third* step for importers seeking to import cattle and beef meat and offals listed in Appendix I of MOT 46/2013, as amended, and MOA 139/2014, as amended, after obtaining both the RI designation and MOA Recommendation; and the *second* step, for importers seeking to import non-bovine animals, meat, and offals listed in Appendix II of MOT 46/2013, as amended, and MOA 139/2014, as amended, after having obtained the MOA Recommendation.[119] As for horticultural products, requests for import approvals are submitted online to the UPP Coordinator and Implementer in accordance with fixed application windows preceding each quarter.[120] Import approvals are granted within two working days once the application is deemed complete[121], are issued "at the beginning of each quarter" for any of the periods, January to March, April to June, July to September, or October to December, and have a three-month validity.[122] The validity period of import approvals may be extended for a maximum of 30 days under certain circumstances, except in the fourth quarter of the year when extension is not possible.[123]

2.2.2.2.5 Obtaining a Certificate of Health

2.27. A Certificate of Health from the country of origin of the animals and animal products that are to be imported must be issued after the RIs have received their Import Approvals.[124] The

[109] *See* paragraph 2.22 above and Exhibit IDN-93.
[110] Article 10 of MOT 46/2013, as amended, Exhibit JE-21; Articles 4(3) and 4(4) of MOA 139/2014, as amended, Exhibit JE-28.
[111] Article 4(1) of MOA 139/2014, as amended, Exhibit JE-28.
[112] Article 23(1) of MOA 139/2014, as amended, Exhibit JE-28.
[113] Articles 25 and 26(2) of MOA 139/2014, as amended, Exhibit JE-28.
[114] Article 29 of MOA 139/2014, as amended, Exhibit JE-28.
[115] Article 31 of MOA 139/2014, as amended, Exhibit JE-28.
[116] Article 33 of MOA 139/2014, as amended, Exhibit JE-28.
[117] Article 23(3) of MOA 139/2014, as amended, Exhibit JE-28.
[118] Article 18 of MOT 46/2013, as amended, Exhibit JE-21.
[119] Article 10 of MOT 46/2013, as amended, Exhibit JE-21, and Exhibit IDN-93. As explained in Sections 2.3.2.3 and 2.3.3.4 below, imports of certain animal and animal products are subject to the 80% realization requirement and to the reference price system.
[120] Article 12(1) of MOT 46/2013, as amended, Exhibit JE-21.
[121] Articles 11(3)-(4) of MOT 46/2013, as amended, Exhibit JE-21.
[122] Articles 12(2)-(3) of MOT 46/2013, as amended, Exhibit JE-21.
[123] Article 12A of MOT 46/2013, as amended, Exhibit JE-21.
[124] Article 15 of MOT 46/2013, as amended, Exhibit JE-21.

Import Approval Number must be specified in the Certificate of Health that must accompany every shipment of animal products to Indonesia.[125]

2.2.3 Post-establishment regulations

2.28. This section covers certain changes to the import licensing regimes for both horticultural products and animals and animal products that took place after the establishment of this Panel.

2.29. Concerning the general importer identification, from January 2016[126], API registrations are valid as long as importers have on-going business activities. Importers holding an API are required to re-register at the issuing agency every five years commencing from the issuance date.[127]

2.30. With respect to the import licensing regime for horticultural products[128], the RI and PI designation processes have been eliminated so that importers of horticultural products need only obtain an RIPH, and an Import Approval, for each validity period.[129] The end-use requirements previously applying to RIs and PIs and some of the documentary requirements have however been maintained. Another element modified is the timing for the submission of applications for Import Approvals: while Import approval applications by API-Ps can be submitted at any time[130], API-Us wishing to import fresh horticultural product have two one-month application windows (December, for imports scheduled for the January-June semester; and June for the July-December semester). API-U applications for chillies and fresh shallots for consumption, and for processed horticultural products can be presented at any time.[131] In addition, the 80% realization requirement and the accompanying penalty to reduce import allocations for the next period have been repealed.[132] Once importers receive their Import Approval they must, however, continue to report on imports realized, attaching the scanned results of an Import Realization Control Card, duly stamped by a Customs and Excise official.[133] Failing to do so twice will cause the Import Approval to be suspended for the next period.[134]

2.31. Concerning the import licensing regime for animal and animal products[135], the RI designation processes have also been eliminated so that to import Appendix I and Appendix II products, API-U and API-P importers only need obtain the MOA Recommendation and the MOT Import Approval.[136] The 80% import realization requirement has also been repealed, although importers need to still submit written reports on their respective import realizations, for supervision purposes.[137] The validity period for the MOA Recommendation and Import Approval has been extended from three to four months (1 January to 30 April; 1 May to 30 August; 1 September to 31 December), with a corresponding reduction in the number of application windows from four per year to three.[138] Furthermore, the listing of animals and animal products in Appendices I and II has been amended.[139] While the domestic absorption requirement at 3% for API-Us is maintained, this requirement is reduced to 1.5% for API-Ps.[140] Finally, the length of prior storage periods is limited to a maximum of six months from the slaughter time to arrival in

[125] Article 15(2) of MOT 46/2013, as amended, Exhibit JE-21.
[126] Regulation Number 70/M-DAG/PER/9/2015 (MOT 70/2015). Indonesia's second written submission, para. 7; and Exhibit IDN-35.
[127] Indonesia's second written submission, para. 12.
[128] MOT 16/2013, as amended, has been replaced by Regulation of the Minister of Trade 71//M-DAG/PER/9/2015 Concerning Provisions on the Import of Horticultural Products of 28 September 2015 (MOT 71/2015), Exhibits JE-12 and IDN-9, which came into effect on 1 December 2015.
[129] Indonesia's response to Panel question No. 11. *See also* Exhibit IDN-30.
[130] Article 12 of MOT 71/2015, Exhibit JE-12.
[131] Article 11 of MOT 71/2015, Exhibit JE-12.
[132] Indonesia's response to Panel question No.15.
[133] Article 20 of MOT 71/2015, Exhibit JE-12.
[134] Article 22 of MOT 71/2015, Exhibit JE-12.
[135] MOT 46/2013, as amended, has been replaced by Regulation of the Minister of Trade 05/M-DAG/PER/1/2016, Concerning Export and Import Provisions on Animals and Animal Products (MOT 05/2016), Exhibit IDN-41, which entered into force on 28 January 2016. MOA 139/2014, as amended, has been replaced by Regulation 58/Permentan/PK.210/11/2015, Concerning Importation of Carcass, Meat and/or its Processed Product (MOA 58/2015) of 25 December 2015, Exhibits IDN-40 and AUS-1.
[136] Indonesia's response to Panel question No. 20; Indonesia's second written submission.
[137] Indonesia's second written submission, para. 4.
[138] Article 30 of MOA 58/2015, Exhibit IDN-40.
[139] Article 22 and Appendices I-III of MOA 58/2015, Exhibit IDN-40.
[140] Article 5 of MOA 58/2015, Exhibit IDN-40.

Indonesia in the case of imported frozen carcass and meat; and to a maximum of three months in the case of chilled carcass and meat.[141]

2.3 The measures at issue

2.3.1 Introduction

2.32. As explained above, the co-complainants have challenged a total of 18 measures concerning Indonesia's import licensing regimes for horticultural products and animals and animal products as well as Indonesia's sufficiency of domestic production requirement. The table below enumerates the 18 measures at issue.

A. IMPORT LICENSING REGIME FOR HORTICULTURAL PRODUCTS	
DISCRETE ELEMENTS OF THE REGIME:	
Measure 1	Limited application windows and validity periods
Measure 2	Periodic and fixed import terms
Measure 3	80% realization requirement
Measure 4	Harvest period requirement
Measure 5	Storage ownership and capacity requirements
Measure 6	Use, sale and distribution requirements for horticultural products
Measure 7	Reference prices for chillies and fresh shallots for consumption
Measure 8	Six-month harvest requirement
REGIME AS A WHOLE:	
Measure 9	Import licensing regime for horticultural products *as a whole*.
B. IMPORT LICENSING REGIME FOR ANIMALS AND ANIMAL PRODUCTS	
DISCRETE ELEMENTS OF THE REGIME:	
Measure 10	Prohibition of importation of certain animals and animal products, except in emergency circumstances
Measure 11	Limited application windows and validity periods
Measure 12	Periodic and fixed import terms
Measure 13	80% realization requirement
Measure 14	Use, sale and distribution of imported bovine meat and offal requirements
Measure 15	Domestic purchase requirement
Measure 16	Beef reference price
REGIME AS A WHOLE:	
Measure 17	Import licensing regime for animals and animal products *as a whole*
C. SUFFICIENCY REQUIREMENT	
Measure 18	Sufficiency of domestic production to fulfil domestic demand

2.3.2 Import licensing regime for horticultural products

2.3.2.1 Measure 1: Limited application windows and validity periods

2.33. Measure 1 consists of a combination of the limited application windows and the six-month validity periods of RIPHs and Import Approvals.[142] Indonesia applies this Measure pursuant to

[141] Article 9 of MOA 58/2015, Exhibit IDN-40.

Article 13 of Regulation MOA 86/2013[143], which regulates the relevant timeframes concerning RIPHs and Articles 13A[144],14[145], 21[146], 22[147] and 30[148] of Regulation MOT 16/2013, as amended, which does the same for Import Approvals.

2.34. Pursuant to these provisions, importers may apply for an RIPH for the period from January to June over 15 working days starting in early November of the previous year, and for the period from July to December over 15 working days starting in early May of that year. Applications for Import Approvals may be made in December for the period from January to June, and in June for the period from July to December. Import Approvals are issued "at the beginning" of each semester and are valid for 6 months.

2.3.2.2 Measure 2: Periodic and fixed import terms

2.35. Measure 2 consists of the requirement to import horticultural products only within the terms of the RIPHs and Import Approvals, including the quantity of the products permitted to be

[142] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 87; United States' first written submission, para. 46.

[143] Article 13 of MOA 86/2013, as amended, provides as follows:
(1) In one year, RIPH is issued 2 (two) times which is valid for a period from January to June and from July to December.
(2) RIPH service as intended in paragraph (1) for the period from January to June, the submission of application is open for 15 working days from the start of November of the previous year, and for the period from July to December, the submission of application is open for 15 working days from the start of May of the current year.
(3) RIPH of fresh horticulture products for industrial raw materials, processed for industrial raw materials, and processed for consumption is issued 1 (one) time within 1 (one) period for 1 (one) company.
(4) RIPH service as intended in paragraph (1) is not applicable for fresh horticulture product in the form of chili and shallot as intended in Article 5 paragraph (3) and paragraph (4).
Exhibit JE-15.

[144] Article 13A of MOT 16/2013, as amended, provides as follows:
(1) The timing for the submission of applications for Import Approval of Horticultural Products as included in Appendix I of this Ministerial Regulation, is defined as follows:
a. for the first Semester, the period from January to June, applications can only be submitted in the month of December; and
b. for the second Semester, the period from July to December, applications can only be submitted in the month of June.
(2) Applications for Import Approval of Horticultural Products, specifically chili (fruit of genus Capsicum) with Tariff Number/HS 0709.60.10.00 and fresh shallots for consumption with Tariff Number/HS 0703.10.29.00, as included in Appendix I of this Ministerial Regulation, can be submitted at any time.
(2) Import Approval, as described in paragraph (1), are issued at the beginning of each semester. Exhibit JE-10.

[145] Article 14 of MOT 16/2013, as amended, provides:
Import Approval, as described in Article 13 paragraph (2), item (a), are valid for 6 (six) months starting from the date of issuance of the Import Approval, except for the Import Approval of Horticultural Products such as chili (fruit of genus Capsicum) with Tariff Number/HS 0709.60.10.00 and fresh shallots for consumption with Tariff Number /HS 0703.10.29.00, which are valid for 3 (three) months starting from the date of issuance of the Import Approval. Exhibit JE-10.

[146] Article 21 of MOT 16/2013, as amended, relevantly provides:
(1) Every Horticultural Product import, as described in Article 2, by a PI-Horticultural Products or a RI-Horticultural Products, must first undergo verification or technical inquiry at its port of origin.
(2) Verification or technical inquiry as described in paragraph (1) will be carried out by a Surveyor designated by the Minister. Exhibit JE-10.

[147] Article 22 of MOT 16/2013, as amended, relevantly provides:
(1) Verification, as described in Article 21 paragraph (1), of Horticultural Product imports, examines data or information regarding: (a) Country and port of origin; (b) Tariff or HS number and product description; (c) Type and volume; (d) Shipping time; (e) Port of destination; . . .
(2) Verification results, as described in paragraph (1), are incorporated in a Surveyor Report (LS), and are to be used as a supplementary document in completing import customs. Exhibit JE-10.

[148] Article 30 of MOT 16/2013, as amended by MOT 47/2013, relevantly provides:
(2) If a fresh Horticultural Product import: (a) is not the Horticultural Product included in the Recognition of the PI-Horticultural Products and/or the Import Approval; . . . it will be destroyed in accordance with regulatory legislation.
(3) If a processed Horticultural Product import: (a) is not the Horticultural Product included in the Recognition of the PI-Horticultural Products and/or the Import Approval; . . . it will be destroyed in accordance with regulatory legislation.
(4) The cost of destroying and re-exporting a Horticultural Product, as described in paragraph (2) and paragraph (3), is the responsibility of the importer. Exhibit JE-10.

imported, the specific type of products permitted to be imported, the country of origin of the products, and the Indonesian port of entry through which the products will enter, and the impossibility to amend these terms during the validity period of RIPHs and Import Approvals.[149] This Measure is implemented by Indonesia by means of Article 6 of MOA 86/2013[150], that regulates the elements that need to be specified in the RIPHs, and, Article 13[151] and 30[152] of MOT 16/2013, as amended, which stipulates the same for the Import Approvals.

2.36. Pursuant to these provisions, the RIPHs include the product name, the tariff post/HS of horticulture products, the country of origin, and entry point, while the Import Approvals include the type of imported product, the quantity requested for the six-month semester, the country of origin and the port of entry. Once issued, the terms of RIPHs and Import Approvals cannot be amended or revised during their validity period and therefore importers cannot import other than as specified in the relevant RIPH or Import Approval. When imported products do not coincide with the terms specified in the Import Approvals and/or in the RIPHs, they are destroyed (fresh) or re-exported (processed) at the importers' cost.[153]

2.3.2.3 Measure 3: 80% realization requirement

2.37. Measure 3 consists of the requirement that RIs of fresh horticultural products must import at least 80% of the quantity of each type of product specified on their Import Approvals for every six-month validity period.[154] This Measure is implemented through Articles 14A[155], 24[156], 25A[157], 26[158] and 27A[159] of MOT 16/2013, as amended.

[149] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 90; United States' first written submission, para. 52.

[150] Article 6(3) and (4) of MOA 86/2013 provide as follows:
(3) RIPH includes;
a. RIPH number;
b. company name and address;
c. company Director name and address;
d. number and date of application letter;
e. product name;
f. tariff post/HS of Horticulture Product;
g. country of origin;
h. manufacturing location (for industrial material); and
i. entry point.
(4) RIPH as intended in paragraph (2) is an Attachment that is an integral part of this Import Approval Letter. Exhibit JE-15.

[151] Article 13 of MOT 16/2013, as amended, reads as follows:
(1) To obtain Import Approval, as described in Article 11, RI-Horticultural Products must submit an electronic application to the Minister and the UPP Coordinator and Implementer, attaching:
a. AN RIPH; and
b. Confirmation as RI-Horticultural Products.
(2) The UPP Coordinator and Implementer, on behalf of the Minister, issues:
a. Import Approval, no more than 2 (two) working days after receiving a complete and accurate application; or
b. A rejection of Import Approval request, no more than 2 (two) working days after receiving an application, in the case that the application is incomplete and/or contains inaccurate information.
(3) Import Approval, as described in paragraph (2) item (a), is issued to a RI-Horticultural Products and a copy of the Import Approval will also be given to relevant agencies. Exhibit JE-10.

[152] Article 30 of MOT 16/2013, as amended by MOT 47/2013 relevantly provides:
(2) If a fresh Horticultural Product import: (a) is not the Horticultural Product included in the Recognition of the PI-Horticultural Products and/or the Import Approval; ... it will be destroyed in accordance with regulatory legislation.
(3) If a processed Horticultural Product import: (a) is not the Horticultural Product included in the Recognition of the PI-Horticultural Products and/or the Import Approval; ... it will be destroyed in accordance with regulatory legislation.
(4) The cost of destroying and re-exporting a Horticultural Product, as described in paragraph (2) and paragraph (3), is the responsibility of the importer. Exhibit JE-10.

[153] Article 30(2)-(3) of MOT 16/2013, as amended, Exhibit JE-10.

[154] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 92; United States' first written submission, para. 56.

[155] Article 14A of MOT 16/2013, as amended, provides that "RI-Horticultural Products who have obtained Import Approval, as described in Article 13 paragraph (2), item (a), are required to realize at least 80% (eighty %) of imports of Horticultural Products as is listed in its Import Approval for every period" Exhibit JE-10.

[156] Article 24 of MOT 16/2013, as amended, provides as follows:

2.38. Pursuant to these provisions, RIs are required to import at least 80% of the quantity specified for each type of horticultural product listed on their Import Approval for every six-month period.[160] Furthermore, RIs must account for the quantity of their realized imports during a semester by submitting an Import Realization Control Card to the Director General of Foreign Trade at the Ministry of Trade on a monthly basis. The Ministry of Trade sanctions RIs that fail to meet the 80% realization requirement or fail to file the Import Realization Control Card, with the suspension of their RI designations. A RI that fails to file the Import Realization Control Card three times could have its designation revoked.

2.3.2.4 Measure 4: Harvest period requirement

2.39. Measure 4 consists of the requirement that the importation of horticulture products takes place prior to, during and after the respective domestic harvest seasons within a certain time period.[161] Indonesia implements this measure mainly by means of Articles 5[162] and 8[163] of MOA 86/2013.

(1) Upon the import of Horticultural Products, PI-Horticultural Products and RI-Horticultural Products must submit a written report including the scanned results of an Import Realization Control Card that has been initialed and stamped by a Customs and Excise official.
(2) The report, as described in paragraph (1), is submitted every month via http://inatrade.kemendag.go.id, no later than the 15th (fifteenth) of the following month to the Director General with a copy for the Director General of Processing and Marketing of Agricultural Products in the Ministry of Agriculture, and the Head of the Food and Drug Control Agency.
(3) The report, as described in paragraph (1), is included in Appendix II, which is an integral part of this Ministerial Regulation.
(4) Import Realization Control Card, as described in paragraph (1), is a control card that measures the amount of realized imports of Horticultural Products. Exhibit JE-10.

[157] Article 25A of MOT 16/2013, as amended, provides:
Recognition as a PI-Horticultural Products and Confirmation as a RI-Horticultural Products is suspended if a company:
(a) does not fulfill the realization requirement of its Import Approval, as described in Article 14A for RI-Horticultural Products; and/or
(b) does not fulfil its obligation to submit a report, as described in Article 24. Exhibit JE-10.

[158] Article 26 of MOT 16/2013, as amended, provides as follows:
Recognition as a PI-Horticultural Products and Confirmation as a RI-Horticultural Products is revoked if a company:
a. does not submit the required report, as described in Article 24, 3 (three) times;
b. is proven to have altered the information included in Horticultural Products import documents;
c. is proven to have submitted false data and/or information that was required in obtaining Recognition as a PI-Horticultural Products, Confirmation as a RI-Horticultural Products, and Import Approval;
d. is proven to have violated the packaging provision, as described in Article 18, and/or the labelling provision, as described in Article 19;
e. is proven to have traded and/or transferred imported Horticultural Products, as is described in Article 7 for PI-Horticultural Products;
f. is proven to have traded and/or transferred imported Horticultural Products to a party other than a Distributor, as is described in Article 15 for RI-Horticultural Products;
and/or
g. is found guilty, on the basis of a court decision which has permanent legal force, of the criminal offense of misusing Horticultural Products import documents. Exhibit JE-10.

[159] Article 27A of MOT 16/2013, as amended, provides:
A company whose Recognition as a PI-Horticultural Products or Confirmation as a RI-Horticultural Products has been revoked, can reapply for Recognition as a PI-Horticultural Products or Confirmation as a RI-Horticultural Products no earlier than 2 (two) years from the date of the revocation of its Recognition as a PI-Horticultural Products or Confirmation as a RI-Horticultural Products. Exhibit JE-10.

[160] Article 14A of MOT 16/2013, as amended, Exhibit JE-10.

[161] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, paras. 95-96; United States' first written submission, para. 60.

[162] Article 5 of MOA 86/2013 provides as follows:
(1) Import of Horticulture Product can be conducted prior to harvest season, during harvest season and after harvest season within a certain time period.
(2) Within a certain time period as intended in paragraph (1) is stipulated by the Minister of Agriculture and submitted to the Minister of Trade.
(3) Import period of horticulture products as intended in paragraph (1) is not applicable to horticulture product of fresh chili and shallot for consumption.
(4) Issuance of RIPH of fresh horticulture products for consumption in the form of chili and shallot is based on determined reference price from the Minister of Trade. Exhibit JE-15.

[163] Article 8 of MOA 86/2013 reads:

2.40. Pursuant to these provisions, importation of horticultural products can only take place *prior to*, *during* and *after* the harvest season, *within* a certain time period established by the Indonesian authorities. Measure 4 prohibits imports outside the time periods decided by the Ministry of Agriculture.[164] In establishing the time periods, the Ministry of Agriculture is guided by the objectives and determinations made by the Food Security Council[165] which are later published as part of Indonesia's five-year Development Plans. The Ministry of Agriculture communicates its specified time periods to the business community before the start of each application window, notifying officially the Ministry of Trade at the same time. The Ministry of Trade may be consulted prior to the official adoption of a specified time period for a validity period. In turn, the Ministry of Trade gives effect to the specified time periods set by the Ministry of Agriculture by issuing Import Approvals in accordance with the specified time period. Importers are required to submit a plan for the distribution of imported products, indicating the time of entry and the region/municipality where the products will be distributed.

2.3.2.5 Measure 5: Storage ownership and capacity requirements

2.41. Measure 5 consists of the requirement that importers must own their storage facilities with sufficient capacity to hold the full quantity requested on their Import Application.[166] This requirement is implemented by Indonesia through Article 8(1)(e) of MOT 16/2013, as amended[167], and by Article 8(2)(c) and (d) of MOA 86/2013, as amended.[168]

2.42. Accordingly, importers applying for designation as an RI are to provide "proof of ownership of storage facilities appropriate for the product's characteristics". In addition, importers applying for an RIPH must include a statement of ownership of storage as part of their applications.

2.3.2.6 Measure 6: Use, sale and distribution requirements for horticultural products

2.43. Measure 6 consists of the requirements on the importation by PIs and RIs of listed horticultural products that limit the use, sale and distribution of the imported products.[169]

(1) RIPH is issued with the following administrative requirements: a. Fresh horticulture products for consumption shall include: - Photo copy of RI-Horticulture Product from the Ministry of Trade; - Photo copy of General Importer Identification Number (API-U); and - Statement of not importing horticulture products which exceed 6 (six) months after the harvest period. b. Fresh and processed horticulture products for industrial raw materials shall include: - Technical letter of consideration, industry location, and industrial capacity from the Minister of Industry; - Photo copy of Importer Producer Identification Number (API-P). c. Processed horticulture product for consumption shall include: - Photo copy of RI-Horticulture Product from the Ministry of Trade; - Importation approval letter from the Agency of Drug and Food Control; and - Photo copy of General Importer Identification Number (API-U). (2) Issuance of RIPH for fresh produce for consumption, in addition to meeting the administrative requirements as intended in paragraph (1) item a must be accompanied with the following technical requirements: a. plantation/business area registration information or Certificate of Good Agriculture Practices/GAP; b. post-harvest packing house registration issued by authorized agency from the country of origin; c. statement of ownership of storage and distribution facilities for horticulture products according to their characteristics and product type; d. statement of suitability of storage capacity; and e. information of distribution plan according to the time and area (regency/city). (3) Technical requirements as intended in paragraph (2) item a and b is translated into Bahasa Indonesia. Exhibit JE-15.

[164] Indonesia's response to Panel question No. 34.

[165] Indonesia's response to Panel Questions nos. 18 and 34.

[166] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 99; United States' first written submission, para. 66.

[167] Article 8 of MOT 16/2013, as amended, provides as follows that: "(1) To receive Confirmation as a RI-Horticultural Products, as described in Article 3, a company must submit an electronic application to the Minister and the UPP Coordinator and Implementer, and attach … e. Proof of ownership of storage facilities appropriate for the product's characteristics…" Exhibit JE-10.

[168] Article 8(2)(c) and (d) of MOA 86/2013 relevantly provides: "(2) Issuance of RIPH for fresh produce for consumption, in addition to meeting the administrative requirements as intended in paragraph (1) item a must be accompanied with the following technical requirements: … c. statement of ownership of storage and distribution facilities for horticulture products according to their characteristics and product type; d. statement of suitability of storage capacity …" Exhibit JE-15.

[169] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, paras. 106-109; United States' first written submission, paras. 70-72.

Indonesia implements this Measure by means of Articles 7[170], 8[171], 15 and 26(e)-(f)[172] of MOT 16/2013, as amended.[173]

2.44. Pursuant to these provisions, an importer that obtains recognition as a PI can only import horticultural products as raw materials or auxiliary materials for its industrial production processes and is thus prohibited from trading and/or transferring them. Likewise, an importer that obtains recognition as an RI can only import horticultural products for consumption provided they are traded or transferred to a distributor and not directly to consumers or retailers. Designation as an RI or PI can be revoked where the relevant importer is proven to have traded and/or transferred imported horticultural products.[174]

2.3.2.7 Measure 7: Reference prices for chillies and fresh shallots for consumption

2.45. Measure 7 consists of the implementation of a reference price system by the Ministry of Trade on imports of chillies and fresh shallots for consumption.[175] Indonesia implements this Measure by means of Article 5(4) of MOA 86/2013[176] and by Article 14B of MOT 16/2013, as amended by MOT 47/2013.[177]

2.46. Pursuant to these provisions, importation is suspended when the domestic market price falls below the pre-established reference price. Whenever the reference price system is activated, imports are temporarily suspended, independently of whether an importer holds an RIPH and/or an Import Approval. Already authorized import volumes do not "carry over" to the next validity period.[178] Imports are resumed when the market price again reaches the reference price.

2.47. The term "reference price" is defined as "the reference selling price at the retail level that is established by the Horticultural Product Price Monitoring Team."[179] This team is formed by the

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[170] Article 7 of MOT 16/2013, as amended, provides: "Businesses that have received Recognition as a PI-Horticultural Products can only import Horticultural Products as raw materials or as supplementary materials for the needs of its industrial production process and are prohibited from trading and/or transferring these Horticultural Products." Exhibit JE-10.

[171] Article 8 of MOT 16/2013, as amended by MOT 47/2013, relevantly provides:
(1) To receive Confirmation as a RI-Horticultural Products, as described in Article 3, a company must submit an electronic application to the Minister and the UPP Coordinator and Implementer, and attach … i. A stamped statement letter agreeing not to sell Horticultural Products directly to consumers or retailers.

[172] Article 26(e)-(f) of MOT 16/2013, as amended by MOT 47/2013, relevantly provides:
Recognition as a PI-Horticultural Products and Confirmation as a RI-Horticultural Products is revoked if a company:
… (e) is proven to have traded and/or transferred imported Horticultural Products, as is described in Article 7 for PI-Horticultural Products;
(f) is proven to have traded and/or transferred imported Horticultural Products to a party other than a Distributor, as is described in Article 15 for RI-Horticultural Products … Exhibit JE-10.

[173] Article 15 of MOT 16/2013, as amended by MOT 47/2013, provides: "Businesses that have received Confirmation as a RI-Horticultural Products: a. Only can trade and/or transfer imported Horticultural Products to a Distributor; and b. Are forbidden from trading and/or transferring imported Horticultural Products directly to consumers or retailers". Exhibit JE-10.

[174] Articles 26(e) and 26(f) of MOT 16/2013, as amended, Exhibit JE-10.

[175] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 109; United States' first written submission, paras. 75-76.

[176] Article 5(4) of MOA 86/2013 provides that "[i]ssuance of RIPH of fresh horticulture products for consumption in the form of chili and shallots is based on determined reference price from the Minister of Trade". Exhibit JE-15.

[177] Article 14B of MOT 16/2013, as amended, reads as follows:
(1) Importation of chili (fruit of genus Capsicum) with Tariff Number/HS 0709.60.10.00 and fresh shallots for consumption with Tariff Number/HS 0703.10.29.00 is conducted with due observance of the Reference Price established by the Horticultural Product Price Monitoring Team which was formed by the Minister and whose membership consists of representatives from relevant agencies.
(2) In the event that the market price of chili (fruit of genus Capsicum) with Tariff Number/HS 0709.60.10.00 and fresh shallots for consumption with Tariff Number/HS 0703.10.29.00 is below the Reference Price, then the importation of chili (fruit of genus Capsicum) with Tariff Number/HS 0709.60.10.00 and fresh shallots for consumption with Tariff Number/HS 0703.10.29.00 is postponed until the market price again reaches the Reference Price.
(3) The Reference Price of chili (fruit of genus Capsicum) with Tariff Number/HS 0709.60.10.00 and fresh shallots for consumption with Tariff Number/HS 0703.10.29.00 as described in article (1) can be evaluated at any time by Horticultural Product Price Monitoring Team. Exhibit JE-10.

[178] *See* Indonesia's response to Panel question No. 13.

[179] Article 1(15) of MOT 16/2013, as amended, Exhibit JE-10.

Minister of Trade and "consists of representatives from relevant agencies".[180] It has the authority to evaluate the reference price "at any time".[181] In determining the reference price, the Ministry of Trade takes into account: (1) farmers' operational costs; (2) farmers' profit margins; and (3) a "reasonable price of such products to be sold to customers."[182] The Ministries of Agriculture and Trade (Directorate of Import, Directorate of Export Import Facilitation and Directorate of Primary and Strategic Products) are responsible for monitoring the reference price system while the domestic market prices of chilli and shallot are monitored by Indonesia's Statistic Central Bureau.[183] The reference price calculation methodology and parameters are not published.[184] Pursuant to the Decree of Director General of Domestic Trade No 118/PDN/KEP/10/2013, effective from 3 October 2013, the reference prices have been respectively set as follows: IDR 26,300/kg for big red chilli; IDR 28,000 for bird's eye chilli; and IDR 25,700 for shallot.[185]

2.3.2.8 Measure 8: Six-month harvest requirement

2.48. Measure 8 consists of the requirement that all imported fresh horticultural products have been harvested less than six months prior to importation.[186] Indonesia implements this measure by means of Article 8(1)(a) of MOA 86/2013.[187] Pursuant to this provision, in order to obtain an RIPH for fresh horticultural products, an RI must produce a statement committing not to import horticultural products harvested over six months prior to importation.

2.3.2.9 Measure 9: Import licensing regime for horticultural products as a whole

2.49. Measure 9 consists of Indonesia's import licensing regime for horticultural products, as maintained through MOT 16/2013, as amended, and MOA 86/2013, as a whole.[188] Reference is made to the various subsections describing the individual elements of this regime that have been challenged as separate Measures 1 to 8.

2.3.3 Import licensing regime for animals and animal products

2.3.3.1 Measure 10: Import prohibition of certain animals and animal products, except in "emergency circumstances"

2.50. Measure 10 consists of the prohibition on the importation of bovine meat, offal, carcass and processed products that are not listed in Appendices I of MOT 46/2013, as amended, and MOA 139/2014, as amended; or non-bovine and processed products that are not listed in Appendices II of MOT 46/2013, as amended, and MOA 139/2014, as amended.[189] Indonesia implements this Measure by means of Article 2(2) of MOT 46/2013, as amended[190]; and Articles 8[191] and 23(3)[192] of MOA 139/2014, as amended, and Article 59(1) of the Animal Law Amendment.[193]

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[180] Article 14B(1) of MOT 16/2013, as amended, Exhibit JE-10.
[181] Article 14B(3) of MOT 16/2013, as amended, Exhibit JE-10.
[182] Indonesia's response to Panel question No. 35.
[183] Indonesia's response to Panel question No. 35.
[184] Indonesia's response to Panel question No. 35.
[185] Indonesia's response to Panel question No. 38.
[186] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 111; United States' first written submission, paras. 80 and 204.
[187] Article 8(1)(a) of MOA 86/2013 provides that: "RIPH is issued with the following administrative requirements: a. Fresh horticulture products for consumption shall include: - Photo copy of RI-Horticulture Product from the Ministry of Trade; - Photo copy of General Importer Identification Number (API-U); and - Statement of not importing horticulture products which exceed 6 (six) months after the harvest period." Exhibit JE-15.
[188] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 274; United States' first written submission, para. 211.
[189] New Zealand's Panel Request, pp. 4-7; United States' Panel Request, pp. 4-7; New Zealand's first written submission, paras. 38-45; United States' first written submission, para. 105.
[190] Article 2(2) of MOT 46/2013, as amended, provides: "The types of Animals and Animal Products that can be imported are included in Appendix I and Appendix II, which is an integral part of this Ministerial Regulation." Exhibit JE-21.
[191] Article 8 of MOA 139/2014, as amended, provides: "Requirements for bovine meats, as listed in Appendix I, are an integral part of this Ministerial Regulation, and non-bovine carcasses and/or meats as well as their processed products that can be imported, as listed in Appendix II, are an integral part of this Ministerial Regulation." Exhibit JE-28.

2.51. Pursuant to the above provisions, only those animals and animal products that are listed in the relevant appendices to both MOA 139/2014, as amended, and MOT 46/2013, as amended, are eligible to obtain MOA Recommendations and Import Approvals, and thus can be imported under Indonesia's import licensing regime. State-owned enterprises may be authorized to import unlisted carcasses and/or secondary cut meats up to the amount determined by Indonesian officials to be required to address food availability, price volatility, inflation and/or natural disasters.[194]

2.3.3.2 Measure 11: Limited application windows and validity periods

2.52. Measure 11 consists of a combination of requirements, including the prohibition on importers from applying for Recommendations and Import Approvals outside four one-month periods, the provision that Import Approvals are valid for only the three-month duration of each quarter, and the requirement that importers are only permitted to apply for Recommendations and Import Approvals in the month immediately before the start of the relevant quarter.[195] This measure is implemented by Indonesia through Article 29 of MOA 139/2014, as amended by MOA 2/2015[196], and Articles 12[197] and 15[198] of MOT 46/2013, as amended.

2.53. Pursuant to these provisions, the issuance of a recommendation is conducted four times; namely, December of the previous year, and March, June, and September of the current year. Applications for Import Approval of animals and animal products listed in Appendix I can only be submitted as follows: (i) for the first quarter (January to March), in the month of December; (ii) for the second quarter (April to June), in the month of March; (iii) for the third quarter (July to September), in the month of June; and (iv) for the fourth quarter (October to December), in the month of September. The Import Approval is then issued at the beginning of each relevant quarter and is valid for three months.

2.3.3.3 Measure 12: Periodic and fixed import terms

2.54. Measure 12 consists of the requirement to only import animals and animal products within the terms of the Recommendations and Import Approvals, the prohibition of importing types/categories of carcasses, meat, and/or their processed products other than as specified in Import Approvals and Recommendations, and the prohibition from requesting changes to the

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[192] Article 23(3) of MOA 139/2014, as amended, provides: "In order to address food availability and price volatility, and anticipate inflation and/or natural disasters, State-Owned Enterprises can be tasked by the Minister of State-Owned Enterprises to import carcasses and/or secondary cut meats." Exhibit JE-28.

[193] Article 59(1) of the *Animal Law Amendment* (Exhibit JE-5) provides as follows:

(1) Every Person that import Animal Product into the territory of Republic of Indonesia must obtain import permit from the minister that organizes government affairs in trade sector after obtaining recommendation from:
   a. the Minister for Fresh Animal Product; or
   b. the Head of agency in the field of drug and food control for processed food product of Animal origin.

[194] Article 23(3) and 5 of MOA 139/2014, as amended, Exhibit JE-28.

[195] New Zealand's Panel Request, pp. 4-7; United States' Panel Request, pp. 4-7; New Zealand's first written submission, para. 46; United States' first written submission, para. 113.

[196] Article 29 of MOA 139/2014, as amended by MOA 2/2015, provides that "[r]ecommendation issuance, as described in Article 28, is conducted 4 (four) times: December of the previous year, and March, June, and September of the current year". (Exhibit JE-28).

[197] Article 12 of MOT 46/2013, as amended, provides as follows:

(1) Applications for Import Approval of Animals and Animal Products, as included in Appendix I, for:
a. The first quarter, period from January to March, can only be submitted in the month of December.
b. The second quarter, period from April to June, can only be submitted in the month of [March]
c. The third quarter, period from July to September, can only be submitted in the month of June.
d. The fourth quarter, period from October to December, can only be submitted in the month of September.
(2) Import Approval is issued at the beginning of each quarter.
(3) Import Approval, as described in Article 11, paragraph (3), item (a), is valid for 3 (three) months commencing from the date of its issuance. Exhibit JE-21.

[198] Article 15 of MOT 46/2013, as amended (Exhibit JE-10), provides as follows:

(1) A Certificate of Health from the country of origin of the Animals and/or Animal Products that are to be imported must be issued after a RI-Animals and Animal Products have received Import Approval.
(2) The Import Approval Number must be included in the Certificate of Health, as described in paragraph (1).

elements specified in Recommendations once they have been issued.[199] This measure is implemented by Indonesia through Articles 30[200] and 33(a)-(b) and 39(e)[201] of MOA 139/2014, as amended[202], and Article 30 of MOT 46/2013, as amended.[203]

2.55. Pursuant to these provisions, MOA Recommendations and Import Approvals must specify, *inter alia*, the quantity of products permitted to be imported; a description of the type, category, cut and HS Code for the products to be imported; the country of origin of products permitted for importation; and the port of entry into Indonesia through which products are permitted to be imported. Importers are prohibited from requesting changes to the country of origin, point of entry, type/category of carcasses, meat, and/or their processed products once a Recommendation has been issued. If the quantity, type, business unit, and/or country of origin of imports is not in accordance with the relevant Import Approval, those imports will have to be re-exported, at the importer's cost.

2.3.3.4 Measure 13: 80% realization requirement

2.56. Measure 13 consists of the requirement whereby RIs must import at least 80% of each type of product covered by their Import Approvals every year.[204] This Measure is implemented by Indonesia by means of Articles 13[205], 25[206], 26[207] and 27[208] of MOT 46/2013, as amended.

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[199] New Zealand's Panel Request, pp. 4-7; United States' Panel Request, pp. 4-7; New Zealand's first written submission, paras. 49-51; United States' first written submission, para. 117.

[200] Article 30 of MOA 139/2014, as amended, provides as follows:
A Recommendation, as described in Article 28, must at a minimum consist of:
a. Recommendation number;
b. Applicant name and address, and cold storage address;
c. Application letter number and date;
d. Country of origin;
e. Name and establishment number of the supplying business unit;
f. Type/category of carcasses, meat, offals and/or their process products, along with HS code;
g. Technical requirements of veterinary public health;
h. Point of entry;
i. Validity period of Recommendation; and
j. Intended use. Exhibit JE-28.

[201] Article 39(e) of MOA 139/2014, as amended, relevantly provides:
Business Operators, State-Owned Enterprises, Regional-Government Owned Enterprises, Social Institutions, or Foreign Country/International Institution Representatives that violate the provisions in:
... (e) Article 33 will be subject to sanctioning in the form of Recommendation revocation, not being given Recommendation in the future, and will have their Import Approval Letter (SPI) and status as a Registered Importer (IT) of Animal Products proposed to the Minister of Trade for revocation. Exhibit JE-28.

[202] Article 33b of MOA 139/2014, as amended by MOA 2/2015, provides as follows:
Business Operators, State-Owned Enterprises, Regional-Government Owned Enterprises, Social Institutions, or Foreign Country/International Institution Representatives, as described in Article 23, paragraph (1) and paragraph (2), that import carcasses, meat, and/or their processed products:
a. are prohibited from requesting changes to the country of origin, point of entry, type/category of carcasses, meat, and/or their processed products in Recommendations that have been issued;
b. are prohibited from importing types/categories of carcasses, meat, and/or their processed products other than what is included in their Recommendation;
c. must prevent the entry and spread of infectious animal diseases; and
d. must report their importation realization from the previous period when submitting a new application for import Recommendation, in accordance with Format-4. Exhibit JE-28.

[203] Article 30 of MOT 46/2013, as amended, reads as follows:
(1) Importers or Exporters of Animals and/or Animal Products that are not in accordance with the provisions in this Ministerial Regulation will be punished in accordance with regulatory legislation
(2) Imports of Animals and/or Animal Products whose quantity, type, business unit, and/or country of origin is not in accordance with their Import Approval and/or not in accordance with the provisions in this Ministerial Regulation will be reexported.
(3) The cost of re-export, as described in paragraph (2), is the responsibility of the importer. Exhibit JE-21.

[204] New Zealand's Panel Request, pp. 4-7; United States' Panel Request, pp. 4-7; New Zealand's first written submission, para. 52; United States' first written submission, para. 122.

[205] Article 13 of MOT 46/2013, as amended, provides as follows:
RI-Animals and Animal Products who have received Import Approval, as described in Article 11, paragraph (3), item (a), are required to realize at least 80% (eighty %) of imports of Animals and Animal Products for 1 (one) year. Exhibit JE-21.

[206] Article 25 of MOT 46/2013, as amended, provides as follows:

2.57. Pursuant to the above provisions, RIs are required to import, on an annual basis, 80% of the quantity of each type of animal and animal product specified in their Import Approvals. In addition, RI designees are required to submit monthly import and export realization reports setting out all of their imports of animals and animal products. These reports must be submitted every month to the Ministry of Trade, the Ministry of Agriculture, and the Head of the Food and Drug Control Agency. The RI designees must attach a photocopy of their "Import Realization Control Card". Failing to fulfil the 80% realization requirement carries the penalty of suspension or revocation of the RI designation, depending on the circumstances established in Articles 26 and 27 of MOT 46/2013, as amended.

2.3.3.5 Measure 14: Use, sale and distribution of imported bovine meat and offal

2.58. Measure 14 consists of certain requirements that limit the use, sale and distribution of imported animals and animal products, including bovine meat and offal.[209] This measure is implemented by Indonesia through Articles 3[210], 17[211], 25(2)[212] and 26[213] of MOT 46/2013, as amended, and Articles 32[214] and 39(d)[215] of MOA 139/2014, as amended.

(1) RI-Animals and Animal Products or companies that have already obtained Import Approval and companies that have already obtained Export Approval must:
a. submit a written report evaluating their import or export of Animals and/or Animal Products, through http://inatrade.kemendag.go.id in the form of the report template included in Appendix IV, which is an integral part of this Ministerial Regulation; and
b. attach a photocopy of Import or Export Realization Control Card that has been signed and stamped by a Customs and Excise official.
(2) RI-Animals and Animal Products that have obtained Import Approval must submit a cattle and beef distribution report in the form of the report templates included in Appendix V and Appendix VI, which are an integral part of this Ministerial Regulation.
(3) The reports, as described in paragraph (1) and paragraph (2), must be submitted every month no later than the 15th (fifteenth) of the following month to the Director General with a copy to:
a. The Director General of Domestic Trade, Ministry of Trade;
b. The Head of the Food and Drug Control Agency; and
c. The Director General of Livestock and Animal Health, Ministry of Agriculture. Exhibit JE-21.

[207] Article 26 of MOT 46/2013, as amended, provides as follows:
Confirmation as a RI-Animals and Animal Products is suspended if a company:
a. does not fulfill the realization obligation of its Import Approval, as described in Article 13; and/or
b. does not fulfill the obligation to submit a report as described in Article 25 as many as 3 (three) times. Exhibit JE-21.

[208] Article 27 of MOT 46/2013, as amended, provides as follows:
Confirmation as a RI-Animals and Animal Products is revoked if a company:
a. does not fulfill the realization obligation of its Import Approval, as described in Article 13 as many as 2 (two) times;
b. is proven to have violated the labeling inclusion provision, as described in Article 19, and/or the packaging provision, as described in Article 20;
c. is proven to have submitted false data and/or information that was required in receiving Confirmation as a RI-Animals and Animal Products, Import Approval, or Export Approval;
d. is proven to have altered the information included in the RI-Animals and Animal Products import, Import Approval, or Export Approval documents; and/or
e. is found guilty, on the basis of a court decision which has permanent legal force, of the criminal offense of misusing RI-Animals and Animal Products import, Import Approval, or Export Approval documents. Exhibit JE-21.

[209] New Zealand's Panel Request, pp. 4-7; United States' Panel Request, pp. 4-7; New Zealand's first written submission, para. 55; United States' first written submission, para. 125.

[210] Article 3 of MOT 46/2013, as amended, provides as follows:
(1) Animals, as described in Article 2, paragraph (2), can be imported in order to:
a. improve genetic quality and diversity;
b. develop science and technology;
c. overcome domestic deficiencies of Seeds, Breeders and/or Feeders; and/or
d. fulfill research and development needs.
(2) Animals, as described in Article 2, paragraph (3), can be exported only if the domestic needs of Seeds, Breeders and/or Feeders have been fulfilled and the sustainability of local livestock is secure. Exhibit JE-21.

[211] Article 17 of MOT 46/2013, as amended, provides that bovine carcasses, meats, and/or offals, as listed in Appendix I "can only be imported for the use and distribution of industry, hotels, restaurants, catering, and/or other special needs". Exhibit JE-21.

[212] Article 25(2) of MOT 46/2013, as amended, provides:

2.59. Pursuant to the above provisions, the animals[216] listed in Appendix I and Appendix II of MOT 46/2013, as amended, can only be imported for the purposes of improving genetic quality and diversity; developing science and technology; overcoming domestic deficiencies of seeds, breeders and/or feeders; and/or fulfilling research and development needs.[217]. For animal products, the bovine carcasses, meats, and/or offals listed in Appendix I of MOT 46/2013 can also be imported for the use and distribution of industry, hotels, restaurants, catering, and/or other special needs.[218] The non-bovine carcasses, meats, and/or offal listed in Appendix II of Article 32 of MOA 139/2014, as amended by MOA 2/2015, may be imported only for the same purposes as the bovine products specified in Appendix I and, additionally, for sale in "modern markets".[219]

2.3.3.6 Measure 15: Domestic purchase requirement for beef

2.60. Measure 15 consists of the requirement imposed upon importers of large ruminant meats to absorb local beef.[220] Indonesia implements this Measure pursuant to Articles 5(1)[221], and (1)[222], 26(1)[223] and 39(b)-(c)[224] of MOA 139/2014, as amended.

RI-Animals and Animal Products that have obtained Import Approval must submit a cattle and beef distribution report in the form of the report templates included in Appendix V and Appendix VI, which are an integral part of this Ministerial Regulation. Exhibit JE-21.

[213] Article 26 of MOT 46/2013, as amended, provides:
Confirmation as a RI-Animals and Animal Products is suspended if a company:
a. does not fulfill the realization obligation of its Import Approval, as described in Article 13; and/or
b. does not fulfill the obligation to submit a report as described in Article 25 as many as 3 (three) times.
Exhibit JE-21.

[214] Article 32 of MOA 139/2014, as amended, provides as follows:
(1) Intended use, as described in Article 30, item (j), for bovine meat, as described in Article 8, includes for: hotel, restaurant, catering, manufacturing, and other special needs.
(2) Intended use, as described in Article 30, item (j), for carcasses, and/or non-bovine meat and processed meats, as described in Article 8, includes for: hotel, restaurant, catering, manufacturing, other special needs, and modern markets.
(3) Other special needs, as described in paragraph (1) and paragraph (2), include:
a. gifts/grants for public worship, charity, social services, or for natural disaster mitigation;
b. the needs of foreign country/international institution representatives and officials on assignment in Indonesia,
c. the needs of science research and development; or
d. sample goods that are not for trade (e.g., that are for exhibition) that are up to 200 (two hundred) kilograms.
(4) The intended use, as described in Article 30, item (j), of State-Owned Enterprises, as described in Article 23, paragraph (3), is to fulfill sufficiency needs and activities of market operations.
(4) The intended use, as described in Article 30, item (j), for imports by State-Owned Enterprises, as described in Article 23, paragraph (3), is to stabilize prices through market operation activities and to provide disaster relief. Exhibit JE-28.

[215] Article 39(d) of MOA 139/2014, as amended, relevantly provides:
Business Operators, State-Owned Enterprises, Regional-Government Owned Enterprises, Social Institutions, or Foreign Country/International Institution Representatives that violate the provisions in:
... (d) Article 32 will be subject to sanctioning in the form of Recommendation revocation, not being given Recommendation in the future, and will have their Import Approval Letter (SPI) and status as a Registered Importer (IT) of Animal Products proposed to the Minister of Trade for revocation. Exhibit JE-28.

[216] Animals, as described in Article 2, paragraph (2), of MOT 46/2013, as amended, Exhibit JE-21.

[217] Article 3. a.-d. of of MOT 46/2013, as amended, Exhibit JE-21.

[218] Article 17 of MOT 46/2013, as amended, Exhibit JE-21.

[219] Articles 30(j) and 32(2) of MOA 139/2014. Exhibit JE-28.

[220] New Zealand's Panel Request, pp. 4-7; United States' Panel Request, pp. 4-7; New Zealand's first written submission, para. 59; United States' first written submission, paras. 129-130.

[221] Article 5(1) of MOA 139/2014 provides as follows:
(1) Business Operators, State-Owned Enterprises, or Regional Government-Owned Enterprises, as described in Article 4, that import large ruminant meats must absorb local beef from slaughter houses that have a Veterinary Control Number.
(2) The absorption of local beef, as described in paragraph (1), must be verified by the Provincial and/or Regency/Municipal Agency from which the local beef originates. Exhibit JE-28.

[222] Article 24(1) of MOA 139/2014, as amended provides as follows:
(1) Recommendation applications that are submitted by Business Operators, State-Owned Enterprises and Regional Government-Owned Enterprises, must include the following:
a. Identity card (KTP) and/or identification as the head of the company;
b. Tax Identification Number (NPWP);
c. Trade Business License (SIUP);
d. Registration Certificate or Business License in the field of livestock and animal health;

2.61. Pursuant to these provisions, in applying for a Recommendation, importers must submit proof of local beef purchases duly verified by the provincial agency or municipality of origin. Accordingly, business operators, state-owned enterprises, or regional government-owned enterprises that import large ruminant meats must absorb local beef when applying for a Recommendation.

2.3.3.7 Measure 16: Beef reference price

2.62. Measure 16 consists of the implementation of a reference price system on imports of Appendix I animals and animal products and the ensuing suspension of imports when the domestic market price of secondary beef cuts falls below the pre-established reference price.[225] This Measure is implemented by means of Article 14 of MOT 46/2013, as amended.[226]

2.63. Pursuant to these provisions, in the event that the market price of secondary cuts of beef is below the reference price, imports of animals and animal products, as included in Appendix I, are suspended. Imports are resumed when the market price reaches again the reference price. The reference price is set at 76,000 Rupiah/kg.[227]

2.3.3.8 Measure 17: Import licensing regime for animals and animal products as a whole

2.64. This measure consists of Indonesia's import licensing regime for animals and animal products, as maintained through MOT 46/2013, as amended, and MOA 139/2014, as amended by

e. Certificate of incorporation, with its most recent amendments;
f. Veterinary Control Number (NKV);
g. Confirmation as a Registered Importer (IT) of Animal Products;
h. Stamped statement letter regarding ownership of cold storage and cold transportation facilities complete with supporting proof/documents, except for ready-to-eat processed meat imports that do not need cold storage facilities as per the information on the product label;
i. Recommendation from provincial Agency;
j. Employment of a competent veterinarian in the field of veterinary public health, proven with a letter of appointment or work contract from the company head;
k. Importation realization report from the previous period;
l. Proof of local beef meat absorption verified by the provincial Agency and/or regency/municipality from which the local beef originates; and
m. Stamped statement letter stating that all the documents submitted are correct and legally valid. Exhibit JE-28.

[223] Article 26(1) of MOA 139/2014, as amended, provides:
An application is rejected, as described in Article 25, if it does not meet the requirements described in Article 5, ... and a rejection letter will be issued by the Director of Veterinary Public Health and Post-Harvest to the importer via online and/or manually with a copy to Director General of Livestock and Animal Health, in accordance with Format-2. Exhibit JE-28.

[224] Article 39(b)-(c) of MOA 139/2014, as amended, relevantly provides:
Business Operators, State-Owned Enterprises, Regional-Government Owned Enterprises, Social Institutions, or Foreign Country/International Institution Representatives that violate the provisions in: (b) Article 5; (c) Article 24 paragraph (1) ... item (l) ... will be subject to sanctioning in the form of Recommendation revocation, not being given Recommendation in the future, and will have their Import Approval Letter (SPI) and status as a Registered Importer (IT) of Animal Products proposed to the Minister of Trade for revocation. Exhibit JE-28.

[225] New Zealand's Panel Request, pp. 4-7; United States' Panel Request, pp. 4-7; New Zealand's first written submission, para. 62; United States' first written submission, para. 131.

[226] Article 14 of MOT 46/2013, as amended, provides as follows:
(1) In the event that the market price of secondary cuts of beef is below the reference price, imports of Animals and Animal Products, as included in Appendix I, of this Ministerial Regulation are postponed until the market price reaches its reference price.
(2) The reference price of secondary cuts of beef, as described in paragraph (1), is Rp 76,000.00/kg (seventy-six thousand rupiah per kilogram).
(3) The reference price of beef, as described in paragraph (2), can be evaluated at any time by the Beef Price Monitoring Team, which is formed by the Minister and whose membership consists of representatives from relevant agencies.
(4) Based on the results of the aforementioned evaluation, as described in paragraph (3), the Beef Price Monitoring Team then proposes a reference price to the Minister in order to set a new reference price. Exhibit JE-21.

[227] Article 14 of MOT 46/2013, as amended, Exhibit JE-21. This price level has remained unchanged since it became effective on 2 September 2013. Indonesia's response to Panel question No. 35.

MOT 2/2015, as a whole.[228] We refer to the various subsections describing the individual elements of this regime which have been challenged as separate Measures 10 to 16.

2.3.4 Measure 18: Sufficiency of domestic production to fulfil domestic demand

2.65. Measure 18 consists of the requirement whereby importation of horticultural products, animals and animal products depends upon Indonesia's determination of the sufficiency of domestic supply to satisfy domestic demand.[229] This measure is encompassed by Article 36B[230] of the Animal Law Amendment, Article 88 of the Horticulture Law, Articles 14 and 36 of the Food Law[231] and Article 30 of the Farmers Law.[232]

2.66. Pursuant to these provisions, importation of horticultural products, animals and animal products is contingent upon the sufficiency of domestic supply for consumption and/or government food reserves.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 New Zealand

3.1. New Zealand requests that the Panel finds that:

a. 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, both

[228] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 274; New Zealand's responses to the Panel Question no. 82, paras. 16-21. New Zealand's second opening statement, paras. 6-8; United States' first written submission, para. 211.

[229] New Zealand's Panel Request, pp. 4-7; United States' Panel Request, pp. 4-7; New Zealand's first written submission, paras. 15-16 and 67; United States' first written submission, paras. 13 and 82-83.

[230] Article 36B of the Animal Law Amendment provides as follows:
(1) 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 fulfill public consumption.
(2) Importation of Livestock as intended in paragraph (1) must be in the form of Feeder.
(3) Importation of large ruminants Feeder cannot exceed certain weight.
(4) Every Person that performs importation of Feeder as intended in paragraph (2) must obtain permit from the Minister.
(5) Every Person that import Feeder from overseas as intended in paragraph (2) must perform fattening domestically to obtain added value in a time period of 4 (four) months at the soonest since quarantine measure is performed in the form of discharge.
(6) Importation of Livestock from overseas as intended in paragraph (2) and paragraph (3) must:
a. fulfill the technical requirement of Animal Health;
b. free of Infectious Animal Disease required by Veterinary Authority;
c. fulfill the provision of the regulating legislation in the field of animal quarantine.
(7) Importation of Livestock from overseas to be bred in Indonesia must:
a. fulfill technical requirement of Animal Health;
b. free of Infectious Animal Disease required by Veterinary Authority; and
c. fulfill the provision of the regulating legislation in the field of Animal quarantine.
(8) Further provision regarding importation of Livestock and Animal Product as intended in paragraph (1) as well certain weight as intended in paragraph (3) is regulated by Ministerial Regulation. Exhibit JE-5.

[231] Article 36 of the Food Law establishes as follows:
(1) Import of Food can only be done if the domestic Food Production is insufficient and/or cannot be produced domestically.
(2) Import of Basic Food can only be done if the domestic Food Production and the National Food Reserve insufficient.
(3) The sufficiency of domestic Basic Food Production and the Government Food Reserves is determined by the minister or the government agency tasked with carrying out government work in the field of Food. Exhibit JE-2.

[232] Article 30 of the Farmers Law provides as follows:
(1) Every Person is prohibited from importing Agricultural Commodities when the availability of domestic Agricultural Commodities is sufficient for consumption and/or Government food reserves.
(2) Sufficiency of consumption and Government food reserves as intended in paragraph (1) is stipulated by the Minister. Exhibit JE-3.

when viewed as a single measure and when its components are viewed as individual measures[233];

b. 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, both when viewed as a single measure and when its components are viewed as individual measures[234];

c. Indonesia's import restrictions based on the sufficiency of domestic production are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture[235];

d. the Domestic Purchase Requirement for beef and the restrictions on use, sale and distribution of animals and animal products are inconsistent with Article III:4 of the GATT 1994 to the extent they affect the internal sale, offering for sale, purchase, transportation, distribution or use of products[236];

e. the restrictions on use, sale and distribution of horticultural products are inconsistent with Article III:4 of the GATT 1994 to the extent they affect the internal sale, offering for sale, purchase, transportation, distribution or use of products[237]; and

f. the limited application windows and validity periods for MOA Recommendations and Import Approvals for animals and animal products and horticultural products are inconsistent with Article 3.2 of the Import Licensing Agreement to the extent that they are non-automatic import licensing procedures.[238] To the extent that the application windows and validity periods are automatic licensing procedures, New Zealand submits that they would be inconsistent with Article 2.2(a) of the Import Licensing Agreement.[239]

3.2. Accordingly, New Zealand requests that the Panel recommend to the DSB that Indonesia brings its prohibitions and restrictions on the imports of animals and animal products and horticultural products into conformity with its WTO obligations.[240]

3.2 United States

3.3. The United States requests that the Panel finds[241] that the prohibitions and restrictions imposed by Indonesia's import licensing regimes for horticultural products and animals and animal products, operating individually and as whole regimes, and the provisions of Indonesia's laws conditioning importation on the insufficiency of domestic production to fulfil domestic demand, are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.[242]

3.4. The United States also requests that to the extent that the Panel finds that the limited application windows and validity periods for MOA Recommendations and Import Approvals, both for horticultural products and for animals and animal products, are subject to the disciplines of the

[233] New Zealand's Panel Request, pp. 4-6; first written submission, para. 435.
[234] New Zealand's Panel Request, pp. 1-4; first written submission, para. 435.
[235] New Zealand's Panel Request, pp. 6-7; first written submission, para. 435.
[236] New Zealand's Panel Request, fn. 12 and 14; first written submission, para. 435.
[237] New Zealand's Panel Request, fn. 7; first written submission, para. 435.
[238] New Zealand's Panel Request, fn. 5 and 8; first written submission, para. 435.
[239] New Zealand's response to Panel question No. 5.
[240] New Zealand's first written submission, para. 437; second written submission, para. 310.
[241] The Panel notes that in response to Panel question No. 4, the United States explained that it "has not presented any argumentation concerning Article III:4 of the GATT 1994 and has not asked the Panel to make findings concerning the inconsistency of the challenged measures with Article III:4. Nor has the United States at this point definitively withdrawn these claims". Similarly, in response to Panel question No. 5, the United States stated that it "has not presented any argumentation concerning Article 2.2 of the Import Licensing Agreement and we have not asked for findings concerning the consistency of the challenged measures with Article 2.2(a). Nor has the United States at this point definitively withdrawn these claims". The United States has not presented any subsequent request for findings by the Panel under these two provisions.
[242] United States' Panel Request; United States' first written submission, para. 395; second written submission, para. 242.

Import Licensing Agreement, these requirements would be inconsistent with Article 3.2 of that Agreement.[243]

3.5. Accordingly, the United States requests, pursuant to Article 19.1 of the DSU, that the Panel recommends the DSB that Indonesia bring the challenged measures into conformity with its WTO obligations.[244]

3.3 Indonesia

3.6. Indonesia requests the Panel to reject the co-complainants' claims in their entirety.[245]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 18 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Argentina, Australia, Brazil, Canada, the European Union, Japan, Korea, Norway, Paraguay and Chinese Taipei are reflected in their executive summaries, provided in accordance with paragraph 21 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, C-6, C-7, C-8, and C-9).

6 INTERIM REVIEW

6.1 Introduction

6.1. On 12 July 2016, the Panel issued its Interim Report to the parties. On 26 July 2016, New Zealand, the United States and Indonesia submitted written requests for the review of the Interim Report. No party requested an interim review meeting. On 2 August 2016, New Zealand and the United States submitted comments on Indonesia's request for review. Indonesia did not submit comments on the co-complainants' requests for review.

6.2. In accordance with Article 15.3 of the DSU, this Section of the Panel Report sets out the Panel's response to the parties' requests for review of precise aspects of the Report made at the interim review stage. The Panel modified aspects of its Report in the light of the parties' comments where it considered it appropriate, as explained below. In addition, the Panel also corrected a number of typographical and other non-substantive errors, including those identified by the parties. References to sections and paragraph numbers in this Section relate to the Interim Report, except as otherwise noted.

6.2 Factual Aspects

6.3. Regarding paragraph 2.8, the United States requested that the Panel make explicit that the measures within our terms of reference are those that were in effect at the time the Panel was established.[246] The United States thus asked us to insert a footnote in the Report including references to Article 7.1 of the DSU and to some jurisprudence. No other party has commented on this request.

6.4. The Panel observes that the United States' request relates to the descriptive part of the Interim Report, where the parties already had the opportunity to present their views on 2 June 2016. We recall that, at that time, the United States submitted a comment on that same paragraph but in relation to a different issue. The Panel considers that the understanding that the measures at issue in this dispute are those in effect at the time of the Panel's establishment is already reflected in Section 2.3 of the Report entitled "Measures at issue". The Panel thus declines to make the changes suggested by the United States.

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[243] United States' Panel Request, fn. 5 and 8; United States' first written submission, paras. 384 and 394.

[244] United States' first written submission, para. 395.

[245] Indonesia's first written submission, para. 189; second written submission, para. 278.

[246] United States' comments on the Interim Report of the Panel, para. 4.

6.3 Structure of the findings

6.5. According to the United States, panel reports frequently contain a section in which the panel sets out its approach to interpretation of the covered agreements as well as the standard of review and burden of proof.[247] The United States suggested that the Panel insert a section at the outset of its findings setting out our approach to these issues. No other party has commented on this request.

6.6. The Panel notes that there is no common approach to inserting introductory sections as suggested by the United States.[248] Nonetheless, our approach to the terms of reference, standard of review or burden of proof in the context of the present proceedings has been punctually addressed by the Panel where relevant. For instance, the Panel's approach to our terms of reference was amply discussed in our Preliminary Ruling of 5 July 2016.[249] Similarly, the Panel's understanding on the burden of proof was discussed in the context of Article XX of the GATT 1994 and the order of analysis the Panel should follow, as evidenced in paragraph 7.34 below. Consequently, the Panel declines to make the changes suggested by the United States.

6.4 Whether certain challenged measures are the results of decisions by private actors

6.7. Regarding paragraphs 7.3 to 7.26, the United States submitted that Indonesia had not argued that the measures at issue were not themselves attributable to Indonesia but that the limiting effects demonstrated by the co-complainants were not attributable to the Indonesian measures because they were entirely the result of the choices of private actors.[250] The United States thus suggested that the Panel either move its discussion on whether certain measures are the result of private actions to the Section of the Report addressing the co-complainants' claims under Article XI:1 of the GATT 1994 or, alternatively, this issue be addressed separately under the Article XI:1 analyses of Measures 1, 2, 3, 5, 11, 12, and 13.[251] No other party has commented on this request.

6.8. While we acknowledge that, in some instances, Indonesia seemed to have argued that the limiting effect of a number of its Measures was the result of the decision of private actors, this does not, however, detract from the fact that Indonesia presented this discussion under Article 4.2 of the Agreement on Agriculture[252] and Article XI:1 of the GATT 1994.[253] To us, this issue goes to the core of our jurisdiction and should be addressed before entering into the substantive analysis of the relevant claims at issue, as the Panel has done. For these reasons, the Panel declines to make the changes suggested by the United States.

6.5 Whether an adverse trade effect test is necessary for a determination under Article XI:1 of the GATT 1994

6.9. Regarding paragraphs 7.47 and 7.49, the United States requested that the Panel change the term "ruling" when referring to the Appellate Body's report in *Argentina – Import Measures* and use instead the term of "findings" or, alternatively, "guidance" to describe the referenced section in the Appellate Body's report.[254] No other party has commented on this request. The Panel made adjustments accordingly in paragraphs 7.47 and 7.49.

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[247] United States' comments on the Interim Report of the Panel, para. 3.

[248] *See*, for instance, the Panel Reports *India – Agricultural Products; US – Animals; India – Solar Cells*; *Argentina – Financial Services.*

[249] *See* Annex A-1.

[250] United States' comments on the Interim Report of the Panel, para. 4 (referring to Indonesia's first written submission, paras. 69, 78, 86, 101, 141, 147 and 163; second written submission, paras. 75 and 177).

[251] United States' comments on the Interim Report of the Panel, para. 7.

[252] For instance, Indonesia argued that "[m]easures that are not maintained, resorted to, or reverted to by a Member are also excluded from the scope of Article 4.2. Thus, a 'measure' that is in fact the result of the decisions of private actors is not included in the scope of measures prohibited by Article 4.2". Indonesia's first written submission, para. 52.

[253] For instance, Indonesia argued that "Article XI:1 provides that only those prohibitions or restrictions 'instituted or maintained' by any Member are prohibited. Measures 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". Indonesia's first written submission, para. 119.

[254] United States' comments on the Interim Report of the Panel, para. 8.

6.6 Evidentiary weight given to administrative practice vs. legal text

6.10. Indonesia requested the Panel to provide further clarification with respect to the evidentiary weight it ascribed to the plain text of Indonesia's laws and regulations versus the common practice of implementing agencies, in the light of the Panel's apparent inconsistency with respect to the treatment of both categories throughout its report.[255] Indonesia noted some disparity between the Panel's treatment of administrative practice in its Interim Report. For Indonesia, in several instances, the Panel seemed to adopt the co-complainants' assertions that importers, in practice, are limited by the operation of Indonesia's import licensing regime[256] while it seemed that similar arguments made by Indonesia regarding the regular practice of its administrative agencies in implementing the import licensing regime were deemed insufficient.[257] Indonesia then quoted paragraph 7.84 of the Interim Report referring to Article 11 of MOT 71/2015 in the context of the Panel's analysis of Measure 1[258] and submitted that this Measure, although outside the Panel's terms of reference, was introduced as an example of the agency's regular practice regarding the timing of approvals.[259] Indonesia further argued that, in its analysis of Measure 4, the Panel accepted the arguments of the co-complainants that administrative practice is more persuasive than the plain text of the regulation. Indonesia quotes part of paragraph 7.151 of the Interim Report in support of its argument.[260]

6.11. Both co-complainants objected to Indonesia's request for review.[261] New Zealand submitted that the Panel appropriately weighed the evidence before it and it is therefore not necessary for the Panel to provide the further clarification requested by Indonesia.[262] New Zealand noted that, in the example provided by Indonesia regarding Measure 4, the Panel made its findings in part based on the extensive evidence submitted by the co-complainants. For New Zealand, the fact that the Panel reached factual findings on the basis of the evidence before it in respect of one measure and factual findings on the basis of other evidence that it weighed appropriately in respect of another measure does not amount to an "inconsistency" in treatment.[263]

6.12. The United States submitted that the "apparent inconsistency" identified by Indonesia does not exist and that the Panel has made an objective assessment and exercised its discretion to give the evidence the weight it considered due.[264] With respect to Measure 1, the United States noted that the co-complainants pointed out that the regulation in force at the time of the Panel's establishment stipulated that Import Approvals were issued at the beginning of each semester and that, in contrast, Indonesia asserted that Import Approvals are issued within two days. The United States pointed out that, in making this claim, Indonesia had cited a regulation that was issued after the establishment of the Panel but that, in any event, the said regulation did not support Indonesia's assertion because it was silent on when Import Approvals are issued.[265] With respect to Measure 4, the United States maintained that the Panel found that, although the text of the regulation "does not expressly restrict importation in terms of specific quantities", the operation of the Measure demonstrated its limiting effect on importation.[266] The United States submitted that in coming to this conclusion, the Panel relied in part on evidence submitted by the co-complaints in the form of letters from Indonesian officials describing the harvest period restrictions and trade data showing sharp declines for the affected horticultural products.[267] For the United States, far from treating the parties' evidence differently, the Panel simply found the co-complainants' evidence persuasive as to the meaning of the challenged measure.[268]

[255] Indonesia's comments on the Interim Report of the Panel, para. 12.
[256] Indonesia's comments on the Interim Report of the Panel, para. 8 (referring to Interim Panel Report, para. 7.91).
[257] Indonesia's comments on the Interim Report of the Panel, para. 8.
[258] Indonesia's comments on the Interim Report of the Panel, para. 9.
[259] Indonesia's comments on the Interim Report of the Panel, para. 10.
[260] Indonesia's comments on the Interim Report of the Panel, para. 11.
[261] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 10; United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 20.
[262] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 12.
[263] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 12.
[264] United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 16.
[265] United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 17 (referring to the Interim Report of the Panel, para. 7.84).
[266] United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 18 (referring to the Interim Report of the Panel, para. 7.151).
[267] United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 18 (referring to the Interim Report of the Panel, paras. 7.151-7.155).
[268] United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 18.

6.13. The Panel observes that Article 15.2 of the DSU, and paragraph 22 of the Panel's Working Procedures, provide parties with an opportunity to request the Panel "to review precise aspects of the interim report". Previous panels have declined to expand the scope of interim review beyond that provided for in Article 15.2 and have accordingly circumscribed their review to address only those comments that relate to "precise aspects" of the interim report.[269] The Panel notes the general terms in which Indonesia put forward its statement that there is a disparity in the treatment of Indonesia's laws and regulations versus the common practice of implementing agencies. Indonesia only identifies three paragraphs[270] of the Interim Report referring to the Panel's analysis of the consistency of two (out of 18) measures at issue with Article XI:1 of the GATT 1994 and that would allegedly represent instances of such a disparity. We shall therefore consider Indonesia's request for review with respect to the three paragraphs it mentioned.

6.14. We commence with paragraph 7.84, where the Panel assessed Indonesia's reliance upon Article 11 of MOT 71/2015 in seeking to respond to allegations about the time it takes to receive an Import Approval, in the context of our analysis of Measure 1 under Article XI:1 of the GATT 1994. In particular, Indonesia had attempted to persuade the Panel that, contrary to the explicit text of Article 13(A) of MOT 16/2013, as amended, Import Approvals were not issued at the beginning of each semester, but rather, within two days after the requests are received by the Ministry of Trade. In paragraph 7.84, we amply discussed why Indonesia's argument was inapposite to prove its point. First, we recalled that MOT 71/2015 was issued after the establishment of this Panel and is therefore not within our terms of reference. Furthermore, as the Panel remarked, there is nothing in Article 11 of MOT 71/2015 that would support Indonesia's contention that Import Approvals are issued within two days after the requests are received by the Ministry of Trade. Indeed, as we pointed out in the Interim Report, this provision does not touch upon the timeframes for the issuance of Import Approvals. In this sense, we fail to see how Article 11 of MOT 71/2015 constitutes an example of the Agency's regular practice as Indonesia is arguing.

6.15. Concerning paragraph 7.91, we note that it includes our conclusion where we agree with the co-complainants that the way Measure 1 is designed and structured results in a limitation of the competitive opportunities of importers in practice because it restricts the market access of imported products into Indonesia. Unlike Indonesia appears to be arguing, we do not simply "adopt the co-complainants' assertions that importers, in practice, are limited by operation of Indonesia's import licensing regime".[271] Rather, we concur with the co-complainants' view after having duly examined the design, architecture and revealing structure of Measure 1.[272]

6.16. Regarding paragraph 7.151, Indonesia argued that, in our analysis, the Panel accepted the arguments of the co-complainants that "administrative practice" is more persuasive than the plain text of the regulation.[273] We disagree with this interpretation of our findings. As evidenced in paragraphs 7.151 to 7.155, in reaching the conclusion that Measure 4 is inconsistent with Article XI:1 of the GATT 1994, the Panel examines the design, architecture and revealing structure of Measure 4 in the light of the evidence submitted by the parties. We note that, in this analysis, we did not refer to "administrative practice" but only to the fact that while there was no express numerical limit set out in the text of the regulation, the consequence of temporarily limiting importations was that of a quantitative restriction prohibited under Article XI:1 of the GATT 1994.

6.17. For these reasons, the Panel declines to make the changes suggested by Indonesia.

6.7 Preliminary issues and claims pursuant Article XI:I of the GATT 1994

6.18. Regarding paragraphs 7.10, 7.15, 7.20, 7.23, and 7.175, the United States requested the Panel to make some changes in the language used when describing its arguments on the grounds that the United States had not referred to volumes of imports in its submissions with respect to these measures, but referred more generally to the limiting effect on importation.[274] No other

[269] Panel Reports, *Japan – Alcoholic Beverages II*, para. 5.2; *Australia – Salmon*, para. 7.3; *Japan – Apples (Article 21.5 – US)*, para. 7.21; *India – Quantitative Restrictions*, para. 4.2; *Canada – Continued Suspension*, paras. 6.16–6.17; *US – Continued Suspension*, paras. 6.17–6.18; *India – Agricultural Products*, para. 6.5; *China – GOES (Article 21.5 – US)*, para. 6.21.

[270] Paragraphs 7.84, 7.91 and 7.151.

[271] Indonesia's comments on the Interim Report of the Panel, para. 8.

[272] *See* paragraphs 7.77-7.89 of the Interim Report of the Panel.

[273] Indonesia's comments on the Interim Report of the Panel, para. 11.

[274] United States' comments on the Interim Report of the Panel, para. 9.

party has commented on this request. The Panel made adjustments accordingly in paragraphs 7.10, 7.15, 7.20, 7.23 and 7.175.

6.8 Claims pursuant Article XI:I of the GATT 1994

6.19. Regarding paragraphs 7.73, 7.101, 7.122, 7.166, 7.310, 7.337 and 7.363, the United States suggested that the Panel may wish to choose a consistent formulation when describing the "task before the Panel"[275] in the referred paragraphs. The United States requested that the Panel revise the mentioned paragraphs to conform to the language used by the Panel in its interpretation of Article XI:1 of the GATT 1994, in particular, to eliminate the reference to the limiting effect on the volume of imports and refer instead to the limiting effect on importation.[276] The United States also asked that the Panel, in using the phrase "limiting effect on imports" or "limiting condition on imports" throughout the Final Report, replace the word "imports" so that the phrases would read "limiting effect on importation" and "limiting condition on importation."[277] No other party has commented on this request. The Panel made adjustments accordingly in paragraphs 7.73, 7.101, 7.122, 7.166, 7.310, 7.337 and 7.363, where appropriate.

6.9 Incentives created by the measures at issue

6.20. Regarding the Panel's analysis of the measures at issue, Indonesia requested that the Panel be explicit regarding the incentives created by each element of the relevant measure at issue when reference is made to such incentives driving private behaviour.[278] In particular, Indonesia noted that, in the context of Measure 2, the challenged measure includes several elements, i.e. quantity, product type and country of origin. With respect to quantity, Indonesia submitted that importers were previously incentivized to comply with a fixed quantity term in their import licences by the imposition of penalties associated with failure to achieve the 80% realization requirement. Indonesia asked the Panel to elaborate on its understanding of the incentives it perceives with respect to the quantity term of Measure 2 in order to provide clarity to Indonesia regarding the steps it needs to take to bring its measures into compliance given that this requirement is no longer in effect.[279]

6.21. The co-complainants objected to Indonesia's request.[280] For New Zealand, the Panel has appropriately made findings under Article XI:1 of the GATT 1994 on the basis of the overall "design, architecture and revealing structure" of the challenged measures and has provided extensive reasoning for these findings in the Interim Report.[281] New Zealand also submitted that it considered that the Panel had discharged its function under its terms of reference by making findings based on the measures as set out in the co-complainants' panel requests and that Indonesia's request to provide further elaboration is not necessary in order for the Panel to discharge its function.[282]

6.22. Similarly, the United States considered that the Panel has made sufficient findings with respect to the operation of the measures to which Indonesia refers and disagrees with Indonesia's request that additional findings are necessary. For the United States, the Panel has already elaborated on the findings with regard to the challenged measures that create incentives and inducement to private actors.[283] The United States also submitted that, to the extent that Indonesia is requesting the Panel to opine on whether Indonesia has already brought its measures into compliance, such a request goes beyond this Panel's term of reference.[284]

6.23. As with its prior request, Indonesia's request that we be more explicit regarding the incentives created by each element of the measures at issue when reference is made to such incentives driving private behaviour is crafted in very general terms. No specific references is made to the paragraphs or wording that Indonesia wishes us to review, apart from a reference to Measure 2 and paragraph 7.109 of our Interim Report. As explained in paragraph 6.13 above, we

[275] United States' comments on the Interim Report of the Panel, para. 10.
[276] United States' comments on the Interim Report of the Panel, para. 10.
[277] United States' comments on the Interim Report of the Panel, para. 11.
[278] Indonesia's comments on the Interim Report of the Panel, para. 4.
[279] Indonesia's comments on the Interim Report of the Panel, para. 4.
[280] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 3; United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 10.
[281] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 4.
[282] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 5.
[283] United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 4.
[284] United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 9.

shall address Indonesia's comments that relate to "precise aspects" of the Interim Report. In this instance, we address the comments concerning Measure 2 in paragraph 7.109 of our Interim Report.

6.24. In this respect, we recall that we have examined in detail the design, architecture and revealing structure of Measure 2 in paragraphs 7.104 to 7.110 of the Interim Report and thus consider that we have already provided extensive reasoning in our findings. Furthermore, in the event that Indonesia is asking us to assess the impact of a repeal of the 80% realization element of Measure 3 with respect to Measure 2, we also recall that our terms of reference included the measures at issue at the time of this Panel's establishment. Therefore, establishing whether Indonesia has repealed an element of Measure 3 (80% realization requirement) and its relevance in terms of compliance with the WTO Agreement is not within our terms of reference. We thus decline Indonesia's request to provide further clarification.

6.10 Whether Measure 1 (Limited application windows and validity periods) is inconsistent with Article XI:1 of the GATT 1994

6.25. Regarding paragraph 7.87, Indonesia requested the Panel to clarify its analysis with respect to the role of geographical location in the design, architecture and revealing structure of Indonesia's import licensing regime. In particular, Indonesia asked whether the Panel is suggesting that the application windows and validity periods that would allow some but not all Members to engage in continuous importation due to relative proximity would nonetheless be inconsistent with Article XI:1 of the GATT 1994.[285] For Indonesia, a measure cannot be inconsistent with respect to certain Members but not to others, depending on their proximity.[286] Indonesia thus argued that it is unclear how Indonesia is meant to take into account the various geographical limitations of all of its trading partners in designing an import licensing regime.[287]

6.26. The co-complainants objected to Indonesia's request.[288] New Zealand disagreed with Indonesia's reading of the Interim Report and considered that the Panel's findings are clear in this regard.[289] New Zealand noted that, with respect to Measure 1, the Panel expressly states that "the effect on importation can be attributed to the intrinsic elements of Measure 1"[290], confirming that the restrictive effect of the measure is a consequence of the intrinsic features of the measure itself, not the geographical proximity of exporting Members.[291] For New Zealand, the Panel found that the challenged measures are by their design inconsistent with Article XI:1 of the GATT 1994, irrespective of the geographic circumstances of an exporting Member. In its view, the Panel did not find that a measure may be inconsistent with respect to certain Members but not inconsistent as to others, depending on their proximity to Indonesia; nor did it find that a measure was "*more* inconsistent toward[s] some Members than others" as Indonesia contends.[292]

6.27. For the United States, Indonesia mischaracterized the Panel's findings since the Panel has found that Measure 1 is a limitation on importation because of its intrinsic elements. The United States pointed out that the Panel further supported its finding by noting the negative effects of Measure 1 on the competitive opportunities of imported products.[293] The United States argued that these elements apply to importers from every WTO Member regardless of their geographic location[294] and that, contrary to Indonesia's assertion, the Panel did not find that Measure 1 is more inconsistent towards some Members than others.[295]

6.28. Concerning paragraph 7.87, we observe that Indonesia interpreted this paragraph of our analysis as meaning that the "the measure might be inconsistent with respect to certain Members,

[285] Indonesia's comments on the Interim Report of the Panel, para. 16.
[286] Indonesia's comments on the Interim Report of the Panel, para. 15.
[287] Indonesia's comments on the Interim Report of the Panel, para. 15.
[288] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 13; United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 24.
[289] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 13.
[290] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 13 (referring to Interim Report, paras. 7.86). (emphasis added by New Zealand)
[291] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 14.
[292] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 15 (referring to Indonesia's comments on the Panel's Interim Report, para. 15. (emphasis original)
[293] Interim Panel Report, para. 7.90.
[294] United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 22.
[295] United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 23.

but not as to others…"[296] and thus argued that a measure cannot be more inconsistent towards some Members than to others.[297] We agree with Indonesia that a measure cannot be more inconsistent towards some Members than to others. This is not, however, our conclusion with respect to Measure 1 and we thus disagree with Indonesia's reading of our findings of inconsistency with Article XI:1 of the GATT 1994 in respect of Measure 1. Indeed, in paragraph 7.86, we explicitly concluded that the effect of Measure 1 on importation "can be attributed to the intrinsic elements of Measure 1". Accordingly, we see no basis for Indonesia's interpretation of our findings and we thus decline Indonesia's request to provide further clarification.

6.11 Whether Measure 3 (80% realization requirement) is inconsistent with Article XI:1 of the GATT 1994

6.29. Referring to paragraph 7.131, Indonesia requested the Panel to either provide an analysis regarding the impact of the realization requirement, and its repeal, *vis-à-vis* the restrictive effects of other measures, or explicitly state that the Panel declines to provide such analysis.[298] Indonesia explained that the Panel's discussion of the realization requirement contains implications for other Measures and that Indonesia understands the Panel to be stating that the effects of Measures 2, 3 and 7 are, to some degree, dependent upon each other. In this respect, Indonesia argued that it understands that the removal of the realization requirement will therefore alter the impact of Measures 2 and 7.[299]

6.30. The co-complainants objected to Indonesia's request.[300] In New Zealand's view, it is clear from the Interim Report that the Panel's findings of inconsistency in respect of each of the measures at issue are not "dependent" upon the operation of any other measures.[301] For New Zealand, the Panel made clear in its Interim Report that each of the measures at issue in this dispute are, when viewed as stand-alone measures, inconsistent with Article XI:1 of the GATT 1994.[302] New Zealand submitted that, although the Panel observed that the "limiting effects of the fixed terms imposed by Measure 2 are enhanced by its interaction with Measure 3"[303] and that the limiting effect of certain measures is "exacerbated" when combined with other measures[304], this fact was not determinative of the Panel's finding that each of the individual measures at issue is inconsistent with Article XI:1 in its own right.[305]

6.31. In the same vein, the United States submitted that, although the Panel found that the 80% realization requirement exacerbates the limiting effects of the other measures[306], the Panel first found each measure to breach Article XI:1 of the GATT 1994 based on its own design, architecture and revealing structure and supporting evidence.[307] The United States further submitted that the Panel has made sufficient findings regarding Measures 2 and 7 to support its conclusion under Article XI:1, independent of any exacerbating effect created by Measure 3.[308] Lastly, the United States argued that, to the extent that Indonesia is requesting the Panel to find that, by removing the 80% realization requirement, Indonesia has already brought its measure into compliance, the United States was of the view that such a request went beyond the Panel's terms of reference.[309]

6.32. With respect to paragraph 7.131, we observe that it includes our analysis of Measure 3 in the context of Indonesia's import licensing regime for horticultural products and in particular of Measures 2 and 7. This analysis follows our conclusion in the previous paragraph that the design, architecture and revealing structure of Measure 3 shows that this measure has a limiting effect in terms of volume of imports of horticultural products into Indonesia. Indonesia is asking us to

[296] Indonesia's comments on the Interim Report of the Panel, para. 15.
[297] Indonesia's comments on the Interim Report of the Panel, para. 15.
[298] Indonesia's comments on the Interim Report of the Panel, para. 7.
[299] Indonesia's comments on the Interim Report of the Panel, paras. 5-6.
[300] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 6; United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 15.
[301] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 8.
[302] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 7.
[303] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 9 (referring to Interim Report, para. 7.111, emphasis added).
[304] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 9 (referring to Interim Report, para. 7.131).
[305] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 9.
[306] *See* Interim Panel Report, para. 7.131.
[307] United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 12.
[308] United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 12.
[309] United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 13.

"either (i) provide analysis regarding the impact of the realization requirement (and its repeal) vis-à-vis the restrictive effects of other measures; or (ii) explicitly state that the Panel declines to provide such analysis".[310] As explained in paragraph 6.24 above, our terms of reference included the measures at issue at the time of this Panel's establishment. Therefore, establishing whether Indonesia has repealed an element of Measure 3 and its relevance in terms of compliance with the WTO Agreement is not within our terms of reference. We thus decline Indonesia's request.

6.12 Whether Measure 5 (Storage ownership and capacity requirements) is inconsistent with Article XI:1 of the GATT 1994

6.33. With respect to paragraphs 7.175 to 7.178, Indonesia requested the Panel to explicitly confirm that its analysis is limited to the specific storage ownership and capacity terms challenged by the co-complainants and is not generally applicable to all pre-importation storage requirements. In particular, Indonesia wanted to confirm that the Panel is not making any findings with respect to whether requiring importers to obtain storage prior to importation is *per se* inconsistent with Article XI:1.[311]

6.34. The co-complainants objected to Indonesia's request.[312] New Zealand considered that Indonesia's request should be declined because the scope of the Panel's findings in respect of Measure 5 is clear from the Interim Report. In New Zealand's view, it would not be appropriate for the Panel, in light of its terms of reference, to make statements regarding the applicability or otherwise of its analysis to measures that are outside its terms of reference.[313] The United States also considered that the Panel's finding and recommendation on Measure 5 appear to be clear. The United States further considered that Indonesia has not identified any ambiguity or error that would require the Panel to revise its Interim Report.[314]

6.35. We note that paragraphs 7.175 to 7.178 of our Interim Report include part of our analysis of the consistency of Measure 5 with Article XI:1 of the GATT 1994. Indonesia is asking us to clarify the scope of that analysis in terms of the relevant measure. In our view, the scope of Measure 5 is clearly defined in paragraph 7.170 and, by reference, in Section 2.3.2.5 above. We are therefore only concluding that Measure 5, as defined in paragraph 7.170 and, by reference, in Section 2.3.2.5 above, is inconsistent with Article XI:1 of the GATT 1994. We thus decline Indonesia's request.

6.13 Whether Measure 6 (Use, sale and distribution requirements for horticultural products) is inconsistent with Article XI:1 of the GATT 1994

6.36. Regarding paragraph 7.180, New Zealand suggested that the last sentence of this paragraph include a reference to the limiting effect through the additional distribution layer, which according to New Zealand, was raised in paragraph 252 of New Zealand's first written submission.[315] No other party has commented on this request. The Panel made adjustments accordingly in paragraph 7.180.

6.14 Whether Measure 10 (Prohibition of importation of certain animals and animal products) is inconsistent with Article XI:I of the GATT 1994

6.37. Regarding paragraph 7.271, New Zealand suggested that the first sentence of this paragraph be amended to reflect New Zealand's submission that the positive list also operates to prohibit imports of bovine carcass and secondary cuts.[316] No other party has commented on this request. The Panel made adjustments accordingly in paragraph 7.121.

6.38. Regarding paragraph 7.290, New Zealand suggested that the second sentence of this paragraph be clarified to reflect New Zealand's submissions that carcass and secondary cuts are

[310] Indonesia's comments on the Interim Report of the Panel, para. 7.
[311] Indonesia's comments on the Interim Report of the Panel, para. 17.
[312] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 17; United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 25.
[313] New Zealand's comments on Indonesia's comments on the Interim Report of the Panel, para. 17.
[314] United States' comments on Indonesia's comments on the Interim Report of the Panel, para. 27.
[315] New Zealand's comments on the Interim Report of the Panel, para. 10.
[316] New Zealand's comments on the Interim Report of the Panel, para. 10 (referring to New Zealand's first written submission, para. 135).

the only unlisted products which state-owned enterprises may be directed to import.[317] No other party has commented on this request. The Panel made adjustments accordingly in paragraph 7.290.

6.15 Whether Measure 13 (80% realization requirement) is inconsistent with Article XI:1 of the GATT 1994

6.39. Regarding paragraph 7.374, New Zealand suggested that for clarity, the word "with" be inserted in the first sentence of this paragraph and the current word "with" be replaced with the word "to".[318] No other party has commented on this request. The Panel made adjustments accordingly in paragraph 7.374.

6.16 Whether Measure 15 (Domestic purchase requirement for beef) is inconsistent with Article XI:1 of the GATT 1994

6.40. Regarding paragraph 7.401, New Zealand suggested that the penultimate sentence of this paragraph be clarified to reflect paragraph 138 of New Zealand's second written submission by deleting the word "misleading."[319] No other party has commented on this request. The Panel made adjustments accordingly in paragraph 7.401.

6.17 Whether Measure 16 (Beef reference price) is inconsistent with Article XI:1 of the GATT 1994

6.41. Regarding paragraph 7.443, in particular footnote 1313 referenced at the end of the second sentence, New Zealand noted that this footnote appears to have been deleted.[320] No other party has commented on this request. The Panel made adjustments accordingly in paragraph 7.443.

6.18 Whether Measure 18 (Sufficiency of domestic production to fulfil domestic demand) is inconsistent with Article XI:1 of the GATT 1994

6.42. Regarding paragraph 7.480, New Zealand noted that there appears to be a footnote missing at the conclusion of this paragraph, referring to New Zealand arguments."[321] No other party has commented on this request. The Panel made adjustments accordingly in paragraph 7.480.

6.19 Whether Measure 3 (80% realization requirement) is justified under Article XX(d) of the GATT 1994

6.43. Regarding paragraph 7.600, New Zealand suggested that, in the sixth sentence of this paragraph, the phrase "New Zealand does not consider it necessary to elaborate on a less trade-restrictive measure" be amended to read "New Zealand does not consider it necessary to elaborate on a less trade-restrictive alternative measure" in order to ensure consistency with New Zealand's second written submission.[322] No other party has commented on this request. The Panel made adjustments accordingly in paragraph 7.600.

6.20 Whether Measure 4 (Harvest period requirement) is provisionally justified under Article XX(b) of the GATT 1994

6.44. Regarding paragraph 7.634, the United States submitted that, in the context of the second sentence of this paragraph, the meaning of the phrase "sufficiency of domestic production fulfils domestic demand" is unclear and would suggest an alternative formulation such as: "to ensure that ~~the sufficiency of~~ domestic production is protected from competition from imports ~~fulfils domestic demand~~" or "to ensure that only ~~the sufficiency of~~ domestic production is used to fulfil~~s~~ domestic demand."[323] No other party has commented on this request. The Panel agrees with the United States that the existing wording may lack clarity and is thus redrafting the relevant sentence in paragraph 7.634 as follows: "Rather, the evidence points to the objective as being to

[317] New Zealand's comments on the Interim Report of the Panel, para. 19 (referring to New Zealand's first written submission, para. 45).
[318] New Zealand's comments on the Interim Report of the Panel, para. 24.
[319] New Zealand's comments on the Interim Report of the Panel, para. 27.
[320] New Zealand's comments on the Interim Report of the Panel, para. 34.
[321] New Zealand's comments on the Interim Report of the Panel, para. 38.
[322] New Zealand's comments on the Interim Report of the Panel, para. 49.
[323] United States' comments on the Interim Report of the Panel, para. 12.

ensure that no importation takes place unless Indonesian authorities deem domestic production insufficient to fulfill domestic demand".

6.21 Whether Measure 6 (Use, sale and distribution requirements for horticultural products) is justified under Article XX(d) of the GATT 1994

6.45. Regarding paragraph 7.756, New Zealand suggested that a sentence be added to the end of the paragraph in order to show that New Zealand considered a less trade restrictive alternative measure for the use, sale and distribution requirement in paragraph 261 of its second written submission.[324] No other party has commented on this request. The Panel made adjustments accordingly in paragraph 7.757.

6.22 Conclusion concerning Indonesia's defence under Articles XX(a), (b) and (d) with respect to Measures 9 through 17

6.46. Regarding paragraph 7.829, the United States stated that, in order to further support the Panel's overall conclusion that Indonesia has not demonstrated that its restrictions on animals and animal products are justified under any claimed exception under Article XX, the United States would welcome findings addressed to the lack of a rational connection and the legal consequence that each measure has not been shown to be "necessary."[325] In the same vein, New Zealand requests that, for completeness, it would be useful if the Panel sets out the parties' arguments and completes the Panel's analysis of Indonesia's defences under the relevant subparagraphs of Article XX of the GATT 1994 in relation to all challenged measures.[326]

6.47. While we understand the co-complainants' concerns about completing the analysis, we consider that, having found that *all* the relevant measures at issue are not applied in a manner consistent with the *chapeau* of Article XX of the GATT 1994, continuing the analysis would be unwarranted. As we explained in paragraph 7.829, compliance with the *chapeau* of Article XX is a necessary requirement in order for a measure to find justification under this provision. Therefore, even if the measures were found to be "necessary" under subparagraphs (a), (b) and/or (d) of Article XX, Indonesia would not be able to rely upon these defences because the measures are not applied in a manner consistent with the *chapeau.* In the event that the Appellate Body were to disagree with our findings in this respect, the Panel has sufficiently developed the record so as to allow for the completion of the analysis should the Appellate Body deem it necessary. We thus decline the co-complainants' request.

7 FINDINGS

7.1 Preliminary issues

7.1.1 Request for enhanced third-party rights

7.1. As described in Section 1.3.2 above, Australia, Brazil, Canada and the European Union jointly requested the Panel to enhance their third-party rights. The decision of the Panel is reproduced hereafter:

> The Panel refers to the joint communication dated 2 December 2015 from Australia, Brazil, Canada and the European Union (hereafter "the requesting third parties"), requesting the Panel to exercise its discretion under Article 12.1 of the DSU to modify its Working Procedures. The requesting third parties wish the Panel to grant them additional rights to those provided in Article 10 of the DSU, in particular: (i) "to receive an electronic copy of all submissions and statements of the parties, including responses to Panel questions, up to the issuance of the interim report"[327]; and (ii) "to be present for the entirety of all substantive meetings of the Panels with the parties".[328] The requesting third parties submit that, in order to ensure that their

[324] New Zealand's comments on the Interim Report of the Panel, para. 59.
[325] United States' comments on the Interim Report of the Panel, para. 14.
[326] New Zealand's comments on the Interim Report of the Panel, para. 63.
[327] Joint letter from the requesting third parties dated 2 December 2015.
[328] Joint letter from the requesting third parties dated 2 December 2015.

interests are fully taken into account, "third parties need to be aware of arguments and evidence that will be presented only in later stages in the dispute".[329]

Responding to the Panel's invitation to present their views on this request, both the United States[330] and Indonesia[331] opposed the granting of enhanced rights to third parties in these proceedings. New Zealand, however, informed the Panel that it supports the request.[332] In other words, the complainant (United States) and the respondent (Indonesia) in DS478 are in agreement in opposing the granting of enhanced third party rights, while in DS477, only the respondent (Indonesia) opposes it.

We understand that the additional rights requested are limited to allowing the third parties to be present during all substantive meetings without taking the floor, and to receiving all written communications of the parties without the right to present views on those communications. The requesting third parties are thus not seeking to have an active role in the proceedings outside the participatory rights already foreseen in our Working Procedures, which are in line with Article 10 of the DSU.

In our decision, we bear in mind that, although we enjoy discretion to grant additional rights to third parties as long as such rights are consistent with the DSU and due process[333], we must be mindful of the distinction drawn in the DSU between parties and third parties, which should not be blurred.[334] We note in this respect that, consistent with Article 10.2 of the DSU, all third parties in a panel proceeding may be presumed to have a "substantial interest" in the matter before the panel.[335] We are aware that panels have on occasion granted additional third party rights in certain circumstances, which could, for instance, include situations where the measures at issue result in significant economic benefits for certain third parties[336]; situations where third parties maintain measures similar to the measures at issue[337], or where practical considerations arise from a third party's involvement as a party in a parallel panel proceeding.[338] As we explain below, we are not persuaded that the circumstances of the request before us would warrant the granting of enhanced third party rights.

The requesting third parties argue that the present disputes raise important questions about the extent of regulation of agricultural imports permissible under WTO rules, including Articles III and XI of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, which are of particular significance to the requesting Members who are all major agricultural exporters. As pointed out by the United States, numerous WTO Members export agricultural products and therefore have "a collective interest in the interpretation of covered agreements".[339] We also concur with the United States' assessment that the requesting third parties "have provided no basis for an assertion that this dispute differs from any other dispute in which other Members may have systemic interests".[340]

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[329] Joint letter from the requesting third parties dated 2 December 2015.
[330] Letter from the United States dated 11 December 2015, para. 13.
[331] Letter from Indonesia dated 14 December 2015.
[332] Letter from New Zealand dated 11 December 2015, para. 2.
[333] The Appellate Body has clarified that, beyond the minimum rights guaranteed under Article 10 and Appendix 3 to the DSU, panels "enjoy a discretion to grant additional participatory rights to third parties in particular cases, as long as such 'enhanced' rights are consistent with the provisions of the DSU and the principles of due process." Appellate Body Report, *US – FSC (Article 21.5 – EC),* para. 243. *See also* Appellate Body Reports, *EC – Hormones (Canada)*, para. 154; *US – 1916 Act*, para. 150; Panel Report, *EC – Export Subsidies on Sugar*, para. 2.3.
[334] Panel Report, *EC– Bananas III (Guatemala and Honduras)*, para. 7.9. *See also*, Panel Reports, *EC – Tariff Preferences*, Annex A, para. 7(d); *EC –Export Subsidies on Sugar (Australia, Brazil and Thailand)*, para. 2.7; *EC and certain member States – Large Civil Aircraft*, para. 7.166.
[335] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.166.
[336] Panel Reports, *EC – Bananas III (Guatemala and Honduras),* para. 7.8; *EC – Tariff Preferences*, Annex A, para. 7(a). *See also*, Panel Report, *EC – Export Subsidies on Sugar*, para. 2.5.
[337] Panel Report, *EC – Tariff Preferences*, Annex A, para. 7(b).
[338] Panel Report, *EC – Hormones (Canada)*, para. 8.17.
[339] Letter from the United States dated 11 December 2015, para. 6.
[340] Letter from the United States dated 11 December 2015, para. 7.

The requesting third parties also argue that the present disputes involve measures of particular trade and economic significance to the requesting Members as major exporters of agricultural products. Furthermore, they contend that the outcome of these disputes will have significant implications for broader agricultural trade between Indonesia and the requesting Members because Indonesia maintains similar measures on the importation of a wide range of agricultural products other than the products at issue in the present disputes. In the absence of further details in this respect, we are unable to see how such interests differ from the collective interests of other exporting Members.

We also note their argument that these disputes will consider measures that are "very similar"[341] to some of those at issue in *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products* (WT/DS484), in which Brazil is the complainant and Australia, Canada, and the European Union are likely to be third parties. As we understand it, DS484 deals with Indonesia's import licensing regime for chicken meat and chicken products, and appears to focus on claims under the SPS and the TBT Agreements. This is not the case for the matters before us. Although there appears to be some overlap with measures in DS484, we do not consider that the disputes before us are sufficiently similar to DS484 to warrant according enhanced third party rights to potential third parties in that dispute.

Finally, we note that prior panels have consistently denied requests for enhanced third-party rights where the parties were unanimously opposed to it.[342] We therefore consider it appropriate to give due regard to the parties' shared view in DS478 that the Panel should decline the third parties' request for enhanced third-party rights. Having so decided and considering the close association between DS478 and DS477 and the fact that the disputes have been joined under Article 9.1 of the DSU, we would find it difficult to decide differently with respect to DS477.

We therefore decline Australia, Brazil, Canada and the European Union's joint request for enhanced third party rights in these proceedings.

7.1.2 Request for a preliminary ruling

7.2. 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 DSU.[343] On 27 January 2016, the Panel communicated its conclusions on Indonesia's request and, on 5 July 2016, the Panel issued its preliminary ruling to the parties with copy to the third parties. The Panel's preliminary ruling of 5 July 2016 is an integral part of this panel Report and is included in Annex A-1.

7.1.3 Whether certain challenged measures are the result of decisions of private actors

7.1.3.1 Introduction

7.3. Before examining the various claims put forward by New Zealand and the United States and the defence advanced by Indonesia, the Panel wishes to clarify the scope of its terms of reference in these proceedings. In particular, whether, as Indonesia argued, certain measures pertaining to its import licensing regime for horticultural products, namely Measures 1 (Limited application windows and validity periods), 2 (Periodic and fixed import terms), 3 (80% realization requirement) and 5 (Storage ownership and capacity requirements); as well as similar measures relating to its regime for animals and animal products, i.e. Measures 11 (Limited application windows and validity periods), 12 (Periodic and fixed import terms) and 13 (80% realization requirement), are "the result of decisions of private actors".[344]

7.4. Indonesia has put forward this contention as part of its argumentation under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. In particular, Indonesia argued

[341] Joint letter from the requesting third parties dated 2 December 2015.
[342] Panel Reports, *Dominican Republic – Safeguard Measures*, para. 1.8; *Argentina – Import Measures*, para. 1.24; and *China – Rare Earths*, para. 7.9.
[343] Indonesia's request for a preliminary ruling, para. 1.
[344] Indonesia's first written submission, para. 52. *See also*, Indonesia's first written submission, paras. 78, 104, 119, 138, 141, 147, 163; Indonesia's second written submission, paras. 75, 177.

that the challenged measures are the result of private actions and not measures instituted or maintained by a Member within the meaning of these provisions. We note that the issue of whether the challenged measures constitute private actions runs to the core of our jurisdiction because only measures "taken by a Member" can be challenged under the DSU. We thus proceed to examine Indonesia's contention to ascertain whether Measures 1, 2, 3, 5, 11, 12 and 13 are measures subject to the DSU and therefore within our jurisdiction.

7.1.3.2 The relevant provision

7.5. Pursuant to Article 3.3 of the DSU, the dispute settlement system addresses "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures *taken by another Member*".[345] In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body considered that this phrase "identifies the relevant nexus, for purposes of dispute settlement proceedings, between the 'measure' and a 'Member'".[346] The Appellate Body further confirmed that, "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings" and that "[t]he acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch."[347] This does not however exclude that the acts or omissions of regional or local governments, or even the actions of private entities, could be attributed to a Member in particular circumstances.[348]

7.6. It is clear that the concept of "measure" subject to WTO dispute settlement is broad. However, regardless of the type of measure challenged, it must meet the requirement of attribution to a Member in order to be subject to WTO dispute settlement.[349] Nonetheless, this does not exclude from scrutiny under the DSU those decisions of private actors that are not independent of a measure of a Member.[350] As the Appellate Body in *Korea – Various Measures on Beef* explained "the intervention of some element of private choice does not relieve [a Member] of responsibility under the GATT 1994".[351] The Appellate Body in *US – COOL* further explained:

> [W]hile detrimental effects caused *solely* by the decisions of private actors cannot support a finding of inconsistency […], the fact that private actors are free to make various decisions in order to comply with a measure does not preclude a finding of inconsistency. Rather, where private actors are induced or encouraged to take certain decisions *because of the incentives created by a measure*, those decisions are not "independent" of that measure.[352]

7.7. With that in mind, we proceed to examine whether, as alleged by Indonesia, Measures 1, 2, 3, 5, 11, 12 and 13 are the result of independent decisions of private actors or, rather, are actions "taken by" Indonesia. We note that the parties have offered similar arguments in respect of those measures embodying analogous features, albeit they relate to different import licensing regimes (horticultural products, and animals and animal products). Given the similar nature of the measures, it is not necessary to examine them individually to determine whether or not they are measures "taken by" Indonesia. Hence, we examine them jointly below.

7.1.3.3 Measures 1 and 11 (Limited application windows and validity periods)

7.8. With respect to Measures 1 and 11, Indonesia argued that the limited application windows and validity periods do not cut off imports at the beginning or end of the validity period and that

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[345] Emphasis added.

[346] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81. *See also,* Appellate Body Report, *Argentina – Import Measures*, para. 5.100.

[347] Appellate Body Report, *US – Corrosion–Resistant Steel Sunset Review*, para. 81. (fns omitted)

[348] Appellate Body Report, *Argentina – Import Measures*, para. 5.100.

[349] Appellate Body Report, *Argentina – Import Measures*, para. 5.100 et seq.

[350] In *Korea – Various Measures on Beef,* the measure at issue required retailers to make a choice as to what to sell. The Panel found that "a government regulation contravenes a Member's obligations if it forces economic operators to make certain choices" (Panel Report, *Korea – Various Measures on Beef*, para. 635).This decision was upheld by the Appellate Body (Appellate Body Report, *Korea – Various Measures on Beef*, para.146). In *Japan – Film,* the panel found that "administrative guidance that creates incentives or disincentives largely dependent upon governmental action for private parties to act in a particular manner" may constitute a governmental measure. Panel Report*, Japan – Film*, para. 10.45 (quoting, GATT Report, *Japan – Semi-conductors*, para. 109).

[351] Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.

[352] Appellate Body Report, *US – COOL*, para. 291. (emphasis original)

importers decide of their own accord not to ship their products after a certain date.[353] New Zealand responded that it is Indonesia's regulations that limit imports and constrain the private decisions of importers through the limited application windows and validity periods, which are clearly set out in those regulations.[354] Likewise, the United States submitted that Indonesia' assertion that any limitation is self-imposed by private actors is incorrect because Indonesia's import licensing regime forces importers to halt shipments four to six weeks before the end of the validity period.[355]

7.9. As described in Section 2.3.2.1 above, Measures 1 and 11 consist of the combination of limited application windows and validity periods as regulated by Article 13 of Regulation MOA 86/2013 Articles 13A,14, 21, 22 and 30[356] of MOT 16/2013, as amended; and Article 29 of MOA 139/2014, as amended by MOA 2/2015, and Articles 12 and 15 of MOT 46/2013, as amended, respectively. These regulations stipulate the periods during which importers may request the necessary authorisations to import horticultural and animal and animal products into Indonesia, as well as the periods of validity of those authorisations once granted. Accordingly, importers wishing to import into Indonesia must apply for the necessary authorizations during the periods stipulated by the regulations encompassing Measures 1 and 11. Likewise, once they have obtained the necessary authorizations, importers can only import the authorized products during the validity period that has been granted according to those same regulations.

7.10. We observe that the co-complainants are challenging Measures 1 and 11 because, by structuring the various periods in a certain manner, these measures allegedly have a limiting effect on importation.[357] In our view, the co-complainants are not challenging the results of the decisions of private actors; rather, they are challenging the Measures that impose the various deadlines that importers must respect in order to be able to import into Indonesia.

7.11. We agree with New Zealand that the fact that private actors are able to make decisions about their import needs does not immunize Indonesia's measures from challenge.[358] As we have explained above, the intervention of some element of private choice does not necessarily relieve a Member of responsibility under the covered agreements.[359] We recall the Appellate Body's explanation that "where private actors are induced or encouraged to take certain decisions because of the incentives created by a measure, those decisions are not 'independent' of that measure".[360] We do not however think that this is the case with respect to Measures 1 and 11 because the co-complainants are challenging the limited application windows and validity periods as set out in Indonesia's regulations. They are not challenging the results of decisions taken by importers.

7.12. We thus conclude that Measures 1 and 11 (limited application windows and validity periods) as set out in the relevant regulations are measures "taken by" Indonesia and thus subject to the DSU and therefore within our jurisdiction.

7.1.3.4 Measures 2 and 12 (Periodic and fixed import terms)

7.13. With respect to Measures 2 and 12, Indonesia argued that because the terms are selected by importers and they are free to alter their terms of importation from one period to the other, any restriction is self-imposed and these terms do not constitute "measures instituted or

[353] Indonesia's second written submission, paras. 67-69, 134.
[354] New Zealand's second written submission, para. 50.
[355] United States' response to Panel question No. 12, United States' second written submission, paras. 75-76.
[356] Article 30 of MOT 16/2013, as amended, relevantly provides:
(2) If a fresh Horticultural Product import: (a) is not the Horticultural Product included in the Recognition of the PI-Horticultural Products and/or the Import Approval; ... it will be destroyed in accordance with regulatory legislation.
(3) If a processed Horticultural Product import: (a) is not the Horticultural Product included in the Recognition of the PI-Horticultural Products and/or the Import Approval; ... it will be destroyed in accordance with regulatory legislation.
(4) The cost of destroying and re-exporting a Horticultural Product, as described in paragraph (2) and paragraph (3), is the responsibility of the importer. Exhibit JE-10.
[357] New Zealand's first written submission, para. 211; United States' first written submission, para. 155; New Zealand's first written submission, para. 154. United States' first written submission, paras. 264-265.
[358] New Zealand's response to Panel Question no 12.
[359] *See* Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.
[360] Appellate Body Report, *US – COOL*, para. 291.

maintained by a Member" within the meaning of Article XI:1 of the GATT 1994.[361] It further argued that the terms of import licences fall outside the scope of Article 4.2 of the Agreement on Agriculture because they are determined by private parties and not by Indonesia.[362] New Zealand responded that the measures challenged in this dispute are not in fact commercial decisions of private actors, but rather, those reflected in Indonesia's laws and regulations which prevent importers from making ordinary commercial decisions and serve to limit imports.[363] The United States clarified that the measures that the co-complainants are challenging are not the specific terms of any or each importer's licence but, rather, the inability of importers, once an Import Approval validity period has begun, to import products of a different type, quantity, country of origin, or port of entry than those specified on their import permits.[364]

7.14. As described in Sections 2.3.2.2 and 2.3.3.3 above, Measures 2 and 12 consist of periodic and fixed import terms requirements implemented by means of Article 6 of MOA 86/2013 and Article 13 and 30 of MOT 16/2013, as amended; and Articles 30 and 33(a)-(b) and 39(e) of MOA 139/2014, as amended, and Article 30 of MOT 46/2013, as amended. These regulations provide that the importation of horticultural products or animals and animal products must be done exclusively within the terms, such as the type and quantity of products, the ports of entry etc, of the relevant import authorizations (RIPHs/MOA Recommendations and Import Approvals) and that these terms cannot be changed during the validity period of those authorizations.

7.15. We observe that the co-complainants are challenging Measures 2 and 12 because they allegedly constitute restrictions having a limiting effect on importation of horticultural products and animals and animal products imported into Indonesia and limit the competitive opportunities of importers and imported products.[365] Indonesia's contention, however, seems to rest upon the assumption that the co-complainants take issue with the actual terms chosen by importers, which are in principle the result of private choices by importers. To us, Indonesia's characterization of Measures 2 and 12 does not correspond to the measures challenged by the co-complainants. Indonesia appears to be confounding the actual terms chosen by individual importers with the challenged measures *per se*. The co-complainants are not challenging the actions taken by importers but rather Indonesia's own regulations imposing fixed terms on importers.

7.16. While the co-complainants do refer to the actions of importers in their argumentation that Measures 2 and 12 constitute quantitative restrictions, as explained in paragraph 7.11 above, decisions of private actors are not independent of a measure when those decisions are the result of incentives created by the measure. We do not however think that this is the case with respect to Measures 2 and 12 because the co-complainants are explicitly challenging the regulations imposing periodic and fixed terms. They are not challenging the results of decisions taken by importers.

7.17. We thus conclude that Measures 2 and 12 (Periodic and fixed import terms) as set out in the relevant regulations are measures "taken by" Indonesia and thus subject to the DSU and therefore within our jurisdiction.

7.1.3.5 Measures 3 and 13: 80% realization requirement

7.18. With respect to Measures 3 and 13, Indonesia argued that the 80% realization requirement is not a restriction because it is a function of importers' own estimates and because it can be changed by the importer at will from one validity period to the next.[366] New Zealand disagreed and submitted that Indonesia's argument is incorrect because the realization requirement is directly linked to the fixed terms importers must list on their import approval application for the validity period.[367] Likewise, the United States contended that the realization requirement is not a function

[361] Indonesia's first written submission, para. 138; Indonesia's second written submission, paras. 167-168.

[362] Indonesia's first written submission, paras. 74 and 104.

[363] New Zealand's response to Panel Questions nos. 12 and 58. *See also* New Zealand's second written submission, paras. 73 and 196.

[364] United States' responses to Panel Question nos. 12 and 58; *See also* United States' second written submission, paras. 78-80.

[365] New Zealand's first written submission, para. 90; New Zealand's second written submission, para. 196; United States' first written submission, paras. 52 and 160. New Zealand's first written submission, paras. 157 and 163; United States' first written submission, para. 274.

[366] Indonesia's first written submission, para. 107.

[367] New Zealand's second written submission, paras. 86-88 and para. 91; *see also* New Zealand's response to Panel question No. 12.

of importers' own estimate because the realization requirement itself forces importers to reduce their import volumes to ensure they meet the 80% threshold.[368]

7.19. As described in Sections 2.3.2.3 and 2.3.3.4 above, Measures 3 and 13 consist of the 80% requirements implemented through Articles 14A, 24, 25A and 26 and 27A of MOT 16/2013, as amended; and Articles 13, 25, 26 and 27 of MOT 46/2013, as amended. Pursuant to these regulations, RIs are required to import at least 80% of the quantity specified for each type of horticultural product listed on their Import Approval for a given period of time.

7.20. We observe that the co-complainants are challenging Measures 3 and 13 because they constitute restrictions allegedly having a limiting effect on importation of horticultural products and animals and animal products into Indonesia. In particular, the co-complainants are arguing that both Measures compel importers to limit their imports, by inducing them to reduce the amounts they request in their Import Approvals. We thus understand that, for the co-complainants, the limiting effect of Measures 3 and 13 derives from the fact that they encourage or induce importers to limit their volume of imports. Indonesia however argued that these Measures are a function of importers' own estimates. We recall that "where private actors are induced or encouraged to take certain decisions *because of the incentives created by a measure*, those decisions are not 'independent' of that measure".[369] Accordingly, if the co-complainants prove that the importers actions are induced or encouraged by Measures 3 and 13, we will consider that those actions are not independent from the Measures themselves. This does not detract from the fact that Measures 3 and 13, as defined by the co-complainants and stipulated in the above-mentioned regulations, are measures taken by Indonesia.

7.21. We thus conclude that the 80% realization requirements as set out in the relevant regulations are measures "taken by" Indonesia, and thus subject to the DSU and therefore within our jurisdiction.

7.1.3.6 Measure 5: Storage ownership and capacity requirements

7.22. Concerning Measure 5, Indonesia argued that any limitations placed on an importer's ability to import caused by the storage capacity requirement for horticultural products are self-imposed.[370] New Zealand responded that the storage ownership and capacity requirement dictates the quantity of product that may be imported. New Zealand argued that these restrictions are not the result of decisions by private actors; rather, Indonesia's import licensing regime drives the decision of importers and its laws and regulations frame the way in which importers take decisions.[371]. The United States submitted that importers do not choose to limit the products they import to a fraction of what they could bring in under normal market conditions. For the United States, their decision to self-restrict the quantity of imported products is a compelled response based on the requirements of Indonesia's storage capacity measure.[372]

7.23. As described in Section 2.3.2.5 above, Measure 5 consists of the storage ownership and capacity requirements regulated through Article 8(1)(e) of MOT 16/2013, as amended, and by Article 8(2)(c) and (d) of MOA 86/2013, as amended. Pursuant to these regulations, importers must own their storage facilities with sufficient capacity to hold the full quantity requested on their Import Application. We observe that the co-complainants are challenging Measure 5 because it allegedly constitutes a restriction having a limiting effect on importation of horticultural imports into Indonesia and limits the competitive opportunities of importers and imported products. With respect to the storage capacity requirement, Indonesia argued that any limitations placed on an importer's ability to import caused by this requirement are self-imposed.

7.24. We note that the obligation to own storage facilities and that these are large enough to accommodate the full quantity requested on importers' Import Applications is provided for in the above regulations. Whether an importer decides to own a larger or smaller storage facility is a private decision which may be considered to result from the requirements imposed by Measure 5. We recall that "where private actors are induced or encouraged to take certain decisions *because of the incentives created by a measure,* those decisions are not 'independent' of that measure".[373]

[368] The United States' response to Panel question No. 12; second written submission, paras. 81-82.
[369] Appellate Body Report, *US – COOL*, para. 291
[370] Indonesia's first written submission, para. 86.
[371] New Zealand's response to Panel question No. 12.
[372] United States' second written submission, para. 86.
[373] Appellate Body Report, *US – COOL*, para. 291. (emphasis original)

Accordingly, if the co-complainants prove that the importers actions are induced or encouraged by Measure 5 and that their decisions are relevant for the purpose of our analysis, we will consider that those actions are not independent from the Measure itself. This does not detract from the fact that Measure 5, as defined by the co-complainants and stipulated in the above-mentioned regulations, is a measure taken by Indonesia.

7.25. We thus conclude that the storage ownership and capacity requirements as set out in the relevant regulations are measures "taken by" Indonesia, and thus subject to the DSU and therefore within our jurisdiction.

7.1.3.7 Conclusion

7.26. We therefore conclude that Measures 1, 2, 3, 5, 11, 12 and 13 are measures taken by Indonesia and not the result of independent decisions of private actors. Accordingly, Measures 1, 2, 3, 5, 11, 12 and 13 are measures subject to the DSU and therefore within our jurisdiction.

7.1.4 Order of analysis

7.27. New Zealand and the United States put forward in their panel requests claims under Articles XI:1 and III:4 of the GATT 1994, Article 4.2 of the Agreement on Agriculture and Articles 2.2(a) and 3.2 of the Import Licensing Agreement. Indonesia raised defences under Articles XX(a),(b) and (d) of the GATT 1994 with respect to the claims of violation under Articles XI:1 and III:4 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Indonesia also invoked Article XI:2(c)(ii) of the GATT 1994 as a defence with respect to some of the claims of violation of Article XI:1. We must decide in which order we will analyse these claims and defences.

7.28. We recall that panels have discretion in deciding the order of their analysis of parties' claims. The Appellate Body recognized this in *Canada – Wheat Exports and Grain Imports* when it stated that "[a]s a general principle, panels are free to structure the order of their analysis as they see fit. In so doing, panels may find it useful to take account of the manner in which a claim is presented to them by a complaining Member."[374] We observe that, while their panel requests were identical, the co-complainants have followed a different order of analysis in their written submissions.[375] Nonetheless, when asked by the Panel which order of analysis they thought we should follow, the co-complainants responded that the Panel should start its analysis with their claims pursuant to Article XI:1 of the GATT 1994 because, in the context of considering quantitative restrictions, Article XI:1 is more specific than Article 4.2 of the Agreement on Agriculture; and because a finding of violation of Article XI:1 without justification under Article XX of the GATT 1994, would be determinative to resolving the dispute.[376] The co-complainants further proposed that we address Indonesia's defence under Article XX of the GATT 1994 and then turn to

[374] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.

[375] New Zealand structured its first written submission according to the provisions under which the challenge is being brought. It began with claims under Article XI:1 of the GATT 1994 with respect to all the measures at issue and then did the same for all claims under Article 4.2 of the Agreement on Agriculture. Notably, in reverse order to that in its panel request, New Zealand started with the individual elements of Indonesia's import licensing regime for animals and animal products as well as the regime as a whole, followed by the individual elements of the regime for horticultural products and the regime as a whole. It then addressed the self-sufficiency requirements. Finally, New Zealand proceeded with its claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement. In its second written submission, New Zealand changed the approach, and although commencing its substantive analysis still with the measures pertaining to the import licensing regime for animals and animal products, it approached each measure under Article XI:1 of the GATT 1994, Article 4.2 of the Agreement on Agriculture, Article XX of the GATT 1994 and where relevant, Article III:4 of the GATT 1994 or Article 3.2 of the Import Licensing Agreement, before passing onto the next measure.

The United States structured its submissions differently. It began its first written submission with arguments on each of the elements of Indonesia's import licensing regime for horticultural products separately as well as the regime as a whole, in light of its claims under Article XI:1 of the GATT first and then Article 4.2 of the Agreement on Agriculture. The same order is followed with respect to each of the individual elements of the import licensing regime for animals and animal products separately and the regime as a whole. The United States then proceeded with its challenge of the self-sufficiency requirement under Articles XI:1 of the GATT 1994 and 4.2 of the Agreement on Agriculture, and proceeded with its arguments regarding the limited application windows and validity periods under Article 3.2 of the Import Licensing Agreement. Its second written submission followed a similar approach, including a response to Indonesia's defence pursuant to Article XX of the GATT 1994.

[376] New Zealand's responses to Panel questions Nos. 6 and 79. United States' responses to Panel questions Nos. 6 and 79.

Article 4.2 of the Agreement on Agriculture.[377] The United States submitted that, if the Panel were to find that Indonesia's measures are justified under Article XX of the GATT 1994, it would not need to examine those measures under Article 4.2.[378] We also note that both co-complainants have argued that Article XI:2(c)(ii) of the GATT 1994 is no longer available to Indonesia, as it has been superseded by the provisions of the Agreement on Agriculture.[379]

7.29. New Zealand proposed that we then turn to the additional claims which only concern some of the measures at issue. In this respect, New Zealand considered that, in this dispute, it is appropriate for Article III:4 to be addressed after the claims under Articles XI:1 and 4.2, and the corresponding defences, have been determined.[380] The co-complainants also suggested that the Panel considers the claims under Article 3.2 of the Import Licensing Agreement last.[381] The United States nonetheless pointed out that, if the Panel finds that the two relevant measures challenged under this provision are found to be inconsistent with the GATT 1994 and the Agreement on Agriculture, it would not be necessary for the Panel to examine the claims under the Import Licensing Agreement.

7.30. Indonesia, at first, asked the Panel to commence its analysis with Article 4.2 of the Agreement on Agriculture on grounds that this provision has a broader scope than Article XI:1.[382] At the first substantive meeting, however, Indonesia indicated that the Panel could begin its analysis with Article XI:1 of the GATT 1994. In its second written submission, Indonesia stated that considerations of efficiency and judicial economy favour the Panel beginning its analysis with Article 4.2 of the Agreement on Agriculture.[383] It also argued that because the co-complainants have failed to provide evidence that the challenged measures are not justified under Article XX, the "Panel cannot, as a matter of law, rule in the complainants' favor under Article 4.2".[384]

7.31. In deciding the order of our analysis, we concur with the panel in *India – Autos* in that it is important to consider first whether a particular order is compelled by principles of valid interpretative methodology, which, if not followed, might constitute an error of law.[385] Provisions from three separate covered agreements are challenged in these disputes, namely the GATT 1994, the Agreement on Agriculture and the Import Licensing Agreement. In *EC – Bananas III*, the Appellate Body articulated the test that should be applied in order to decide the order of analysis where two or more provisions from different covered agreements appear *a priori* to apply to the measure in question. The Appellate Body indicated that the provision from the agreement that "deals specifically, and in detail" with the measures at issue should be analysed first.[386] We also bear in mind that the order we choose may have an impact on the potential to apply judicial economy.[387]

7.32. We note that all 18 measures at issue have been challenged under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. We also note that, as pointed out by the United States, the co-complainants have brought identical claims under both provisions[388]; i.e. the allegation that all 18 measures constitute quantitative restrictions. We agree with the co-complainants that the provision which deals specifically with quantitative restrictions is Article XI:1 of the GATT 1994. Article 4.2 of the Agreement on Agriculture, on the contrary, has a broader scope and refers to measures other than quantitative restrictions. We note that this was also the view expressed by Australia and Canada at the third-party session; while Brazil, the European Union, and Japan signalled that they were comfortable with the Panel commencing its analysis under Article XI:1 of the GATT 1994.

7.33. We will thus commence our examination with Article XI:1 of the GATT 1994. We note that this is the approach followed in all previous disputes where the complainants brought claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture and the respondent

[377] New Zealand's response to Panel question No. 80; United States' response to Panel question No. 80.
[378] United States' response to Panel question No. 80.
[379] New Zealand's response to Panel question No. 114. United States' response to Panel question No. 114.
[380] New Zealand's response to Panel question No. 80.
[381] New Zealand's response to Panel question No. 80; United States' response to Panel question No. 80.
[382] Indonesia's first written submission, para. 45.
[383] Indonesia's second written submission, paras. 39-41.
[384] Indonesia's second written submission, para. 38.
[385] Panel Report, *India – Autos*, para. 7.154.
[386] Appellate Body Report, *EC – Bananas III*, para. 204.
[387] Panel Report, *India – Autos*, para. 7.161.
[388] United States' response to Panel question No. 79.

invoked a defence under Article XX.[389] Given that Article XI:2(c)(ii) of the GATT 1994 concerns measures that may be excluded from the scope of the obligations in Article XI:1 of GATT 1994, we will address it in the context of our analysis of the latter. If we find that all or some of the measures are inconsistent with Article XI:1 of GATT 1994, we will examine Indonesia's defence pursuant to Article XX of the GATT 1994. We take this approach because if the measures were to be justified under this provision, we would not need to analyse the claims under Article 4.2 of the Agreement on Agriculture. Indeed, footnote 1 to Article 4.2 of the Agreement on Agriculture excludes from the scope of this provision those "measures maintained … under other general, non agriculture-specific provisions of GATT 1994". We consider that measures maintained under Article XX of the GATT 1994 are "measures maintained … under other general, non agriculture-specific provisions of GATT 1994" and therefore outside the scope of Article 4.2 of the Agreement on Agriculture.

7.34. We note that, as indicated above, Indonesia argued that, because the co-complainants have failed to provide evidence that the challenged measures are not justified under Article XX, the "Panel cannot, as a matter of law, rule in the complainants' favor under Article 4.2".[390] We understand Indonesia to be asking the Panel to invert the burden of proof under Article XX of the GATT 1994. As pointed out by New Zealand, it is well established in WTO jurisprudence following the Appellate Body decision in *US – Wool Shirts and Blouses*[391] that the burden of identifying and establishing affirmative defences under Article XX rests on the party asserting the defence.[392] Thus it is for Indonesia, and not the co-complainants, to establish the defence under Article XX of the GATT 1994.

7.35. If the measures are not justified under Article XX, we will then proceed with the claims under Article 4.2 of the Agreement on Agriculture. Next, we will proceed to examine the additional claims that only concern some of the measures at issue. We will commence by the claim under Article III:4 of the GATT 1994, which has been made only with respect to three measures at issue. This will be followed by an analysis of the claims under the Import Licensing Agreement, which concern only two measures.

7.36. A final point to decide is the order of our analysis with respect to the measures at issue; i.e. whether we should first address those measures pertaining to the import licensing regime for horticultural products or those measures pertaining to the regime for animals and animal products. In this respect, we note that the co-complainants agreed that there is no legal reason to start with one regime or the other; they did, however, suggest that we address each regime separately because, despite the similarity of some of the measures, each regime has its own specificities.[393] Taking into account these comments, the Panel has decided to commence with the measures concerning the import licensing regime for horticultural products, to be followed by those for animals and animal products; this is also in line with the order chosen by the co-complainants in their panel requests.

7.2 Claims pursuant to Article XI:1 of the GATT 1994

7.2.1 Introduction

7.37. The co-complainants have challenged 18 separate measures under Article XI:1 of the GATT 1994. We will begin by examining the relevant legal provision and the applicable legal standard. Before applying this standard to our assessment of the consistency of each of the 18 measures at issue with this provision, we will examine some preliminary issues raised by the parties.

7.2.2 The text of Article XI of the GATT 1994

7.38. Article XI of the GATT 1994 provides, in relevant part:

General Elimination of Quantitative Restrictions

[389] *See* Panel Reports, *India – Quantitative Restrictions*, paras. 5.112-5.242; *Korea – Various Measures on Beef*, paras. 747–769; *EC – Seal Products*, paras. 7.652-7.665; *US – Poultry (China)*, paras. 7.484-7.487.
[390] Indonesia's second written submission, para. 38.
[391] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[392] New Zealand's response to Panel question No. 81.
[393] New Zealand's response to Panel question No. 7; United States' response to Panel question No. 7.

> 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member.
>
> 2. The provisions of paragraph 1 of this Article shall not extend to the following:
>
> (*a*) …
>
> (*c*) Import restrictions on any agricultural or fisheries product, imported in any form,* necessary to the enforcement of governmental measures which operate:
>
> (i) …
>
> (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level;…

7.39. By its terms, this provision forbids Members to institute or maintain prohibitions and restrictions, be it through quotas, import or export licences, or other measures, on (i) the importation of any product of the territory of any other contracting party, or (ii) the exportation or sale for export of any product destined for the territory of any other contracting party. The provision explicitly excludes prohibitions or restrictions imposed through duties, taxes or other charges. The Appellate Body in *Argentina – Import Measures* described Article XI:1 of the GATT 1994 as "lay[ing] down a general obligation to eliminate quantitative restrictions" and prohibiting Members from "institut[ing] or maintain[ing] prohibitions or restrictions other than duties, taxes, or other charges, on the importation, exportation, or sale for export of any product destined for another Member."[394]

7.2.3 Legal standard under Article XI:1 of the GATT 1994

7.40. Panels have traditionally conducted their examination of alleged inconsistencies with Article XI:1 of the GATT 1994 following a two-step analysis: they have examined first (i) whether the complainant has demonstrated that the measure at issue is a measure of the type covered by Article XI:1, and if it has so demonstrated, then they have considered (ii) whether the complainant has demonstrated that the measure at issue constitutes a prohibition or restriction on importation (or exportation).[395] As explained by the Appellate Body, this analysis must be carried out on a case-by-case basis, taking into account the import (or export) formality or requirement at issue and the relevant facts of the case.[396]

7.2.3.1 Step 1: Whether the measure at issue falls within the scope of Article XI:1 of the GATT 1994

7.41. The Panel is called upon as a first step to establish whether the co-complainants have demonstrated that Indonesia's measures constitute measures covered by Article XI:1 of the GATT 1994. The text of Article XI:1 defines its scope in both a negative and a positive manner. It commences by excluding from its scope a number of measures, namely "duties, taxes or other charges". Article XI:1 thus applies to "quotas, import or export licences" as well as a residual category of "other measures". The term "other measures" has traditionally been considered by prior panels as a "broad residual category".[397] Under this understanding, panels have found that the concept of a restriction on importation covers any measures that result in "any form of

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[394] Appellate Body Report, *Argentina – Import Measures*, para. 5.216.

[395] *See* Panel Reports, *Argentina – Import Measures*, para. 6.244; *India – Autos*, para. 4.119 (referring to GATT Panel Report, *Japan – Semi–Conductors*, para. 104). *See also*, Panel Report, *India – Quantitative Restrictions*, para. 5.142.

[396] Appellate Body Report, *Argentina – Import Measures*, para. 5.245.

[397] Panel Report, *Argentina – Hides and Leather*, para. 11.17. *See also* Panel Report, *Argentina – Import Measures*, para. 6.246 (referring to GATT Panel Report, *Japan – Semi-Conductors*, para. 104 and Panel Report, *Argentina – Hides and Leather*, para. 11.17).

limitation imposed *on*, or *in relation to* importation".[398] The Appellate Body has confirmed that the expression "other measures" suggests that Article XI:1 has a broad coverage. Nonetheless, the Appellate Body has emphasized that the scope of application of this provision is not unfettered because it excludes "duties, taxes and other charges" and "Article XI:2 of the GATT 1994 further restricts the scope of application of Article XI:1 by providing that the provisions of Article XI:1 shall not extend to the areas listed in Article XI:2".[399] As we explain in Section 7.2.4.2 below, Indonesia relied upon Article XI:2(c)(ii) to exclude some of the measures at issue from the scope of Article XI:1 of the GATT 1994.

7.42. In order to determine whether a measure falls within the scope of Article XI:1 of the GATT 1994, the panel in *Brazil – Retreaded Tyres* considered that a panel must examine the "nature" of the measure.[400] In *Argentina – Import Measures*, the panel considered that what is relevant when examining a measure under Article XI:1 of the GATT 1994 is whether a measure prohibits or restricts trade, rather than the means by which such prohibition or restriction is made effective.[401] Interpreting the words "made effective through" quotas, import or export licences or other measures, the Appellate Body in *Argentina – Import Measures* explained that this suggests that the scope of Article XI:1 covers measures through which a prohibition or restriction is produced or becomes operative.[402]

7.2.3.2 Step 2: Whether the measure at issue constitutes a prohibition or restriction on importation within the scope of Article XI:1 of the GATT 1994

7.2.3.2.1 Prohibitions and restrictions having a limiting effect on importation

7.43. If the examination under the first step reveals that the measures at issue fall under Article XI of the GATT 1994, then the Panel is called upon as a second step to establish whether the co-complainants have demonstrated that Indonesia's measures constitute "prohibitions" or "restrictions" on importation within the scope of Article XI:1 of the GATT 1994. In this respect, the Appellate Body has defined the term "prohibition" as a "legal ban on the trade or importation of a specified commodity" and 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.[403] As to whether a restriction is "on the importation", the panel in *India – Autos* indicated that "[i]n the context of Article XI:1 [of the GATT 1994], the

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[398] Panel Report, *Colombia – Ports of Entry*, para. 7.227 (referring to Panel Report, *India – Autos*, paras. 7.254–7.263 and 7.265; Panel Report, *Brazil – Retreaded Tyres*, para. 7.371). (emphasis original)

[399] Appellate Body Report, *Argentina – Import Measures*, para. 5.219. (footnotes omitted)

[400] Panel Report, *Brazil – Retreaded Tyres,* para. 7.372.

[401] The panel reasoned as follows:

> The expression "whether made effective through quotas, import or export licences *or other measures*" used in Article XI:1 of the GATT 1994 implies that the provision covers all measures that constitute import "prohibitions or restrictions" regardless of the means by which they are made effective. The reference to "quotas, import or export licences" is only indicative of some means by which import prohibitions or restrictions may be made effective. This does not imply that the scope of Article XI:1 of the GATT 1994 is limited to prohibitions or restrictions that are made effective through quotas or import or export licences. What is relevant when examining a measure under Article XI:1 of the GATT 1994 is whether a measure prohibits or restricts trade, rather than the means by which such prohibition or restriction is made effective. In light of this reasoning, the Panel will commence by examining the claims raised by the complainants under Article XI:1 of the GATT 1994 *irrespective* of whether this measure constitutes an import licence.

Panel Report, *Argentina – Import Measures*, para. 6.363.

[402] The Appellate Body reasoned as follows:

> Article XI:1 of the GATT 1994 prohibits prohibitions or restrictions other than duties, taxes, or other charges "made effective through quotas, import or export licences or other measures". The Appellate Body has described the word "effective", when relating to a legal instrument, as "in operation at a given time". We note that the definition of the term "effective" also includes something "[t]hat is concerned in the production *of* an event or condition". Moreover, the Appellate Body has described the words "made effective", when used in connection with governmental measures, as something that may refer to a measure being "operative", "in force", or as having "come into effect". In Article XI:1, the expression "made effective through" precedes the terms "quotas, import or export licences or other measures". This suggests to us that the scope of Article XI:1 covers measures through which a prohibition or restriction is produced or becomes operative.

Appellate Body Report, *Argentina – Import Measures*, para. 5.218 (referring to the Appellate Body Reports, *China – Raw Materials*, para. 356; *US – Gasoline*, p. 20, DSR 1996:I, p. 19). (footnotes omitted)

[403] Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to the Appellate Body Reports, *China – Raw Materials*, para. 319).

expression 'restriction … on importation' may … be appropriately read as meaning a restriction 'with regard to' or 'in connection with' the importation of the product".[404]

7.44. Finding support in the title of Article XI "*General Elimination of Quantitative Restrictions*", the Appellate Body in *Argentina – Import Measures* explained that the use of the word "quantitative" suggests that only those prohibitions and restrictions that limit the quantity or amount of a product being imported (or exported) would fall within the scope of this provision:

> The use of the word "quantitative" in the title of Article XI of the GATT 1994 informs the interpretation of the words "restriction" and "prohibition" in Article XI:1, suggesting that the coverage of Article XI includes those prohibitions and restrictions that limit the quantity or amount of a product being imported or exported.[405] This provision, however, does not cover simply *any* restriction or prohibition. Rather, Article XI:1 refers to prohibitions or restrictions "on the importation … or on the exportation or sale for export". Thus, in our view, 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.[406] Moreover, 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.[407]

7.45. Hence, only those prohibitions or restrictions that have a limiting effect on importation (or exportation) are covered by Article XI:1 of the GATT 1994. Prior panels have also similarly interpreted the concept of "restrictions" and have concluded that Article XI:1 is applicable to conditions which are "limiting" or have a "limiting effect".[408] As to how to ascertain the limiting effects of a measure, the Appellate Body in *Argentina – Import Measures* has explained that this can be done through an analysis of its design, architecture, and revealing structure, in its relevant context.[409]

7.46. When examining whether measures have a limiting effect on importation, some panels have focused on whether those measures limited the competitive opportunities available to imported products. Panels have thus given relevance to factors such as the existence of uncertainties affecting importation, whether the measures affect investment plans, restrict market access for imports or make importation prohibitively costly or unpredictable, whether they constitute disincentives affecting importations, or whether there is unfettered or undefined discretion to

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[404] Panel Report, *India – Autos*, para. 7.257. *See also,* Panel Report, *Argentina – Import Measures*, para. 6.458.

[405] (*original footnote*) Appellate Body Reports, *China – Raw Materials*, para. 320.

[406] (*original footnote*) We note that our understanding of Article XI:1 of the GATT 1994 is supported by two provisions of the Import Licensing Agreement that suggest that certain import licensing procedures may result in some burden without themselves having trade-restrictive effects on imports. Footnote 4 of the Import Licensing Agreement provides that "import licensing procedures requiring a security which have no restrictive effects on imports are to be considered as falling within the scope of [Article 2]", which deals with automatic import licensing. In addition, Article 3.2 of the Import Licensing Agreement provides that, while "[n]on-automatic licensing shall not have trade-restrictive … effects on imports additional to those caused by the imposition of the restriction", such procedures "shall be no more administratively burdensome than absolutely necessary to administer the measure."

[407] Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to the Appellate Body Reports, *China – Raw Materials*, para. 319-320).

[408] The panel in *India – Quantitative Restrictions* noted that the ordinary meaning of the term "restriction" is "a limitation on action, a limiting condition or regulation" (Panel Report, *India – Quantitative Restrictions*, para. 5.128). In *India – Autos*, the panel endorsed the interpretation of the term "restriction" used by the panel in *India – Quantitative Restrictions* and concluded that "any form of *limitation* imposed on, or in relation to importation constitutes a restriction on importation within the meaning of Article XI:1" (Panel Report, *India – Autos*, para. 7.265. (Emphasis original). This panel also asserted that the expression "limiting condition" used by the panel in *India – Quantitative Restrictions* "suggests the need to identify not merely a condition placed on importation, but a condition that is limiting, i.e. that has a limiting effect. In the context of Article XI, that limiting effect must be on importation itself" (Panel Report, *India – Autos*, para. 7.270). The Panels in *Brazil – Retreaded Tyres, Dominican Republic – Import and Sale of Cigarettes*, and *Colombia – Ports of Entry* cited, with approval, key passages from *India – Quantitative Restrictions* and *India – Autos* which delineated this standard (Panel Report, *Brazil – Retreaded Tyres*, para. 7.371; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.252 and 7.258; Panel Report, *Colombia – Ports of Entry,* paras. 7.233-7.235).

[409] Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to the Appellate Body Reports, *China – Raw Materials*, paras. 319-320).

reject a licence application.[410] In particular, the panel in *Argentina – Import Measures* found that some of Argentina's measures created "uncertainty as to an applicant's ability to import, d[id] not allow companies to import as much as they desire[d] or need[ed], but condition[ed] imports to their export performance and impose[d] a significant burden on importers that [was] unrelated to their normal importing activity".[411] In reference to the panel report in *Dominican Republic – Import and Sale of Cigarettes*, the panel in *Argentina – Import Measures* noted that "not every measure affecting the opportunities for entering the market would be covered by Article XI [of the GATT 1994], but only those measures that constitute a prohibition or restriction on the importation of products, i.e. those measures which affect the opportunities for importation itself".[412]

7.2.3.2.2 Whether an adverse trade effect test is necessary for a determination under Article XI:1

7.47. We recall that the Appellate Body in *Argentina – Import Measures* acknowledged that the limitation on imports "need not be demonstrated by quantifying the effects of the measure at issue".[413] The Appellate Body explained that "such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context".[414] The exact meaning of this finding has been the source of disagreement among the parties.

7.48. Indonesia argued that there is no breach of Article XI:1 of the GATT 1994 with respect to the measures at issue in this dispute because there is no adverse impact on trade flows[415] and that, for a measure to constitute a "quantitative restriction", it must impose an "absolute limit" on imports.[416] For Indonesia, just because Article XI:1 does 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.[417] In Indonesia's view, in order to demonstrate a violation of Article XI:1 of the GATT 1994, a complainant must show through clear and convincing evidence that the measure at issue has a "limiting effect on importation"[418], and it is not enough that the measure merely affects imports. In Indonesia's view, it is no excuse that complainants need not quantify the precise effect of the measure; complainants must demonstrate that a measure has a limiting effect on the quantity or amount of imports.[419]

7.49. The co-complainants disagreed and stressed that, although they have demonstrated the severe trade impact of Indonesia's regime, the above finding of the Appellate Body indicates that an adverse impact on trade flows is not a necessary component of the legal test for a quantitative

[410] For instance, in *Argentina – Hides and Leather*, the panel stated that "Article XI:1, like Articles I, II and III of the *GATT 1994*, protects competitive opportunities of imported products not trade flows" (Panel Report, *Argentina – Hides and Leather*, para. 11.20). The panel in *Brazil – Retreaded Tyres* found a violation of Article XI:1 where fines did not impose a *per se* restriction on importation, but acted as an absolute disincentive to importation by penalizing it and making it "prohibitively costly" (Panel Report, *Brazil – Retreaded Tyres*, para. 7.370). The panel in *Colombia – Ports of Entry*, in reference to previous cases dealing with Article XI:1 of the GATT 1994, stated that this provision was applicable to "measures which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly, all of which have implications on the competitive situation of an importer (Panel Report, *Colombia – Ports of Entry*, para. 7.240 (referring to GATT Panel Report, *EEC – Minimum Import Prices*; GATT Panel Report, *Canada – Provincial Liquor Boards (EEC)*; Panel Report, *Argentina – Hides and Leather;* Panel Report, *Brazil – Retreaded Tyres*)). In *China – Raw Materials*, although dealing with restrictions on exportation and in a finding declared moot by the Appellate Body due to terms of reference concerns (Appellate Body Reports, *China – Raw Materials*, paras. 234-235), the panel examined a licence system and found that "a licence requirement that results in a restriction additional to that inherent in a permissible measure would be inconsistent with GATT Article XI:1. Such restriction may arise in cases where licensing agencies have unfettered or undefined discretion to reject a licence *application".* Panel Reports, *China – Raw Materials*, para. 7.957.

[411] Panel Report, *Argentina – Import Measures*, para. 6.479 (finding upheld by the Appellate Body Report, *Argentina – Import Measures*, para. 5.288).

[412] Panel Report, in *Argentina – Import Measures*, para. 6.458 *(*referring to the Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.261).

[413] Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to the Appellate Body Reports, *China – Raw Materials*, paras. 319-320).

[414] Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to the Appellate Body Reports, *China – Raw Materials*, paras. 319-320).

[415] *See*, for instance, Indonesia's first written submission, paras. 55, 78, 80, 84, 93, 141 and 161.

[416] Indonesia's first written submission, paras. 54, 55, and 110.

[417] Indonesia's second written submission, para. 24.

[418] Indonesia's second written submission, para. 23 (referring to Panel Report, *India – Quantitative Restrictions*, para. 7.270).

[419] Indonesia's second written submission, para. 30.

restriction.[420] The United States recalled that the co-complainants can demonstrate a measure's inconsistency with Article XI:1 by showing that its design, structure, and operation, in themselves, impose limitations on importation (actual or potential).[421] New Zealand further indicated that, while not an essential part of the legal test under Article XI:1, the Panel may nonetheless use statistical data as evidence to inform its overall examination of whether a measure has a limiting effect. New Zealand added that this approach was confirmed by the Appellate Body in *Peru – Agricultural Products* where it noted that "evidence on the observable effects of the measure" can be considered but that a "panel is not required to focus its examination primarily on numerical or statistical data".[422]

7.50. In our view, the wording of the Appellate Body Report in *Argentina – Import Measures* is straightforward: the limiting effect of the measures "need not be demonstrated by quantifying the effects of the measure at issue".[423] Hence, contrary to Indonesia's position, the co-complainants are not obliged to demonstrate the limiting effects of the measures at issue by quantifying their effects though trade flows. On the contrary, the co-complainants can demonstrate the limiting effects of the measures "through the design, architecture, and revealing structure of the measure at issue considered in its relevant context".[424] Nevertheless, while not required to do so, the co-complainants have presented data on trade flows[425] that we will consider when examining each of the measures at issue. In this respect, we concur with New Zealand in that, while not an essential part of the legal test under Article XI:1 of the GATT 1994, the Panel may nonetheless use statistical data as evidence to inform its overall examination of whether a measure has a limiting effect. This was confirmed by the Appellate Body in *Peru – Agricultural Products* where it noted that "evidence on the observable effects of the measure" can be considered but that a "panel is not required to focus its examination primarily on numerical or statistical data".[426]

7.2.4 Preliminary issues

7.51. In this Section, we address Indonesia's contention that all or some of the measures at issue in this dispute are outside the scope of Article XI:1 of the GATT 1994 because (i) they are automatic import licensing regimes or (ii) they are covered by Article XI:2(c)(ii) of the GATT 1994.

7.2.4.1 Whether the measures at issue are outside the scope of Article XI:1 because they are automatic import licensing procedures

7.52. Indonesia argued that its import licensing regime for horticultural products, animals, and animal products is an automatic import licensing regime expressly permitted under Article 2.2(a) of the Import Licensing Agreement and therefore, excluded from the scope of Article XI:1 of GATT 1994 (and Article 4.2 of the Agreement on Agriculture).[427] For Indonesia, its import licensing regime for horticultural products and animals and animal products is automatic because applications for MOA Recommendations, RIPHs and Import Approvals have been granted in all cases when all legal requirements are fulfilled pursuant to Article 2(1) of the Import Licensing Agreement.[428]

[420] New Zealand's second written submission, para. 5; United States' first written submission, para. 143; United States' second written submission, para. 9.
[421] United States' second written submission, para. 11. United States' response to Panel question No. 110.
[422] New Zealand's second written submission, para. 8 (referring to Appellate Body Report, *Peru – Agricultural Products*, para. 5.56 and fn. 362).
[423] United States' response to Panel question No. 110, para. 95 (referring to Appellate Body Report, *Argentina – Import Measures*, para. 5.217, in turn referring to Appellate Body Reports, *China – Raw Materials*, paras. 319-320).
[424] Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to Appellate Body Reports, *China – Raw Materials*, paras. 319-320).
[425] *See* New Zealand's response to Panel question No. 110, para. 61; United States' response to Panel question No. 110, para. 97.
[426] New Zealand second written submission, para. 8 (referring to Appellate Body Report, *Peru – Agricultural Products*, para. 5.56 and fn. 362).
[427] Indonesia's second written submission, para. 67.
[428] Indonesia's second written submission, paras. 47 (referring to Indonesia's first written submission, paras. 63 and 176; Indonesia's opening statement during the first substantive meeting, para. 18; Indonesia's responses to Panel's Questions No. 8 and 52, 50 and 51).

7.53. The co-complainants disagree with Indonesia's contention. In addition to arguing that not all of the measures at issue are import licensing procedures[429], New Zealand submitted that the characterization of a measure as an "automatic" or "non-automatic" licensing regime is not relevant to the Panel's inquiry under Article XI:1 of the GATT 1994 (or Article 4.2 of the Agreement on Agriculture).[430] For New Zealand, the recurring question before this Panel is whether the measures at issue constitute restrictions within the meaning of Article XI:1 (and Article 4.2 of the Agreement on Agriculture).[431] In its view, while some of these restrictions are made effective through import licences, the Import Licensing Agreement is not relevant to the Panel's analysis of these claims. According to New Zealand, it is important to distinguish between import licensing procedures, on the one hand, and underlying restrictions made effective through import licences, on the other.[432] New Zealand contended that an analysis under Article XI:1 (and Article 4.2 of the Agreement on Agriculture) cannot be conducted simply by assessing whether the licensing procedures used to implement the underlying restrictions are characterized as "automatic" or "non-automatic" because it would be a perverse result if measures that operated to limit imports were immune from challenge under Article XI:1 of the GATT 1994 (or Article 4.2 of the Agreement on Agriculture) simply because they were made effective through automatic licensing procedures.[433]

7.54. The United States added that Indonesia's assertion that "automatic" import licensing procedures are outside the scope of Article XI:1 (and Article 4.2 of the Agreement on Agriculture)[434] is refuted by the text of the provision.[435] The United States argued that the text of Article XI:1 of the GATT 1994 is explicit in that "import or export licences" can impose restrictions on importation within the meaning of Article XI:1 and consequently, a label such as "automatic" would not suffice to exclude, *per se,* Indonesia's import regimes from the ambit of these provisions.[436] The United States also contended that Indonesia's import licensing regimes are not, in any event, "automatic".[437]

7.55. We agree with the United States that there is nothing in the text of Article XI:1 of the GATT 1994 that suggests that import licensing regimes, automatic or non-automatic, are outside the scope of this provision. On the contrary, import licences are expressly included in the indicative list of measures covered by this provision: restrictions or prohibitions can be "made

[429] New Zealand submitted that with the exception of Measures 1 and 11, which it claimed are quantitative restrictions as well as prohibited non−automatic licensing procedures, all other measures at issue are not "administrative procedures used for the operation of import licensing regimes" under Article 1.1 of the Import Licensing Agreement, but rather, quantitative import restrictions inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. New Zealand's opening statement at the second substantive meeting of the Panel, paras. 11-13 (referring to Panel Report, *Korea − Various Measures on Beef*, para. 784; Panel Report, *EC − Poultry*, para. 254; Appellate Body Report, *EC − Bananas III*, para. 197).

[430] New Zealand's opening statement at the second substantive meeting of the Panel, para. 14.

[431] New Zealand's opening statement at the second substantive meeting of the Panel, para. 15.

[432] For New Zealand, the distinction between import licensing procedures, on the one hand, and underlying restrictions made effective through import licences, on the other has been articulated by the Appellate Body in *EC − Bananas III* where it confirmed that the Import Licensing Agreement covers import licensing procedures and their administration, not underlying import restrictions. New Zealand's opening statement at the second substantive meeting of the Panel, paras. 11-13 (referring to Panel Report, *Korea − Various Measures on Beef*, para. 784; Panel Report, *EC − Poultry*, para. 254; Appellate Body Report, *EC − Bananas III*, para. 197).

[433] New Zealand's opening statement at the second substantive meeting of the Panel, para. 14.

[434] The United States pointed out that Article 4.2 of the Agreement on Agriculture covers "any measures of the kind which have been required to be converted into ordinary customs duties" with "ordinary customs duties" being the only measures that are excluded from Article 4.2 are. The United States submits that 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. United States' second written submission, para. 95 (referring to Appellate Body Report, *Chile − Price Band System*, paras. 200−201); United States' response to Panel question No. 11. United States' opening oral statement at the second substantive meeting of the Panel, para. 8).

[435] United States' second written submission, paras. 95-96; opening oral statement at the second meeting of the Panel, para. 8.

[436] United States' second written submission, paras. 96; response to Panel question No. 11.

[437] The United States argued that they are not automatic because they impose substantive prohibitions and restrictions on the type and quantity of products that can be imported, as well as restrictions on, inter alia, who can apply to import, when importation can occur, and the purposes for which imports can enter. For the United States, regardless of the number of applications approved, or the lack of discretion on the part of Indonesian officials in reviewing these applications, such measures cannot be considered "automatic" in any sense of the word. United States' second written submission, section III.A; response to Panel question No. 11; opening oral statement at the second meeting of the Panel, para. 12.

effective", i.e. produced or become operative[438], "through" import licenses. In our view, the text of Article XI:1 of the GATT 1994 does not support Indonesia's contention that automatic import licenses are excluded from the scope of Article XI:1 of the GATT 1994. We also concur with the co-complainants that the essence of an analysis under Article XI:1 of the GATT 1994 does not depend on how a measure is labelled, but rather on whether it imposes a restriction or prohibition on importation. In this sense, we are of the view that a determination of whether the measures at issue constitute automatic import licences or import licensing procedures is not a necessary threshold in our examination of the co-complainants' claims under Article XI:1 of the GATT 1994. Like the panel in *Argentina – Import Measures*, we consider that what is relevant when examining a measure under Article XI:1 of the GATT 1994 is whether a measure prohibits or restricts trade, rather than the means by which such prohibition or restriction is made effective.[439]

7.56. We also observe that the Import Licensing Agreement does not operate to exclude automatic import licences or licensing procedures *per se* from the scope of Article XI:1 of the GATT 1994. In fact, the provision relied upon by Indonesia, Article 2.2(a), is in line with Article XI of the GATT 1994 in providing that automatic licensing procedures "shall not be administered … as to have *restrictive* effects on imports …". Moreover, Article 1.2 provides that "Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994".

7.57. We thus conclude that we do not need to examine whether Indonesia's measures at issue constitute automatic import licences or licensing procedures as a necessary threshold question in our analysis of the claims under Article XI:1 of the GATT 1994.

7.2.4.2 Indonesia's reliance upon Article XI:2(c)(ii) of the GATT 1994

7.58. We now proceed to examine the second argument put forward by Indonesia in seeking to exclude some of its measures from the scope of Article XI:1 of the GATT 1994. In this instance, Indonesia has relied upon Article XI:2(c)(ii) of the GATT 1994 to exclude Measure 4 (Harvest period requirement)[440], Measure 7 (Reference prices for chillies and shallots)[441] and Measure 16 (Beef reference price)[442] from the scope of Article XI:1. Indonesia contended that these measures are necessary to remove a temporary surplus of horticultural products, animals and animal products in Indonesia's domestic market.[443] We recall that Article XI:2(c)(ii) of the GATT 1994 reads as follows:

> 2. The provisions of paragraph 1 of this Article shall not extend to the following:
>
> (*a*) …
>
> (*c*) Import restrictions on any agricultural or fisheries product, imported in any form,* necessary to the enforcement of governmental measures which operate:
>
> (i) …
>
> (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level;…

7.59. The co-complainants responded that Article XI:2(c)(ii) is no longer available with respect to agricultural products following the entry into force of the Agreement on Agriculture. The co-complainants explained that 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, and excludes measures maintained "under other general, non-agriculture-specific provisions of the

[438] Appellate Body Report, *Argentina – Import Measures*, para. 5.218.
[439] Panel Report, *Argentina – Import Measures*, para. 6.363.
[440] Indonesia's second written submission, para. 203.
[441] Indonesia's second written submission, para. 197.
[442] Indonesia's second written submission, para. 199.
[443] Indonesia's second written submission, paras. 252-257.

of GATT 1994". According to the co-complainants, as Article XI:2(c) applies explicitly to "import restrictions on any agricultural or fisheries product", it is not a "general, non-agriculture-specific provision" of the GATT 1994. Thus such measures have not been excluded from the types of measures which were required to be converted to ordinary customs duties under Article 4.2 of the Agreement on Agriculture. The co-complainants also drew the Panel's attention to Article 21.1 of the Agreement on Agriculture, which provides that the provisions of the GATT 1994 apply "subject to the provisions of this Agreement".[444] The co-complainants further submitted that even if Article XI:2(c)(ii) of the GATT 1994 were applicable, Indonesia failed to demonstrate its constitutive elements.[445]

7.60. We agree with the co-complainants. As they explained, Article XI:2(c) has been rendered inoperative with respect to agricultural measures by Article 4.2 of the Agreement on Agriculture, which prohibits Members from maintaining, resorting to, or reverting to, "any measures of the kind which have been required to be converted into ordinary customs duties". Footnote 1 to Article 4.2 provides that the only measures that fall outside the scope of this provision are the ones "maintained under balance-of-payment provisions or under other general, non-agriculture-specific provisions of the GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement". Article XI:2(c) by its terms concerns agricultural products and therefore does not qualify under the exclusion for general, non-agriculture-specific provisions. Therefore, Indonesia cannot rely upon Article XI:2(c)(ii) of the GATT 1994. This is confirmed by Article 21 of the Agreement on Agriculture, which provides that "[t]he provisions of GATT 1994", including Article XI:2(c)(ii) of the GATT 1994, "shall apply subject to the provisions of this Agreement". Accordingly, we conclude that Indonesia cannot rely upon Article XI:2(c)(ii) of the GATT 1994 to exclude Measures 4, 7 and 16 from the scope of Article XI:1 of the GATT 1994 because, with respect to agricultural measures, Article XI:2(c) has been rendered inoperative by Article 4.2 of the Agreement on Agriculture.

7.2.5 Whether Measure 1 (Limited application windows and validity periods) is inconsistent with Article XI:1 of the GATT 1994

7.2.5.1 Arguments of the parties

7.2.5.1.1 New Zealand

7.61. New Zealand claims that the limited application and validity periods for horticultural products under the import licensing regime have a limiting effect on imports contrary to Article XI:1 of the GATT 1994 as they adversely affect the volume of horticultural imports into Indonesia. According to New Zealand, importers may only submit applications for RIPHs and Import Approvals during limited application windows and the RIPHs and Import Approvals set out limited validity periods for the importation of horticultural products into Indonesia. New Zealand argues that these requirements are structured in such a way that imports are severely restricted over the period between validity periods.[446]

7.62. New Zealand explains that RIPHs are issued twice a year for the periods January to June and July to December. For the period from January to June, the application window for RIPHs is 15 working days from the start of November of the previous year. For the period June to December, the application window for RIPHs is 15 working days from the start of May of the current year.[447] For Import Approvals for RIs the application window for the January to June validity period is December, and for the July to December period, the application period is June.[448] New Zealand argues, however, that the application windows for Import Approvals are often not open for the entire month.[449] New Zealand submits that these narrow application windows, combined with

[444] New Zealand's response to Panel question No. 114. United States' response to Panel question No. 114.

[445] New Zealand's response to Panel question No. 114. United States' response to Panel question No. 114.

[446] New Zealand's first written submission, para. 211.

[447] New Zealand's first written submission, para. 212 (referring to Article 13, MOA 86/201, Exhibit JE-15); second written submission, para. 180.

[448] New Zealand's first written submission, para. 212 (referring to. Article 13A, MOT 16/2013 as amended by MOT 47/2013 (Exhibit JE-10)). Article 13A of MOT 40/2015 (Exhibit JE-11), which further amends MOT 16/2013, sets out these same application and validity windows.

[449] New Zealand's first written submission, para. 213; second written submission, para. 180. Exhibit NZL-51, in particular, shows that, for the period January-June 2014, the application window for Import Approvals was only seven working days from 9-17 December 2014.

seasonality and the time it takes to package and ship product to Indonesia, negatively affects suppliers, particularly those with longer transportation lines.[450] For New Zealand, imports are also disrupted at the end of each validity period because importers do not want to risk having products arriving in Indonesia after the semester has ended[451], particularly due to the applicable sanctions. In its view, this decrease in imports of horticultural products in the first month of each validity period, and at the end of each period, is reflected in the trade statistics for New Zealand apple and onion exports to Indonesia.[452] In response to Indonesia's argument that such information is mere "anecdotal" evidence, New Zealand argues that is not the case since the trade statistics in question are sourced from the New Zealand Customs Service, focusing on exports to Indonesia of horticultural products of particular importance to New Zealand.[453]

7.63. New Zealand contends that the panels in *Colombia – Ports of Entry* and *Argentina – Import Measures* (citing previous GATT panel decisions) have confirmed that measures which restrict market access can constitute quantitative restrictions contrary to Article XI:1 of the GATT 1994.[454] New Zealand submits that this is the case as well for the limited application windows and validity period requirements as they restrict the competitive opportunities and have a limiting effect on horticultural product imports, contrary to Article XI:1 of the GATT 1994.[455]

7.2.5.1.2 United States

7.64. The United States claims that Indonesia's application window and validity period requirements are inconsistent with Article XI:1 of the GATT 1994 because they constitute restrictions within the meaning of that provision, i.e. "a limitation, or limiting condition on importation, or has a limiting effect on importation".[456] The United States argues that these requirements constitute restrictions within Article XI:1 because their structure causes a period of several weeks at the end of one semester, and at the beginning of another, when products from the United States (and other Members far from Indonesia) *cannot* be exported to Indonesia.[457] Additionally, the United States claims that this requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[458]

7.65. The United States explains that an RI can apply for an RIPH and Import Approvals to import horticultural products only during a limited window prior to the beginning of a new semester, that RIPHs and Import Approvals are valid only for one six-month period, and that an RI must reapply for them every semester. According to the United States, shipping of horticultural products for any semester cannot begin until after RIPHs and Import Approvals are issued because exporters shipping goods to Indonesia must have valid RIPH and Import Approval numbers from the RI in Indonesia in order to have their horticultural products inspected and verified in the country of origin. The United States contends that, once an RI obtains its RIPH and Import Approval and places its orders for the next semester, it takes at least four to six weeks for horticultural products to arrive in Indonesia, assuming that the US exporters ship immediately. In these conditions, the products must arrive in Indonesia and clear customs before the end of the semester.[459]

7.66. According to the United States, these periods of non-shipment created by the structure and operation of the application windows and validity periods of the RIPHs (15 working days in November and May only) and Import Approvals (one month in December and June only) impose limiting conditions on importation and have direct limiting effects on horticultural product imports.[460] The United States finds support for its allegation that the structure of the application windows and validity periods respectively applicable to RIPHs and Import Approvals are restrictions

[450] New Zealand's first written submission, para. 214.
[451] New Zealand's first written submission, para. 215.
[452] New Zealand's first written submission, paras. 216-217.
[453] New Zealand's second written submission, para. 182.
[454] New Zealand's first written submission, para. 219 (referring to Panel Report, *Colombia – Ports of Entry*, paras. 7.238-7.241 (citing *Canada – Provincial Liquor Boards* (EEC), paras. 4.24 and 4.25; *Canada – Provincial Liquor Boards (US)*, para. 5.6; and *EEC – Minimum Import Prices*, para. 4.9) and Panel Report, *Argentina – Import Measures*, para. 6.454).
[455] New Zealand's first written submission, para. 219 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.274.)
[456] United States' first written submission, para. 154.
[457] United States' first written submission, para. 155.
[458] United States' first written submission, fn. 283.
[459] United States' first written submission, para. 156-158; second written submission, para. 14; response to Panel question No. 28, paras. 100-102.
[460] United States' first written submission, para. 157.

under Article XI:1 in prior jurisprudence[461], and in particular, in the panel report in *Colombia – Ports of Entry.* The United States submits that the panel considered a measure that restricted the entry to two Colombian ports of imports of certain textile and apparel products from Panama and found that the challenged measure had a "limiting effect" on imports because "uncertainties, including access to one seaport for extended periods of time and the likely increased costs that would arise for importers operating under the constraints of the port restrictions, limit competitive opportunities for imports arriving from Panama."[462] The United States contends that Indonesia's requirements go well beyond "uncertainties" and "likely increased costs" since Indonesia's measures operate to wholly exclude US horticultural products from the Indonesian market for four to six weeks out of every semester, and two to three months out of every year.[463]

7.67. The United States also argues that, although not required under Article XI:1 of the GATT 1994, it submitted evidence demonstrating the effect of this "no-shipment" period on imports, including statements by exporters of horticultural and animal products attesting that the application windows and validity periods prevent them from selling to Indonesia altogether for the last four to six weeks of one validity period and the beginning of the next.[464]

7.68. In response to Indonesia's argument that the market share of US-origin oranges, lemons, frozen potatoes, and grapefruit juice increased from 2012 to 2014[465], the United States argues that while the market share of US-origin oranges grew between 2012 and 2015, overall imports of oranges fell significantly over the same period. The United States also contends that the data on Indonesia's orange imports do not contradict the *prima facie* case established by the co-complainants.[466]

7.2.5.1.3 Indonesia

7.69. Indonesia argues that its import licensing system for horticultural products is an automatic import licensing system and that, for this reason, it does not violate Article XI:1 of the GATT 1994.[467] Indonesia contends that should the Panel prefer to assess each element of Indonesia's import licensing regime for horticultural products, the application windows and validity periods do not violate Article XI:1 of the GATT 1994 because they allow for continuous importation of products into Indonesia.[468]

7.70. Indonesia submits that it is simply untrue that there is a period of time during which imports are "restricted" as a function of the timing of the import licence application process.[469] For Indonesia, the co-complainants' argument is at odds with their argument that they are compelled to import too much as a result of the realization requirement. Indonesia also contends that the market share of many key imports from the co-complainants has increased since the implementation of Indonesia's current import licensing regime, contrasting with the co-complainant's arguments that the import licensing regime has trade-restrictive effects. Indonesia submits that this evidence shows that the application window and validity period elements of Indonesia's import licensing for fresh horticultural products is consistent with Article XI:1 of the GATT 1994.[470]

7.71. Indonesia argues that nothing in Article XI:1 of the GATT 1994 prevents Members from implementing reasonable, non-discriminatory licensing schemes to regulate imports. According to Indonesia, the fact that the licences are not infinite in duration or that the application periods are

[461] United States' first written submission, para. 158 (referring to Appellate Body Report, *Argentina – Import Measures* , para. 5.217; Appellate Body Report, *China – Raw Materials*, para. 320).
[462] United States' first written submission, para. 158 (referring to the Panel Report, *Colombia – Ports of Entry*, para. 7.274).
[463] United States' first written submission, para. 158.
[464] The United States also refers to trade data showing that shipments of US apples to Indonesia came to a halt towards the end of the semesters in December and June in the period 2013-2015; data showing that the gap in shipments did not occur prior to the 2012-2013 season, when the import licensing regulations became effective; and data showing that the total quantity of US apple exports to Indonesia dropped significantly beginning in the 2012-2013 season and have not returned to pre-2013 levels. United States' second written submission, para. 15.
[465] Indonesia's opening statement at the first substantive meeting of the Panel, para. 20; *see also* Indonesia's response to Panel question No. 18.
[466] United States' second written submission, para. 18.
[467] Indonesia's second written submission, para. 165.
[468] Indonesia's second written submission, para. 166.
[469] Indonesia's first written submission, para. 134.
[470] Indonesia's second written submission, para. 159.

fixed to certain periods does not give rise to a quantitative restriction within the meaning of Article XI:1 of the GATT 1994.[471] Indonesia contends that application windows are permitted under Article 1(6) of the Import Licensing Agreement and that it allows 15 working days (21 calendar days) for the application window to apply for an RIPH for horticultural products and a one-month application window for IA applications. Indonesia further sustains that all applications for RIPHs, Recommendations or Import Approvals can be submitted online at INATRADE (Trade Licensing Services Using Electronic and Online System) and REIPPT (Export Import Recommendation for Certain Agricultural Products).[472]

7.72. For Indonesia, the validity periods of its import licences for horticultural products, animals, and animal products cover 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.[473] Indonesia also contends that the application window and validity periods are very common features among WTO Members in administering imports.[474]

7.2.5.2 Analysis by the Panel

7.73. As noted in paragraph 7.37 above, the Panel will examine each of Indonesia's 18 measures in turn. Thus the first task before the Panel is to establish whether, as claimed by the co-complainants, Measure 1 is inconsistent with Article XI:1 of the GATT 1994 because it constitutes a restriction having a limiting effect on the importation of horticultural imports into Indonesia and limits the competitive opportunities of importers and imported products.[475] As explained in Section 7.2.3 above, prior panels have followed a two-step test whereby they first establish whether the complainant has demonstrated that the measure at issue falls within the scope of Article XI:1 of the GATT 1994, followed by a consideration of whether the complainant has demonstrated that the measure at issue has a limiting effect on importation.

7.74. The co-complainants argued that Measure 1 constitutes a restriction on importation[476], and that it is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[477] New Zealand further argued that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 1, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure".[478] The United States submitted that Article XI:1 applies to *any* "restriction," including those "made effective through quotas, import or export licences *or other measures*".[479]

7.75. Indonesia did not contest the co-complainants' characterization of Measure 1.[480] Rather, it has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[481] We recall our conclusion in Section 7.2.3.2.1 above that automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. Given the description of Measure 1 in Section 2.3.2.1 above, we concur with the co-complainants in that Measure 1 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

7.76. Given the broad scope of "other measures", we consider it more efficient to follow the approach of the panel in *Argentina – Import Measures*[482] described in paragraph 7.42 above and thus proceed to examine whether the co-complainants demonstrated that Measure 1 prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective. In doing so, we will determine whether the co-complainants demonstrated that Measure 1 has a limiting effect on importation. To carry out this analysis, we recall that the Panel may examine the design, architecture, and revealing structure of Measure 1, within its relevant context.

[471] Indonesia's first written submission, para. 135.
[472] Indonesia's second written submission, para. 161.
[473] Indonesia's second written submission, para. 163.
[474] Indonesia's second written submission, para. 164.
[475] New Zealand's first written submission, para. 211; United States' first written submission, para. 155.
[476] New Zealand's first written submission, para. 211; United States' first written submission, para. 155.
[477] New Zealand's first written submission, para. 284; United States' first written submission, fn. 283.
[478] New Zealand's first written submission, para. 284.
[479] United States' first written submission, para. 142. (emphasis original)
[480] Indonesia's response to Panel question No. 10.
[481] Indonesia's second written submission, para. 165.
[482] Panel Report, *Argentina – Import Measures*, para. 6.363.

7.77. In this- respect, as described in Section 2.3.2.1 above, Measure 1 consists of the of the limited application windows and the six-month validity period of RIPHs and Import Approvals, together with some pre-shipment requirements that preclude importers from shipping their products before they obtain an Import Approval and the requirement that importers must complete all importations of horticultural products covered in their RIPHs and Import Approvals during the validity period of these documents.[483] Indonesia applies this Measure pursuant to Article 13 of Regulation MOA 86/2013, which regulates the relevant timeframes concerning RIPHs and Articles 13A, 14, 21, 22 and 30 of Regulation MOT 16/2013, as amended, which does the same for Import Approvals. We discern the following elements in the design, architecture and structure of this measure as per the mentioned regulations:

a. Pursuant to Article 13 of MOA 86/2013, importers may apply for an RIPH for the validity period from January to June during 15 working days starting in early November of the previous year, and for the validity period from July to December during 15 working days starting in early May of that year;

b. Pursuant to Article 13A of MOT 16/2013, as amended, applications for Import Approvals may be made in December for the validity period from January to June, and in June for the validity period from July to December;

c. Pursuant to Articles 21(1) and 21(2) of MOT 16/2013, as amended by MOT 47/2013, every importation of horticultural products must undergo a technical verification which is carried out by a surveyor designated by the Minister of Trade. Article 22 of MOT 16/2013, as amended, provides that the verification conducted under Article 21(1) examines information that includes the country and port of origin, the tariff classification and product description, and the type and volume of the products to be imported.

d. Pursuant to Article 30 of MOT 16/2013, as amended, fresh or processed horticultural products imports that is not the horticultural product included in the recognition of the PI-Horticultural products and/or the Import Approval will be destroyed or re-exported in accordance with regulatory legislation.

7.78. According to New Zealand, Measure 1 is structured in such a way that imports are severely restricted over the period between validity periods. This is because importers may only submit applications for RIPHs and Import Approvals during limited windows and the RIPHs and Import Approvals set out limited validity periods for the importation of horticultural products.[484] The United States shares New Zealand's view and argues that Measure 1 constitutes a restriction within the scope of Article XI:1 because its structure causes a period of several weeks at the end of one semester and the beginning of another when products from the United States (and other Members far from Indonesia) cannot be exported to Indonesia.[485]

7.79. Key to understanding the co-complainants' challenge to this measure is their contention that horticultural products cannot be shipped from the country of origin until after the Import Approval for that period has been issued.[486] In their view, some of the data required by Article 22 of MOT 16/2013, as amended by MOT 47/2013, can only be obtained after receiving the RIPHs and Import Approvals for the relevant validity period and, therefore, the shipment of horticultural

[483] Request for the Establishment of a Panel by New Zealand, pp. 1-4; Request for the Establishment of a Panel by the United States, pp. 1-4; New Zealand's first written submission, para. 87; United States' first written submission, paras. 46.

[484] New Zealand's first written submission, para. 211.

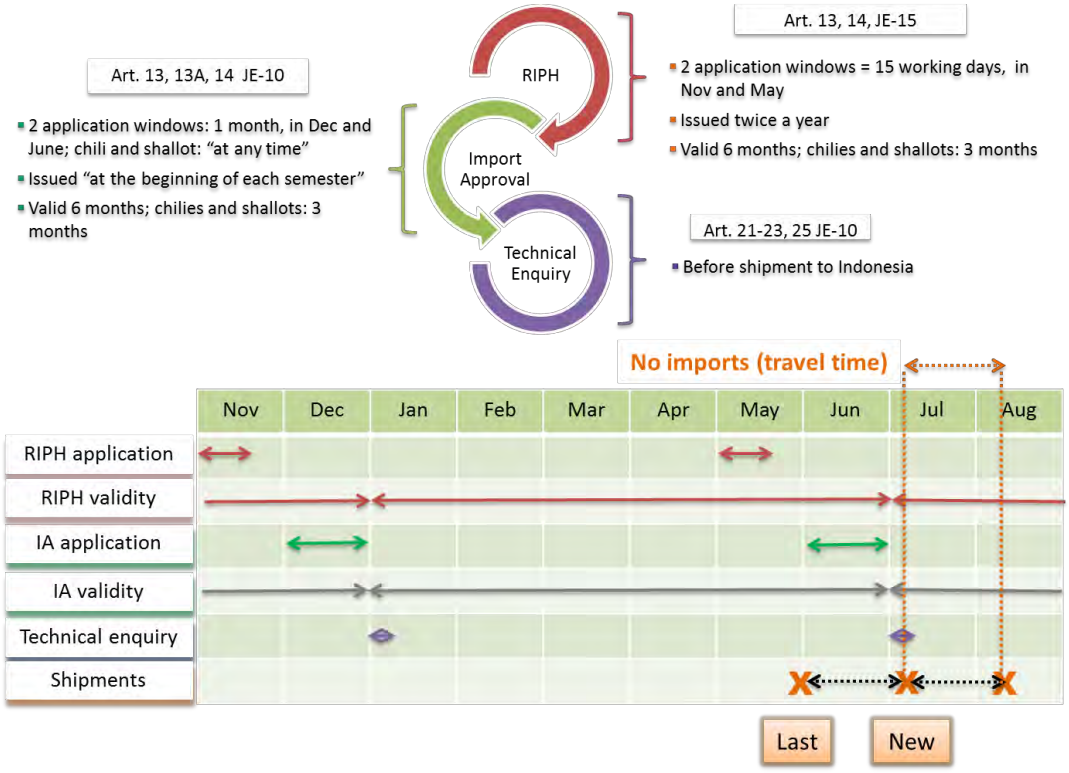
[485] United States' first written submission, para. 155.

[486] New Zealand's first written submission, para. 88; United States' first written submission, para. 47. New Zealand refers to Example Import Approval 1, para. 1 (Exhibit NZL-47) and to Article 22, MOT 16/2013 (Exhibit JE-8) which sets out the pre shipment inspection (PSI) requirements that importers must comply with prior to shipping horticultural products to Indonesia. New Zealand submits that the information required by the PSI surveyor is the information contained in an importer's Import Approval, meaning that an importer must obtain an Import Approval prior to PSI and therefore, horticultural products cannot be shipped from their country of origin until after the Import Approvals for that period are issued. The United States refers to Ministry of Trade, Import Approval for Horticultural Products, para. 1 (Exhibit USA-19) (stating: "Imports of the aforementioned Horticultural Products must undergo verification or technical inquiry in the country of origin ...in a manner that is in accordance with customs procedures" and the RI "must show an original copy of this Import Approval letter for Horticultural Products to a Customs and Excise official, on site, for each importation activity, in order to complete the Import Realization Control Card (attached), which verifies the quantity and type of imported goods").

products can only begin after obtaining these documents, in particular, the Import Approval.[487] In support, the co-complainants referred to Exhibit USA-69, which contains the provisions for verification of horticultural products from KSO SUCOFINDO, a surveyor designated by Indonesia's Ministry of Trade, which requires that, in order to apply for a verification request, importers need to file certain documents, including an Import Approval for horticultural products.[488]

7.80. We understand that the alleged restriction occurs because of the combination of the different elements or requirements that encompass Measure 1, namely (i) the timing of the application windows, (ii) the requirement that all horticultural goods arriving into Indonesia must clear customs during the validity period of the relevant Import Approval[489], and (iii) the requirement that an Import Approval must be issued before products are shipped to Indonesia together with the factual circumstances inherent in international transportation depending on the geographical location of the exporting country. According to the evidence on the record, it may take two to six weeks for products shipped from the co-complainants to reach Indonesia.[490] The following graph shows the operation of the various requirements integrated into Measure 1:

Import licensing for horticultural products: Measure 1 scenario



Sources: Based on MOT 16/2013 as amended by MOT 47/2013 (JE-10) and MOA 86/2013 (JE-15).

7.81. To ensure that we understood and analysed correctly the design, architecture, and revealing structure of this Measure as well as its resulting operation in practice, the Panel devised a hypothetical scenario that we shared with the parties. We sought their views to confirm whether our assumptions accurately reflected the functioning of this Measure.[491] In our hypothetical scenario, we assumed that an importer has obtained an RIPH and an Import Approval for the validity period of January-June 2015 and that it takes, on average, four weeks for the products to get from the country of origin to Indonesia. This means that at the latest, the importer must make

[487] New Zealand's response to Panel question No. 28; United States' response to Panel question No. 28.
[488] Exhibit USA-69.
[489] We understand this is a result of the validity periods for the RIPHs and Import Approvals and Article 30 of MOT 16/2013, as amended. *See also* Exhibit USA-19 presenting an Import Approval which states "This Import Approval is valid beginning July 1, 2014 (one July two thousand fourteen) until December 31, 2014 (thirty one December two thousand fourteen), as proven by the date of a customs registration notice, Manifest (BC 1.1), in accordance with valid customs provisions".
[490] *See* Exhibit USA-21, USA-49, NZL-49, NZL-50, NZL-97. *See also* New Zealand's response to Panel question No. 94; United States' response to Panel question No. 94; Indonesia's response to Panel question No. 94; New Zealand's comments on Indonesia's response to Panel question No. 94.
[491] *See* Panel Question no. 94.

its last shipment by the beginning of June for the products to arrive on time to be admitted into Indonesia before the validity of the Import Approval expires. We also assumed that the same importer applied for an RIPH and an Import Approval for the validity period July-December 2015 during the application window for each of these documents (i.e. the first 15 business days of May for the RIPH, and the month of June for the Import Approval). Following Article 13(A)(2) of MOT 16/2013, as amended, the Import Approval would be issued at the beginning of each semester, i.e. in July in this scenario. Therefore, the earliest the importer would be able to ship horticultural products under the validity period of July-December would be at the beginning of July because it cannot ship any products before obtaining the new Import Approval (due to the pre-shipment verification requirements). If the importer were able to ship the products immediately after obtaining the Import Approval, the products would arrive at the beginning of August due to the shipping time assumptions. In this scenario, there would be no imports during the month of July, the importer would have to stop imports at the beginning of June and could only resume them after obtaining a new Import Approval in early July.

7.82. The hypothetical scenario, which was modelled to closely follow how the different elements or requirements encompassed in this Measure operate, shows that by virtue of the design, architecture and revealing structure under Indonesia's import licensing regime for horticultural products, there is a period of time when there are no imports into Indonesia. While the co-complainants agreed that the scenario provided an accurate depiction of the way the measure works[492], Indonesia argued that the scenario does not take into account the duration of the approval process, both for RIPH and for Import Approval. Indonesia explained that if the complete application for an RIPH is received on the first day of the application window pursuant to Article 12 of MOA 86/2013, the RIPH will be issued within seven days (8 November at the latest), and in the case of Import Approvals, if the complete application for Import Approval is received by the Ministry of Trade on 1 December, the Import Approval will be issued within two days (3 December at the latest).[493] For Indonesia, this means the importer will be able to import its products right after the issuance of the Import Approval, and the products will arrive in Indonesia by the beginning of the import period. Indonesia also contended that it takes approximately two weeks to ship products from different ports in New Zealand to Indonesia [494] and that it is possible to obtain an extension under Article 12A of MOT 17/2014.[495]

7.83. The co-complainants responded that Indonesia's contention that the Import Approval will be issued within two days is incorrect because Article 13(A)(2) of MOT 16/2013, as amended, clearly stipulates that Import Approvals are issued "at the beginning of each semester."[496] New Zealand also disagreed with Indonesia's statement that it takes approximately two weeks to ship products from New Zealand to Indonesia. In the context of the similar measure applicable to animals and animal products, New Zealand explained that in reality, it takes at least three weeks to ship bovine meat and offal from New Zealand to Indonesia, plus another one to two weeks to prepare the shipment prior to export.[497]

7.84. We concur with the co-complainants in that Article 13(A) of MOT 16/2013, as amended, explicitly provides that Import Approvals are issued at the beginning of each semester. We note that Indonesia relied upon Article 11 of MOT 71/2015 in seeking to respond to allegations about the time it takes to receive approvals. However, this regulation was issued after the establishment of this Panel and is not within the various elements that constitute the measure before us. We also note that even if it were included in Measure 1, Article 11 of MOT 71/2015 does not stipulate when an Import Approval shall be issued and hence we do not find support there for Indonesia's statements about the timing of approvals.[498] In relation to Indonesia's contention regarding the

[492] New Zealand's response to Panel question No. 94; United States' response to Panel question No. 94;

[493] Indonesia's response to Panel question No. 94, para. 32. We note that in support of the contention that the Import Approval will be issued within 2 days, Indonesia refers to Article 11 of MOT 71/2015.

[494] Indonesia's response to Panel question No. 94, para. 34.

[495] Indonesia's response to Panel question No. 94, para. 33.

[496] New Zealand's comments on Indonesia's response to Panel question No. 94 (referring to Article Article 13A of MOT 16/2013, as amended, Exhibit JE-10; Onions New Zealand Exporter Statement, Exhibit NZL-49; and Pip Fruit New Zealand Export Statement, Exhibit NZL-50). United States' comments on Indonesia's response to Panel question No. 94.

[497] New Zealand's comments on Indonesia's response to Panel question No. 94 (referring to Meat Industry Association Statement, p. 8, Exhibit NZL-12 and to "Letter from Onions New Zealand regarding shipping times for onions from New Zealand to Indonesia" (Exhibit NZL-97).

[498] Article 11 of MOT 71/2015 provides as follows:

The timing for the submission of applications for Import Approval for companies possessing API-U, is as follows:

a. Import Approval for Fresh Horticultural Products is divided into two [periods] each

shipping time, we recall that in paragraph 7.80 above, we mentioned that there was evidence on the record that it may take two to six weeks for products shipped from the co-complainants to reach Indonesia.[499] Nonetheless, even if we were to assume that it only takes two weeks to ship products from New Zealand to Indonesia, the above hypothetical scenario would still show that for a period of time, no imports would enter Indonesia. The only difference would be that the period when imports would not enter would be reduced from one month to two weeks. In any event, we note that unless the products were able to reach Indonesia the following day after receiving the Import Approval, something that seems highly unlikely to us, there would always be a period of time when there would be no imports to Indonesia. Regarding Indonesia's argument that the RIPH will be issued within seven days, we note that even in this scenario, the importer would still have to wait another three weeks before submitting an Import Approval application, because the application window starts only in December. In this sense, the RIPH issuance timelines become irrelevant.

7.85. We also note that other than contesting timeframes for issuing approvals and the shipping time from New Zealand, Indonesia did not take issue with other elements of the hypothetical scenario set forth above, nor with the manner in which it reflects the design, architecture and revealing structure of Measure 1.

7.86. As we explained above, the effect on importation can be attributed to the intrinsic elements of Measure 1, namely (i) the timing of the application windows, which is very close to the expiration of the previous import documents, (ii) the requirements that preclude importers from shipping products before having obtained the new Import Approval, and (iii) the requirement that all horticultural goods arriving in Indonesia must clear customs during the validity period of the relevant Import Approval. Added to these is that international transportation from the co-complainants necessarily takes some time.

7.87. While the intrinsic elements of Measure 1 are attributable to Indonesia, the factual circumstances resulting from the geographical location of the co-complainants are obviously not attributable to Indonesia. Indeed, Indonesia argued that "its geographic location on the planet is not a 'measure' designed to 'restrict' imports from either New Zealand or the United States".[500] We agree. However, Indonesia should have taken into account when designing the various elements that encompass Measure 1 that international transportation necessarily would have an impact on the operation of the measures and the ability of WTO Members to meet Indonesia's requirements.

7.88. We also observe that the operation of Measure 1 as depicted in our hypothetical scenario above and the resulting period with no imports is confirmed by the trade statistics submitted by the co-complainants. The graphs shown in Annexes 4 and 5 of New Zealand's first submission describe apple and onion exports to Indonesia, contrasting the statistics for the same months in the years prior to the import licensing regime being put in place at the end of 2012. The volume of imports decreased in the periods between validity periods of Import Approvals. Similarly, in Exhibit USA-50, weekly export statistics for apples, as compiled by the US Northwest Horticultural Council, show that, from 2013 to 2015, shipments of US apples to Indonesia also "came to a halt towards the end of the first and second semesters", i.e. in December and June.

7.89. Having examined the design, architecture and revealing structure of Measure 1, we conclude that Measure 1 has a limiting effect on importation because, during certain periods of time, the operation of Measure 1 results in no imports of horticultural products into Indonesia.

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year, with the following provisions:
1. for the first Semester, the period from January to June, applications must be submitted in the month of December of the previous year; and
2. for the second Semester, the period from July to December, applications must be submitted in the month of June of that year.
b. Import Approval applications for Fresh Horticultural Products, specifically chillies (fruits of the genus *Capsicum*) with Tariff Number/HS 0709.60.10.00 and fresh shallots for consumption with Tariff Number/HS/0703.10.29.00, can be submitted at any time;
c. Import Approval applications for Processed Horticultural Products can be submitted at any time. (Exhibit JE-12)

[499] See Exhibit USA-21, USA-49, NZL-49, NZL-50, NZL-97. *See also* New Zealand's response to Panel question No. 94; United States' response to Panel question No. 94; Indonesia's response to Panel question No. 28; New Zealand's comments on Indonesia's response to Panel question No. 94.

[500] Indonesia's first written submission, fn. 83.

7.90. In addition, we note that the co-complainants have also argued that Measure 1 has a negative effect on the competitive opportunities of imported products. In this respect, New Zealand referred to the panels in *Colombia – Ports of Entry* and *Argentina – Import Measures* (citing previous GATT panel decisions) that have confirmed that measures that restrict market access can constitute quantitative restrictions contrary to Article XI:1 of the GATT 1994.[501] For New Zealand, this is the case of the limited application windows and validity period requirements as they restrict competitive opportunities.[502] Similarly, the United States found support in the panel report in *Colombia – Ports of Entry*, and explained how that panel considered a measure that restricted the entry to two Colombian ports of imports of certain textile and apparel products from Panama and found that the challenged measure had a "limiting effect" on imports because "uncertainties, including access to one seaport for extended periods of time and the likely increased costs that would arise for importers operating under the constraints of the port restrictions, limit competitive opportunities for imports arriving from Panama."[503] The United States submitted that Indonesia's requirements go well beyond "uncertainties" and "likely increased costs" since Indonesia's measures operate to wholly exclude US horticultural products from the Indonesia market for four to six weeks out of every semester, and two to three months out of every year.[504]

7.91. We agree with the co-complainants that the way Measure 1 is designed and structured results in a limitation of the competitive opportunities of importers in practice because it restricts the market access of imported products into Indonesia.

7.2.5.3 Conclusion

7.92. For the reasons stated above, we find that Measure 1 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.2.6 Whether Measure 2 (Periodic and fixed import terms) is inconsistent with Article XI:1 of the GATT 1994

7.2.6.1 Arguments of the parties

7.2.6.1.1 New Zealand

7.93. New Zealand claims that Measure 2 (which it calls "Fixed Licence Terms") constitutes a restriction on imports because it limits imports to the products, quantity, source and port of entry set out in the import approval documents thereby removing the ability of importers to respond to market forces and external factors that occur during a validity period.[505] New Zealand submits that the Import Approvals that RIs must obtain specify the quantity of product that may be imported during a validity period. The quantities specified in the Import Approvals constitute the maximum quantity of that product that may be imported in the following validity period.[506]

7.94. New Zealand further argues that 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 regime has the effect of, among other things, prohibiting imports from countries other than those specified in the relevant import licence, and prohibiting imports arriving in a different Indonesian port than that specified in the RIPH or Import Approval.[507] New Zealand submits that by restricting the parameters within which importers may import products (including the port of entry) through the import licences, importers have fewer opportunities to import horticultural products into Indonesia and that such restrictions have an impact on the "competitive

[501] New Zealand's first written submission, para. 219 (referring to Panel Report, *Colombia – Ports of Entry*, paras. 7.238-7.241 (citing *Canada – Provincial Liquor Boards* (EEC), paras. 4.24 and 4.25; *Canada – Provincial Liquor Boards (US)*, para. 5.6; and *EEC – Minimum Import Prices*, para. 4.9) and Panel Report, *Argentina – Import Measures*, para. 6.454).

[502] New Zealand's first written submission, para. 219 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.274.)

[503] United States' first written submission, para. 158 (referring to the Panel Report, *Colombia – Ports of Entry*, para. 7.274).

[504] United States' first written submission, para. 158.

[505] New Zealand's first written submission, para. 221 (referring to Appellate Body Report, *Argentina – Import Measures*, para. 5.217); second written submission, para. 195.

[506] New Zealand's first written submission, para. 222; second written submission, para. 196.

[507] New Zealand's first written submission, para. 226.

opportunities" available to imported products.[508] New Zealand claims that this has a consequential limiting effect on imports contrary to Article XI:1 of the GATT 1994.[509]

7.95. New Zealand also contends that not only are these terms fixed for the period of validity of the licence, but Indonesia also limits which terms can be included in the import licence through the operation of other components of its import licensing regime for horticultural products.[510] For New Zealand, it is therefore not correct to state that Indonesia does not place any limitations on the terms identified because the various legal requirements operate together with Measure 2 to place limitations on the terms identified on the import licences.[511]

7.96. Responding to Indonesia's argumentation that the facts in *Colombia – Ports of Entry* are different from those in this case because importers have the flexibility to identify more than one port of entry on the Import Approval application, New Zealand argues that such "flexibility" is at odds with the legal requirement set out in Article 32 of MOT 16/2013 whereby "[e]ach Horticultural Product can only be imported through destination ports that are in accordance with regulatory legislation".[512] New Zealand also submits that, in any case, the requirement to set out the port of destination is only one of the requirements of Measure 2 that cannot be amended during the period of validity of the Import Approval.[513]

7.2.6.1.2 United States

7.97. The United States claims that Measure 2 is a restriction within the meaning of Article XI:1 and is therefore inconsistent with Article XI:1 of the GATT 1994.[514] Additionally, the United States submits that this requirement is not a duty, tax, or other charge and, therefore, is within the scope of Article XI:1.[515] According to the United States, Indonesia limits horticultural imports to products of the type, quantity, country of origin and port of entry listed on the RIPH and Import Approval that are granted at the beginning of each semester; and prohibits the importation of any horticultural products, of other types, from different origins, or into different ports without a valid permit. The United States argues that a measure is a "restriction" if it imposes "a limitation on importation, a limiting condition on importation, or has a limiting effect on importation."[516] The United States claims that since only certain imports, as listed on the RIPH and Import Approval at the outset of each semester, are allowed to enter the territory of a Member during that semester, that measure imposes a restriction on imports within the meaning of Article XI:1.[517]

7.98. The United States argues that during any six-month period, the only horticultural products that are permitted to be imported are those that conform to the products listed on importers' original RIPHs and Import Approvals, as issued at the beginning of the semester.[518] In the United States' view, this means that PIs can only import the specific type of horticultural products from the country of origin through the port of entry specified on their RIPHs during the semester.[519] According to the Unites States, once Indonesia issues the RIPHs and Import Approvals for six months, importers cannot change the listed specifications or apply to import new or additional products and thus, importers cannot take advantage of market opportunities or mitigate risks inherent in the global supply chains.[520] For the Unites States, these features imply that (i) imports of certain products (those for which no RIPH or Import Approval was granted at the beginning of the import period) are effectively banned until the next period; (ii) only a specified quantity of each type of product can be imported until the next period; (iii) products from other WTO Members are restricted to the amounts originally requested by importers; and (iv) 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. Thus, the United States claims that the type, quantity, country of origin and port of entry requirements imposed through the RIPHs and Import Approvals are a

[508] New Zealand's first written submission, para. 227 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.274).
[509] New Zealand's first written submission, para. 227.
[510] New Zealand's second written submission, para. 198.
[511] New Zealand's second written submission, para. 199.
[512] New Zealand's second written submission, para. 200.
[513] New Zealand's second written submission, para. 201.
[514] United States' first written submission, para. 160.
[515] United States' first written submission, fn. 295.
[516] United States' first written submission, para. 161 (referring to Appellate Body Report, *Argentina – Import Measures* para. 5.217).
[517] United States' first written submission, para. 160.
[518] United States' first written submission, para. 163.
[519] United States' first written submission, para. 163.
[520] United States' first written submission, para. 163.

limitation on importation, a limiting condition on importation, or have a limiting effect on importation, and constitute a "restriction" within the meaning of Article XI:1.[521]

7.99. The United States further argues that previous panels have found that measures imposing limits of this kind are restrictions under Article XI:1. The United States refers to *India – Autos*, where the panel found that a measure that imposed a trade balancing requirement that companies' exports be at least equivalent in value to their imports 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"[522], and to *Colombia – Ports of Entry*, where the panel found that a measure restricting the entry of certain textile and apparel products from Panama to two ports of entry in Colombia was a restriction under Article XI:1.[523]

7.2.6.1.3 Indonesia

7.100. Indonesia argues that the complainants have failed to adequately explain how a requirement that importers determine their own terms of importation has any limiting effect on imports.[524] Indonesia submits that because the terms of importation such as the type, quantity, country of origin, and port of entry are chosen by importers, the licence terms cannot constitute "measures that are instituted or maintained by Indonesia" and therefore Measure 2 falls outside the scope of Article XI:1 of the GATT 1994.[525] Additionally, Indonesia submits that importers are free to alter their terms of importation from one licence application to the next, meaning that the "terms" are only static for the duration of one validity period, and that it does not place any limitations on the terms identified by importers other than the realization requirement that exists to ensure importers make a reasonable estimate of their anticipated import volumes. Indonesia asserts that importers are not required to allocate anticipated import volumes to specific ports of entry in their applications, and that it is believed that some importers preserve flexibility by listing more ports of entry than they ultimately use in their import licence applications, with no sanctions in place for such behaviour.[526]

7.2.6.2 Analysis by the Panel

7.101. The task before the Panel is to establish whether, as claimed by the co-complainants[527], Measure 2 is inconsistent with Article XI:1 of the GATT 1994 because it constitutes a restriction having a limiting effect on importation of horticultural imports into Indonesia and limits the competitive opportunities of importers and imported products.

7.102. We begin by noting the co-complainants' contention that Measure 2 constitutes a restriction on importation[528], and that it is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[529] New Zealand argued that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 2, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure".[530] The United States submitted that Article XI:1 applies to *any* "restriction," including those "made effective through quotas, import or export licenses *or other measures*."[531]

7.103. We observe that Indonesia has not contested the co-complainants' characterization of Measure 2.[532] Rather, it has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[533] We recall our conclusion in

[521] United States' first written submission, para. 164.
[522] United States' first written submission, para. 166 (referring to Panel Report, *India – Autos,* para. 7.320).
[523] United States' first written submission, para. 166 (referring to *Colombia – Ports of Entry*, para. 7.274).
[524] Indonesia's first written submission, para. 137.
[525] Indonesia's first written submission, para. 138.
[526] Indonesia's first written submission, para. 139; second written submission, para. 168.
[527] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 90; New Zealand's second written submission, para. 196; United States' first written submission, paras. 52 and 160.
[528] New Zealand's first written submission, para. 221; United States' first written submission, para. 160.
[529] New Zealand's first written submission, para. 284; United States' first written submission, fn. 295.
[530] New Zealand's first written submission, para. 284.
[531] United States' first written submission, para. 142.
[532] Indonesia's response to Panel question No. 10.
[533] Indonesia's second written submission, para. 165.

Section 7.2.3.2.1 above that automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. In addition, Indonesia has attempted to exclude Measure 2 from the scope of this provision by arguing that it is not a measure "instituted or maintained by Indonesia" but the result of decisions by private actors.[534] We refer to Section 7.1.3 above where we concluded that Measure 2 is a measure taken by Indonesia. Given the description of Measure 2 in Section 2.3.2.2 above, we concur with the co-complainants in that Measure 2 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

7.104. As with Measure 1[535], we proceed to examine whether the co-complainants have demonstrated that Measure 2 prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective. In doing so, we will determine whether the co-complainants have demonstrated that Measure 2 has a limiting effect on importation. To carry out this analysis, we recall that the Panel is to examine the design, architecture, and revealing structure of Measure 2, within its relevant context.

7.105. As described in Section 2.3.2.2 above, Measure 2 consists of the requirement to only import horticultural products within the terms of the RIPHs and Import Approvals. These terms include the quantity of the products permitted to be imported, the specific type of products permitted to be imported, the country of origin of the products, and the Indonesian port or ports of entry through which the products will enter. Such terms cannot be subject to changes during the validity period of the relevant RIPH and Import Approval.[536] This measure is implemented by Indonesia by means of Article 6 of MOA 86/2013, that regulates the elements of RIPHs; Article 13 of MOT 16/2013, as amended, that stipulates the same for the Import Approvals; and Article 30 of MOT 16/2013 as amended by MOT 47/2013 that establishes that when imported products do not coincide with the type of products specified in the Import Approvals and/or in the RI and PI designations, they are destroyed (fresh) or re-exported (processed) at the importers' cost. From the text of these regulations, we understand that the interdiction to amend the terms of the granted RIPHs and Import Approvals during their validity period means that importers cannot import products of a different type, in a greater quantity or from another country or through a different port than that specified in the relevant RIPH or Import Approvals.

7.106. We observe that Indonesia does not deny that these terms cannot be modified but submits that importers are free to alter the terms of importation from one licence application to the next.[537] In response to a question from the Panel to clarify the extent to which these terms can be effectively modified, Indonesia replied that in case an importer desired to increase the original quantity of imports set out in the import documents, such an importer would have two options: (i) to submit another application specifying greater quantities, provided that the application window is still open and the RIPH has not been issued yet, or (ii) to submit an application specifying a greater quantity during the next application window. Similarly, Indonesia replied that if an importer desired to reduce the quantity of its imports below the amount it previously sought in its application, such an importer would have two options: (i) to reduce its imports by up to 20% without penalty, or (ii) reduce its imports by more than 20% and risk the imposition of a penalty under the old regulations.[538]

7.107. We note that the co-complainants have focused their argumentation on the operation of this Measure, and in particular, its detrimental impact on competitive opportunities. They contended that the operation of the measure, which results from its design, causes a limiting effect on importation.[539] For instance, New Zealand argued that by restricting the parameters within which importers may import products through the import licences, importers have fewer opportunities to import horticultural products into Indonesia and that such restrictions have an

[534] Indonesia's first written submission, para. 138.

[535] *See* paragraph 7.76 above.

[536] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 90; United States' first written submission, para. 52.

[537] Indonesia's first written submission, para.75.

[538] Indonesia's response to Panel question No. 15. We note that Indonesia mentions that, under MOT 71/2015, the 80% realization requirement has been lifted as to horticultural products, so there is no longer any penalty for reducing imports by any amount.

[539] *See*, for instance, New Zealand's first written submission, para. 227; New Zealand's second written submission, para. 198; United States' first written submission, para. 164.

impact on the "competitive opportunities" available to imported products[540], with a consequential limiting effect on imports, contrary to Article XI:1 of the GATT 1994.[541]

7.108. Similarly, the United States stressed the detrimental impact of this Measure with respect to the competitive opportunities of importers. The United States thus argued that, once Indonesia issues the RIPHs and Import Approvals for a six-month period, importers cannot change the listed specifications or apply to import new or additional products and thus cannot take advantage of market opportunities or mitigate risks inherent in the global supply chain.[542] For the United States, these features of Indonesia's import licensing system imply that (i) imports of certain products (those for which no RIPH or Import Approval was granted at the beginning of the import period) are effectively banned until the next period; (ii) only a specified quantity of each type of product can be imported until the next period; (iii) products from other WTO Members are restricted to the amounts originally requested by importers; and, (iv) 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.[543]

7.109. When examining the design, architecture and revealing structure of Measure 2, we observe that the various requirements it embodies and the way in which they interact, have the effect of an import quota. Indeed, Measure 2 fixes the amount and the type of products that can be imported for each validity period, i.e. every six months. This means that, for that six-month period, there is a maximum quantity of products of a given type that can be imported that cannot be modified. We note that, as Indonesia argued, the amount of the quota would be set by the importers themselves as they are determining the amounts requested in their Import Approvals. In this sense, the actual amount of the quota is not being determined by Indonesia but rather by the actions of the importers. We recall that the fact that private actors are free to make various decisions in order to comply with a measure does not preclude a finding of inconsistency. On the contrary, "where private actors are induced or encouraged to take certain decisions *because of the incentives created by a measure*, those decisions are not 'independent' of that measure".[544] In the present case, the existence of a system which has the effect of creating a quota for every six-month period can be perceived as the result of the manner in which Indonesia structures this measure. We thus perceive the limiting effect of this Measure in terms of volume of imports.

7.110. We also note that, by prohibiting changes in originally specified parameters in the RIPHs and the Import Approvals and thus not allowing the importation of new or additional products during the validity period of these documents or the change of original port of entry, Measure 2 provides importers with fewer opportunities to import horticultural products into Indonesia. We thus observe that such restrictions have an impact on the competitive opportunities available to imported products.[545] In particular, and as claimed by the co-complainants[546], we note that this Measure removes flexibility from importers to respond to changing market circumstances or external factors within a given validity period. Consequently, importers are deterred from taking advantage of new market opportunities or from controlling adverse situations that require changing importation plans.

7.111. If we place Measure 2 in the context of Indonesia's import licensing regime for horticultural products, we concur with New Zealand that, not only are these terms fixed for the period of validity of the licence, but Indonesia also limits which terms can be included in the import licence through the operation of other components of its import licensing regime for horticultural products.[547] We thus share New Zealand's view that it is not correct to state that Indonesia does not place any limitations on the terms identified because the various legal requirements operate together with Measure 2 to place limitations on the terms identified in the import licences,[548] for instance, with Measure 4 (harvest period requirements). We also observe that the limiting effects of the fixed terms imposed by Measure 2 are enhanced by its interaction with Measure 3

[540] New Zealand's first written submission, para. 227 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.274).
[541] New Zealand's first written submission, para. 227.
[542] United States' first written submission, para. 163.
[543] United States' first written submission, para. 164.
[544] Appellate Body Report, *US – COOL*, para. 291. (emphasis original)
[545] New Zealand's first written submission, para. 227 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.274).
[546] New Zealand's first written submission, para. 224; second written submission, para. 197; United States' first written submission, para. 163.
[547] New Zealand's second written submission, para. 198.
[548] New Zealand's second written submission, para. 199.

(80% realization requirement) and Measure 5 (the storage ownership and capacity requirements) by taking away flexibility from importers to respond to changing circumstances.

7.2.6.3 Conclusion

7.112. For the reasons stated above, we find that Measure 2 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.2.7 Whether Measure 3 (80% realization requirement) is inconsistent with Article XI:1 of the GATT 1994

7.2.7.1 Arguments of the parties

7.2.7.1.1 New Zealand

7.113. New Zealand claims that the effect of the 80% realization requirement is to limit the amount of imports that importers request in their horticulture import licences because it induces importers to self-limit the quantity of imports they request in their horticulture import licences and that this is inconsistent with Article XI:1 of the GATT 1994 as it has a limiting effect on imports.[549] New Zealand argues that RIs are prohibited from importing horticultural products in subsequent validity periods if they fail to import at least 80% of the quantity of each type of product specified on their Import Approval[550], and that importers must submit an Import Realization Control Card every month to demonstrate compliance with this requirement.[551] New Zealand submits that importers have a strong incentive to comply with the 80% realization requirement due to the severe consequences of non-compliance and the risk of effectively being prevented from operating their businesses. New Zealand maintains that importers respond by conservatively estimating, or underestimating, the quantities requested in their import licences in order to ensure they are able to satisfy the 80% realization requirement.[552] New Zealand sustains that as a result 40 horticultural importers, 24% of the total number of horticultural importers, had their licences to import fresh horticultural products suspended in 2015 for two years.[553]

7.114. New Zealand also contends that the limiting effect of the 80% realization requirement is exacerbated when combined with Measure 2 because certain import terms, such as the quantity, product type, port of entry and country of origin are locked in prior to the commencement of a validity period. In turn, this limits the flexibility available to importers to satisfy the 80% realization requirement.[554] New Zealand submits that the design and structure of this measure acts as a "limitation on action, a limiting condition" and therefore, as the Appellate Body in *Argentina – Import Measures* and *China – Raw Materials* found, is a restriction within the meaning of Article XI:1.[555]

7.2.7.1.2 United States

7.115. The United States claims that the requirement that RIs import, or "realize", at least 80% of the quantity specified for each type of horticultural product on their Import Approval for the semester is a restriction within the meaning of Article XI:1 and is therefore inconsistent with Article XI:1 of the GATT 1994.[556] Additionally, the United States claims that this requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[557] The United States argues that, for each semester, Indonesia requires each RI to import at least 80% of the quantity specified for each type of horticultural product listed on its Import Approval.[558]

[549] New Zealand's first written submission, paras. 228 and 236.
[550] New Zealand's first written submission, para. 228 (referring to Article 14A, MOT 16/2013 as amended by MOT 47/2013, Exhibit JE-10).
[551] New Zealand's first written submission, para. 228.
[552] New Zealand's first written submission, para. 232 (referring to Onions New Zealand Exporter Statement, Exhibit NZL-49; Pip Fruit New Zealand Export Statement, Exhibit NZL-50; and ASEIBSSINDO Statement, Exhibit NZL-53); second written submission, para. 209.
[553] New Zealand's second written submission, para. 209.
[554] New Zealand's first written submission, para. 233.
[555] New Zealand's first written submission, para. 234 (referring to Appellate Body Report, *Argentina – Import Measures* and to Appellate Body Report, *China – Raw Materials*).
[556] United States' first written submission, para. 168; second written submission, para. 19.
[557] United States' first written submission, fn. 306.
[558] United States' first written submission, para. 170.

Further, to monitor compliance, Indonesia requires each RI to submit monthly its Import Realization Control Card, which accounts for the quantity of realized imports.[559] The United States submits that according to Indonesia's legislation, an RI that fails to meet the 80% realization requirement or fails to file the Import Realization Control Card may have its RI designation suspended.[560] In the United States' view, each RI must lower the quantity it requests in its Import Approval application to less than the amount it would otherwise request in order to mitigate this risk.[561]

7.116. The United States also argues that RIs are concerned by the price depressing effects of an over-supply of the market at the end of the period, due to importers' efforts to meet the 80% realization requirement.[562] The United States contends that this problem is more acute in the case of chillies and shallots since the reference price requirement for these products makes importing large quantities during short periods of time to comply with the realization requirement even riskier, possibly causing prices to drop below the reference prices and cutting off imports altogether.[563] For the United States, the realization requirement is a limitation or limiting condition on importation, or has a limiting effect on importation since the importer is subjected to the requirement as a condition for receiving permission to import, and failure to comply may result in ineligibility to import in a future period.[564]

7.117. The United States sustains that previous panels have found that measures imposing limits of this kind are restrictions under Article XI.[565] The United States argues that the panel in *India – Autos* found that a measure imposing a requirement that importers balance the value of imported auto kits and components with the value of their exports from India[566] had a limiting effect and was thus a "restriction" under Article XI:1. In concluding this, the United States sustains that the panel found that the measure did not set an "absolute numerical limit," but "induced [an importer] . . . to limit its imports of the relevant products" in relation to the importers' "concern[] about its ability to export profitably."[567] The United States claims that similar to that case, Indonesia's 80% realization requirement causes importers to limit the amount that they request in their import approval applications, which, in turn, restricts the quantity of products they are allowed to import.[568]

7.118. The United States argues that the co-complainants have also presented evidence demonstrating that the realization requirements have had an adverse impact on imports, including statements by several US exporters attesting to the fact that the realization requirement causes importers "to be conservative in their applications," that is, to "apply for less than if they did not have to worry about meeting 80% of their quota"[569], and a statement by the Indonesian association of horticultural product importers (ASEIBSSINDO), confirming that importers' fear of not being able to meet the realization requirement has caused them to be "conservative in the amounts they apply for to make sure they will be able to meet the 80% rule and so avoid sanctions."[570] The United States contends that this evidence is not "anecdotal conjecture".[571]

7.2.7.1.3 Indonesia

7.119. Indonesia argues that the realization requirement does not constitute a restriction within the meaning of Article XI:1 of the GATT 1994.[572] According to Indonesia, the co-complainants'

[559] United States' first written submission, para. 170.
[560] United States' first written submission, para. 170.
[561] United States' first written submission, paras. 171-173; second written submission, para. 19.
[562] United States' first written submission, para. 171 (referring to Exhibit USA-21).
[563] United States' first written submission, para. 172.
[564] United States' first written submission, para. 175.
[565] United States' first written submission, para. 176 (referring to the Panel Report, *India – Autos,* para. 7.268 and Panel Report, *Argentina – Import Measures*, para. 6.256).
[566] United States' first written submission, para. 176 (referring to the Panel Report *India – Autos*, para. 7.268).
[567] United States' first written submission, para. 176 (referring to the Panel Report *India – Autos*, para. 7.268).
[568] United States' first written submission, para. 176.
[569] United States' second written submission, para. 20.
[570] United States' second written submission, para. 20.
[571] United States' second written submission, para. 21.
[572] Indonesia's first written submission, para. 144.

argument is based on "nothing more than anecdotal conjecture", and they have not presented any evidence that the realization requirement has had an adverse impact on trade flows.[573]

7.120. Indonesia argues that the realization requirement serves as a safeguard against importers grossly overstating their anticipated imports and, since Indonesia is a developing country with limited resources to devote to import administration, having estimates of expected trade volumes for each validity period is important. Indonesia contends this measure is not meant to constrain imports and that there is no upward limit to the amount an importer can import in a given validity period. Indonesia asserts that it understands the need for flexibility in the estimates and thus that the realization requirement is specifically fixed at 80% to allow for a margin of error. Indonesia further asserts that this requirement strikes a balance between incentivizing importers to provide realistic estimates of anticipated imports and allowing a margin of error before penalties are applied.[574] Indonesia contends that, in any event, the penalties applied are reasonable, as there is only a two-term suspension of an importer's designation as RI. Indonesia submits that the realization requirement is "fair, balanced and narrowly constructed" to further the legitimate objective of maintaining "administrative efficiency".[575]

7.121. Indonesia submits that the complainants have speculated that extreme volatility in the global supply chain would result in an importer losing its RI designation through no fault of its own, but that they have been unable to point to a single instance in which a "catastrophic supply chain event" has caused an importer to fall below the 80% realization requirement and subsequently lose its importer designation. Indonesia also submits that the complainants have failed to demonstrate that imports as a whole have decreased as a result of the realization requirement.[576] Indonesia further submits that MOT 5/2016, for animals and animals products, and MOT 71/2015, for horticultural products, have eliminated the 80% realization requirement and that it is no longer in effect in Indonesia.[577]

7.2.7.2 Analysis by the Panel

7.122. The task before the Panel is to establish whether, as claimed by the co-complainants[578], Measure 3 is inconsistent with Article XI:1 of the GATT 1994 because it constitutes a restriction having a limiting effect on importation of horticultural imports into Indonesia. In particular, we are to determine whether Measure 3 compels importers to limit their imports by inducing them to reduce the amounts they request in their Import Approvals to elude the established penalties.

7.123. We commence by observing that the co-complainants argued that Measure 3 constitutes a restriction on importation[579], and that it is not a duty, tax, or other charge, and is therefore within the scope of Article XI:1.[580] New Zealand further argued that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 3, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure".[581] The United States submitted that Article XI:1 applies to *any* "restriction," including those "made effective through quotas, import or export licenses *or other measures*".[582]

7.124. We observe that Indonesia has not contested the co-complainants' characterization of Measure 3.[583] Rather, it has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[584] We recall our conclusion in Section 7.2.3.2.1 above whereby automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. Given the description of Measure 3 in Section 2.3.2.3 above, we concur with the co-complainants in that Measure 3 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

[573] Indonesia's first written submission, para. 141; second written submission, para. 172.
[574] Indonesia's first written submission, para. 142; second written submission, para. 173.
[575] Indonesia's first written submission, para. 142; second written submission, para. 174.
[576] Indonesia's first written submission, para. 143.
[577] Indonesia's second written submission, para. 176; Indonesia's responses to Panel question No. 15, para. 10.
[578] New Zealand's first written submission, para. 232; United States' first written submission, para. 168.
[579] New Zealand's first written submission, para. 234; United States' first written submission, para. 168.
[580] New Zealand's first written submission, para. 284; United States' first written submission, fn. 283.
[581] New Zealand's first written submission, para. 284.
[582] United States' first written submission, para. 142.
[583] Indonesia's response to Panel question No. 10.
[584] Indonesia's second written submission, para. 165.

7.125. As with the previous measures[585], we proceed to examine whether the co-complainants have demonstrated that Measure 3 prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective. In doing so, we will determine whether the co-complainants have demonstrated that Measure 3 has a limiting effect on importation. To carry out this analysis, we recall that the Panel is to examine the design, architecture, and revealing structure of Measure 3, within its relevant context.

7.126. As described Section 2.3.2.3 above, Measure 3 consists of the requirement that RIs of fresh horticultural products must import 80% of the quantity of each type of product specified on their Import Approvals for every six-month validity period.[586] This measure is implemented by Indonesia through Articles 14A, 24, 25A and 26 and 27A of MOT 16/2013, as amended by MOT 47/2013. Under Articles 25A and 26 of MOT 16/2013, as amended by MOT 47/2013, the Ministry of Trade sanctions RIs that fail to meet the 80% realization requirement and sanctions both RIs and PIs who fail to file the Import Realization Control Card by suspending their designations. For example, an RI that fails to file the Import Realization Control Card three times could have its designation revoked.

7.127. We observe that central to the co-complainants' argumentation is the alleged limiting effect on importation as a result of the incentives created by the 80% realization requirement. New Zealand thus argued that the design and structure of the 80% realization requirement acts as a "limitation on action, a limiting condition".[587] In its view, importers have a strong incentive to comply with the 80% realization requirement because the consequences of failing to comply with it are severe and result in an importer being effectively prevented from operating its business. For New Zealand, importers respond by conservatively estimating, or underestimating, the quantities requested in their import licences to ensure they are able to satisfy the 80% realization requirement.[588]

7.128. Likewise, the United States submitted that each RI must lower the quantity it requests in its Import Approval application to less than the amount it would otherwise request to mitigate this risk of non-compliance with the 80% realization requirement.[589] For the United States, RIs are concerned about the price depressing effects of an over-supplied market at the end of the period due to a number of importers trying to meet the 80% realization requirement, meaning decreased profitability.[590] We note the United States contended that this problem is more acute in the case of chillies and shallots because the reference price requirement makes importing large quantities during short periods of time to comply with the realization requirement even riskier, possibly causing the prices of chillies and shallots to drop below the reference prices and cutting off imports altogether.[591]

7.129. Looking at the design, architecture and revealing structure of this Measure, we note that it does not *per se* limit the quantity of imports of horticultural products that can enter Indonesia. Certainly, Measure 3 requires importers to effectively import a large percentage of the amounts requested in their applications for Import Approvals but does not create an outright prohibition on the importation of horticultural products. This Measure nonetheless includes enforcement rules which provide for severe penalties for not complying with the 80% realization requirement. Indeed, pursuant to Article 26 of MOT 16/2013, as amended, non-compliance with the 80% realization requirement can lead to the revocation of an importer's RI designation, with a possibility of reapplication not earlier than two years from the date of revocation.[592] By its very nature, the possibility of experiencing severe penalties, which may mean the loss of the importer's commercial livelihood, reasonably constitutes an incentive for importers to comply with the 80% realization requirement. As argued by the co-complainants[593], it is reasonable to conclude that the

[585] *See* for instance, paragraph 7.76 above.

[586] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 92; United States' first written submission, para. 56.

[587] New Zealand's first written submission, para. 234 (referring to Appellate Body Report, *Argentina – Import Measures* and to Appellate Body Report, *China – Raw Materials*).

[588] New Zealand's first written submission, para. 232 (referring to Onions New Zealand Exporter Statement, Exhibit NZL-49; Pip Fruit New Zealand Export Statement, Exhibit NZL-50); and ASEIBSSINDO Statement, Exhibit NZL-53); second written submission, para. 209.

[589] United States' first written submission, paras. 171-173.

[590] United States' first written submission, para. 171 (referring to Exhibit USA-21).

[591] United States' first written submission, para. 172.

[592] Article 27A, MOT 16/2013, as amended, Exhibit JE-10.

[593] New Zealand's first written submission, para. 232 (referring to Onions New Zealand Exporter Statement, Exhibit NZL-49; Pip Fruit New Zealand Export Statement, Exhibit NZL-50); and ASEIBSSINDO Statement, Exhibit NZL-53); second written submission, para. 209; United States' first written submission,

prospect of having their RI designation revoked and therefore not being able to import products for at least two years is a powerful enough incentive to induce importers to conservatively estimate or underestimate their desired import quantities to ensure they are able to satisfy the 80% realization requirement.

7.130. We observe that the effect of this measure may vary depending on the importer's situation; in particular, on its projections of how many horticultural products it expects to sell and import in a given period of time, its competitive situation, market conditions and how risk-averse the importer might be. Accordingly, an importer who is confident that the demand for its products will not significantly change over the validity period of an Import Approval or who is a risk-taker might not be incentivized to reduce the quantities it requests to a great extent. The situation will differ where the importer expects demand and prices to be volatile or is risk-averse and therefore does not want to request a quantity that it may not be able to import without failing to comply with the 80% requirement. Nonetheless, we believe that in both cases, though there might be a difference in the degree that Measure 3 affects the importers' decision of how much to request in their Import Approvals, any importer will be induced to be more conservative in its estimations. In our view, this Measure exacerbates the risks inherent in conducting trade transactions. We thus consider that the design, architecture and revealing structure of Measure 3 shows that this measure has a limiting effect in terms of volume of imports of horticultural products into Indonesia.

7.131. When we examine Measure 3 in the context of Indonesia's Import licensing regime for horticultural products, we note that, as New Zealand explains[594], the limiting effect of the 80% realization requirement appears to be "exacerbated" when combined with Measure 2. We recall that Measure 2 consists of the requirement to only import horticultural products within the terms of the RIPHs and Import Approvals. Given that certain import terms, such as the quantity, product type, port of entry, and country of origin are set prior to the commencement of a validity period and cannot be changed during that validity period, the flexibility available to importers to satisfy the 80% realization requirement by perhaps changing the type of products, the country of origin or the port of entry, gets further reduced. As noted in paragraph 7.128 above in relation to the price effects emphasized by the United States, the limiting effect of Measure 3 can be perceived as also being exacerbated when combined with Measure 7 relating to the importation of chillies and shallots. As the United States explains, one can reasonably understand that the existence of the reference price requirement may make importing large quantities during short periods of time to satisfy the realization requirement even riskier because it may result in the prices of chillies and shallots dropping below the reference price. As we explain in Section 2.3.2.3 above, this would mean the suspension of imports altogether.

7.132. We observe that Indonesia has argued that the co-complainants have not presented any evidence that the realization requirement has had an adverse impact on trade flows.[595] As explained in Section 7.2.3.2.2 above, the limitation on imports "need not be demonstrated by quantifying the effects of the measure at issue".[596] Nonetheless, the evidence on the record further confirms the limiting effect of this Measure. For instance, a number of US exporters attests that the realization requirement causes importers "to be conservative in their applications", since they "don't have crystal balls – they don't know what is going to happen in the market – so they apply for less than they would normally ask for", that is, they "apply for less than if they did not have to worry about meeting 80% of their quota".[597] The co-complainants also refer to a statement by the ASEIBSSINDO, indicating that importers' fear of not being able to meet the realization requirement has caused them to be "conservative in the amounts they apply to import to make sure they will be able to meet the 80% rule and so avoid sanctions".[598]

7.133. Finally, we observe the similarity of Measure 3 with the measures examined by the panel in *India – Autos*. This panel found that a measure that did not set an absolute numerical limit on imports but induced importers to limit their imports as a consequence of the obligation to satisfy an export commitment imposed by India[599] amounted to an import restriction, where the degree of

para. 173. United States' first written submission, para. 171 (referring to MOT 16/2013, as amended by MOT 47/2013, article 14A, Exhibit JE-10).

[594] New Zealand's first written submission, para. 233.

[595] Indonesia's first written submission, para. 141; second written submission, para. 172.

[596] Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to the Appellate Body Reports, *China – Raw Materials*, paras. 319-320).

[597] Exhibit USA-21.

[598] Exhibit USA-28 and NZL-53.

[599] Panel Report, *India – Autos*, para. 7.268.

effective restriction resulting from the measure varied from signatory to signatory depending on several factors. For the panel in that dispute, a manufacturer was in no instance free to import, without commercial constraint, as many products as it wished without regard to its export opportunities and obligations.[600] The 80% realization requirement acts in a similar way by incentivizing importers to limit the amount that they request in their import approval applications, which, in turn, restricts the quantity of products they are allowed to import.

7.2.7.3 Conclusion

7.134. For the reasons stated above, we find that Measure 3 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.2.8 Whether Measure 4 (Harvest period requirement) is inconsistent with Article XI:1 of the GATT 1994

7.2.8.1 Arguments of the parties

7.2.8.1.1 New Zealand

7.135. New Zealand claims that as a prohibition or restriction on the import of horticultural products, the Indonesian harvest period requirement is a quantitative restriction prohibited by Article XI:1 of the GATT 1994.[601] New Zealand submits that Indonesia's import licensing regime prohibits the importation of certain horticultural products over the Indonesian harvest period by withholding or limiting RIPHs over those periods.[602] New Zealand argues that prohibitions and restrictions that have a limiting effect on imports through restricting the ability of imported products to compete in the domestic marketplace, have been considered by panels to be inconsistent with Article XI:1.[603]

7.136. New Zealand claims that the importation of horticultural products is restricted to periods outside the pre-harvest, harvest and post-harvest season for those same products in Indonesia. According to New Zealand, the Indonesian Ministry of Agriculture issues RIPHs for the importation of fresh horticultural products for direct consumption and, as part of the application process for an RIPH, an RI is required to submit a plan for distribution of the imported products by time and region/municipality. The Ministry of Agriculture withholds or limits the quantities approved in an RIPH based on pre-harvest, harvest and post-harvest periods of Indonesian production of horticultural products.[604] New Zealand claims that in early May 2015, the Ministry of Agriculture indicated that for the second half of 2015, imports of certain products should be restricted due to Indonesian production over the same period[605] and that the Ministry of Agriculture recommended that no shallot, chilli, mango, banana, melon, papaya or pineapple imports should take place and that imports of oranges and mandarin oranges be limited to the period October to December.[606] New Zealand also points to reports on Indonesian fruit imports confirming that in late May 2015, the Ministry of Agriculture intended to ban citrus imports (except for lemons) between the harvest period from July and September.[607]

7.137. Responding to Indonesia's arguments, New Zealand contends that Indonesia does not even attempt to argue that its limitation of imports during periods of domestic harvest is not a "restriction" within the meaning of Article XI:1 of the GATT 1994, but rather, that it seeks to rely only on a defence under Article XX(b).[608]

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[600] Panel Report, *India – Autos*, para. 7.277.
[601] New Zealand's first written submission, para. 242.
[602] New Zealand's first written submission, para. 241.
[603] New Zealand's first written submission, para. 242 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.236).
[604] New Zealand's first written submission, para. 238 (referring to Article 5(2), MOA 86/2013 , Exhibit JE-15).
[605] New Zealand's first written submission, para. 238 (referring to Prohibition/Limitation Letter from the MOA, Exhibit NZL-39).
[606] New Zealand's first written submission, para. 238.
[607] New Zealand's first written submission, para. 239 (referring to "Indonesia's citrus importers under threat" *Asiafruit,* 27 May 2015, (Exhibit NZL-74) and "Growers left to find a market as Indonesia turns away citrus" *NewsMail,* 17 July 2015, (Exhibit NZL-75).
[608] New Zealand's second written submission, para. 221.

7.2.8.1.2 United States

7.138. The United States claims that Indonesia restricts the importation of horticultural products based on the Indonesian harvest periods for the same domestic products and that this limitation is a restriction on importation inconsistent with Article XI:1 of the GATT 1994.[609] The United States also claims that this requirement is not a duty, tax or other charge, and, therefore, is within the scope of Article XI:1.[610] The United States argues that the harvest period requirement is a limitation, or limiting condition on importation, or has a limiting effect on importation since through the RIPH application process, Indonesia limits the importation of certain horticultural products during the harvest season for the same domestic products.[611] According to the United States, under MOA 86/2013, the Ministry of Agriculture establishes periods of time within each semester during which it restricts or prohibits the importation of certain horticultural products to protect the same domestic products during their harvest periods.[612] The United States submits that the Ministry of Agriculture requires an RI to submit its plan as to when and where it intends to distribute the imported horticultural products during each semester[613], and that based on this information, the Ministry limits the importation of horticultural products with respect to domestic harvest periods through the RIPH process.[614]

7.139. The United States submits that Indonesia's import data for the relevant horticultural products points to the effects of Indonesia's restrictions based on harvest periods. The United States argues that, for example, Indonesia imported approximately 980,000 kilograms of mangoes in 2011 and 1 million kilograms in 2012[615] but that the import quantity fell precipitously after the promulgation of MOA 86/2013 to 119,000 kilograms in 2013 and to 233,466 kilograms in 2014. The United States also argues that there was no importation of mangoes from January to August of 2013 and from June to December of 2014[616] and that import data for other covered horticultural products such as bananas, durians, melons, and pineapples followed a similar pattern.[617] The United States contends that in late 2015, the Ministry of Agriculture shared with importers its plans for seasonal restrictions in 2016[618], which included a complete yearly ban on shallots, chillies, bananas, pineapples, mangoes, melons, and papayas.[619] In addition, the United States submits that carrots are restricted to 15% of demand, durian is allowed for only three months, and oranges and onions are allowed for only six months.[620] Furthermore, in 2015, the Ministry of Agriculture did not issue permits for importation of any citrus fruits except lemons from July to September.[621]

7.140. The United States recalls that 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.[622] That panel found that such measure "restricted the importation of rice for periods of time" and was thus a quantitative import restriction.[623] The United States argues that, similarly, Indonesia's requirement based on the Indonesian harvest periods imposes a limitation on imported horticultural products, and has a limiting effect on import quantities allowed into Indonesia.[624] For the United States, the restrictive

[609] United States' first written submission, para. 178.
[610] United States' first written submission, fn. 319.
[611] United States' first written submission, para. 179.
[612] United States' first written submission, para. 180; second written submission, para. 22.
[613] United States' first written submission, para. 180 (referring to Article 8(2)(e) of MOA 86/2013, Exhibit JE-15, and RI Notification of Distribution Plan to Ministry of Agriculture, May 2015, Exhibit USA-24); second written submission, para. 22.
[614] United States' first written submission, para. 180.
[615] United States' first written submission, para. 182 (referring to "Query: Importation of Mangoes, from 2011-2015, Monthly," *BPS – Statistics Indonesia,* Exhibit USA-51).
[616] United States' first written submission, para. 182 (referring to "Query: Importation of Mangoes, from 2011-2015, Monthly," *BPS – Statistics Indonesia*, Exhibit USA-51).
[617] United States' first written submission, para. 182; second written submission, para. 23.
[618] United States' second written submission, para. 23 (referring to Exhibit USA-91).
[619] United States' second written submission, para. 23 (referring to Exhibit USA-91).
[620] United States' second written submission, para. 23 (referring to Exhibits USA-91 and USA-92).
[621] United States' second written submission, para. 23 (referring to Exhibits USA-27, USA-92 and USA 93).
[622] United States' first written submission, para. 180 (referring to Panel Report, *Turkey – Rice*, para. 7.113).
[623] United States' first written submission, para. 180 (referring to Panel Report, *Turkey – Rice*, para. 7.121).
[624] United States' first written submission, para. 184.

effect of this measure is clear from its text, structure and operation, and given the scope of the authority given to the Ministry of Agriculture by Indonesia's laws.[625]

7.2.8.1.3 Indonesia

7.141. Indonesia claims that this measure is excepted from the disciplines of Article XI:1 because it is necessary to protect human, animal, or plant life or health in accordance with Article XX(b) of the GATT 1994.[626] Indonesia argues that oversupply of fresh horticultural products in a particular region of Indonesia's vast archipelago could have "disastrous consequences" as the equatorial climate accelerates the decomposition of fresh horticultural products, posing a serious health concern due to the spread of certain pathogenic bacteria from rotten produce. Indonesia argues that in the absence of coordination of imports with domestic harvest times, stockpiles of rotting fresh horticultural products are likely to cause serious public health threats. For Indonesia, in ensuring that imports are re-directed during domestic harvest periods, it is taking a proactive approach to protecting its population from disease.[627] For Indonesia, therefore, this measure is necessary to ensure food safety.[628]

7.142. Indonesia confirms that, pursuant to Article 5 (1) of MOA 86/2013, imports are made during the specified periods which are outside the period of pre-harvest, harvest time and post-harvest, adding that imports are not banned but only regulated in terms of timing when to enter the Indonesian territory.[629] In response to Panel question No. 17, Indonesia also clarifies that, the Ministry of Agriculture keeps the business community abreast of its decisions in this respect, through reports published by the Agency for Food Security, as well as before the start of each application window. The Ministry of Trade "gives effect" to the time period set by the Ministry of Agriculture by issuing Import Approvals accordingly. The Ministry of Agriculture also "guarantees that all RIPHs that are submitted for Import Approval comply with the specified time period by working with importers at the RIPH application stage to ensure they exclude the specified time period from their licence requests".[630]

7.143. In addition, Indonesia submits that this measure can also be justified under Article XI:2 (c) (ii) to remove a temporary surplus.[631] According to Indonesia, the intention is to prevent oversupply of only certain fresh horticultural products that could have disastrous consequences. Indonesia explains that, given its location, it has always been an agricultural country and most of its citizens engage in farming for a living. While almost each province in Indonesia has its own production of chillies and shallots, Indonesia is also the centre of other fresh horticultural products like mangos, durians, potatoes, carrots, bananas, papayas, pineapples and melons, which are produced throughout every provinces in Indonesia. Indonesia contends that this means that, in certain periods of time, a particular agricultural product is abundant in Indonesia.[632]

7.2.8.2 Analysis by the Panel

7.144. The task before the Panel is to establish whether, as the co-complainants claim[633], Measure 4 constitutes a prohibition or restriction having a limiting effect on importation inconsistent with Article XI:1 of the GATT 1994. In particular, we are to determine whether Measure 4 prohibits the importation of certain horticultural products at times which relate to Indonesia's own harvesting period for the same type of horticultural products.

7.145. We commence by noting that the co-complainants argued that Measure 4 constitutes a prohibition or restriction on importation[634], and that it is not a duty, tax, or other charge, and is therefore within the scope of Article XI:1.[635] New Zealand further argued that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 4, constitute prohibitions or restrictions made effective through an "import

[625] United States' second written submission, para. 24.
[626] Indonesia's first written submission, para. 150.
[627] Indonesia's first written submission, para. 155.
[628] Indonesia's first written submission, para. 201.
[629] Indonesia's response to Panel question No. 33, para. 21.
[630] Indonesia's response to Panel question No. 17.
[631] Indonesia's second written submission, para. 203.
[632] Indonesia's second written submission, para. 255.
[633] New Zealand's first written submission, para. 242; United States' first written submission, para. 178.
[634] New Zealand's first written submission, para. 242; United States' first written submission, para. 178.
[635] New Zealand's first written submission, para. 284; United States' first written submission, fn. 319.

licence" or, alternatively, an "other measure".[636] The United States submitted that Article XI:1 applies to *any* "restriction," including those "made effective through quotas, import or export licenses *or other measures*".[637]

7.146. We observe that Indonesia has not contested the co-complainants' characterization of Measure 4.[638] Rather, it has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[639] We recall our conclusion in Section 7.2.3.2.1 above whereby automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. Given the description of Measure 4 in Section 2.3.2.4 above, we concur with the co-complainants that Measure 4 is not a duty, tax, or other charge and that it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

7.147. As with the previous measures[640], we proceed to examine whether the co-complainants have demonstrated that Measure 4 prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective. In doing so, we will determine whether the co-complainants have demonstrated that Measure 4 has a limiting effect on importation. To carry out this analysis, we recall that the Panel is to examine the design, architecture, and revealing structure of Measure 4, within its relevant context.

7.148. As described in Section 2.3.2.4 above, Measure 4 consists of the requirement that the importation of horticulture products takes place prior to, during and after the respective domestic harvest seasons within a certain time period.[641] Indonesia implements this measure mainly by means of Articles 5 and 8 of MOA 86/2013. Pursuant to these provisions, importation of horticultural products can only take place *prior to*, *during* and *after* the harvest season, *within* a certain time period established by the Indonesian authorities. The time period requirements do not place limits on the quantity of products that importers can import within a given validity period, but rather *when* they are able to import such products, thus prohibiting imports outside the time periods decided by the Ministry of Agriculture.[642] In establishing the time periods, the Ministry of Agriculture is guided by the objectives and determinations made by the Food Security Council[643] which are later published as part of Indonesia's five-year Development Plans. The Ministry of Agriculture communicates its specified time periods to the business community before the start of each application window, notifying officially the Ministry of Trade at the same time. The Ministry of Trade may be consulted prior to the official adoption of a validity period. In turn, the Ministry of Trade gives effect to the specified time periods set by the Ministry of Agriculture by issuing Import Approvals in accordance with the specified time period.[644]

7.149. As described above, Indonesia has designed Measure 4 through the operation of the RIPH system. Accordingly, Indonesia controls the importation of certain horticultural products over the Indonesian harvest period for the same type of products by withholding or limiting RIPHs over those periods.[645] In practice, Indonesia would be prohibiting or restricting the importation of certain products depending on a decision from the authorities which is linked to the domestic harvesting period of the same domestic product. This also seems to be the understanding of the co-complainants. New Zealand, for instance, argues that Indonesia prohibits the importation of certain horticultural products over the Indonesian harvest period by withholding or limiting RIPHs over those periods[646] and thus restricting the ability of imported products to compete in the domestic marketplace.[647]

7.150. Indonesia does not seem to contest that Measure 4 results in temporary limitations on importation. Indeed, Indonesia, apart from raising defences under Articles XX and XI:2(c)(ii), has merely argued that the co-complainants have not demonstrated that its temporary limitations on

[636] New Zealand's first written submission, para. 284.
[637] United States' first written submission, para. 142.
[638] Indonesia's response to Panel question No. 10.
[639] Indonesia's second written submission, para. 165.
[640] *See*, for instance, paragraph 7.76 above.
[641] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, paras. 95-96; United States' first written submission, para. 60.
[642] Indonesia's response to Panel question No. 34.
[643] Indonesia's response to Panel questions No. 18 and 34.
[644] Indonesia's response to Panel question No. 34.
[645] New Zealand's first written submission, para. 241.
[646] New Zealand's first written submission, para. 241.
[647] New Zealand's first written submission, para. 242.

imports for specific periods during the year have had a limiting effect on imports.[648] We note that, for clarification purposes, the Panel asked Indonesia to elaborate on the meaning of the "temporary limitations of imports for specific periods of time" as mentioned in its first written submission.[649] Indonesia replied that "imports are not banned but only regulated in terms of timing when to enter the territory of Indonesia".[650] Similarly, in response to a Panel question on the manner in which the Ministry of Trade gave effect to the specific time periods mentioned in Article 8(2)e of MOA 86/2013, Indonesia replied that this was done by issuing Import Approvals in accordance with these time periods and that the Ministry of Agriculture guaranteed that all RIPHs that were submitted when applying for Import Approvals complied with the specific time periods by "working with importers at the RIPH application stage to ensure they exclude the specified time period from their license request". Indonesia further clarified that the time period requirement did not place limits on the quantity of products but only on the timing of imports.[651]

7.151. It thus appears that Measure 4 is designed within the context of other components of Indonesia's import licensing regime, allowing the government to prohibit importation of particular products during particular periods. While the letter of Measure 4 does not expressly restrict importation in terms of specific quantities, the practical consequence of limiting importation temporally, as framed by Indonesia, is that during certain periods of time the volume of imports is reduced to zero. Hence, Measure 4 constitutes a quantitative restriction amounting to a total prohibition because no imports are permitted during specified periods of time. Likewise, Measure 4 also constitutes a quantitative restriction when importation is not prohibited because the volume of imports that is allowed is reduced during a given time period.

7.152. This understanding is confirmed by the evidence presented by the co-complainants. For instance, the co-complainants have submitted a letter dated 6 May 2015 from the Secretary to the Director General of Horticulture addressed to the Secretary to the Director General of Processing and Marketing of Agricultural Products, responding to a request for "data and information in relation to harvesting season and monthly production from July − December 2015 for several fruit and vegetable commodities"[652], and recommending the institution of an import ban on horticultural products that compete with domestic products to be harvested in the period in July to December. The Secretary to the Director General of Horticulture further recommended imposing "import restrictions" on certain products having no defined local harvest season and on products to be harvested in the first half of the year.[653]

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[648] Indonesia's first written submission, para. 82.

[649] Panel question No. 33 (referring to Indonesia's first written submission, paras. 82-83).

[650] Indonesia's reply to Panel question No. 33.

[651] Indonesia's reply to Panel question No. 34.

[652] Letter from Dr Yul Harry Bahar, Secretary to the Director General for Horticulture to the Secretary to the Director General of Processing and Marketing of Agricultural Products, May 6, 2015, Exhibits USA-25 and NZL-39.

[653] Letter from Dr Yul Harry Bahar, Secretary to the Director General for Horticulture to the Secretary to the Director General of Processing and Marketing of Agricultural Products, May 6, 2015, Exhibits USA-25 and NZL-39. The letters reads: "It is necessary that we suggest a restriction or ban on imports for the following vegetable and fruit commodities for Semester II of 2015:

> 1. No red onion imports, because there was a large harvest in [Indonesia's] production centers, Central Java, East Java, South Sulawesi and West Nusa Tenggara (NTB), so that there is a surplus of supply for July, August and September.
> 2. No chilli imports, because production is even/stable throughout the year and price is relatively stable, and there is a government program which facilitates chilli planting during the dry season which will yield harvests in Semester II.
> 3. Import restriction on processed potatoes and Atlantic potato seeds.
> 4. Import restriction on carrots − limited to 15 % of demand − because there are market segments which require certain qualities [of carrots]. However if there is a policy to completely stop carrot imports, we will support it.
> 5. No mango imports because many areas will have a large harvest, especially during Semester II in the months of October, November, and December. For July, August and December there will be harvests in West Java, Central Java and South Sulawesi.
> 6. No banana, melon, papaya and pineapple imports, as the production is even/stable throughout the year and is able to meet domestic demand; bananas and pineapples have been exported to several countries.
> 7. Import restriction on oranges for October, November and December because several production centers such as West Sumatra, West Kalimantan and East Java will still be harvesting in July and August, and tend to decrease in October, November and December.
> 8. Import restriction on durian in August, September and October because there will be no harvest occurring [then].
> ...

7.153. Furthermore, the United States has provided the Panel with Indonesia's import data for the relevant horticultural products pointing to the limiting effects of Measure 4 on importation:

a. Indonesia imported approximately 980,000 kilograms of mangoes in 2011 and one million kilograms in 2012[654] but the import quantity fell after the promulgation of MOA 86/2013, to 119,000 kilograms in 2013 and to 233,466 kilograms in 2014;

b. There was no importation of mangoes from January to August of 2013 and from June to December of 2014[655];

c. Import data for other covered horticultural products such as bananas, durians, melons, and pineapples follow a similar pattern[656];

d. In late 2015, the Ministry of Agriculture shared with importers its plans for seasonal restrictions in 2016[657], which included a complete yearly ban on shallots, chillies, bananas, pineapples, mangoes, melons, and papayas.[658] Carrots are restricted to 15% of demand, durian is allowed for only three months, and oranges and onions are allowed for only six months[659];

e. In 2015, the Ministry of Agriculture did not issue permits for importation of any citrus fruits except lemons from July to September.[660]

7.154. We note that one of the arguments put forward by New Zealand is that Measure 4 has a limiting effect on imports through restricting the ability of imported products to compete in the domestic marketplace. In our view, there is no scope for competition when the imported products cannot enter the marketplace and this is precisely what may happen whenever Measure 4 is triggered by Indonesia and a prohibition to import certain products during a time period is enforced.

7.155. We note that both parties referred the Panel to prior disputes where panels examined measures sharing some features with Measure 4. For instance, New Zealand refers to *Colombia – Ports of Entry* when arguing the limiting effect on imports through restricting the ability of imported products to compete in the domestic marketplace.[661] The United States refers to the panel in *Turkey – Rice* that 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[662], and found that such measure "restricted the importation of rice for periods of time" and was thus a quantitative import restriction.[663] We agree with the co-complainants that Measure 4 shares similar features with those examined by these panels. In any event, Measure 4 has a limiting effect on importation as its application results in either the prohibition of importation or a restriction in the volume of products that can be imported.

7.2.8.3 Conclusion

7.156. For the reasons stated above, we find that Measure 4 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

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[654] United States' first written submission, para. 182 (referring to "Query: Importation of Mangoes, from 2011-2015, Monthly," *BPS – Statistics Indonesia,* Exhibit USA-51).
[655] United States' first written submission, para. 182 (referring to "Query: Importation of Mangoes, from 2011-2015, Monthly," *BPS – Statistics Indonesia*, Exhibit USA-51).
[656] United States' first written submission, para. 182; second written submission, para. 23.
[657] United States' second written submission, para. 23 (referring to Exhibit USA-91).
[658] United States' second written submission, para. 23 (referring to Exhibit USA-91).
[659] United States' second written submission, para. 23 (referring to Exhibits USA-91 and USA-92).
[660] United States' second written submission, para. 23 (referring to Exhibits USA-27, USA-92 and USA-93).
[661] New Zealand's first written submission, para. 242 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.236).
[662] United States' first written submission, para. 180 (referring to Panel Report, *Turkey – Rice*, para. 7.113).
[663] United States' first written submission, para. 180 (referring to Panel Report, *Turkey – Rice*, para. 7.121).

7.2.9 Whether Measure 5 (Storage ownership and capacity requirements) is inconsistent with Article XI:1 of the GATT 1994

7.2.9.1 Arguments of the parties

7.2.9.1.1 New Zealand

7.157. New Zealand claims that the storage ownership and capacity requirement has a limiting effect on imports and is inconsistent with Article XI:1 of the GATT 1994.[664] According to New Zealand, Indonesia's import licensing regime for horticultural products requires that, in order to obtain an RI designation and an RIPH, importers must own storage facilities that are appropriate to the type and quantity of imported products.[665] New Zealand argues that this measure has a limiting effect on imports for two reasons: (i) the requirement to own storage facilities of appropriate capacity places an unnecessary and burdensome limitation on importers when they could simply hire, or have access to the required storage facilities, and (ii) it allows Indonesia to place a ceiling on the quantity of imported horticultural products allowed into the market according to the size of storage capacity the importer owns.[666]

7.158. New Zealand recalls that the panel in *Argentina – Import Measures* found that the Advance Sworn Import Declaration required by the Argentine Government for most imports of goods constituted a restriction within the meaning of Article XI:1[667], because, *inter alia*, "it does not allow companies to import as much as they desire or need without regard to their export performance".[668] New Zealand claims that, in terms of tying the quantity of imports to another factor, a parallel can be seen in this dispute where Indonesia's storage capacity requirement does not allow companies to import as much as they desire or need without regard to their storage capacity at a one-to-one ratio.[669] New Zealand argues that this one-to-one ratio is imposed even though fresh fruit and vegetables are almost always sold to customers shortly after they are imported, and without taking into account product turnover during that period. According to New Zealand therefore, this measure has a significant limiting effect on the quantity of imports.[670] New Zealand further submits that this effect is exacerbated by the requirement to own, rather than lease or have access to, storage facilities of the requisite capacity. In this regard, New Zealand refers to the Panel in *Brazil – Retreaded Tyres*, which considered that there could be restrictions on importation where the measure acted as a disincentive to importation by penalizing it, or making it prohibitively costly.[671] New Zealand argues that the storage ownership and capacity requirement places a significant burden on importers that is unrelated to their normal importing activity.[672]

7.159. New Zealand contends that Indonesia has failed to explain why it is necessary for importers to *own* storage capacity and why importers cannot lease or otherwise acquire access to appropriate storage capacity. For New Zealand, Indonesia has also failed in explaining why it is necessary for importers to own storage capacity that must equal the quantity of products imported over the entire six-month period on a one-to-one ratio.[673] Responding to Indonesia's arguments, New Zealand contends that evidence shows that if the owned storage capacity does not match the findings of the Ministry of Trade audit, an importer is required to reapply for registration as a Registered Importer and specify on the application the storage capacity as determined by the Ministry of Trade.[674]

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[664] New Zealand's first written submission, para. 250.
[665] New Zealand's first written submission, para. 243.
[666] New Zealand's first written submission, para. 244.
[667] New Zealand's first written submission, para. 247 (referring to Panel Report, *Argentina – Import Measures* at para. 6.474).
[668] New Zealand's first written submission, para. 247 (referring to Panel Report, *Argentina – Import Measures* at para. 6.474).
[669] New Zealand's first written submission, para. 247.
[670] New Zealand's first written submission, para. 248 (referring to ASEIBSSINDO Statement, Exhibit NZL-53); second written submission, para. 234.
[671] New Zealand's first written submission, para. 249 (referring to Panel Report, *Brazil – Retreaded Tyres*, para. 7.370).
[672] New Zealand's first written submission, para. 249 (referring to Panel Report, *Argentina – Import Measures*, para. 6.474).
[673] New Zealand's second written submission, para. 234.
[674] New Zealand's second written submission, para. 235 (referring to Exhibit NZL-57).

7.2.9.1.2 United States

7.160. The United States claims that Indonesia's requirement that an importer must own its storage facility to receive an RI designation and an RIPH to import fresh horticultural products 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 of the GATT 1994 and is therefore inconsistent with Article XI:1.[675] The United States also claims that this requirement is not a duty, tax or other charge and is therefore within the scope of Article XI:1.[676]

7.161. The United States submits that Indonesia limits the total quantity specified on an Import Approval for each semester to the total storage capacity of the facilities owned by the RI and that such a requirement limits the quantity of imported products allowed as well as increases the cost of importation. According to the United States, this requirement 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 of the GATT 1994.[677] The United States explains that this requirement limits the quantity of products that can be imported during a semester because it does not take into account that horticultural product inventory typically undergoes multiple turnovers in a semester.[678] For the United States, limiting the quantity of imported products for an entire semester to the storage capacity of each importer necessarily limits the quantity of imports because it operates as an artificial ceiling on the quantity an RI can import during each semester. The United States submits that even if the RI manages to purchase additional storage facilities, or expand the capacity of existing facilities, it still has to wait until the next semester to increase the quantity specified in its Import Approval.[679]

7.162. The United States argues that the ownership requirement also adversely affects the competitive opportunities of imported products by creating burdensome and even prohibitive storage costs. In particular, the United States submits that this requirement precludes RIs from seeking alternative, more economical storage arrangements, including leasing or renting capacity and creates a higher capital barrier to entry for importers seeking RI designation, thereby reducing the pool of customers for shippers and exporters.[680]

7.163. Responding to Indonesia's argument that the co-complainants' claim against the storage capacity requirement is "at odds with the Complainants' claim that importers are habitually underestimating their import volumes because of the 80% realization requirement"[681], the United States argues this is not the case since (i) there may be two independent causes for an importer's decision to reduce the quantity of products they seek to import and (ii) the restrictive effect of different requirements may operate most strongly for different importers at different times, so that, for example, an importer owning a great amount of storage capacity might be most affected by the realization requirement, while importers hoping to import more than their owned storage capacity might be affected most by the storage capacity requirement.[682]

7.2.9.1.3 Indonesia

7.164. Indonesia argues that the storage ownership requirement is not a restriction on imports within the meaning of Article XI:1 of the GATT 1994 as 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 an importer may import during a particular validity period. According to Indonesia, any limitations placed on importers' ability to import are self-imposed and this requirement is merely a food-safety measure that does not interfere with trade volumes.[683]

7.165. Indonesia submits that the co-complainants' argument that the storage capacity requirement acts as an "artificial ceiling" on imports is at odds with the co-complainants' claim that importers are habitually underestimating their import volumes because of the 80% realization requirement. According to Indonesia, this is so as the co-complainants are arguing that importers

[675] United States' first written submission, para. 187.
[676] United States' first written submission, fn. 330.
[677] United States' first written submission, para. 188; second written submission, para. 25.
[678] United States' first written submission, paras. 189-190; second written submission, para. 25.
[679] United States' first written submission, para. 189.
[680] United States' first written submission, para. 190.
[681] United States' second written submission, para. 26 (referring to Indonesia's first written submission, para. 85).
[682] United States' second written submission, para. 27.
[683] Indonesia's first written submission, para. 147; second written submission, para. 177.

are unable to import as much as they like, while at the same time they are struggling to import 80% of their anticipated import volumes.[684]

7.2.9.2 Analysis by the Panel

7.166. The task before the Panel is to establish whether, as claimed by the co-complainants[685], Measure 5 is a restriction within the meaning of Article XI:1 of the GATT 1994 and therefore inconsistent with this provision. In particular, we are to determine whether it constitutes a restriction having a limiting effect on importation of horticultural imports into Indonesia and limits the competitive opportunities of importers and imported products.

7.167. We commence by observing that the co-complainants argued that Measure 5 constitutes a restriction having a limiting effect on importation[686], and that it is not a duty, tax, or other charge, and is therefore within the scope of Article XI:1.[687] New Zealand also argued that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 5, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure".[688] The United States submits that Article XI:1 applies to *any* "restriction," including those "made effective through quotas, import or export licenses *or other measures*".[689]

7.168. We also observe that Indonesia has not contested the co-complainants' characterization of Measure 5.[690] Rather, it has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[691] We recall our conclusion in Section 7.2.3.2.1 above whereby automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. Given the description of Measure 5 in Section 2.3.2.5 above, we concur with the co-complainants that Measure 5 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

7.169. As with the previous measures[692], we proceed to examine whether the co-complainants have demonstrated that Measure 5 prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective. In doing so, we will determine whether the co-complainants have demonstrated that Measure 5 has a limiting effect on importation. To carry out this analysis, we recall that the Panel is to examine the design, architecture, and revealing structure of Measure 5, within its relevant context.

7.170. As described in Section 2.3.2.5 above, we observe that Measure 5 consists of the requirement that importers must *own* their storage facilities with sufficient capacity to hold the quantity requested on their Import Application.[693] This Measure is implemented by Indonesia through Article 8(1)(e) of MOT 16/2013, as amended by MOT 47/2013, and by Article 8(2)(c) and (d) of MOA 86/2013. Accordingly, Article 8(1)(e) of MOT 16/2013, as amended by MOT 47/2013, requires that importers applying for designation as an RI are to provide "proof of ownership of storage facilities appropriate for the product's characteristics", while Article 8(2)(c) of MOA 86/2013 requires importers to include a statement of ownership of storage as part of their RIPH applications.

7.171. We observe that both co-complainants have focused their argumentation on the structure of Measure 5 as causing that limiting effect on importation. For instance, New Zealand argued that Measure 5 has a limiting effect on imports because the requirement to own storage facilities of appropriate capacity places an unnecessary and burdensome limitation on importers when importers could simply hire, or have access to, the required storage facilities; and because it

[684] Indonesia's first written submission, para. 146; second written submission, para. 177.
[685] New Zealand's first written submission, para. 250; United States' first written submission, para. 188.
[686] New Zealand's first written submission, para. 250; United States' first written submission, para. 191.
[687] New Zealand's first written submission, para. 284; United States' first written submission, fn. 330.
[688] New Zealand's first written submission, para. 284.
[689] United States' first written submission, para. 142.
[690] Indonesia's response to Panel question No. 10.
[691] Indonesia's second written submission, para. 165.
[692] *See* for instance, paragraph 7.76 above.
[693] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 99; United States' first written submission, para. 66.

allows Indonesia to place a ceiling on the quantity of imported horticultural product that is allowed into the market according to how much storage capacity the importer owns.[694]

7.172. In the same vein, the United States explained that this requirement limits the quantity of products that can be imported during a semester because it does not take into account that horticultural product inventory typically undergoes multiple turnovers in a semester.[695] For the United States, limiting the quantity of imported products for an entire semester to the storage capacity of each importer necessarily limits the quantity of imported products because it operates as an artificial ceiling on the quantity an RI can import during each semester. In its view, even if the RI manages to purchase additional storage facilities or expand the capacity of its existing facilities, it still has to wait until the next semester to increase the quantity specified in its Import Approval.[696]

7.173. The United States further argued that the ownership requirement adversely affects the competitive opportunities of imported products by creating burdensome and even prohibitive storage costs. In particular, the United States submitted that this requirement precludes RIs of horticultural products from seeking alternative, more economical storage arrangements, including leasing or renting capacity and creates a higher capital barrier to entry for importers seeking RI designation, thereby reducing the pool of customers for shippers and exporters.[697]

7.174. Indonesia disagreed and argued that it 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 an importer may import during a particular validity period. According to Indonesia, any limitations placed on an importer's ability to import are self-imposed and this requirement is merely a food-safety measure that does not interfere with trade volumes.[698]

7.175. We commence by examining the allegations that Measure 5 has a limiting effect on the importation of horticultural products into Indonesia. Looking at the design, architecture and revealing structure of this Measure, we observe that it explicitly limits the volume of imports of horticultural products by a given importer to the maximum amount that this importer can store in its own storage facilities during the six-month validity period of its Import Approval. The importer cannot therefore request an Import Approval for a quantity that exceeds the capacity of the storage facilities it owns, even if, for instance, the importer rents or borrows appropriate storage facilities. This effectively ties the permitted import quantities to the storage capacity owned by the importer and consequently creates a numerical limit on the amount of products an importer may bring into Indonesia each semester. In other words, Measure 5 imposes a limit on horticultural product imports that equals the storage capacity that an importer owns when it applies for a Recommendation and an Import Approval. We thus perceive the limiting effect of this Measure in terms of volume of imports.

7.176. We also observe that the restrictive effects of this numerical limitation could be exacerbated, as the co-complainants argued, by ignoring the possibility of multiple turnovers of horticultural products taking place during a six-month period.[699] In this sense, additional storage capacity might gradually become available as the products are sold, therefore allowing importers to renew their inventories with new imports. This measure, however, precludes such possibility as storage capacity is measured when the importer applies for the relevant import documents and remains fixed and unchanged during the six-month validity period of Import Approvals. Even if importers sell their entire inventory well before the end of that period, or if they acquire more storage capacity[700], they would not be able to import more products during the same period. This is the consequence of the combined operation of Measure 5 with Measures 1 (Application windows and validity periods) and 2 (Fixed and periodic import terms), thus precluding importers from modifying the terms (such as quantity of products) in their Recommendations or Import Approvals during the validity periods of such documents.[701]

[694] New Zealand's first written submission, para. 244.
[695] United States' first written submission, paras. 189-190; second written submission, para. 25.
[696] United States' first written submission, para. 189.
[697] United States' first written submission, para. 190.
[698] Indonesia's first written submission, para. 147; second written submission, para. 177.
[699] United States' first written submission, para. 189 (referring to Exhibit USA-28); New Zealand's first written submission, para. 246 (referring to Exhibit NZL-56).
[700] United States' first written submission, para. 189. New Zealand's first written submission, para. 244.
[701] *See* Section 7.2.6 above.

7.177. We further concur with the co-complainants that Measure 5 affects the importers' commercial opportunities because it increases the costs associated with importation and sets a numerical limit to imports. Indeed, importers are obliged to own their storage facilities thus incurring an additional and rather onerous limitation because they cannot simply lease or even borrow facilities; they must own them. As the co-complainants point out, Indonesia has not explained why it is necessary for importers to own the storage facilities rather than simply renting them or using more flexible schemes. The costs are also increased for potential entrants to the import market as they will have to invest in storage facilities, as opposed to simply renting or finding less expensive arrangements, to become eligible to receive an RI designation.

7.178. We note Indonesia's contention that Measure 5 does not place a limit on the amount of storage capacity an importer may acquire and that any limitations placed on importers' ability to import are self-imposed.[702] We can concede that by owning more storage capacity, importers could mitigate the impact of this requirement because they would be able to request higher quantities in their Import Approvals. This however proves the additional burden placed on importers because owning larger facilities, as opposed to renting or engaging in other more flexible arrangements, certainly represents an additional cost. In our view, even if there is a degree of private choice in determining the numerical limitation of imports, as it is the importer who decides how much storage capacity it wants (or simply can) own, the existence of the limiting effect on importation is not a consequence of the importer's decision but rather of the design, architecture and revealing structure of Measure 5.

7.2.9.3 Conclusion

7.179. For the reasons stated above, we find that Measure 5 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.2.10 Whether Measure 6 (Use, sale and distribution requirements for horticultural products) is inconsistent with Article XI:1 of the GATT 1994

7.2.10.1 Arguments of the parties

7.2.10.1.1 New Zealand

7.180. New Zealand claims that Indonesia's restrictions on the use, sale and distribution of horticultural products are designed to have a limiting effect, at the border, on the products that can be imported into Indonesia.[703] New Zealand argues that these restrictions create disincentives to importation and place an undue burden on imports[704], and are thus restrictions inconsistent with Article XI:1 of the GATT 1994.[705] New Zealand argues that importers of horticultural products must obtain an Import Approval as either an RI or PI in order to import certain horticultural products. New Zealand contends that RIs may only trade or transfer imported horticultural products to a distributor and are forbidden from trading or transferring the imported products directly to consumers or retailers.[706] Similarly, New Zealand argues that PIs may only import horticultural products as raw materials or supplementary materials for industrial production processes and are prohibited from trading and/or transferring imported horticultural product.[707] According to New Zealand, if RIs and PIs do not comply with these restrictions, their recognition as an RI or PI can be revoked.[708] For New Zealand, the limiting effect of this measure arises from the RIs' inability to channel certain horticultural products directly to consumers and retailers, which

[702] Indonesia's first written submission, para. 147; second written submission, para. 177.
[703] New Zealand's first written submission, para. 258 (referring to Appellate Body Report, *Argentina – Import Measures*, para. 5.217).
[704] New Zealand's first written submission, para. 258 (referring to Panel Report, *Brazil – Retreaded Tyres*, para. 7.730, 7.737.
[705] New Zealand's first written submission, para. 258.
[706] New Zealand's first written submission, para. 251 (referring to Article 15, MOT 16/2013, Exhibit JE-8).
[707] New Zealand's first written submission, paras. 251 and 253 (referring to Article 7, MOT 16/2013, Exhibit JE-8).
[708] New Zealand's first written submission, para. 251 (referring to Article 26(f), MOT 16/2013, Exhibit JE-8).

adds a distribution layer, and the requirement that PIs must use all the imported horticultural products for processing or destroy or re-export unused products.[709]

7.181. New Zealand submits that WTO jurisprudence makes clear that the restriction or limiting effect of a measure must be on "importation" itself[710], and that the expression "restriction … on importation" has been interpreted as a restriction "with regard to" or "in connection with" the importation of a product.[711] According to New Zealand, there must be a link between the limiting effect of a measure and the importation of a product. This link can be demonstrated through the "design, architecture, and revealing structure" of a measure.[712] New Zealand argues that in the present dispute, there is a clear connection between the limiting effect of the restrictions on use, sale and distribution of listed horticultural products and the importation of such products into Indonesia. New Zealand states that this is illustrated by the fact that RI and PI designations will not be issued unless the importer submits as part of its application proof of a distribution contract and a statement that the importer will not sell directly to consumers (in the case of an RI)[713] or proof of an Industrial Business Licence or similar (in the case of a PI)[714], and that a failure to comply with the use, sale and distribution conditions is enforced through sanctions under which an Importer's Designation may be revoked, and the importer will be unable to import horticultural products.[715] New Zealand submits that in *India – Quantitative Restrictions*, the panel found that India maintained an import licensing regime that included the requirement that only entities defined as an "Actual User" could import certain goods.[716] New Zealand argues that the panel concluded that this condition was "a restriction on imports because it precludes imports of products for resale by intermediaries"[717] that operated as a restriction under Article XI:1.[718]

7.182. Responding to Indonesia's argument that this measure is not a prohibited restriction under Article XI:1 of the GATT 1994 because the co-complainants have failed to demonstrate that "limiting imports of horticultural products to certain end uses" has limited imports of horticultural products "overall"[719], New Zealand contends that Indonesia appears to be arguing that the co-complainants must show that there is a quantitative impact on imports for a breach of Article XI:1 to be found and that this argument must fail since WTO jurisprudence makes it clear that this need not be demonstrated by quantifying the effects of the measure at issue.[720]

7.2.10.1.2 United States

7.183. The United States claims that Indonesia's restrictions on importation of horticultural products based on their use, sale, and transfer, are restrictions within the meaning of Article XI:1 and are therefore inconsistent with this provision.[721] The United States also claims that this requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[722] The United States submits that RIs can only sell imported horticultural products to distributors and are prohibited from selling directly to consumers and retailers while PIs can only

[709] New Zealand's first written submission, paras. 251-253; second written submission, para. 249.
[710] New Zealand's first written submission, para. 255 (referring to Appellate Body Report, *Argentina – Import Measures*, para. 5.217 and Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.261).
[711] New Zealand's first written submission, para. 255 (referring to Panel Report, *Argentina – Import Measures*, para. 6.458).
[712] New Zealand's first written submission, para. 255 (referring to Appellate Body Report, *Argentina – Import Measures*, para. 5.217).
[713] New Zealand's first written submission, para. 257 (referring to Article 8(1)(g), (h) and (i), MOT 16/2013, Exhibit JE-8).
[714] New Zealand's first written submission, para. 257 (referring to Article 5(1)(a), MOT 16/2013, Exhibit JE-8).
[715] New Zealand's first written submission, para. 257 (referring to Article 26, MOT 16/2013, Exhibit JE-8).
[716] New Zealand's first written submission, para. 256 (referring to Panel Report, *India – Quantitative Restrictions*, para. 2.24).
[717] New Zealand's first written submission, para. 256 (referring to Panel Report, *India – Quantitative Restrictions*, para. 5.142).
[718] New Zealand's first written submission, para. 256 (referring to Panel Report, *India – Quantitative Restrictions*, para. 5.143).
[719] New Zealand's second written submission, para. 248 (referring to Indonesia's first written submission, paras. 90 and 156).
[720] New Zealand's second written submission, para. 248 (referring to Panel Report, *Argentina – Import Measures*, para. 6.264, which in turn refers to the Panel Report, *Argentina – Hides and Leather*, para. 11.20; and Appellate Body Report, *Argentina – Import Measures*, para. 5.217).
[721] United States' first written submission, para. 192.
[722] United States' first written submission, fn. 319.

import horticultural products as materials for use in their own industrial production process and are prohibited from selling or transferring imported horticultural products to another entity.[723] The United States argues that the Ministry of Trade may revoke an importer's RI or PI designation for violating these restrictions, which would make the importer ineligible to import horticultural products.[724]

7.184. The United States further submits that the restrictions on the sale, transfer or use of imported products are a limitation or limiting condition on importation, or have a limiting effect on importation since the importer may not import and sell according to commercial considerations, but only as permitted by its importer status. The United States therefore claims that these requirements are a "restriction" within the meaning of Article XI:1.[725] The United States argues that Indonesia's restrictions also increase the costs associated with importation since, in the case of RIs, retailers such as supermarkets or vegetable and fruit vendors, cannot import horticultural products themselves and cannot buy directly from RIs. In the United States' view, this requirement necessarily inserts another level in the supply chain between RIs and retailers by forcing importers and retailers to rely on distributors in their business models, which in turn, lengthens the supply chain and increases the costs associated with imported horticultural products.[726] With regard to PIs, the United States claims that the restriction on importers and their sale and transfer of imported horticultural products creates waste and increases unnecessarily the cost of using imported products in their production processes since the restriction on sale and transfer forces them to either destroy the excess products or incur the cost of storing them.[727] For the United States, it is a basic rule of economics that if the input costs of producing or obtaining a product increase, the supply of the product in that market will decrease and thus, if imported horticultural products are made unnecessarily costly, the supply curve for such products will shift such that lower levels of imports are brought into Indonesia.[728]

7.185. The United States submits that previous panels have found that measures imposing limits of this kind are restrictions under Article XI:1. The United States claims that the panel in *India – Quantitative Restrictions* considered an import regime that also included a use restriction and the panel found this measure 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".[729] The United States claims that Indonesia's use, sale, and transfer restrictions operate in a similar manner, in that they preclude the importation of horticultural products for sale directly to retailers and consumers and, in the case of PIs, for transfer or sale to another entity.[730]

7.2.10.1.3 Indonesia

7.186. Indonesia argues that the limitation of imports of horticultural goods to certain end-users does not constitute a quantitative restriction within the meaning of Article XI:1 of the GATT 1994. Indonesia submits that the co-complainants have failed to demonstrate that limiting imports of horticultural products to certain end uses has in any way limited the amount of imports for horticultural products overall.[731]

7.187. Indonesia sustains that it differentiates between the RI and PI designation only for statistical purposes which allows keeping track of horticultural products needed for direct consumption and those used as a raw material for further processing. For Indonesia, these provisions do not in any way limit the quantity of imports for horticultural products.[732]

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[723] United States' first written submission, para. 193 (referring to Article 7 of MOT 16/2013, as amended by MOT 47/2013); second written submission, para. 28.

[724] United States' first written submission, para. 193 (referring to Article 26 of MOT 16/2013, as amended by MOT 47/2013).

[725] United States' first written submission, para. 193; second written submission, para. 29.

[726] United States' first written submission, para. 194 (referring to Stephen V. Marks, *Indonesia Horticultural Imports and Policy Responses: An Assessment*, September 2012, USAID/SEADI, at 26, Exhibit USA-53); second written submission, para. 29.

[727] United States' first written submission, para. 195.

[728] United States' second written submission, para. 30.

[729] United States' first written submission, para. 196 (referring to Panel Report, *India – Quantitative Restrictions,* para. 5.142).

[730] United States' first written submission, para. 196.

[731] Indonesia's first written submission, para. 156; second written submission, para. 190.

[732] Indonesia's second written submission, para. 189.

7.2.10.2 Analysis by the Panel

7.188. The task before the Panel is to establish whether, as claimed by the co-complainants[733], Measure 6 imposes a limiting condition on importation contrary to Article XI:1 of the GATT 1994. In particular, we are to determine whether by prohibiting RIs from selling imported horticultural products to consumers or retailers and, similarly, prohibiting PIs from trading and transferring imported horticultural products, Measure 6 constitutes a restriction having a limiting effect on importation.

7.189. We commence by observing that the co-complainants argued that Measure 6 constitutes a restriction on importation[734], and that it is not a duty, tax, or other charge, and is therefore within the scope of Article XI:1.[735] New Zealand contended that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 6, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure".[736] The United States submitted that Article XI:1 applies to *any* "restriction," including those "made effective through quotas, import or export licenses *or other measures*".[737]

7.190. We also observe that Indonesia has not contested the co-complainants' characterization of Measure 6.[738] Rather, it has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[739] We recall our conclusion in Section 7.2.3.2.1 above whereby automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. Given the description of Measure 6 in Section 2.3.2.6 above, we concur with the co-complainants that Measure 6 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

7.191. As with the previous measures[740], we proceed to examine whether the co-complainants have demonstrated that Measure 6 prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective. In doing so, we will determine whether the co-complainants have demonstrated that Measure 6 has a limiting effect on importation. To carry out this analysis, we recall that the Panel is to examine the design, architecture, and revealing structure of Measure 6, within its relevant context.

7.192. As described in Section 2.3.2.6 above, we observe that Measure 6 consists of the requirements on the importation by PIs and RIs of listed horticultural products that limit the use, sale and distribution of the imported products.[741] Indonesia implements this measure through Articles 7, 8, 15 and 26(e) − (f) of MOT 16/2013, as amended by MOT 47/2013. The requirements differ depending on whether the importer obtains a designation as a PI or RI. Concerning PIs, pursuant to Article 7 of MOT 16/2013, as amended by MOT 47/2013, an importer that obtains the recognition as a PI can only import horticultural products as raw materials or auxiliary materials for its industrial production processes and is thus prohibited from trading and/or transferring them. Concerning RIs, Article 15 of MOT 16/2013, as amended by MOT 47/2013, provides that an importer that obtains the recognition as an RI can only import horticultural products for consumption provided they are traded or transferred to a distributor and not directly to consumers or retailers. Articles 26(e) and 26(f) of MOT 16/2013, as amended, further provide that designation as RI or PI can be revoked where the relevant importer is proven to have traded and/or transferred imported horticultural products as is described in Articles 7 and 15 of MOT 16/2013.

7.193. We observe that the co-complainants appear to consider that the structure and operation of Measure 6 is causing a limiting effect on importation by affecting the competitive opportunities of imported products. In essence, we understand the co-complainants to take issue with the requirement that horticultural products imported for consumption cannot be sold directly to

[733] New Zealand's first written submission, para. 258. United States' first written submission, para. 193; second written submission, para. 29.
[734] New Zealand's first written submission, para. 258; United States' first written submission, para. 192.
[735] New Zealand's first written submission, para. 284; United States' first written submission, fn. 332.
[736] New Zealand's first written submission, para. 284.
[737] United States' first written submission, para. 142.
[738] Indonesia's response to Panel question No. 10.
[739] Indonesia's second written submission, para. 165.
[740] *See,* for instance, paragraph 7.76 above.
[741] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, paras. 106-109; United States' first written submission, paras. 70-72.

consumers but only to distributors and that those products imported for further processing cannot be sold or transferred to another entity.

7.194. For instance, New Zealand argued that the limiting effect of this measure arises from the inability of RIs to import certain horticultural products for direct sale to consumers and retailers, and of PIs who must use all the horticultural products they import for processing or destroy or re-export unused products.[742] New Zealand thus contended that there is a clear connection between the limiting effect of the restrictions on use, sale and distribution of listed horticultural products and the importation of such products into Indonesia. New Zealand sustained that this is illustrated by the fact that RI and PI designations will not be issued unless the importer submits, as part of the importer designation application, proof of a distribution contract and a statement that the importer will not sell directly to consumers (in the case of an RI)[743] or proof of an Industrial Business Licence or similar (in the case of a PI).[744] New Zealand further contended that this Measure is enforced through sanctions under which an Importer's Designation may be revoked and the importer will be unable to import horticultural products.[745]

7.195. The United States agreed and also referred to the way this measure limits the competitive opportunities of importers. It thus argued that Indonesia's restrictions also increase the costs associated with importation since, in the case of RIs, retailers such as supermarkets or vegetable and fruit vendors, cannot import horticultural products themselves and cannot buy directly from RIs. In the United States' view, this requirement necessarily inserts another level in the supply chain between RIs and retailers by forcing importers and retailers to rely on distributors in their business models, which in turn, lengthens the supply chain and increases the costs associated with imported horticultural products.[746] With regard to PIs, the United States contended that the restriction on importers and their sale and transfer of imported horticultural products creates waste and increases unnecessarily the cost of using imported products in their production processes. This is so because the restriction on sale and transfer forces the PI to either destroy the excess imports or incur the cost of storing them if not used during its production process.[747] For the United States, it is a basic rule of economics that if input costs increase, supply will decrease and thus, if imported horticultural products are made unnecessarily costly, the supply curve for such products will shift such that lower levels of imports are brought into Indonesia.[748]

7.196. We thus observe that the co-complainants' case is built around the notion that Measure 6 increases the costs faced by importers and reduces the competitive opportunities of imported products by generating disincentives and undue burdens on importation.[749]Accordingly, business operators are compelled to take decisions and act without due regard to commercial considerations, only as permitted by one's importer status[750] because the costs associated with importation increase for both RIs (having to sell to distributors[751]) and PIs (having to either destroy the products imported in excess of actual processing, or incur the cost of storing them if unused).[752]

7.197. Although the immediate effect of this measure would be to prevent importers of horticultural products from undertaking certain transactions in Indonesia, we concur with the co-complainants that such requirements are likely to have an impact on the competitive opportunities of importers and imported goods. As argued by the co-complainants, limiting the type of transactions that importers can carry out also affects importation because Measure 6 is structured

[742] New Zealand's first written submission, paras. 251-253; second written submission, para. 249.
[743] New Zealand's first written submission, para. 257 (referring to Article 8(1)(g), (h) and (i), MOT 16/2013, Exhibit JE-8).
[744] New Zealand's first written submission, para. 257 (referring to Article 5(1)(a), MOT 16/2013, Exhibit JE-8).
[745] New Zealand's first written submission, para. 257 (referring to Article 26, MOT 16/2013, Exhibit JE-8).
[746] United States' first written submission, para. 194 (referring to Stephen V. Marks, *Indonesia Horticultural Imports and Policy Responses: An Assessment*, September 2012, USAID/SEADI, p. 26, Exhibit. USA-53); second written submission, para. 29.
[747] United States' first written submission, para. 195.
[748] United States second written submission, para. 30.
[749] New Zealand's first written submission, para. 258 (referring to Panel Report, *Brazil – Retreaded Tyres*, para. 7.730, 7.737).
[750] United States' first written submission, para. 193; second written submission, para. 29.
[751] United States' first written submission, para. 194 (referring to Stephen V. Marks, *Indonesia Horticultural Imports and Policy Responses: An Assessment*, September 2012, USAID/SEADI, p. 26, Exhibit. USA-53); second written submission, para. 29.
[752] United States' first written submission, para. 195.

as a condition that affects the importer's eligibility with the consequence of non-compliance being the revocation of the RI or PI status, thus eliminating the ability of importers to import products altogether.

7.198. We observe that by requiring products imported by RI's to be traded or transferred to a distributor and not directly to consumers or retailers, Measure 6 restricts the competitive opportunities for imported products as it increases the costs of their marketing and affects the business plans of importers. This is mainly a consequence of forcing importing products to go through a distributor before they can reach the final consumer and consequently inserting an additional layer in the distribution chain of horticultural products. In this respect, we agree with the United States that, in practical terms, this implies that retailers such as supermarkets or vegetable and fruit vendors cannot import horticultural products themselves and cannot buy directly from RIs.[753] Similarly, in the case of PIs, by requiring imported products to be used as raw materials or auxiliary materials for their industrial production processes and prohibiting PIs from trading and/or transferring them, Measure 6 imposes an undue burden on imports.[754] Indeed, importers are forced to either use all the products they import for processing or find alternative ways to dispose of unused products that do not involve selling or transferring them in the Indonesian market.

7.199. As the co-complainants point out, in *India – Quantitative Restrictions*, the panel examined a similar measure, namely India's "actual user requirement" that provided that some products could only be imported by the "Actual User", thus not allowing the importation of products for resale by intermediaries. The panel, finding support in prior GATT 1947 reports[755], found that the Indian measure was "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".[756] We concur with that panel's analysis and adopt it as our own for the purpose of Measure 6.

7.2.10.3 Conclusion

7.200. For the reasons stated above, we find that Measure 6 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.2.11 Whether Measure 7 (Reference prices for chillies and fresh shallots) is inconsistent with Article XI:1 of the GATT 1994

7.2.11.1 Arguments of the parties

7.2.11.1.1 New Zealand

7.201. New Zealand claims that Measure 7 which provides for reference prices for chillies and fresh shallots for consumption is inconsistent with Article XI:1 of the GATT 1994[757] because imports of chillies and fresh shallots are prohibited when the domestic price of those products falls

[753] United States' first written submission, para. 194 (referring to Stephen V. Marks, *Indonesia Horticultural Imports and Policy Responses: An Assessment*, September 2012, USAID/SEADI, p. 26, Exhibit USA-53); second written submission, para. 29.

[754] New Zealand's first written submission, para. 258 (referring to Panel Report, *Brazil – Retreaded Tyres*, paras. 7.730 and 7.737.

[755] The panel observed that a minimum import price system had already been considered to be a restriction within the meaning of Article XI:1. GATT Panel Report, *EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, adopted on 18 October 1978, BISD 25S/68, para. 4.9. Similarly, a panel found that a measure limiting exports below a certain price was within the scope of Article XI:1. GATT Panel Report, *Japan – Semi–conductors*, adopted 4 May 1988, BISD 35S/116, para. 105. In a case involving limitations on the points of sale available to imported beer, a panel found that such limitations were restrictions within the meaning of Article XI:1. GATT Panel Report, *Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, adopted on 22 March 1988, BISD 35S/37, para. 4.24. This case involved state trading operations and the panel emphasized that the Note Ad Articles XI, XII, XIII, XIV and XVIII referred to "restrictions" generally and not to "import restrictions". It accordingly considered restrictions on distribution as within the meaning of "other measures" under Article XI:1, even though such measures might be examined also under Article III:4. Here the restrictions at issue, although related to distribution, are on importation.

[756] Panel Report, *India – Quantitative Restrictions*, paras. 5.142-5.143.

[757] New Zealand's first written submission, para. 267.

below a reference price set by the Ministry of Trade.[758] The issuance of RIPHs for the importation of chillies and shallots is based on a reference price determined by the Ministry of Trade[759] so that if the domestic market price for chillies is below the stipulated reference price, the importation of chillies and shallots is "postponed" until the domestic price exceeds the reference price.[760]

7.202. New Zealand submits that, since January 2013, the Indonesian Government has used the reference price mechanism to restrict imports, prohibiting imports of chillies in all but five months.[761] New Zealand argues that similar restrictions apply to shallots.[762] According to New Zealand, the statistics presented by Indonesia indicate that no imports of chillies took place in February, March and April of 2015[763] since the domestic price of big red chillies in these months was lower than the reference price and therefore imports would have been "postponed".[764] Similarly, New Zealand contends that there were no imports of shallots in January 2015 when the domestic price was lower than the reference price.[765] For New Zealand, the substantial drop in imports of chillies from 5349.5 tonnes in 2011 to 29.5 tonnes in 2014, when the domestic price of chillies was mostly lower than the reference price, provides support for the argument that the reference price system has a limiting effect on imports.[766]

7.203. New Zealand contends that Indonesia's reference price for chillies and shallots is similar to minimum import prices requirements that previous panels and GATT panels, such as *EEC – Minimum Import Prices*[767] and *Japan – Semiconductors*[768]*,* have found to be inconsistent with Article XI:1*.* New Zealand submits that the panel in *China – Raw Materials* considered the consistency or otherwise of limiting exports below certain prices[769] and found that China's requirement on exporting enterprises to export at set or coordinated export prices or otherwise face penalties was a restriction under Article XI:1 because it "by its very nature has a limiting or restricting effect on trade".[770] New Zealand also refers to *Chile – Price Band System* and states that the conclusion in this dispute was that a measure which ensures that certain imported products will not enter a domestic market at a price lower than a certain threshold is inconsistent with the WTO Agreement.[771] New Zealand claims that by its nature, the reference price requirement is akin to those found in *Chile – Price Band System* and *China – Raw Materials*.[772]

7.204. New Zealand further argues that reference prices also create uncertainty, as has been acknowledged by a previous Assistant Minister for International Cooperation at the Indonesian Ministry of Agriculture.[773] New Zealand argues that the panel in *Chile – Price Band System* confirmed the approach taken by earlier panels, including *Colombia – Ports of Entry*,[774] that "uncertainty" created by a measure may constitute a restriction within the meaning of

[758] New Zealand's first written submission, para. 259 (referring to Article 14B, MOT 16/2013 as amended by MOT 47/2013, Exhibit JE-10 and Article 5(4) of MOA 86/2013*,* Exhibit JE-15).
[759] New Zealand's first written submission, para. 259 (referring to Article 5(4), MOA 86/2013, Exhibit JE-15).
[760] New Zealand's first written submission, para. 259.
[761] New Zealand's first written submission, para. 260.
[762] New Zealand's first written submission, para. 262.
[763] New Zealand's second written submission, para. 265 (referring to Exhibit IDN-29).
[764] New Zealand's second written submission, para. 265 (referring to Exhibit IDN-31).
[765] New Zealand's second written submission, para. 265 (referring to Exhibits IDN-29 and IDN-31).
[766] New Zealand's second written submission, para. 265 (referring to Exhibits IDN-29 and IDN-31).
[767] New Zealand's first written submission, para. 265 (referring to GATT Panel Report, *EEC – Minimum Import Prices,* para. 4.9).
[768] New Zealand's first written submission, para. 263 (referring to GATT Panel Report, *Japan – Semiconductors*, para. 105).
[769] New Zealand's first written submission, para. 263 (referring to Panel Report, *China – Raw Materials*, paras. 7.1081-7.1082).
[770] New Zealand's first written submission, para. 263 (referring to Panel Report, *China – Raw Materials*, para. 7.1082).
[771] New Zealand's first written submission, para. 264 (referring to Appellate Body Report, *Chile – Price Band System*, para. 254(b)).
[772] New Zealand's first written submission, para. 265.
[773] New Zealand's first written submission, para. 266 (referring to The Frame of Agricultural Policy and Recent Major Agricultural Policies in Indonesia" *FFTC Paper*, Exhibit NZL-61).
[774] New Zealand's first written submission, para. 266 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.240).

Article XI:1.[775] New Zealand submits that there is inherent uncertainty in the reference price system for chillies and shallots and that the setting of reference prices is opaque.[776]

7.2.11.1.2 United States

7.205. The United States claims that this requirement is a prohibition or restriction within the meaning of Article XI:1 and, therefore, is inconsistent with Article XI:1 of the GATT 1994.[777] Additionally, the United States claims that this requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[778] The United Stated submits that Indonesia's reference price requirement for chillies 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. According to the United States, MOT 16/2013, as amended by MOT 47/2013, stipulates that the importation of chillies and fresh shallots must "observe" the reference prices established by the Ministry of Trade[779] and if the market prices of chillies 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."[780] For the United States, the reference price has also a limiting effect on importation at all times because the threat of such a broad prohibition reduces the incentives for importation.[781]

7.206. The United States submits that Indonesia's reference price requirement is similar to a minimum import price requirement, which previous panels have found to be a restriction under Article XI:1. The United States submits that as the panel in *China – Raw Materials* recognized, the "applicability of Article XI:1 to minimum price requirements" was addressed by two GATT panels, *EEC – Minimum Import Prices* and *Japan – Semi-Conductors*, both of which concluded that such requirements were "restrictions" under Article XI:1.[782] According to the United States, the reference price requirement is even more categorical than the minimum import prices or minimum export prices found to be restrictions by those previous panels because it prohibits *any* imports of chillies and shallots once the reference price has been reached, not only imports sold at prices below that reference price.[783]

7.207. The United States contends that, contrary to Indonesia's argument, it has provided ample and sufficient evidence demonstrating that the reference price system constitutes a restriction under Article XI:1 of the GATT 1994.[784] According to the United States, Indonesia has attempted to obscure this fact by arguing that the reference price system "has had little or no impact on imports or the issuance of import licences," and by presenting a chart purporting to show that imports of chillies and fresh shallots into Indonesia were below the level of Import Approvals issued in 2013 and 2014.[785] For the United States, Indonesia's logic is inverted since imports for that period would be below the quantity of products listed on Import Approvals for that period if the reference price prohibition were triggered.[786]

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[775] New Zealand's first written submission, para. 266 (referring to Panel Report, *Argentina – Import Measures*, para. 6.260).

[776] New Zealand's first written submission, para. 266 (referring to "Horticultural Import Policy in Indonesia" *FFTC Paper*, Exhibit NZL-59).

[777] United States' first written submission, para. 198.

[778] United States' first written submission, fn. 338.

[779] United States' first written submission, para. 199 (referring to Article 14B of MOT 16/2013, as amended by MOT 47/2013, Exhibit JE-10).

[780] United States' first written submission, para. 199 (referring to Article 14B of MOT 16/2013, as amended by MOT 47/2013, Exhibit JE-10); second written submission, para. 33.

[781] United States' first written submission, paras. 314-315; second written submission, para. 33; response to Panel question No. 39, para. 110.

[782] United States' first written submission, para. 201 (referring to Panel Report *China – Raw Materials Panel*, para. 7.1075 which cited GATT Panel Report *Japan – Semi-Conductors* paras. 106, 117; GATT Panel Report *EEC – Minimum Import Prices*, para. 4.9).

[783] United States' first written submission, para. 202.

[784] United States' second written submission, para. 32 (referring to Indonesia's first written submission, para. 93; response to Advance Panel question No. 31, para. 31; opening statement at the first substantive meeting of the Panel, para. 25).

[785] United States' second written submission, para. 34 (referring to Indonesia's opening statement at the first substantive meeting of the Panel, para. 25).

[786] United States' second written submission, para. 34.

7.2.11.1.3 Indonesia

7.208. Indonesia argues that reference prices for chillies and shallots are not restrictions on imports within the meaning of Article XI:1 of the GATT 1994 because the reference price system is not applied to individual entries. Indonesia argues that this scheme does not ban imports of chillies and shallots below the reference price by applying additional duties or by "denying entry outright".[787] Indonesia argues that the reference price system for chillies and shallots is one tool it uses to protect against harmful oversupply of perishable food items in equatorial heat and the consequences of extreme price volatility on the availability of a continuous supply of fresh chillies and shallots in Indonesia's food supply.[788]

7.209. Indonesia submits that the reference price system for chillies and shallots is a temporary measure, which is necessary to remove a surplus of the like domestic product, and thus it is justified under Article XI:2(c)(ii) of the GATT 1994.[789] Indonesia argues that it maintains a reference price system for the importation of chillies, shallots and beef as a tool to protect against harmful oversupply and spoilage of these highly perishable food items in a hot equatorial climate. Reference prices are established by taking into account elements including supply and demand of the product concerned in the local market. According to Indonesia, if markets prices fall below the respective reference prices, this indicates the existence of oversupply of such products in the domestic market.[790] Indonesia notes that this system is not continuously in effect. Moreover, it argues, even when the market prices for chillies and shallots dip below the set reference price, this system is not automatically activated because the price drop will first trigger the relevant agency to investigate whether price volatility of these sensitive products merits a temporary cessation of imports. Indonesia maintains that, when this system is indeed activated, it is always on a temporary basis in response to an immediate crisis.[791] In response to a question from the Panel on how many times the reference price system has been triggered with respect to each of these two products in the course of 2013-2015, Indonesia replied that it was in place in 2015.[792]

7.2.11.2 Analysis by the Panel

7.210. The task before the Panel is to establish whether, as claimed by the co-complainants[793], Measure 7 that provides for reference prices for chillies and shallots has a limiting effect on importation contrary to Article XI:1 of the GATT 1994. In particular, we are to determine whether the importation of chillies and shallots is prohibited when the domestic price falls below the reference price and whether the Measure has a limiting effect on importation during the times when the reference price system has not been triggered.

7.211. We begin by observing that the co-complainants argued that Measure 7 constitutes a restriction on importation[794], and that it is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[795] New Zealand argued that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 7, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure".[796] The United States submitted that Article XI:1 applies to *any* "restriction", including those "made effective through quotas, import or export licenses *or other measures*".[797]

7.212. We note that Indonesia has not contested the co-complainants' characterization of Measure 7.[798] Rather, it has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[799] We recall our conclusion in Section 7.2.3.2.1 above whereby automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. Given the description of Measure 7 in Section 2.3.2.7

[787] Indonesia's first written submission, para. 154.
[788] Indonesia's second written submission, para. 197.
[789] Indonesia's second written submission, paras. 197 and 256.
[790] Indonesia's second written submission, para. 254.
[791] Indonesia's second written submission, para. 255.
[792] Indonesia's response to Panel question No. 37.
[793] New Zealand's first written submission, para. 267; United States' first written submission, para. 198.
[794] New Zealand's first written submission, paras. 259 and 267; United States' first written submission, para. 198.
[795] New Zealand's first written submission, para. 284; United States' first written submission, fn. 338.
[796] New Zealand's first written submission, para. 284.
[797] United States' first written submission, para. 142.
[798] Indonesia's response to Panel question No. 10.
[799] Indonesia's second written submission, para. 165.

above, we concur with the co-complainants that Measure 7 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

7.213. As with the previous measures[800], we proceed to examine whether the co-complainants have demonstrated that Measure 7 prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective. In doing so, we will determine whether the co-complainants have demonstrated that Measure 7 has a limiting effect on importation. To carry out this analysis, we recall that the Panel is to examine the design, architecture, and revealing structure of Measure 7, within its relevant context.

7.214. As described in Section 2.3.2.7 above, Measure 7 consists of the implementation of a reference price system by the Ministry of Trade on imports of chillies and fresh shallots for consumption.[801] Indonesia implements this Measure by means of Article 5(4) of MOA 86/2013 and Article 14B of MOT 16/2013, as amended by MOT 47/2013. Pursuant to these provisions, importation is "postponed" when the market price falls below the pre-established reference price. Accordingly, whenever the reference price system is activated, imports are temporarily "postponed", independently of whether an importer holds an RIPH and/or an Import Approval. Notably, already authorized import volumes do not "carry over" to the next validity period.[802] Imports are resumed when the market price again reaches the reference price.

7.215. Indonesia's regulations define the term "reference price" as "the reference selling price at the retail level that is established by the Horticultural Product Price Monitoring Team".[803] In determining the reference price, the Ministry of Trade takes into account: (1) farmers' operational costs; (2) farmers' profit margins; and (3) a "reasonable price of such products to be sold to customers."[804] The Ministries of Agriculture and Trade (Directorate of Import, Directorate of Export Import Facilitation and Directorate of Primary and Strategic Products) are responsible for monitoring the reference price system while the domestic market prices of chilli and shallot are monitored by Indonesia's Statistic Central Bureau.[805]

7.216. The Panel notes that the reference price calculation methodology and parameters are not published.[806] In response to a question from the Panel, Indonesia indicated that the reference price for chillies and shallots has only been fixed once at IDR 26,300/kg for big red chillies, IDR 28,000/kg for bird's eye chillies and IDR 25,700/kg for shallots, effective from 3 October 2013 to the present. Regarding the communication of the factors included in the calculation methodology, Indonesia responded that although these were not published, importers and exporters were "involved and engaged" during the formulation of the reference price.[807] Indonesia also clarified that the reference price system for chillies and shallots was in place in 2015.[808] We further note that, pursuant Article 14B(3) of MOT 16/2013, as amended by MOT 47/2013, the reference price can be evaluated at any time by the Horticultural Product Price Monitoring Team.

7.217. The co-complainants' challenge against Measure 7 appears to be two-fold: on the one hand, they consider that the design, structure and operation of Measure 7 results in both a straight import ban when the reference price system is triggered[809]; on the other hand, that this same design, structure and operation results in restrictions having a limiting effect on importation during the times where the reference price system has not been triggered.[810]

7.218. Concerning the alleged import ban, we observe that, pursuant to this Measure, importation is "postponed", which in practice means that importation is not allowed, when the market price falls below the pre-established reference price. Thus, whenever the reference price system is

[800] *See* for instance, paragraph 7.76 above.
[801] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 109; United States' first written submission, paras. 75-76.
[802] *See* Indonesia's response to Panel question No. 13.
[803] Article 1(15) of MOT 16/2013, as amended, Exhibit JE-10.
[804] Indonesia's response to Panel question No. 35.
[805] Indonesia's response to Panel question No. 35.
[806] Indonesia's response to Panel question No. 35.
[807] Indonesia's response to Panel question No. 35.
[808] Indonesia's response to Panel question No. 37.
[809] New Zealand's first written submission, para. 259 (referring to Article 14B of MOT 16/2013 as amended by MOT 47/2013, Exhibit JE-10, and Article 5(4) of MOA 86/2013, Exhibit JE-15). United States' first written submission, para. 198.
[810] United States' first written submission, paras. 314-315; second written submission, para. 33; response to Panel question No. 39, para. 110.

activated, imports are temporarily banned, independently of whether an importer holds a valid RIPH and/or an import approval. Our understanding of the functioning of the reference price system is that imports are not exactly "postponed" in the sense of deferred or put on hold. Indeed, already authorized import volumes do not "carry over" to the next validity period.[811] Indonesia explained that "[i]f the reference price system is activated and MOT temporarily suspends issuance of Import Approvals for chillies and shallots, an importer that only has an RIPH will not be allowed to import those products".[812] To us, this confirms that the effect of the temporary suspension is the imposition of a ban on importation because importers will not get one of the documents necessary to obtain the authorization to import products, i.e. an RIPH and Import Approval. In addition, we observe that the ban applies to all chillies and shallots, whatever their price. Therefore, the ban is absolute even if the price of the imported chillies and shallots is above the respective reference price. Imports are resumed when the market price reaches again the respective reference price.

7.219. We thus observe that the operation of the reference price system is simple: once the domestic prices for chillies and shallots respectively fall below the reference prices established by the Ministry of Trade, imports of such products are suspended, which bearing in mind that already authorized import volumes do not "carry over" to the next validity period, means that they are simply prohibited during the activation of the reference price system. In other words, once the reference price system is triggered, there is an absolute ban on the importation of these products that falls squarely into the definition of a "prohibition" under Article XI:1 of the GATT 1994.[813]

7.220. We concur with the co-complainants in that Indonesia's reference price system for chillies and shallots is similar to minimum price requirements that previous WTO and GATT panels have found to be inconsistent with Article XI:1*.* For instance, as recalled by the panel in *China – Raw Materials*, the "applicability of Article XI:1 to minimum price requirements" was addressed by two GATT panels, *EEC – Minimum Import Prices* and *Japan – Semi-Conductors*, both of which concluded that such requirements were "restrictions" under Article XI:1.[814] As New Zealand pointed out, the panel in *China – Raw Materials* considered the consistency of limiting exports below certain prices[815] and found that China's requirement on exporting enterprises to export at set or coordinated export prices or otherwise face penalties was a restriction under Article XI:1 because "by its very nature has a limiting or restricting effect on trade".[816] New Zealand also argued that, by its nature, Measure 7 is akin to those found in *Chile – Price Band System.*[817] We agree with the United States in that Measure 7 is even more "categorical" than the minimum import prices or minimum export prices found to be restrictions by those previous panels because it prohibits *any* imports of chillies and shallots once the relevant reference price has been reached, not only imports sold at prices below that reference price.[818]

7.221. We thus conclude that the design, architecture and revealing structure of Measure 7 results in a prohibition on importation each time the reference price system is triggered and that it is thus contrary to Article XI:1 of the GATT 1994.

7.222. Concerning the alleged restrictive effect of this Measure in situations where the domestic price is above the reference price, we concur with the United States[819] in that the operation of this Measure creates uncertainties and incentives for importers to limit the quantities they import. On the one hand, these uncertainties are the logical consequence of the lack of transparency of this

[811] *See* Indonesia's response to Panel question No. 13, setting a hypothetical scenario of an importer who already holds an RIPH but is faced with the activation of the reference price system before the Import Approval is obtained.

[812] Indonesia's response to Panel question No. 13.

[813] We recall that the Appellate Body has defined this term as a "legal ban on the trade or importation of a specified commodity". Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to the Appellate Body Reports, *China – Raw Materials*, para. 319)

[814] United States' first written submission, para. 201 (referring to Panel Report *China – Raw Materials Panel*, para. 7.1075 that cited GATT Panel Report *Japan – Semi-Conductors* paras. 106, 117; GATT Panel Report *EEC – Minimum Import Prices*, para. 4.9).

[815] New Zealand's first written submission, para. 263 (referring to Panel Report, *China – Raw Materials*, paras. 7.1081-7.1082).

[816] New Zealand's first written submission, para. 263 (referring to Panel Report, *China – Raw Materials*, para. 7.1082).

[817] New Zealand's first written submission, para. 265 (referring to Appellate Body Report, *Chile – Price Band System*, para. 254(b)).

[818] United States' first written submission, para. 202.

[819] United States' first written submission, paras. 314–315; second written submission, para. 33; response to Panel question No. 39, para. 110.

system, as the reference price calculation methodology and parameters are not published[820] and the reference price can be re-evaluated at any time.[821] On the other hand, the design and structure of this Measure incentivizes importers to be conservative in the amounts of their imports because increments in the supply of the chillies and shallots in the domestic market increase the likelihood of the reference price system being triggered and importation being "postponed". Indeed, any increase in imports is likely to increase the supply of these products in the Indonesian market, threatening to depress domestic prices and activate the reference price system with the ensuing import ban. Importers would therefore have an incentive to limit the quantities they import to prevent the price falling below the activation threshold. In this sense, the mere possibility that the importation of chillies and shallots may be banned altogether creates incentives for importers to limit the amounts of chillies and shallots they import into Indonesia at any time and not just when the reference price system is actually triggered.

7.223. It is for these reasons that we cannot agree with Indonesia's attempt to justify its reference price system by arguing that it is not continuously in effect and that even when the market prices for chillies and shallots drop below the set reference price, this system is not automatically activated because the price drop will first trigger the relevant agency to investigate whether price volatility of these sensitive products merits a temporary cessation of imports.[822] As we stated above, the reference price system has a limiting effect on importation even when not actually triggered because it influences importers' decisions at all times as they will have an incentive to elude the Measure and mitigate its consequences.

7.224. As argued by New Zealand, the panel in *Chile Price Band System* confirmed the approach taken by earlier panels, including *Colombia – Ports of Entry*,[823] that "uncertainty" created by a measure may constitute a restriction within the meaning of Article XI:1.[824] We agree with New Zealand that there is inherent uncertainty in the reference price system for chillies and shallots and that the setting of reference prices is opaque.[825]

7.225. Although not necessary to establish the limiting effect of Measure 7[826], the parties have also addressed its adverse impact on importation, relying on trade statistics and market price information to support their contention.[827] Of particular interest to the Panel's analysis is Exhibit IDN-31 providing the domestic and reference prices for big red chilli, curly red chilli and shallot, on a monthly basis. Responding to the Panel's inquiry as to the specific instances where the reference price system was actually triggered with respect to each covered product in the course of 2013-2015, Indonesia merely stated that "the reference price system for chilli and shallot was in place in 2015".[828] Thus, it is unclear to us if, and when, the system was actually triggered, which adds another element of unpredictability. Based on Exhibit IDN-31, the Panel can only observe the instances where the domestic prices for big red and curly red chillies and fresh shallots fell below the levels pre-determined by the Ministry of Trade, as reflected in the following graphs:

[820] Indonesia's response to Panel question No. 35; United States' response to Panel question No. 11, citing Exhibit USA-31.

[821] Article 14B(3) of MOT 16/2013, as amended by MOT 47/2013, Exhibit JE-10.

[822] Indonesia's second written submission, para. 255.

[823] New Zealand's first written submission, para. 266 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.240).

[824] New Zealand's first written submission, para. 266 (referring to Panel Report, *Argentina – Import Measures*, para. 6.260).

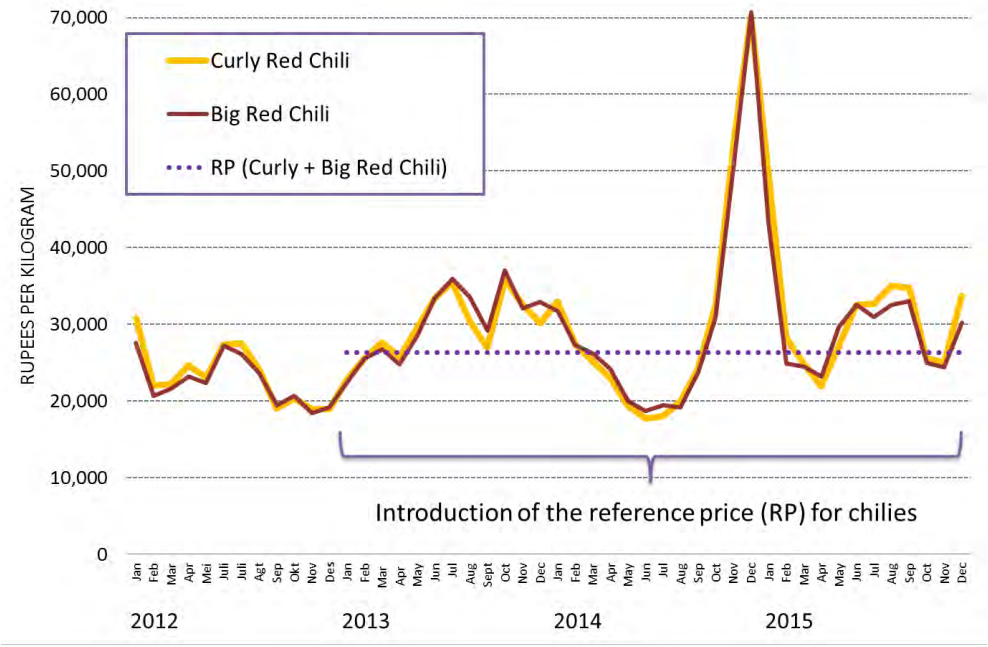
[825] New Zealand's first written submission, para. 266 (referring to "Horticultural Import Policy in Indonesia" *FFTC Paper*, Exhibit NZL–59).

[826] *See* Section 7.2.3.2.2 above.

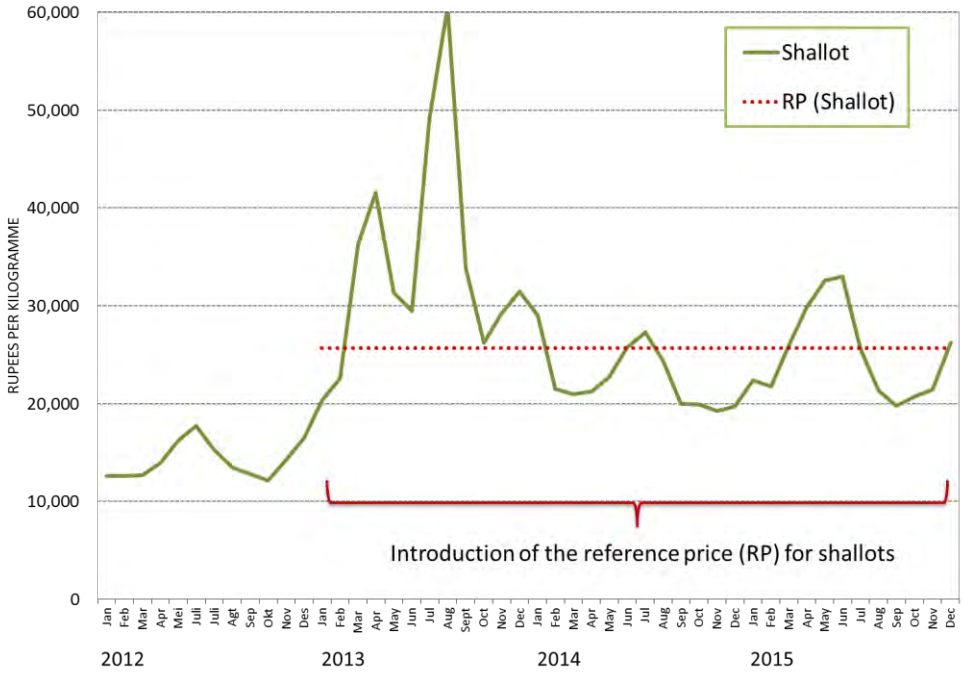
[827] Responding to Panel question No. 19(a) seeking monthly import statistics in volume terms, Indonesia submits Exhibit IDN-29, which only provides annual import statistics of chillies and shallots for the 2009-2014 period. Monthly import statistics are only given for the first four months of 2015; *See also* Exhibit USA-87 and Corr.1 (annual imports of listed fresh horticultural products in 2009-2015, among which chillies and fresh shallots), showing that imports of chillies fell by 99% from 2011 to 2014 while imports of shallots fell by 53.5% during the same period, and by 90% from 2011 to 2015.

[828] Indonesia's response to Panel question No. 37.

Domestic and Reference Prices for Big RED and Curly RED Chillies, 2012-2015 *(Rupees per kilogram)*



Domestic and Reference Prices for Fresh Shallots, 2012-2015 *(Rupees per kilogram)*



Source: Indonesia's response to Panel question No. 38. Exhibit IDN-31

7.226. The evidence submitted by Indonesia confirms our conclusion that the design, architecture and revealing structure of Measure 7 and its resulting operation, have a limiting effect on importation into Indonesia.

7.2.11.3 Conclusion

7.227. For the reasons stated above, we find that Measure 7 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.2.12 Whether Measure 8 (Six-month harvest requirement) is inconsistent with Article XI:I of the GATT 1994

7.2.12.1 Arguments of the Parties

7.2.12.1.1 New Zealand

7.228. New Zealand claims that the six-month harvest requirement operates as a prohibition on imports of horticultural products and therefore falls within the scope of a prohibition or restriction contrary to Article XI:1 of the GATT 1994.[829] New Zealand submits that Indonesia requires that imported fresh horticultural products must have been harvested less than six months previously.[830] According to New Zealand, an RIPH may only be issued to an importer of horticultural products provided that a declaration to this effect is submitted as part of the application.[831] If an importer is found to have made an incorrect statement in its RIPH application, an RIPH will not be granted for one year, rendering that importer unable to import horticultural products into Indonesia.[832] New Zealand argues that the Appellate Body in *China – Raw Materials* considered that the term "prohibition" was a "legal ban on the trade or importation of a specified commodity"[833], and the panel in *US – Poultry (China)* found that the rule of the United States "had the effect of prohibiting the importation of poultry products from China".[834] Similarly, New Zealand argues that in *Brazil – Retreaded Tyres*, the measure at issue "operate[d] so as to prohibit" the importation of retreaded tyres.[835]

7.229. According to New Zealand, Indonesia appears to concede that its prohibition on the import of horticultural products harvested more than six months previously is a ban on importation, but argues that this requirement does not limit imports because imported products can be stored in Indonesia instead.[836] For New Zealand, Indonesia fails to have regard to the meaning of the term "prohibition" in Article XI:1 of the GATT 1994 which is considered by the Appellate Body to be a "legal ban on the trade or importation of a specified commodity".[837]

7.2.12.1.2 United States

7.230. The United States claims that Indonesia requires that all imported fresh horticultural products must have been harvested less than six months prior to importation and that this requirement is a restriction inconsistent with Article XI:1 of the GATT 1994.[838] The United States also claims that this requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[839] The United States submits that to obtain an RIPH, MOA 86/2013, as amended, requires an RI to affirm that it will not import any fresh horticultural products that were harvested more than six months previously.[840] The United States also submits that Indonesia

[829] New Zealand's first written submission, para. 270; second written submission, para. 276.
[830] New Zealand's first written submission, para. 268 (referring to Article 8(1), MOA 86/2013, Exhibit JE-15).
[831] New Zealand's first written submission, para. 268 (referring to Article 8(1)(a), MOA 86/2013, Exhibit JE-15).
[832] New Zealand's first written submission, para. 268 (referring to Article 14, MOA 86/2013, Exhibit JE-15).
[833] New Zealand's first written submission, para. 269 (referring to Appellate Body Report, *China – Raw Materials*, para. 319).
[834] New Zealand's first written submission, para. 269 (referring to Panel Report, *US – Poultry (China)*, para. 7.457).
[835] New Zealand's first written submission, para. 269 (referring to Panel Report, *Brazil – Retreaded Tyres*, para. 7.14).
[836] New Zealand's second written submission, para. 276 (referring to Indonesia's first written submission, paras. 88 and 150-152).
[837] New Zealand's second written submission, para. 276 (referring to Appellate Body Report, *China – Raw Materials*, para. 319).
[838] United States' first written submission, para. 204; second written submission, para. 36.
[839] United States' first written submission, fn. 342.
[840] United States' first written submission, para. 204 (referring to Article 8 of MOA 86/2013 , Exhibit JE-15).

requires an RI to submit as part of its RIPH application a statement committing to follow the requirement, and if the RI violates this requirement, it will not be granted an RIPH or permitted to import horticultural products for one year.[841] The United States argues that this requirement is a limitation or limiting condition on importation, or has a limiting effect on importation. The United States argues that the importer may not import products according to commercial considerations, but only those products meeting the requirement and that a failure to comply may further lead to the importer losing the right to import horticultural products for one year.[842] The United States thus contends that the six-month harvest requirement constitutes a "restriction" within the meaning of Article XI:1.[843]

7.231. The United States further submits that the six-month harvest requirement has a pronounced impact on those fresh horticultural products that can be stored for more than six months, such as apples, since they can be stored in a controlled atmosphere after harvest, where they remain fresh for more than six months. The United States submits that, consequently, apples and certain other horticultural products can be shipped year-round to global markets[844], but, under the six-month harvest requirement, RIs are effectively prohibited from importing apples from the United States into Indonesia from April to October.[845] The United States submits that 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.[846] The United States claims that, similarly, Indonesia's requirement imposes a limitation based on the time certain imported horticultural products were harvested thus having a limiting effect on the quantity allowed into Indonesia.[847]

7.2.12.1.3 Indonesia

7.232. Indonesia claims that the "harvest plus six months limitation" for fresh horticultural imports is not a restriction on imports within the meaning of Article XI:1 of the GATT 1994.[848]

7.233. Indonesia submits that, as importers are required to acquire storage facilities under its licensing regime, they may easily import goods within six months of harvest and then store them locally for longer periods. Indonesia argues that the rationale behind this requirement lies in the need to ensure food safety, as having fresh horticultural products imported sooner allows Indonesian health authorities to inspect them to "ensure quality" instead of importing such goods at a later date "when it is impossible to verify that proper storage procedures have been followed".[849] Indonesia further argues that storing goods locally does not place any burden on importers as these goods will be stored "somewhere" and that it is highly likely that the price of storing such products would be "far less expensive" in Indonesia than in either the United States or New Zealand, where real estate prices are higher.[850]

7.2.12.2 Analysis by the Panel

7.234. The task before the Panel is to establish whether, as claimed by the co-complainants, Measure 8 constitutes a restriction on importation inconsistent with Article XI:1 of the GATT 1994 because only horticultural products that have been harvested less than six months prior to importation can be imported.

7.235. We commence by noting that the co-complainants argued that Measure 8 constitutes a restriction on importation[851], and that it is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[852] New Zealand argued that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 8,

[841] United States' first written submission, para. 205; second written submission, para. 37.
[842] United States' first written submission, para. 205 (referring to MOA 86/2013, Exhibit JE-15).
[843] United States' first written submission, para. 206.
[844] United States' first written submission, para. 204 (referring to Controlled Atmospheric Storage, Washington Apple Commission, Exhibit. USA-34); second written submission, para. 37.
[845] United States' first written submission, para. 207.
[846] United States' first written submission, para. 208 (referring to Panel Report *Turkey – Rice*, para. 7.121).
[847] United States' first written submission, para. 208.
[848] Indonesia's first written submission, para. 152.
[849] Indonesia's first written submission, para. 151
[850] Indonesia's first written submission, para. 151.
[851] New Zealand's first written submission, para. 258; United States' first written submission, para. 192.
[852] New Zealand's first written submission, para. 258; United States' first written submission, fn. 342.

constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure".[853] The United States submitted that Article XI:1 applies to *any* "restriction," including those "made effective through quotas, import or export licenses *or other measures*."[854]

7.236. We observe that Indonesia has not contested the co-complainants' characterisation of Measure 8.[855] Rather, it has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[856] We recall our conclusion in Section 7.2.3.2.1 above whereby automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. Given the description of Measure 8 in Section 2.3.2.8 above, we concur with the co-complainants that Measure 8 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

7.237. As with the previous measures[857], we proceed to examine whether the co-complainants have demonstrated that Measure 8 prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective. In doing so, we will determine whether the co-complainants have demonstrated that Measure 8 has a limiting effect on importation. To carry out this analysis, we recall that the Panel is to examine the design, architecture, and revealing structure of Measure 8, within its relevant context.

7.238. As described in Section 2.3.2.8 above, Measure 8 consists of the requirement that all imported fresh horticultural products be harvested less than six months prior to importation.[858] Indonesia implements this measure by means of Article 8(1)(a) of MOA 86/2013 which establishes that to obtain an RIPH for fresh horticultural products, an RI must produce a statement committing not to import horticultural products that were harvested more than six months prior to importation.

7.239. We observe that the co-complainants consider that Measure 8 is either a straight prohibition on importation (New Zealand) or a limitation or limiting condition on importation, or that it has a limiting effect on importation (United States). For instance, New Zealand claimed that the six-month harvest requirement operates as a prohibition on imports of horticultural products.[859] New Zealand emphasized that an RIPH may only be issued to an importer of horticultural products provided that a declaration to this effect is submitted as part of the application[860], and that if the importer is found to have made an incorrect statement, an RIPH will not be granted for one year, rendering importers ineligible to import horticultural products into Indonesia.[861]

7.240. Similarly, the United States argued that Measure 8 imposes a limitation based on the time certain imported horticultural products were harvested and thus has a limiting effect on the quantity allowed into Indonesia.[862] The United States also argued that an importer may not import products according to commercial considerations, but only import those products meeting such a requirement, and that non-compliance may cause the importer to lose the right to import horticultural products for one year.[863] The United States thus focused on the limiting effect that Measure 8 has on competitive opportunities. The United States further contended that Measure 8 has a particularly restrictive impact on those fresh horticultural products, such as apples, that can be stored in a controlled atmosphere where they can remain fresh for more than six months.[864] Consequently, while apples and certain other horticultural products can be shipped year-round to global markets, under Measure 8, RIs are effectively prohibited from importing apples from the

[853] New Zealand's first written submission, para. 284.
[854] United States' first written submission, para. 142.
[855] Indonesia's response to Panel question No. 10.
[856] Indonesia's second written submission, para. 165.
[857] *See*, for instance, paragraph 7.76 above.
[858] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 111; United States' first written submission, paras. 76 and 204.
[859] New Zealand's first written submission, para. 270; second written submission, para. 276.
[860] New Zealand's first written submission, para. 268 (referring to Article 8(1)(a) of MOA 86/2013, Exhibit JE-15).
[861] New Zealand's first written submission, para. 268 (referring to Article 14 of MOA 86/2013, Exhibit JE-15). This view is shared by the United States. *See* United States' first written submission, para. 205; second written submission, para. 37.
[862] United States' first written submission, para. 208.
[863] United States' first written submission, para. 205 (referring to MOA 86/2013, Exhibit JE-15).
[864] United States' first written submission, para. 204 (referring to Controlled Atmospheric Storage, Washington Apple Commission, Exhibit. USA-34); second written submission, para. 37.

United States into Indonesia from April to October.[865] The United States submitted that 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 constitutes a quantitative restriction.[866] The United States contended that 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.[867]

7.241. We observe that Measure 8 is designed to prohibit the importation of all horticultural products that have been harvested more than six months prior to importation. To us, this is an absolute ban on these products that, as argued by New Zealand[868], falls squarely into the definition of a "prohibition" under Article XI:1 of the GATT 1994.[869] We note that New Zealand also drew the Panel's attention to the panel report in *US – Poultry (China)* where the measure at issue was found to have "the effect of prohibiting the importation of poultry products from China", and was thus found to be inconsistent with Article XI:1.[870] Similarly, New Zealand argued that in *Brazil – Retreaded Tyres*, the measure at issue "operate[d] so as to prohibit" the importation of retreaded tyres.[871] We agree with the co-complainants that Measure 8 constitutes a straightforward import prohibition for products harvested more than six-months before, and, in this respect, it is inconsistent with Article XI:1 of the GATT 1994.

7.242. We observe that Indonesia attempted to justify this Measure on food safety grounds, in the sense that having fresh horticultural products imported sooner after harvest allows Indonesian health authorities to inspect the product to "ensure quality" instead of importing such goods at a later date "when it is impossible to verify that proper storage procedures have been followed".[872] Indonesia further argued that storing goods locally does not place any burden on importers as these goods will be stored "somewhere" and that it is highly likely that the price of storing such products would be "far less expensive" in Indonesia than in either the United States or New Zealand, where real estate prices are higher.[873] Whilst we do not think that these are valid arguments in terms of justifying an import ban, they would rather seem to belong to the realm of exceptions and not within our analysis under Article XI:1 of the GATT 1994.

7.2.12.3 Conclusion

7.243. For the reasons stated above, we find that Measure 8 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a prohibition on importation.

7.2.13 Whether Measure 9 (Indonesia's import licensing regime for horticultural products as a whole) is inconsistent with Article XI:1 of the GATT 1994

7.2.13.1 Arguments of the parties

7.2.13.1.1 New Zealand

7.244. New Zealand claims that, in addition to each of the components of Indonesia's import licensing regime for horticultural products operating independently being inconsistent with Article XI:1, these trade restrictive requirements, viewed as a whole, are inconsistent with Article XI:1 of the GATT 1994.[874] New Zealand argues that, in *Argentina – Import Measures,* the panel and the Appellate Body considered whether individual trade restrictive requirements can constitute a single

[865] United States' first written submission, para. 207.
[866] United States' first written submission, para. 208 (referring to Panel Report *Turkey – Rice*, para.7.121).
[867] United States' first written submission, para. 208.
[868] New Zealand's first written submission, para. 269 (referring to Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (in turn, referring to Appellate Body Reports, *China – Raw Materials*, para. 319)).
[869] We recall that the Appellate Body has defined this term as a "legal ban on the trade or importation of a specified commodity". Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to the Appellate Body Reports, *China – Raw Materials*, para. 319).
[870] New Zealand's first written submission, para. 269 (referring to Panel Report, *US – Poultry (China)*, para. 7.457).
[871] New Zealand's first written submission, para. 269 (referring to Panel Report, *Brazil – Retreaded Tyres*, para. 7.14).
[872] Indonesia's first written submission, para. 151
[873] Indonesia's first written submission, para. 151.
[874] New Zealand's first written submission, para. 271; second written submission, para. 283.

measure and stated that it is the manner in which they operate in combination which determines the existence and content of a single measure.[875] New Zealand argues that where different elements contribute in different combinations and degrees, as part of a single measure, to the realization of a common policy objective, it would be artificial only to consider them individually.[876] New Zealand maintains that the present dispute is similar to the situation in *Argentina – Import Measures* because the components of Indonesia's import licensing regime constitute different elements that contribute towards Indonesia's policy objective of "self-sufficiency". For New Zealand, it is not solely through individual and distinct measures, but through a regime with integrated components, that the true extent of the restrictive nature of the Indonesian import licensing regime can be seen.[877]

7.245. New Zealand further argues that Indonesia's import licensing regime as a whole has a limiting effect on imports stemming from the combined effects of individual measures, which are themselves trade restrictive.[878] New Zealand argues that this is due to two reasons: first, the import licensing regime for listed horticultural products restricts the opportunities to market imported horticultural products in Indonesia[879], and second, Indonesia restricts the volume of horticultural products that may be imported into Indonesia.[880] New Zealand maintains that the various components of Indonesia's restrictive import licensing regime viewed individually and in combination create disincentives to import. New Zealand submits that the design of the import licensing regime is geared toward limiting the importation of horticultural products as part of an overarching policy objective of achieving "self-sufficiency" in certain foodstuffs.[881] New Zealand argues that they fall within the analytical framework adopted by the panel in *Argentina – Import Measures*[882] and, in this sense, the restrictive impact of the import licensing regime viewed collectively is greater than the sum of its parts.[883]

7.246. New Zealand submits that the components of Indonesia's import licensing regime for horticultural products, both when viewed as individual measures and as a single overarching measure, constitute restrictions made effective through an "import licence" or, alternatively, an "other measure" within the meaning of Article XI:1 of the GATT 1994.[884] According to New Zealand, Indonesia's Importer Designations, RIPHs and Import Approvals, all fall within the ordinary meaning of the term "import licence" since an importer may not import products unless and until it has obtained the relevant Importer Designation, RIPH and Import Approval.[885] New Zealand also submits that the other requirements imposed by Indonesia on the import of horticultural products, namely the storage ownership and capacity requirements, the restrictions on use, sale and distribution, the use of reference prices, and the six-month harvest requirement are all requirements which are "made effective" through import licences since they are inextricably linked to the import licensing regime for horticultural products.[886]

7.247. New Zealand alternatively argues that, in any event, these requirements are "other measures" that fall within the scope of Article XI of the GATT 1994. New Zealand submits that the panel in *US – Poultry (China)* summarized the WTO and GATT jurisprudence on the notion of "other measures" concluding that the term encompasses a "broad residual category" and includes any type of measure, "irrespective of the legal status of the measure".[887]

7.248. Responding to Indonesia's argument that the co-complainants "have failed to present sufficient pre- and post-implementation data" to support the argument that the regime as a whole

[875] New Zealand's first written submission, para. 272 (referring to Panel Report, *Argentina – Import Measures*, paras. 6.223-6.225).
[876] New Zealand's first written submission, para. 272 (referring to Panel Report, *Argentina – Import Measures*, para. 6.228).
[877] New Zealand's first written submission, para. 273.
[878] New Zealand's first written submission, para. 274.
[879] New Zealand's first written submission, para. 274.
[880] New Zealand's first written submission, para. 274.
[881] New Zealand's first written submission, para. 275.
[882] New Zealand's first written submission, para. 275 (referring to Panel Report, *Argentina – Import Measures*, para. 6.474).
[883] New Zealand's first written submission, para. 275.
[884] New Zealand's first written submission, para. 278.
[885] New Zealand's first written submission, para. 280.
[886] New Zealand's first written submission, para. 281.
[887] New Zealand's first written submission, para. 283 (referring to Panel Report, *US – Poultry (China)*, para. 7.450).

restricts imports of horticultural products[888], New Zealand argues that Indonesia has again sought to rely on a false premise that quantification of trade effects is necessary for a breach of Article XI:1 to be found.[889]

7.2.13.1.2 United States

7.249. The United States claims that the Indonesian import licensing regime is a "restriction" within the meaning of Article XI:1 of the GATT 1994, and that Indonesia breaches Article XI:1 by instituting or maintaining this regime. The United States argues that Indonesia's import licensing regime for horticultural products serves as a limitation or limiting condition on importation, or has a limiting effect on importation. The United States argues that 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. [890]

7.250. For the United States, the various import requirements as maintained through MOT 16/2013, as amended by MOT 47/2013, and MOA 86/2013[891], 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 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"[892] and to prohibit importation "when the availability of domestic Agricultural Commodities is sufficient".[893]

7.2.13.1.3 Indonesia

7.251. Indonesia claims that the co-complainants have failed to establish that any of the components of Indonesia's import licensing regime for horticultural products constitute "restrictions" on imports and therefore Indonesia's import licensing regime as a whole is not a "restriction" within the meaning of Article XI:1 of the GATT 1994.

7.252. Indonesia also claims that its import licensing for certain horticulture products is automatic, pursuant to Article 2 of the Import Licensing Agreement.[894] For Indonesia, automatic import licensing is expressly permitted under Article 2.2(a) of the Import Licensing Agreement and therefore excluded from the scope of Article XI:1 of GATT 1994.[895] Indonesia contends that it has repeatedly submitted that no application of Import Approval has ever been rejected for certain horticulture products provided that all legal requirements set forth under MOT 16/2013 or MOT 71/2015 have been fulfilled by the importers in their applications. For Indonesia, no RIPH applications have ever been rejected for certain horticulture products provided that all legal requirements set forth under MOA 86/2013 have been fulfilled by the importers in their applications.[896] Indonesia argues that this shows that its import licensing for certain horticulture products implemented through RIPH and Import Approvals have been granted in all cases pursuant to Article 2(1) of Import Licensing Agreement and that the co-complainants have failed to submit any evidence indicating that an RIPH or Import Approval application was rejected when fulfilling all legal requirements.[897]

7.253. Indonesia further contends that its import licensing for certain horticulture products implemented through RIPHs and Import Approvals is not administered in such a manner as to have restricting effects on imports subject to automatic licensing pursuant to Article 2 (2)(a)

[888] New Zealand's second written submission, para. 284 (referring to Indonesia's first written submission, para. 95).
[889] New Zealand's second written submission, para. 284.
[890] United States' first written submission, para. 216.
[891] United States' first written submission, para. 211.
[892] United States' first written submission, para. 215 (referring to Article 3 of the Horticulture Law, Exhibit JE-1).
[893] United States' first written submission, para. 215 (referring to Article 30 of the Farmers Law, Exhibit JE-3).
[894] Indonesia's second written submission, paras. 44 and 66.
[895] Indonesia's second written submission, para. 67.
[896] Indonesia's second written submission, para. 47 (referring to Indonesia's first written submission, paras. 63 and 176; Indonesia's opening statement during the first substantive meeting, para. 18; Indonesia's responses to Panel's Questions No. 8 and 52).
[897] Indonesia's second written submission, paras. 50 and 51.

because it complies with the elements of this provision.[898] For Indonesia, the co-complainants have not alleged that its import licensing limits the person, firm, or institution that is eligible to apply for and obtain an import licence because any person, firm or institution is equally eligible to apply for and obtain import licences.[899] With respect to the timing of applications, Indonesia contends that pursuant to Article 8(1) of MOT 71/2015 for certain horticultural products, Import Approvals must be granted within two working days and that pursuant to Article 12(1) of MOA 86/2013 for certain horticultural products RIPHs must be granted within seven working days.[900]

7.254. Responding to the co-complainants' argument that Indonesia's import licensing for certain horticultural products is not automatic because the applications for licences cannot be submitted on any working day prior to customs clearance and because this application window requirement has a restricting effect on imports[901], Indonesia contends that this narrow interpretation of Article 2(2)(a)(ii) of the Import Licensing Agreement is incorrect for two reasons.[902] First, the co-complainants erred in contending that the existence of the application windows to apply for RIPH and Import Approvals for certain *fresh* horticultural products is inconsistent with Article 2 (2)(a)(ii) of the Import Licensing Agreement and therefore Indonesia's import licensing for all horticultural products are not automatic. Indonesia explains that the application window for Import Approvals is not applicable for fresh chillies and shallots, processed horticultural products, and for fresh horticulture imports to be used as raw materials for API-P holders.[903] Second, Indonesia disagrees with the co-complainants' broad interpretation of Article 2(2)(a)(ii) of the Import Licensing Agreement, whereby an import licence application must be accepted on any working day prior to customs clearance, with indefinite time.[904] For Indonesia, Article 2(2)(a)(ii) of the Import Licensing Agreement must be seen in conjunction with Article 1(6) of Import Licensing Agreement, which acknowledges that an application window for import licensing application procedures is allowed under the Import Licensing Agreement. Indonesia contends that it allows 15 working days for the application window to apply for RIPH for horticultural products, a one-month window to apply for an MOA Recommendation for animal products, and a one-month window for Import Approval applications. For Indonesia, this is already in line with Article 1(6) of the Import Licensing Agreement.[905]

7.255. Indonesia also contends that, even if its import licensing regime for horticulture products is considered to fall 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 is not a "quantitative restriction".[906] Indonesia submits 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 of products are inconsistent with Article XI and this limitation need not be demonstrated by quantifying the effects of the measure at issue, but rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.[907] For Indonesia, a complainant must show through clear and convincing evidence that the measure at issue has a "limiting effect on importation". According to Indonesia, just because Article XI:1 does not require precise quantification of the trade effects of a challenged measure does not mean that a complainant is excused from demonstrating that the measure has some effect on trade.[908] According to Indonesia, the co-complainants have failed to present sufficient pre- and post-implementation import data to support the assertion that its import licensing regime for horticultural products "as a whole" operates to restrict the quantity of imports. Indonesia maintains that there is no reason to believe there is a causal connection between the slowing of imports in the middle of the year, as presented by New Zealand[909] and the application windows and validity periods for Indonesia's import licences. Indonesia argues that, on the contrary, it has

[898] Indonesia's second written submission, para. 52.
[899] Indonesia's second written submission, para. 53.
[900] Indonesia's second written submission, para. 54.
[901] Indonesia's second written submission, para. 66 (referring to United States' first written submission, paras. 386-387 and New Zealand's first written submission, paras. 423-426).
[902] Indonesia's second written submission, para. 55.
[903] Indonesia's second written submission, para. 57 (referring to Article 12 of MOT 71/2015, Exhibit IDN-9).
[904] Indonesia's second written submission, para. 59.
[905] Indonesia's second written submission, paras. 64-65.
[906] Indonesia's second written submission, para. 68.
[907] Indonesia's second written submission, para. 70 (referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.217).
[908] Indonesia's second written submission, para. 71.
[909] Indonesia's second written submission, para. 73 (referring to New Zealand's first written submission, Annex 5).

shown that the complainants' market share increased for certain horticultural products, both fresh and processed.[910]

7.2.13.2 Analysis by the Panel

7.256. The task before the Panel is to establish whether, as claimed by the co-complainants, Measure 9, i.e. Indonesia's import licensing regime for horticultural products as a whole, is inconsistent with Article XI:1 of the GATT 1994. In particular, we are to determine whether Measure 9 has a limiting effect on importation as a result of the combined operation of the different requirements that compose Indonesia's import licensing regime for horticultural products.

7.257. We commence by observing that the co-complainants argued that Measure 9 constitutes a restriction on importation[911], and that it is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[912] New Zealand argued that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 9, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure".[913] The United States submitted that Article XI:1 applies to *any* "restriction," including those "made effective through quotas, import or export licenses *or other measures*"-[914]

7.258. We observe that Indonesia has not contested the co-complainants' characterisation of Measure 9.[915] Rather, it has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[916] We recall our conclusion in Section 7.2.3.2.1 above whereby automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. Given the description of Measure 9 in Section 2.3.2.9 above, we concur with the co-complainants that Measure 9 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

7.259. As with the previous measures[917], we proceed to examine whether the co-complainants have demonstrated that Measure 9 prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective. In doing so, we will determine whether the co-complainants have demonstrated that Measure 9 has a limiting effect on importation.

7.260. As described in Section 2.3.2.9 above, Measure 9 consists of Indonesia's import licensing regime for horticultural products, as maintained through MOT 16/2013, as amended by MOT 47/2013, and MOA 86/2013, as a whole.[918] We understand that Measure 9, as described by the co-complainants, consists of the ensemble of Measures 1 through 8 and would therefore not include requirements pertaining to Indonesia's import licensing regime for horticultural products, other than those encompassed in Measures 1 through 8.[919] We further understand that the co-complainants are challenging Indonesia's import licensing regime for horticultural products as a whole on grounds that it is distinct from Measures 1 through 8, inasmuch as it relates to the combined effect and operation of those measures to achieve certain policy goals.[920]

7.261. In this respect, New Zealand argued that it is not solely through individual and distinct measures, but through a regime with integrated components, that the true extent of the restrictive nature of the Indonesian import licensing regime for horticultural products can be perceived.[921] For New Zealand, the various distinct requirements are cumulatively more restrictive than the sum of each of the individual requirements due to the way in which the requirements interact with each other.[922] New Zealand argued that this is due to two reasons: first, the import licensing regime for

[910] Indonesia's second written submission, para. 74 (referring to Indonesia's first written submission, para. 178).
[911] New Zealand's first written submission, para. 276; United States' first written submission, para. 210.
[912] New Zealand's first written submission, para. 284; United States' first written submission, fn. 347.
[913] New Zealand's first written submission, para. 278.
[914] United States' first written submission, para. 142.
[915] Indonesia's response to Panel question No. 10.
[916] Indonesia's second written submission, para. 165.
[917] *See,* for instance, paragraph 7.76 above.
[918] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 274; United States' first written submission, para. 211.
[919] *See* for instance New Zealand's opening statement at the second substantive meeting, para. 27.
[920] New Zealand's first written submission, para. 273; United States' first written submission, para. 215; Indonesia's response to Panel question No. 82.
[921] New Zealand's first written submission, para. 273; response to Panel question No. 82, para. 20.
[922] New Zealand's first written submisison, para. 275; response to Panel question No. 82.

listed horticultural products restricts the opportunities to market imported horticultural products in Indonesia[923], and second, Indonesia restricts the volume of horticultural products that may be imported into Indonesia.[924] New Zealand maintained that the various components of Indonesia's restrictive import licensing regime viewed individually and in combination create disincentives to import. For New Zealand, the design of the import licensing regime is geared toward limiting the importation of horticultural products as part of an overarching policy objective of achieving "self-sufficiency" in certain foodstuffs.[925]

7.262. The United States was also of the same view and explained that the various import requirements as maintained through MOT 16/2013, as amended by MOT 47/2013, and MOA 86/2013[926], 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. For the United States, 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"[927] and to prohibit importation "when the availability of domestic Agricultural Commodities is sufficient."[928]

7.263. Indonesia's main contention is that its import licensing regime for horticultural products, animals, and animal products is an automatic import licensing regime expressly permitted under Article 2.2(a) of Import Licensing Agreement and therefore, excluded from the scope of Article XI:1 of GATT 1994.[929] Indonesia also contended that, even if it is considered to fall within the scope of Article XI:1 of GATT 1994, the design, architecture, and revealing structure of Indonesia's import licensing regime as a whole is not a "quantitative restriction".[930] Indonesia submitted 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 of products are inconsistent with Article XI and this limitation need not be demonstrated by quantifying the effects of the measure at issue, but rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.[931] For Indonesia, a complainant must show through clear and convincing evidence that the measure at issue has a "limiting effect on importation", and, just because Article XI:1 does not require precise quantification of the trade effects, this does not mean a complainant is excused from demonstrating that the challenged measure has some effect on trade.[932] According to Indonesia, the co-complainants have failed to present sufficient pre- and post-implementation import data to support the assertion that its import licensing regime for horticultural products "as a whole" operates to restrict the quantity of imports.[933]

7.264. We observe that central to the co-complainants' contention that Measure 9 is inconsistent with Article XI:1 of the GATT 1994 is their argument relating to the manner in which the different requirements operate in combination[934] and how the restrictive effect of each of the components of Indonesia's import licensing regime for horticultural products is exacerbated when combined.[935] Their view is that Measures 1 to 8 are cumulatively more restrictive than the sum of each of the individual requirements due to the way in which the requirements interact with each other.[936]

7.265. We consider that the co-complainants' challenge to Indonesia's import licensing system for horticultural products, as a whole, can be more easily understood from the standpoint of an

[923] New Zealand's first written submission, para. 274.
[924] New Zealand's first written submission, para. 274.
[925] New Zealand's first written submission, para. 275.
[926] United States' first written submission, para. 211.
[927] United States' first written submission, para. 215 (referring to Article 3 of the Horticulture Law, Exhibit JE−1).
[928] United States' first written submission, para. 215 (referring to Article 30 of the Farmers Law, Exhibit JE−3).
[929] Indonesia's second written submission, para. 67.
[930] Indonesia's second written submission, para. 68.
[931] Indonesia's second written submission, para. 70 (referring to Appellate Body Reports, *Argentina − Import Measures*, para. 5.217).
[932] Indonesia's second written submission, para. 71.
[933] Indonesia's second written submission, para. 74 (referring to Indonesia's first written submission, para. 178).
[934] New Zealand's first written submission, para. 272; United States' first written submission, para. 215.
[935] New Zealand's first written submission, paras. 198-202 and 271−277; response to Panel question No. 82.
[936] United States' response to Panel question No. 82, paras. 15-16.

importer wishing to import horticultural products into Indonesia. As described in Section 2.2.2.1 above and illustrated in Annex E-1, this importer has to navigate within the confines of a number of requirements and procedures before it can effectively obtain all the necessary approvals and documents to import products into Indonesia. Among these requirements and procedures, the importer will need to comply with those encompassed in Measures 1 through 8. The design, architecture and revealing structure of Indonesia's import licensing regime for horticultural products as a whole is such that it is not enough for the importer to comply with one of the requirements; it will need to comply with all of them to be able to import into Indonesia. We thus agree with the co-complainants that the various requirements and procedures constituting Indonesia's import licensing regime for horticultural products are intrinsically related and intertwined.

7.266. As we have previously found, Measures 1 through 8 impose several restrictions and prohibitions on importation that not only limit the quantity of horticultural products that can be imported into Indonesia, sometimes imposing an absolute ban, but also affect the competitive opportunities of imported products, increase the costs associated with importation, affect the investment plans of importers, cause uncertainty in the importation business, and create incentives among importers to limit the amounts they effectively import. Although each of these measures is a prohibition or restriction under Article XI:1 of the GATT 1994 in its own right, we observe that the restrictive effects of each measure are compounded once they are seen as part of a system because they are interrelated and do not work in isolation.

7.267. For instance, as explained in paragraphs 7.111 and 7.131 above, Measure 2, which prohibits changes to RIPHs and Import Approvals throughout their validity periods, exacerbates the limiting effects of Measure 3 (80% realization requirement), and Measure 5 (storage ownership and capacity requirements) by taking away flexibility from importers to respond to changing circumstances and to be able to comply with these requirements. Also, as described in paragraph 7.131 above, Measure 3 and Measure 7 (Reference price for chillies and shallots) mutually reinforce each other's restrictive effects because importers may need to import large quantities of products during short periods of time in order to comply with the 80% realization requirement, but this may trigger the activation of the reference price because the market will have an increased supply that may cause prices to drop. Also, the limiting effects of Measure 5[937] are amplified by Measure 1 (Application windows and validity periods) because importers have to wait for until the next validity period before they can request additional quantities in case they decide to increase their storage capacity.

7.268. This amplified or exacerbated limiting effect deriving from the inherent interaction of Measures 1 through 8 in practice needs to be considered by importers when taking import-related decisions. This logically will lead to situations where the simultaneous application of these requirements, for instance, the activation of the reference price system (Measure 7), the existence of seasonal restrictions as a consequence of Indonesia's harvest period requirement (Measure 4) or the six month harvest requirement (Measure 8), may impose significant limitations as to the quantities or costs associated with importation. We can reasonably understand how by the end of an importation process, and after having tried to comply with the numerous trade-restrictive requirements imposed by Indonesia through Measures 1 through 8, an importer's ability to import can be severely impaired, if not impeded, and the importer itself may be materially discouraged from undertaking any business in Indonesia. In this sense, we agree with New Zealand that Indonesia's import licensing regime for horticultural products is characterized by an overall environment which is unfavourable to imports and importers, imposing strong disincentives for commercial operators to conduct importation and affect importer's investment plans.[938] Indonesia's argumentation either under the Import Licensing Agreement or that evidence of trade effects from the co-complainants is required[939] does not change the above conclusion.

7.269. It thus seems to us that, as evidenced through its design, architecture and revealing structure, the limiting effect of each of the challenged components constituting Measure 9 is compounded or exacerbated as a result of their inherent interaction as part of Indonesia's import licensing regime as a whole.

[937] *See* paragraph 7.175.

[938] New Zealand's first written submission, para. 202 (referring to Meat Industry Association Statement, p. 8, Exhibit NZL-12); second written submission, para. 172 (referring to European Union's first opening statement, paras. 4-5; Australia's third party written submission, para. 60).

[939] Indonesia's second written submission, para. 71.

7.2.13.3 Conclusion

7.270. For the reasons stated above, we find that Measure 9 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.2.14 Whether Measure 10 (Prohibition of importation of certain animals and animal products) is inconsistent with Article XI:I of the GATT 1994

7.2.14.1 Arguments of the parties

7.2.14.1.1 New Zealand

7.271. New Zealand claims that Indonesia uses a "positive list" system to prohibit all imports of bovine offal and certain forms of manufacturing meat and, except where emergency circumstances exist, bovine carcass and secondary cuts and that this is inconsistent with Article XI:1 of the GATT 1994. New Zealand argues that because these products are not listed in Appendix I of MOA 139/2014, they are ineligible to obtain an MOA Recommendation (and therefore an Import Approval, which requires an MOA Recommendation as a prerequisite).[940] New Zealand claims that, as a consequence of being unable to obtain MOA Recommendations and Import Approvals, importers are prohibited from importing these products, contrary to Article XI:1.[941]

7.272. New Zealand argues that in *Brazil – Retreaded Tyres,* the panel stated that the meaning of the term "prohibition" in Article XI:1 required that "Members shall not forbid the importation of any products of any other Member into their markets"[942] and that the panel in that dispute confirmed that a prohibition on the issuance of import licences necessary for the importation of retreaded tyres was inconsistent with Article XI:1.[943] New Zealand claims that, for similar reasons, Indonesia's ban on imports of bovine offal and certain forms of manufacturing meat is inconsistent with Article XI:1.[944] New Zealand submits that while it is not necessary to demonstrate the existence of actual negative trade effects resulting from these measures[945], the prohibition on importation of bovine offal (except tongue and tail) has severely limited Indonesian imports of these products. In particular, New Zealand argues that the quantity of edible bovine offal imported into Indonesia in the first six months of 2015 represented only 5% of the quantity imported in the same period in 2010.[946]

7.273. Responding to Indonesia's argument that it "does not maintain a 'positive list' of animal product imports" and that the requirements to obtain MOA Recommendations and Import Approvals "do not apply" to unlisted products[947], New Zealand contends that this is not supported by Indonesian laws, regulations, or the supplementary evidence provided by the co-complainants confirming the existence of the positive list. For New Zealand, Article 2(2) of MOT 46/2013 states that "[t]he types of Animals and Animal Products that can be imported are included in Appendix I and Appendix II"[948] and Appendix I of MOA 139/2014, which list the types of bovine meat, carcass and offal that are permitted to be imported, is entitled "Bovine meat that can be imported into the territory of the Republic of Indonesia".[949] New Zealand argues that as described by the co-complainants, animals and animal Products are defined broadly in the relevant Indonesian regulations, and *inter alia* include all edible meat, carcass, offal and other processed meat

[940] New Zealand's first written submission, paras. 131 and 135 (referring to Article 2(2) of MOT 46/2013, Exhibit JE-18).
[941] New Zealand's first written submission, paras. 131 and 135.
[942] New Zealand's first written submission, para. 133 (referring to Panel Report, *Brazil – Retreaded Tyres*, para. 7.11).
[943] New Zealand's first written submission, para. 133 (referring to Panel Report, *Brazil – Retreaded Tyres*, para. 7.15).
[944] New Zealand's first written submission, para. 133 (referring to Panel Report, *Brazil – Retreaded Tyres*, para. 7.11).
[945] New Zealand's first written submission, para. 134 (referring to Panel Report, *Argentina — Hides and Leather,* paras. 11.20-11.21),
[946] New Zealand's first written submission, para. 134 (referring to "Indonesia Import Statistics From all countries 2010-2015" *Global Trade Atlas* Exhibit, NZL-4).
[947] Indonesia's first written submission, paras. 34, 96 and 164. *See also* Indonesia's first opening statement, para. 26, stating that "animals and animal products not listed in Appendix I and II [of MOT 46/2013] are simply exempt from the requirements of that regulation".
[948] New Zealand's second written submission, para. 30.
[949] New Zealand's second written submission, para. 30.

products.[950] For New Zealand, therefore, Indonesia's laws are clear that unlisted meat, carcass, offal and other processed meat products are not permitted for importation.[951]

7.274. New Zealand notes that Indonesia does not refer at all to the Ministry of Agriculture disciplines in MOA 139/2014 and that, as noted in its first written submission, MOA 139/2014 and MOT 46/2013 *collectively* prescribe a "positive list" of the meat, offal, carcass and processed meat products that are permitted to be imported.[952] New Zealand contends that products not listed in Appendix I of MOA 139/2014 cannot obtain an MOA Recommendation or an Import Approval[953] and that Indonesia has not explained how products not listed in MOA 139/2014 are able to obtain MOA Recommendations and Import Approvals.[954] New Zealand further contends that Indonesia's own statements to the Panel confirm that certain unlisted products are prohibited. New Zealand refers to responses to the Panel's questions where Indonesia acknowledges that "certain beef offal products (specifically, heart and liver)" are not permitted to be imported.[955] Bovine heart and liver are both unlisted in the relevant regulations and Appendices.[956] For example, in its response to Panel question No. 1.2, Indonesia acknowledges that all animals and animal products (including unlisted animals and animal products) are required to "comply with all other food laws and regulations" including *inter alia* Law 18/2009 as amended by Law 41/2014.[957] According to New Zealand, this directly contradicts Indonesia's contention that the requirements to obtain MOA Recommendations and Import Approvals "do not apply" to unlisted products[958] thus reinforcing the fact that meat, offal, carcass and processed products that are not listed in the Appendices to either MOT 46/2013 or MOA 139/2014 are ineligible for importation.[959]

7.275. New Zealand points to its submission of a range of other evidence in support of its claim regarding the existence of the positive list, including trade data demonstrating the substantial drop in offal imports in 2015 as a consequence of the total ban on bovine offal imports (except tongue and tail) through MOA 139/2014[960]; data demonstrating the substantial reduction in Indonesian imports of fresh and frozen beef in 2015 as a consequence of the ban on importation of bovine secondary cuts[961]; and data demonstrating the severe drop in total Indonesian imports of bovine meat[962] and offal[963] since 2010.

7.276. According to New Zealand, the only circumstance where imports of bovine carcass and beef secondary cuts are permitted is when the Indonesian Government directs Indonesian state-owned enterprises to conduct importation of these products.[964] According to New Zealand, the relevant regulations only permit directions to the state-owned enterprises to import to be made by Indonesian ministers where (i) certain emergency conditions exist (namely a lack of food availability or an animal disease outbreak, price volatility or inflation, or a natural disaster);[965]

[950] New Zealand's second written submission, para. 30.
[951] New Zealand's second written submission, para. 30.
[952] New Zealand's second written submission, para. 31.
[953] New Zealand's first written submission, para. 38 and fn. 63−65; second written submission, para. 31.
[954] New Zealand's second written submission, para. 31.
[955] New Zealand's second written submission, para. 32 (referring to Indonesia's response to the Panel question No. 1.2 , para. 25).
[956] *See* List of bovine meat and offal products and their eligibility for importation into Indonesia (Exhibit NZL-22).
[957] Indonesia's responses to Panel question No. 1.2, para. 25.
[958] Indonesia's first written submission, paras. 34, 96 and 164.
[959] New Zealand's second written submission, para. 33.
[960] New Zealand's second written submission, para. 34 (referring to Exhibit NZL-4 and New Zealand's first written submission, para. 134).
[961] New Zealand's second written submission, para. 34 (referring to Exhibits NZL-4, NZL-5; New Zealand's first written submission, paras. 3-4, 24 and Figure 1; New Zealand's first opening statement, Figure 7).
[962] New Zealand's second written submission, para. 34 (referring to Exhibit NZL-87).
[963] New Zealand's second written submission, para. 34 (referring to Figures A and B of Annex 1 and Exhibit NZL-87).
[964] New Zealand's first written submission, para. 137 (referring to Articles 23(3) and (4), MOA 139/2014, as amended, Exhibit JE-28).
[965] New Zealand's first written submission, para. 137 (referring to Articles 23(3) and (4), MOA 139/2014, as amended, Exhibit JE-28).

(ii) approval is obtained by a second Minister[966]; and (iii) MOA Recommendations and Import Approvals are issued to the state-owned Enterprise which receives the ministerial direction.[967]

7.277. New Zealand submits that prohibiting imports except in these exceptional circumstances acts as a limitation on the opportunities for importation of bovine carcass and beef secondary cuts since importers, including state-owned enterprises, may not even *apply for licences* for bovine carcass and beef secondary cuts of their own volition and the resulting effect is that imports are not permitted at all in ordinary circumstances.[968] New Zealand argues that even if Indonesian ministers, in exceptional circumstances, permit importation of bovine carcass and beef secondary cuts by state-owned enterprises, the measure still constitutes a violation of Article XI:1.[969] According to New Zealand, the restrictions imposed on the importation of bovine carcass and beef secondary cuts are analogous to those considered in *China – Raw Materials* in that there is no certainty that imports of bovine carcass and beef secondary cuts will be permitted by the Indonesian Government.[970] New Zealand contends that the uncertainty created by the limited circumstances in which imports of bovine carcass and secondary cuts may be directed to be imported has a similar limiting effect to that described in *Argentina – Import Measures*: exporters and other economic actors are unable to predict if, or when, they will be permitted to export bovine carcass and beef secondary cuts to Indonesia[971] and this leaves exporters unable to plan in advance, causing them to reduce their planned exports to Indonesia.[972]

7.2.14.1.2 United States

7.278. The United States claims that Indonesia's import licensing regime bans the importation of certain animals and animal products by allowing the importation only of those products listed in the appendices to its import licensing regulations and that this ban is inconsistent with Article XI:1 of the GATT 1994 since it is a prohibition within the meaning of Article XI:1.[973] Additionally, the United States claims that this requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[974] The United States argues that MOT 46/2013, as amended, and MOA 139/2014, as amended, list all the types of animals and animal products "that can be imported" into Indonesia[975], and that numerous types of animals and animal products are not listed in the appendices to these regulations, including chicken cuts and parts (frozen and fresh or chilled) and secondary cuts of beef.[976] The United States maintains that because applications for Recommendations or Import Approvals to import animals or animal products that are not listed in the appendices of both regulations will not be granted, and because importers are prohibited from importing animals and animal products not specified on a valid Recommendation and Import Approval[977], animals and animal products not listed in the mentioned appendices are therefore banned.[978]

7.279. The United States submits that Indonesia's import licensing regulations for animals and animal products impose a ban on the importation of any animal or animal product that is not listed in the appendices of both MOT 46/2013 and MOA 139/2014 and that this falls under the purview of the term "prohibition" in Article XI:1 of the GATT 1994.[979] The United States refers to the panel in *US – Poultry (China)* and argues that in that case it was concluded that the challenged measure was a prohibition inconsistent with Article XI:1 because the measure at issue "had the effect of

[966] New Zealand's first written submission, para. 137 (referring to Articles 23(3) and (4) of MOA 139/2014, as amended, Exhibit JE-28).
[967] New Zealand's first written submission, para. 137 (referring to Article 18(2) of MOT 46/2013, Exhibit JE-18).
[968] New Zealand's first written submission, para. 139.
[969] New Zealand's first written submission, para. 141.
[970] New Zealand's first written submission, para. 142.
[971] New Zealand's first written submission, para. 145 (referring to Meat Industry Association Statement, p. 7, Exhibit NZL-12).
[972] New Zealand's first written submission, para. 131 (referring to Panel Report, *Argentina – Import Measures*, para. 6.260).
[973] United States' first written submission, para. 258; second written submission, para. 87.
[974] United States' first written submission, fn. 384.
[975] United States' first written submission, para. 260.
[976] United States' first written submission, para. 154 (referring to Meat Industry Letter, p. 2, Exhibit USA-44).
[977] United States' first written submission, para. 260 (referring to Article 33(b) of MOA 139/2014 as amended, Exhibit JE-28; and Article 30(2)-(3) of MOT 46/2013 as amended, Exhibit JE-21).
[978] United States' first written submission, para. 261.
[979] United States' first written submission, para. 259 (referring to Appellate Body Report, *China – Raw Materials*, para. 319)

prohibiting the importation of poultry products from China". [980] The United States also argues that 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.[981]

7.280. For the United States, Indonesia has not rebutted the co-complainants' *prima facie* demonstration that animals and animal products not listed in the appendices of MOT 46/2013, as amended, and, for carcasses, meat, and offal, the appendices of MOA 139/2014, are prohibited from being imported into Indonesia.[982] The United States notes that although Indonesia denies that it maintains a "positive list" in its first written submission[983], it does not address the co-complainants' claim based on the text of the regulations and other sources, but only refers to trade data showing that live bovine animals classified under two HS Codes were imported into Indonesia in 2013 and 2014.[984] The United States points to its response to Panel Question no. 47 where it submitted that the two tariff codes are indeed included in MOT 46/2013 as presented in Exhibit JE-18, which includes the original Bahasa version with an official signature page [985], and is the version posted on the Ministry of Trade website.[986] The United States submits that it appears that Indonesia relied on an unofficial or outdated version of MOT 46/2013 in making this argument.[987]

7.281. The United States also contends that in response to the Panel's request to clarify the legal instruments under which unlisted products could otherwise be imported, Indonesia acknowledges that "certain beef offal products" are banned.[988] Indonesia, however, maintains that other products are allowed "unless expressly prohibited by another instrument".[989] The United States contends that Indonesia did not point to any difference in the treatment of the relevant regulations of unlisted beef offal products and other unlisted animals and animal products that would explain this situation.[990]

7.2.14.1.3 Indonesia

7.282. Indonesia argues that it does not maintain a "positive list" of animal product imports and that it is "simply untrue" that only the animals and animal products listed in Appendix I and II of MOT 46/2013 are allowed to be imported into Indonesia. Indonesia submits that consequently, the "measure" challenged by complainants does not in fact exist and therefore is not a "restriction" within the meaning of Article XI:1 of the GATT 1994.[991]

7.283. Indonesia contends that, as evidenced in Exhibit IDN-32, there are other animals and animal products not listed in the regulations mentioned by the co-complainants that have been imported into Indonesia during the period of 2009 until 2015 (January-April).[992]

7.284. Indonesia claims that in any event, any animals or animal products that are not allowed to be imported into Indonesia are prohibited solely for the protection of human, animal or plant health or life under Article XX (b) of the GATT 1994.[993]

[980] United States' first written submission, para. 263 (referring to Panel Report, *US – Poultry (China)*, para. 7.457).
[981] United States' first written submission, para. 263 (referring to Panel Report, *Brazil – Retreaded Tyres*, para. 7.14).
[982] United States' second written submission, para. 91.
[983] United States' second written submission, para. 91 (referring to Indonesia's first written submission, para. 96).
[984] United States' second written submission, para. 88.
[985] United States' second written submission, para. 88 (referring to United States' response to Panel question No. 47, paras. 124-126; MOT 46/2013, as amended, p. 16-17, Exhibit JE-18).
[986] United States' second written submission, para. 88 (referring to Exhibit USA-84).
[987] United States' second written submission, para. 88.
[988] United States' second written submission, para. 90 (referring to Indonesia's response to Advance Panel question No. 24, para. 25).
[989] United States' second written submission, para. 90. (referring to Indonesia's response to Advance Panel question No. 21, para. 22).
[990] United States' second written submission, para. 90.
[991] Indonesia's first written submission, para. 164.
[992] Indonesia's second written submission, para. 205.
[993] Indonesia's second written submission, para. 206.

7.2.14.2 Analysis by the Panel

7.285. The task before the Panel is to establish whether, as claimed by the co-complainants[994], Measure 10 constitutes a prohibition on the importation of certain animals and animal products not listed in Appendices I and II of MOT 46/2013, as amended, and MOA 139/2014, as amended, and is thus inconsistent with Article XI:1 of the GATT 1994.

7.286. We begin by recalling the co-complainants' contention that Measure 10 constitutes a prohibition on importation of unlisted products[995], and that it is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[996] New Zealand argued that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 10, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure".[997] The United States submitted that Article XI:1 applies to *any* "restriction," including those "made effective through quotas, import or export licenses *or other measures*".[998]

7.287. Indonesia has not challenged that this Measure is not a duty, tax, or other charge. Given the description of Measure 10 in Section 2.3.3.1 above, we concur with the co-complainants that Measure 10 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994. Nonetheless, unlike with other Measures at issue, Indonesia has contested the co-complainants' characterisation of Measure 10 as an import prohibition on unlisted products[999] For Indonesia, the "measure" challenged by the co-complainants does not exist.[1000] There is therefore an important difference of opinion between the parties concerning the characterisation or even the existence of this Measure. We thus commence our analysis by recalling the description of Measure 10 put forward by the co-complainants and proceed to examine whether the prohibition exists.

7.288. As described in Section 2.3.3.1 above, we observe that Measure 10 consists of the prohibition on the importation of bovine meat, offal, carcass and processed products that are not listed in Appendices I of MOT 46/2013, as amended, and MOA 139/2014, as amended; or non-bovine and processed products that are not listed in Appendices II of MOT 46/2013, as amended, and MOA 139/2014, as amended; and Article 59(1) of the Animal Law Amendment.[1001] Indonesia implements this Measure by means of Article 2(2) of MOT 46/2013, as amended; and Articles 8 and 23(3) of MOA 139/2014, as amended. State-owned enterprises may be authorized to import unlisted carcasses and/or secondary cut meats to address food availability, price volatility, inflation and/or natural disasters.[1002]

7.289. As indicated, and further to the cited provisions, the co-complainants have claimed that only those animals and animal products that are listed in the relevant appendices to both MOA 139/2014, as amended, and MOT 46/2013, as amended, are eligible to obtain MOA Recommendations and Import Approvals. They have thus deduced that any bovine animal products *not* listed in both Appendix I of MOA 139/2014, as amended, and MOT 46/2013, as amended, would be *ineligible* to obtain an MOA Recommendation and an Import Approval and would therefore be prohibited from importation into Indonesia.[1003] The co-complainants further submitted that Article 26 of MOA 139/2014, as amended, provides that an application for an MOA Recommendation will be rejected if it does not meet certain requirements, including the requirement in Article 8 of that same regulation that the products specified in the application be listed in Appendix I or Appendix II of the Regulation.[1004] They further indicated that Article 2(2) of MOT 46/2013 provides that "[t]he types of Animals and Animal Products that can be imported are

[994] New Zealand's first written submission, paras. 131 and 135. United States' first written submission, para. 258; second written submission, para. 87.
[995] New Zealand's first written submission, paras. 131 and 135; United States' first written submission, para. 258.
[996] New Zealand's first written submission, para. 208; United States' first written submission, fn. 384.
[997] New Zealand's first written submission, para. 203.
[998] United States' first written submission, para. 142.
[999] Indonesia's response to Panel question No. 10.
[1000] Indonesia's first written submission, para. 164.
[1001] New Zealand's Panel Request, pp. 4-7; United States' Panel Request, pp. 4-7; New Zealand's first written submission, paras. 38-45; United States' first written submission, para. 105.
[1002] Article 23(3) of MOA 139/2014, as amended, Exhibit JE-28.
[1003] New Zealand's first written submission, para. 38; United States' first written submission, para. 260.
[1004] New Zealand's first written submission, fn.65; United States' first written submission, fn. 192.

included in Appendix I and Appendix II".[1005] In addition, both co-complainants pointed to Article 59(1) of the Animal Law as generally requiring importers to obtain an Import Approval and MOA Recommendation in order to import animal products. According to New Zealand, this provision "reinforces the point that, all animal products must, as a matter of Indonesian law, obtain Import Approvals and MOA Recommendations, whether or not listed in MOT 46/2013, as amended".[1006]

7.290. We note that the co-complainants "agree that the ban on bovine carcasses and beef secondary cuts is a subset of this broader prohibition and that, with respect to this subset of products, there is a limited exception under which Indonesia allows state-owned enterprises to import prohibited products to meet certain emergency conditions".[1007] In this context, New Zealand observed that Article 23(3) of MOA 139/2014, as amended, allows state-owned enterprises to import unlisted carcass and secondary cuts in order to address food availability and price volatility, and anticipate inflation and/or natural disasters.[1008] In New Zealand's view, this provision confirms the existence of an import prohibition on unlisted animals and animal products, except in specific situations.[1009] In other words, the only instance where imports of unlisted products are permitted is when the government instructs state-owned enterprises to import carcasses and/or secondary cut meats where certain emergency conditions are deemed to exist.

7.291. On the opposite pole, Indonesia denied that "only the animals and animal products listed in Appendix I and Appendix II of MOT 46/2013 are allowed to be imported into Indonesia"[1010] and submitted that it does not maintain a "positive list" of animal product imports. Indonesia maintained that all animals and animal products are eligible for importation, with the exception of certain beef offal (i.e., heart and liver).[1011] According to Indonesia, all animals and animal products that are not listed in Appendices I and II of MOT 46/2013 must comply with all other food-related laws and regulations, "to the extent these laws and regulations are applicable to all animals and animal products", including: the Food Law[1012]; the Animal Law and its Amendment[1013]; MOA 139/2014, as amended[1014]; MOT 57/2013[1015]; MOT 17/2014[1016]; and MOT 41/2015.[1017]

7.292. Indonesia, in spite of our requests, has failed to identify the legal provisions that would specifically allow unlisted animals and animal products to be imported. In response to a question from the Panel, Indonesia asserted that animals and animal products not listed in either Appendix II of MOT 46/2013, as amended, or MOA 139/2014, as amended, are "generally permitted to be imported into Indonesia unless expressly prohibited by another instrument or agency determination".[1018] Indonesia did not submit any legal instrument providing that imports are allowed unless expressly prohibited. Furthermore, the Panel has attempted to seek further clarification on this matter asking Indonesia to describe how Indonesian importers can obtain the "import permit" and the "recommendation" referred to in Article 59 of the Animal Law Amendment that are necessary to import bovine meat, offal and carcass products that are not listed in either Appendix I of MOT 46/2013, as amended by MOT 17/2014 or Appendix I of MOA 139/2014, as amended by MOA 2/2015.[1019] Indonesia replied that the listed products under Appendix I of MOT 46/2013 were discussed with the relevant business associations and the reasons why some products are not listed in the appendices is because there is no demand for such products in Indonesia or because they are prohibited for food safety reasons. Indonesia also submitted that

[1005] New Zealand's second written submission, para. 30; United States first written submission, para. 260.
[1006] New Zealand's response to Panel question No. 41, paras. 84-85.
[1007] United States' response to Panel question No. 3.
[1008] New Zealand's first written submission, paras. 44-45, 137-145, and 310.
[1009] *See also* paragraph 7.292 above. In paragraphs 30-35, 38-45, 131, 309-312 of its first written submission, New Zealand provided specific examples of the types of beef secondary cuts, bovine offal, and bovine manufacturing meat that are prohibited from importation. *See also* Exhibit NZL-22, an indicative list of *bovine* meat, offal and carcass products claimed by New Zealand to be prohibited from importation. *See* United States' first written submission, paras. 104 – 110, for a list of *non-bovine* meat, offal, carcass and processed meat products that are not listed in Appendix II of MOT 46/2013, as amended, and Appendix II of MOA 139/2014, as amended.
[1010] Indonesia's first written submission, para. 96.
[1011] Indonesia's response to Panel question No. 24, para. 25.
[1012] Exhibit JE-2.
[1013] Exhibits JE-4 and JE-5.
[1014] Exhibit JE-28.
[1015] Exhibit JE-19.
[1016] Exhibit JE-20.
[1017] Exhibit JE-22.
[1018] *See* Indonesia's response to Panel question No. 21.
[1019] Indonesia's response to Panel question No. 102.

there are only three recognized types of meat cuts: prime cut, secondary cut, and offal, which are all included in the Appendix I of MOT 46/2013.[1020]

7.293. As the co-complainants pointed out, Indonesia has not explained how importers of bovine meat, offal and carcass products that are not listed in both Appendix I of MOT 46/2013, as amended and Appendix I of MOA 139/2014, as amended, can obtain Import Approvals and MOA Recommendations.[1021] Indonesia has also not identified any other regulation pursuant to which a Recommendation could be granted for such products or whereby the products could be imported legally.[1022] Indonesia did indicate that all animals and animal products that are not listed in the Appendices I and II of MOT 46/2013 must comply with all other food-related laws and regulations, "to the extent these laws and regulations are applicable to all animals and animal products", including the Animal Law and its Amendment[1023] and MOA 139/2014.[1024] We also note Indonesia's contention that the requirements to obtain MOA Recommendations and Import Approvals "simply do not apply" for animals and animal products not appearing in the mentioned appendices.[1025] We recall, however, that Article 59 of the Animal Law Amendment[1026] establishes that every person wishing to import animals and animal products into Indonesia must obtain an import permit from the minister that organizes government affairs in the trade sector after obtaining a recommendation from the Minister for Fresh Animal Product or the head of the agency in the field of drug and food control for processed food products. To us, this provision confirms that all animals and animal products, except as specifically provided in the law, need an Import Approval and a Recommendation prior to importation into Indonesia, regardless of whether they are included in Appendices I and II of MOT 46/2013, as amended and MOA 139/2014, as amended. In this same vein we also note Indonesia's statement that "[w]ithout import approval from MOT and…MOA recommendation ("MOA-R") for certain animal products, an importer cannot import such products into Indonesia".[1027]

7.294. As explained in paragraph 7.292 above, the Panel sought to further clarify the implications of Article 59 of the Animal Law Amendment, in particular how importers could obtain the "import permit" and the "recommendation" necessary to import animals and animal products not listed in the relevant Appendices of MOT 46/2013, as amended, and MOA 139/2014, as amended, referred to in this provision.[1028] As pointed out by the co-complainants[1029], Indonesia's response did not address the essence of the question and, what is more, it suggested that the reasons why some products are not listed in the mentioned appendices is because there is no demand for such products in Indonesia or because they are prohibited for food safety reasons.[1030] To us, these indications should be read in conjunction with Indonesia's previous statement that certain beef offal (i.e., heart and liver) are prohibited for importation[1031] and are indicative that there are some unlisted products that cannot be imported into Indonesia. As the United States indicated, we also observe that Indonesia did not point to any difference in the treatment of the relevant regulations of unlisted beef offal products and other unlisted animals and animal products that would explain why some unlisted animal products are not allowed into Indonesia while others are.[1032]

7.295. Our conclusion is further confirmed by the existence of an exception clause authorizing state-owned enterprises to import unlisted carcasses and/or secondary cut meats to address food availability, price volatility, inflation and/or natural disasters.[1033] Allowing state-owned enterprises to import unlisted products under very specific and exceptional circumstances persuades us that, at least, those unlisted products are prohibited from importation; otherwise, the exception would not make any sense.

[1020] Indonesia's response to Panel question No. 102
[1021] New Zealand's comments on Indonesia's response to Panel question No. 102, para. 28; United States' comments on Indonesia's response to Panel question No. 102, para. 43.
[1022] United States' comments on Indonesia's response to Panel question No. 102, para. 43.
[1023] Exhibits JE-4 and JE-5.
[1024] Indonesia's response to Panel question No. 24, para. 25.
[1025] Indonesia's first written submission, paras. 34, 96 and 164.
[1026] Indonesia's response to Panel question No. 102.
[1027] Indonesia's second written submission, para. 43.
[1028] Indonesia's response to Panel question No. 102.
[1029] New Zealand's comments on Indonesia's response to Panel question No. 102, para. 28; United States' comments on Indonesia's response to Panel question No. 102, para. 43.
[1030] Indonesia's response to Panel question No. 102.
[1031] Indonesia's response to Panel question No. 24, para. 25.
[1032] United States' second written submission, para. 90.
[1033] Article 23(3) of MOA 139/2014, Exhibit JE-28.

7.296. We are mindful of Indonesia's argument that there are other animals and animal products not listed in the regulations mentioned by the co-complainants that have been imported into Indonesia, in particular, for tariff numbers 0102.29.10.90, 0102.29.90.00[1034], and those contained in Exhibit IDN-32, limited to imports from New Zealand and the United States.[1035] Regarding the first two tariff codes, and having reviewed the evidence in the record, we are persuaded by the arguments presented by United States that they are indeed included in MOT 46/2013 as shown in Exhibit JE-18 and JE-21, and that this same version is posted on the Indonesian Ministry of Trade website.[1036] We observe that Exhibit IDN-32 contains some import statistics covering the period 2009-2015 (January-April), showing positive import figures for the first four months of 2015 with respect to some tariff lines (0401.50.90.00, 0401.50.10.00, 0401.20.10.00, among others) that are not listed in the Appendices of MOT 46/2013, as amended. However, Exhibit IDN-32 also shows that there have been a wide variety of unlisted products where no imports have been made in that same period. Exhibit USA-89 reinforces this point: a number of unlisted products (*e.g.* cuts and edible offal of fresh and frozen chicken and turkey; fresh and frozen bovine carcases and half-carcasses) have been zero or near zero since the import licensing regime became effective.[1037] To us, the evidence presented is inconclusive because it does not show that products not listed in the referred appendices can obtain the relevant import documents as mandated by Article 59 the Animal Law Amendment, which clearly requires this as a condition for importation.

7.297. Accordingly, on the basis of the regulations on the record and in the absence of effective rebuttal from Indonesia, we consider that the co-complainants have presented a *prima facie* case that Indonesia's regulations only allow for the importation of animals and animal products listed in Appendices I of MOT 46/2013, as amended, and MOA 139/2014, as amended; or non-bovine and processed products listed in Appendices II of MOT 46/2013, as amended, and MOA 139/2014, as amended. We thus agree with the co-complainants in that Indonesia's regulations prohibit the importation of certain animals and animal products not listed in Appendices I and II of MOT 46/2013, as amended, and MOA 139/2014, as amended. We consider that this ban falls squarely into the definition of a "prohibition" under Article XI:1 of the GATT 1994.[1038]

7.298. On the basis of the foregoing, we conclude that Measure 10 imposes a prohibition on the importation of certain animals and animal products not listed in Appendices I and II of MOT 46/2013, as amended, and MOA 139/2014, as amended, and is thus inconsistent with Article XI:1 of the GATT 1994. Having reached this conclusion, we do not think that it is necessary for the positive resolution of this dispute to continue our analysis of New Zealand's contention that the limited exception for state-owned enterprises that may be authorized to import unlisted carcasses and/or secondary cut meats also has a limiting effect on importation.[1039]

7.2.14.3 Conclusion

7.299. For the reasons stated above, we find that Measure 10 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a prohibition on importation.

7.2.15 Whether Measure 11 (Limited application windows and validity periods) is inconsistent with Article XI:1 of the GATT 1994

7.2.15.1 Arguments of the parties

7.2.15.1.1 New Zealand

7.300. New Zealand claims that the limited application windows and validity periods for MOA Recommendations and Import Approvals restrict trade in a manner inconsistent with Article XI:1 of

[1034] Indonesia's first written submission, para. 98.

[1035] The import statistics supplied by Indonesia in Exhibit IDN-32 were in response to Panel question No. 43, seeking total imports of all listed and unlisted animals and animal products, not just from New Zealand and United States. *See also* Indonesia's second written submission, para. 205.

[1036] United States' second written submission, para. 88 (referring to Exhibit USA-84); response to Panel question No. 47.

[1037] United States' comments on Indonesia's response to Panel question No. 43 (referring to Exhibit IDN-32 and Exhibit USA-89).

[1038] We recall that the Appellate Body has defined this term as a "legal ban on the trade or importation of a specified commodity". Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to the Appellate Body Reports, *China – Raw Materials*, para. 319).

[1039] Article 23(3) of MOA 139/2014, Exhibit JE-28.

the GATT 1994. New Zealand argues that importers are only permitted to apply for MOA Recommendations and Import Approvals in the month immediately before the start of the relevant quarter, and, in practice, the period during which MOA Recommendations can be applied for is less than one month because (i) MOA Recommendations must be obtained before Import Approvals may be applied for; and (ii) the application period for MOA Recommendations set by the Ministry of Agriculture is often shorter than one month. New Zealand submits that these limited application windows mean that importers are only able to apply for permission to import animals and animal products four times a year, and prohibit approvals being obtained outside of these limited time periods.[1040]

7.301. New Zealand argues that the limited application windows have a particularly restrictive effect on imports at the start of each quarter. New Zealand explains that because the application periods for MOA Recommendations and Import Approvals are immediately prior to the start of each quarter, Import Approvals are only granted at the commencement of the relevant quarter.[1041] New Zealand claims that 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.[1042] For New Zealand, even if an importer were willing to take significant commercial risk by shipping products to Indonesia in "anticipation of receiving its import licence" prior to the products' arrival, they are legally unable to do so as a consequence of Indonesia's regime.[1043] According to New Zealand, once an Import Approval is issued and an import order is finalized, it is necessary for exporters to prepare the shipment to Indonesia. New Zealand claims that since this process can take weeks, importers are effectively unable to arrange for products to arrive in Indonesia during the first month of each quarter[1044], which constitutes a severe limitation on the volume of imports over the course of a year.[1045] New Zealand contends that the evidence it has submitted shows how this limiting condition is more than hypothetical since imports from all countries into Indonesia drop, with regularity, in the first month of each validity period as a consequence of Indonesia's measures.[1046]

7.302. New Zealand also submits that once issued at the commencement of a quarter, Import Approvals are valid for only a three-month period, with the consequence that no product is permitted to be imported after the expiry of this validity period, meaning that imports are also restricted at the end of each quarter.[1047] According to New Zealand, Import Approvals specify that imports must clear customs prior to the end of each quarter[1048] and accordingly, there is a period during the final weeks of each quarter when products are unable to be shipped, as they will not arrive in Indonesia prior to the end of the quarter.[1049] New Zealand claims that products arriving after this date will be refused entry into Indonesia and re-exported.[1050] New Zealand therefore contends that the combined inability to import at the start of a quarter or to export towards the end of a quarter means there is a "dead zone" during which products cannot be imported into Indonesia.[1051] New Zealand contends that such measures which restrict "market access" or "create uncertainty and affect investment plans" have been held by a number of panels to constitute restrictions in violation of Article XI:1.[1052] New Zealand thus holds that the limited application windows and validity periods similarly restrict Indonesian market access and create uncertainty for

[1040] New Zealand's first written submission, para. 147.
[1041] New Zealand's first written submission, para. 149 (referring to Article 12(2), MOT 46/2013, Exhibit JE-18).
[1042] New Zealand's first written submission, para. 149 (referring to Beef Import Approval Example, para. 1 Exhibit NZL-21); second written submission, para. 48.
[1043] New Zealand's second written submission, para. 48.
[1044] New Zealand's first written submission, para. 149 (referring to Meat Industry Association Statement, pp. 7 − 8, Exhibit NZL-12).
[1045] New Zealand's first written submission, para. 149; second written submission, para. 47.
[1046] New Zealand's first written submission, Figures 4 and 5; New Zealand's first opening statement, Figure 8; second written submission, para. 47.
[1047] New Zealand's first written submission, para. 151 (referring to Article 12(3), MOT 46/2013, Exhibit JE-18); second written submission, para. 49.
[1048] New Zealand's first written submission, para. 151 (referring to Beef Import Approval Example, para. 9, Exhibit NZL-21).
[1049] New Zealand's first written submission, para. 151 (referring to Meat Industry Association Statement, p. 7, Exhibit NZL-12).
[1050] New Zealand's first written submission, para. 151 (referring to Article 30(2), MOT 46/2013, Exhibit JE-18 and Beef Import Approval Example, para. 9, Exhibit NZL-21).
[1051] New Zealand's first written submission, para. 152.
[1052] New Zealand's first written submission, para. 154 (referring to Panel Reports, *Colombia − Ports of Entry*, para. 7.240; *China − Raw Materials*, para. 7.1081; *US − Poultry (China)*, para. 7.454).

imported animals and animal products, thereby limiting imports contrary to Article XI:1 of the GATT 1994.[1053]

7.303. New Zealand further contends that it is Indonesia's regulations that limit imports, not the private importers' decisions since the limited application windows and validity periods are clearly set out in Indonesian regulations and constrain the actions of private actors.[1054]

7.2.15.1.2 United States

7.304. The United States claims that this measure is inconsistent with Article XI:1 of the GATT 1994 because it constitutes a restriction within the meaning of Article XI:1, that is, it is a limitation or limiting condition on importation or has a limiting effect on importation.[1055] The United States argues that the combination of the limited time windows within which importers can apply for, and receive, import permits, and the short validity periods within which imports can enter Indonesia, results in a period of several weeks at the end of one validity period and the beginning of the next one where products *cannot* be exported to Indonesia. For the United States, due to the design and structure of Indonesia's licence application windows and import validity periods, and given the long distances between US and Indonesian ports, there is a period of five to six weeks during each import period when US exporters cannot ship to Indonesia at all.[1056] Additionally, the United States claims that this requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[1057]

7.305. The United States contends that Import Approvals are issued four times a year for a single three-month validity period[1058], and that they can be applied for only during the month preceding the start of a period. The United States also contends that an Import Approval application can be submitted only after the importer has received a Recommendation from the Ministry of Agriculture, which are issued only during the month prior to the start of a validity period.[1059] The United States maintains that, in reality, importers often have less than a month to apply for an Import Approval, that the application window for Recommendations is sometimes delayed and that permission to import is granted only once the import period has begun, and sometimes well into the period.[1060] The United States submits that because the relevant Import Approval number must be written on the Certificate of Health that is issued in the products' country of origin[1061], importers cannot begin placing orders, and exporters cannot begin shipping, until after Import Approvals have been issued for that period. The United States contends that once orders are placed, it takes US products at least four to six weeks to be shipped to Indonesia[1062], and thus, the earliest that US animals and animal products could reach Indonesia (assuming Recommendations and Import Approvals are issued on the first day of the validity period) is about one month after the start of a validity period.[1063] The United States also contends that all animals and animal products imported during a validity period must arrive in Indonesia and clear customs prior to the end of the period.[1064] This is because, if the customs clearance process is not completed by that moment, even imports that arrived at the Indonesian port within the validity period are prohibited from entering Indonesia and must be re-exported.[1065] The United States claims that, to ensure customs clearance into Indonesia before the end of the period, US exporters must stop accepting orders and shipping to

[1053] New Zealand's first written submission, para. 154.
[1054] New Zealand's second written submission, para. 50.
[1055] United States' first written submission, paras. 264-265.
[1056] United States' first written submission, paras. 156-157, 266-271; second written submission, para. 14; United States' response to Panel question No. 28, paras. 100-102.
[1057] United States' first written submission, fn. 393.
[1058] United States' first written submission, para. 266 (referring to MOT 46/2013, as amended, article 12(1)-(2), Exhibit JE-21).
[1059] United States' first written submission, para. 266 (referring to MOT 46/2013, as amended, article 12(2), Exhibit JE-21 and MOA 139/2014 as amended, article 29, Exhibit JE-28).
[1060] United States' first written submission, para. 267.
[1061] United States' first written submission, para. 268 (referring to Ministry of Trade, Import Approval for Beef, Exhibit USA-43).
[1062] United States' first written submission, para. 268 (referring to NHC Statements, p. 3 and 5, Exhibit USA-21).
[1063] United States' first written submission, para. 268.
[1064] United States' first written submission, para. 269 (referring to Ministry of Trade, Import Approval for Beef, Exhibit USA-43).
[1065] United States' first written submission, para. 269.

Indonesia four to six weeks before the end of the period, as it takes that long to transport US products to a port and ship them to Indonesia.[1066]

7.306. The United States explains that in light of these market realities, Indonesia's application window and validity period requirements have a limiting effect on imports of US products into Indonesia. The United States claims that, as a consequence, there is at least one month at the end of each period when Indonesian importers seeking to import animals or animal products are *precluded* from choosing US products.[1067] According to the United States, these periods without orders and shipments add up to four to six *months* per year and thus, for a third to half of each year, US products are denied the opportunity to compete in the Indonesian market.[1068] The United States submits that in *Colombia – Ports of Entry* the panel found that a measure restricting imports from Panama to two Colombian ports had a limiting effect on imports because "uncertainties, including access to one seaport for extended periods of time and the likely increased costs that would arise for importers operating under the constraints of the port restrictions, limit competitive opportunities for imports arriving from Panama".[1069] The United States submits that Indonesia's application windows and validity periods, however, are far more restrictive in that they wholly exclude US animals and animal products from entering Indonesia for four to six weeks each quarter, and a total of four to six months each year.[1070] The United States claims that these requirements therefore constitute a "restriction" within the scope of Article XI:1.[1071]

7.2.15.1.3 Indonesia

7.307. Indonesia claims that its import licensing system for animals and animal products is an automatic import licensing system and that for this reason it does not violate Article XI:1 of the GATT 1994.[1072] Indonesia submits that in case the Panel prefers to assess each element of Indonesia's import licensing regime for animals and animal products, it contends that the application windows and validity periods do not violate Article XI:1 of the GATT 1994 because they allow for continuous importation of products into Indonesia.[1073]

7.308. Indonesia refers to its position under Article 4.2 of the Agreement on Agriculture on how the co-complainants' claims must fail with respect to the application windows and validity periods for import licences, the self-selected import license terms and the realization requirement for imports.[1074] For Indonesia, the co-complainants' argument is at odds with their argument about being compelled to import too much as a result of the realization requirement. It also contends that the market share of many key imports from the co-complainants has increased since the implementation of Indonesia's current import licensing regime and this contrast with the co-complainant's argument that the import licensing regime has trade-restrictive effects. Indonesia submits that this evidence shows that the application window and validity period elements of Indonesia's import licensing for animals, and animal products is consistent with Article XI:1 of the GATT 1994.[1075]

7.309. Indonesia contends that the application windows are permitted under Article 1(6) of the Import Licensing Agreement. According to Indonesia, it allows for a one-month window to apply for an MOA Recommendation for animal products, and a one-month window to submit Import Approval applications. All applications for MOA-Recommendations or Import Approvals can be submitted online at INATRADE and REIPPT.[1076] For Indonesia, the validity periods of its import licences for horticultural products, animals, and animal products cover the entire calendar year and there is no period of time during which imports are restricted as a function of the lapse in validity

[1066] United States' first written submission, paras. 269-270 (referring to NHC Statements, pg 3, Exhibit USA-21); United States' second written submission, para. 14.
[1067] United States' first written submission, para. 271.
[1068] United States' first written submission, para. 271.
[1069] United States' first written submission, para. 272 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.274).
[1070] United States' first written submission, para. 272.
[1071] United States' first written submission, para. 273.
[1072] Indonesia's second written submission, para. 165.
[1073] Indonesia's second written submission, para. 166.
[1074] Indonesia's first written submission, para. 163.
[1075] Indonesia's second written submission, para. 159.
[1076] Indonesia's second written submission, para. 161.

periods.[1077] Indonesia also contends that the application window and validity period are very common in administering imports in WTO Members.[1078]

7.2.15.2 Analysis by the Panel

7.310. The task before the Panel is to establish whether, as claimed by the co-complainants[1079], Measure 11 is inconsistent with Article XI:1 of the GATT 1994 because it constitutes a restriction having a limiting effect on importation of animals and animal product imports into Indonesia.

7.311. We note that the co-complainants argued that Measure 11 constitutes a restriction on importation[1080], and that it is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[1081] New Zealand argued that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 11, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure".[1082] The United States submitted that Article XI:1 applies to *any* "restriction," including those "made effective through quotas, import or export licenses *or other measures*".[1083]

7.312. We observe that Indonesia has not contested the co-complainants' characterisation of Measure 11.[1084] Rather, Indonesia has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[1085] We recall our conclusion in Section 7.2.4.1 above whereby automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. Given the description of Measure 11 in Section 2.3.3.2 above, we concur with the co-complainants that Measure 11 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

7.313. As with Measure 1[1086], we proceed to examine whether the co-complainants have demonstrated that Measure 11 prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective. In doing so, we will determine whether the co-complainants have demonstrated that Measure 11 has a limiting effect on importation. To carry out this analysis, we recall that the Panel is to examine the design, architecture, and revealing structure of Measure 11, within its relevant context.

7.314. As described in Section 2.3.3.2 above and similar to Measure 1, Measure 11 consists of a combination of requirements, including the prohibition on importers from applying for Recommendations and Import Approvals outside four one-month validity periods, the provision that Import Approvals are valid for only the three-month duration of each quarter, and the requirement that importers are only permitted to apply for Recommendations and Import Approvals in the month immediately before the start of the relevant quarter.[1087] This measure is implemented by Indonesia through Article 29 of MOA 139/2014, as amended by MOA 2/2015, and Article 12 and 15 of MOT 46/2013, as amended. We discern the following elements in the design, architecture and structure of this measure as per the mentioned regulations:

a. Pursuant to Article 29 of MOA 139/2014, as amended by MOA 2/2015 the issuance of a Recommendation is conducted four times; namely, December of the previous year, and March, June, and September of the current year.

b. Pursuant to 12 of MOT 46/2013, as amended, Applications for Import Approval of animals and animal products listed in Appendix I can only be submitted as follows: (i) for the first quarter (January to March), in the month of December; (ii) for the second quarter (April to June), in the month of March; (iii) for the third quarter (July to

[1077] Indonesia's second written submission, para. 163.
[1078] Indonesia's second written submission, para. 164.
[1079] New Zealand's first written submission, para. 154. United States' first written submission, paras. 264-265.
[1080] New Zealand's first written submission, para. 154. United States' first written submission, paras. 264-265.
[1081] New Zealand's first written submission, para. 208; United States' first written submission, fn. 393.
[1082] New Zealand's first written submission, para. 203.
[1083] United States' first written submission, para. 142. (emaphsis original)
[1084] Indonesia's response to Panel question No. 10.
[1085] Indonesia's second written submission, para. 165.
[1086] *See* paragraph 7.76 above.
[1087] New Zealand's Panel Request, pp. 4-7; United States' Panel Request, pp. 4-7; New Zealand's first written submission, para. 46; United States' first written submission, para. 113.

September), in the month of June; and (iv) for the fourth quarter (October to December), in the month of September. The Import Approval is then issued at the beginning of each relevant quarter and is valid for three months, and

c. Pursuant to Article 15 of MOT 46/2013, as amended, a Certificate of Health from the country of origin of the animals and animal products that are to be imported must be issued after the RIs have received their Import Approvals.[1088] The Import Approval Number must be specified in the Certificate of Health that must accompany every shipment of animal products to Indonesia.[1089]

7.315. According to the co-complainants, as the number and date of the Import Approval must be specified on the health certificate issued by the exporting country and as a pre-requisite for exporting the relevant goods, an animal or animal product cannot be physically shipped until the Import Approval is issued, the order finalized and the health certificate issued in the exporting country.[1090] The United States thus argued that due to the design and structure of this Measure, and given the long distances between United States and Indonesian ports, there is a period of five to six weeks during each import period when US exporters cannot ship to Indonesia at all.[1091] New Zealand rather focused on the limiting effect of Measure 11 on the competitive opportunities of importers, and the combined effects of (i) the application windows respectively established for MOA Recommendations and Import Approvals, as well as (ii) the timeframe set out to obtain the Health Certification Requirement.[1092] For New Zealand, the combination of the inability to import at the start of a quarter, along with the corresponding inability to export towards the end of a quarter means there is a "dead zone" during which products cannot be imported into Indonesia.[1093] In its view, even if an importer were willing to take significant commercial risk by shipping product to Indonesia in "anticipation of receiving its import licence" prior to the products' arrival, they are legally unable to do so as a consequence of Indonesia's regime.[1094] Once an Import Approval is issued and an import order is finalized, it is necessary for exporters to prepare the product and ship it to Indonesia. New Zealand argued that since this process can take weeks, importers are effectively unable to arrange for products to arrive in Indonesia during the first month of each quarter[1095] and that this constitutes a severe limitation on the volume of imports which can be imported over the course of a year.[1096] New Zealand contended that such measures restrict "market access" or "create uncertainty and affect investment plans".

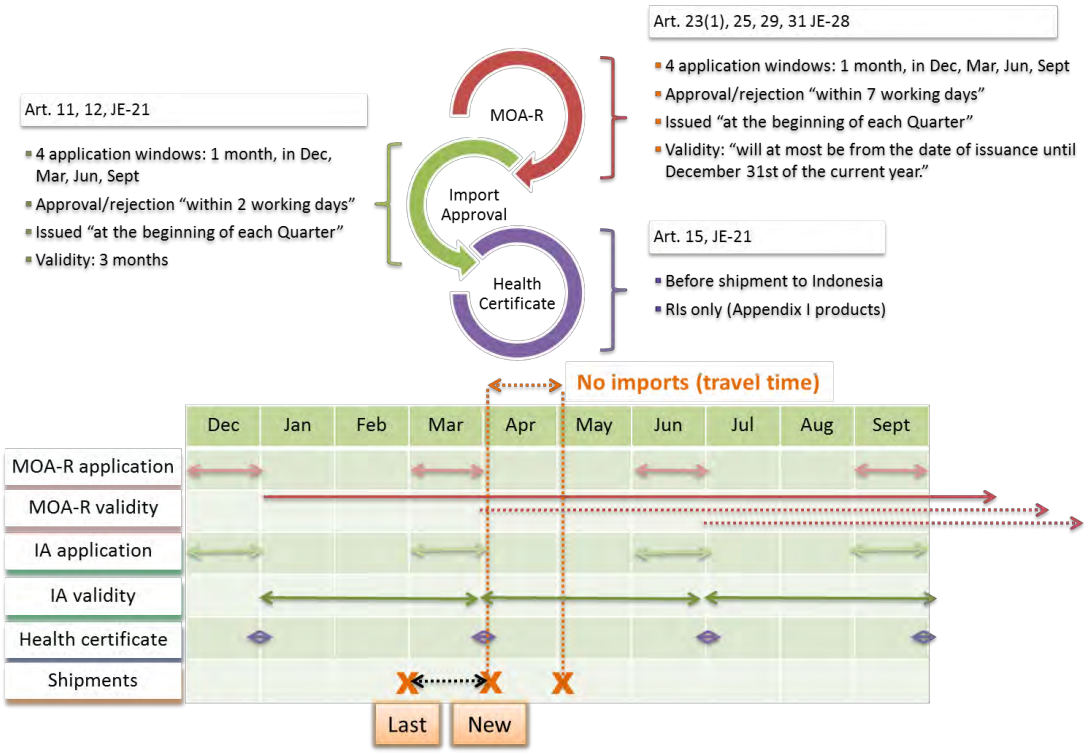
7.316. We note that a key element in understanding the challenge brought by the co-complainants is the fact that animals and animal products cannot be shipped from the country of origin until after the Import Approval for that period has been issued. As mentioned in paragraph 7.314 above, this is a consequence of Article 15(1) of MOT 46/ 2013, which requires that a "[c]ertificate of Health from the country of origin of the Animals and/or Animal Products that are to be imported must be issued after an RI-Animals and Animal Products have received Import Approval" and that the Import Approval Number be included in the Certificate of Health. New Zealand argued that since the number and date of the Import Approval must be specified on the health certificate issued by the exporting country, a product cannot be physically shipped until the Import Approval is issued, the order finalized and the health certificate issued in the exporting country.[1097] Similarly, the United States explained that the health certificate *cannot be issued*, and thus the goods *cannot be shipped*, until after the Import Approvals for that period have been issued.[1098]

7.317. As was the case with Measure 1, we understand that the alleged restriction occurs because of the combination of the different elements or requirements that constitute Measure 11, namely (i) the timing of the application windows, (ii) the requirement that all goods arriving into Indonesia must clear customs during the validity period of the Import Approval and (iii) the requirement that

[1088] Article 15 of MOT 46/2013, as amended, Exhibit JE-21.
[1089] Article 15(2) of MOT 46/2013, as amended, Exhibit JE-21.
[1090] New Zealand's first written submission, para. 48 and fn. 84; United States' first written submission, para. 112.
[1091] United States' first written submission, paras. 156-157, 266-271; second written submission, para. 14; response to Panel question No. 28, paras. 100-102.
[1092] New Zealand's first written submission, paras. 147-150.
[1093] New Zealand's first written submission, para. 152.
[1094] New Zealand's second written submission, para. 48.
[1095] New Zealand's first written submission, para. 149 (referring to Meat Industry Association Statement, pp. 7 – 8, Exhibit NZL-12).
[1096] New Zealand's first written submission, para. 149; second written submission para. 47.
[1097] New Zealand's first written submission, fn. 84.
[1098] United States' first written submission, para. 112.

an Import Approval must be issued before products are shipped to Indonesia; and the factual circumstances inherent to international transportation depending on the geographical location of the exporting country. As we mentioned in paragraph 7.80 above, there is evidence on the record that it takes two to six weeks for products shipped from the co-complainants to reach Indonesia.[1099] The following graph shows the operation of the various requirements constituting Measure 11:

IMPORT LICENSING FOR ANIMALS AND ANIMAL PRODUCTS: MEASURE 11 SCENARIO



Sources: Based on MOA 139/2014 as amended by MOA 2/2015 (JE-28) and MOT 46/2013 as amended by MOT 57/2013 and MOT 17/2014 (JE-21)

7.318. To better understand the design, architecture, and revealing structure of this Measure and its resulting operation in practice, the Panel devised a hypothetical scenario, similar to the one used in our analysis of Measure 1. We assume that an importer has obtained a Recommendation and an Import Approval for the validity period of January to March 2015 and that it takes, on average, four weeks for the products to get from the country of origin to Indonesia. This means that at the latest, the importer must make its last shipment by the beginning of March for the products to arrive on time to be admitted to Indonesia, before the validity of the Import Approval expires. We also assume that the importer applied for an MOA Recommendation and an Import Approval for the validity period April to June 2015 during the application window for each of these documents (i.e. March). Following Article 12(2) of MOT 46/2013, as amended, the Import Approval would be issued at the beginning of each quarter, i.e. in April in this scenario. Therefore, the earliest the importer would be able to ship animals and animal products under the validity period of April to June, would be at the beginning of April since it cannot ship any products before obtaining the new Import Approval (due to the health certificate requirement). If the importer is able to ship the products immediately after obtaining the Import Approval, the products would arrive at the beginning of May due to the shipping time assumptions. Therefore, in this scenario, there would be no imports during the month of April, the importer would have to stop imports at the beginning of March and could only resume them after obtaining a new Import Approval in early April.

7.319. The hypothetical scenario, which was modelled to closely follow how the different elements or requirements encompassed in this Measure operate, shows that under Indonesia's import

[1099] See Exhibit USA-21, USA-49, NZL-49, NZL-50, NZL-97. *See also* New Zealand's response to Panel question No. 94; United States' response to Panel question No. 94; Indonesia's response to Panel question No. 94; New Zealand's comments on Indonesia's response to Panel question No. 94.

licensing regime for animals and animal products, there is a period of time where there are no imports into Indonesia. It is worth noting that this period of no imports can be attributed to three separate causes: (i) the timing of the application windows, which is very close to the expiration of the previous import documents (ii) the requirements that preclude importers from shipping products before having obtained the new Import Approval, that would otherwise allow importers to save time by shipping their products in advance while waiting for the new Import Approval, and (iii) the shipping time from the country of origin, which creates a gap between the time where the new Import Approval is received and the time when the goods subject to such Import Approval arrive to Indonesia. Of these three causes, the first two are attributable to Indonesia's regulations while the third one is due to geographical considerations when shipping products from the co-complainants' territory to Indonesia.

7.320. While the elements of Measure 11 are attributable to Indonesia, the factual circumstances resulting from the geographical location of the co-complainants *vis-à-vis* Indonesia are obviously not directly attributable to Indonesia. It is worth noting that when referring to this geographical dimension of the challenge brought by the co-complainants, Indonesia responded that "its geographic location on the planet is not a 'measure' designed to 'restrict' imports from either New Zealand or the United States.[1100] This fact is nonetheless known to Indonesia and thus could have been taken into account when designing the various requirements that encompass Measure 11.

7.321. Indonesia argued that it is possible to obtain an extension of the validity period of Import Approvals, and consequently, if an importer obtains such a document for the January to June period and provided documentation that the products have been shipped in June and are likely to enter Indonesia after the end of the period, then MOT will grant an extension of up to one month.[1101] Indeed, as we noted in Section 2.2.2.2.4 above, pursuant Article 12A of MOT 46/2013, the validity period of import approvals may be extended for a maximum of 30 days under certain circumstances.[1102] However, we agree with the co-complainants[1103] that such extension does not appear to be automatic. Indeed, pursuant to Article 12A(5) of MOT 46/2013, an importer applying for an extension must provide "a stamped statement letter … regarding the reason for submitting an application for an extension of the Import Approval validity period along with sufficient supporting evidence" and this provision is not clear as to what reasons might justify an extension. Additionally, the extension will not be granted for the fourth quarter of the year and to be eligible to apply for an extension, goods must have left the country of origin prior to the end of the ordinary validity period of the Import Approval.[1104]

7.322. It is worth noting that unlike the regime for horticultural products where there are only two validity periods for Import Approvals, the regime for animals and animal products has four validity periods. As claimed by the co-complainants, this would mean that there are several months throughout the year where imports are restricted in Indonesia. We therefore observe that as a consequence of (i) the operation and interaction the different requirements under this measure and (ii) the shipping times from the co-complainants' territory to Indonesia, there are several periods of time where there are no imports of animals and animal products into Indonesia.

7.323. The operation of Measure 11 as depicted in our hypothetical scenario above and the resulting period with no imports is confirmed by the trade statistics the co-complainants have provided. As argued by New Zealand, the evidence reveals a regular pattern of import flows from all countries into Indonesia that invariably drop in the first month of each validity period.[1105]

7.324. Having examined the design, architecture and revealing structure of Measure 11, we perceive the limiting effect of this Measure in terms of volume of imports because, during certain periods of time, the operation of Measure 11 results in no imports of animals and animal products into Indonesia.

7.325. In addition, and as was the case for Measure 1, we note that the co-complainants have also argued that Measure 11 has a negative effect on the competitive opportunities of imported

[1100] Indonesia's first written submission, fn. 83.
[1101] Indonesia's response to Panel question No. 94
[1102] Article 12A of MOT 46/2013, as amended, Exhibit JE-21.
[1103] New Zealand's response to Panel question No. 49; comments on response by Indonesia to Panel question no. 94. United States' response to Panel question No. 49; comments on response by Indonesia to Panel Question no. 94.
[1104] Article 12A(3)-(4) of MOT 46/2013, as amended, Exhibit JE-21.
[1105] New Zealand's first written submission, Figures 4 and 5; first opening statement, Figure 8; second written submission, para. 47.

products. New Zealand, for instance, contended that measures such as this that restrict "market access" or "create uncertainty and affect investment plans" have been held by a number of panels such as *Colombia – Ports of Entry*, *China – Raw Materials* or *US – Poultry (China)* to constitute restrictions in violation of Article XI:1.[1106] For New Zealand, Measure 11 similarly restricts Indonesian market access and creates uncertainty for imported animals and animal products, thereby limiting imports contrary to Article XI:1 of the GATT 1994.[1107] Likewise, the United States refers to *Colombia – Ports of Entry* where the panel found that a measure restricting imports from Panama to two Colombian ports had a limiting effect on imports because "uncertainties, including access to one seaport for extended periods of time and the likely increased costs that would arise for importers operating under the constraints of the port restrictions, limit competitive opportunities for imports arriving from Panama."[1108] The United States submitted that Indonesia's application windows and validity periods are far more restrictive in that they wholly exclude US animals and animal products from entering Indonesia for four to six weeks each quarter or a total of four to six months each year.[1109]

7.326. We agree with the co-complainants that the way Measure 11 is designed and structured results in a limitation of the competitive opportunities of importers in practice because it restricts the market access of imported products into Indonesia.

7.2.15.3 Conclusion

7.327. For the reasons stated above, we find that Measure 11 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.2.16 Whether Measure 12 (Periodic and fixed import terms) is inconsistent with Article XI:1 of the GATT 1994

7.2.16.1 Arguments of the parties

7.2.16.1.1 New Zealand

7.328. New Zealand claims that Measure 12 has a limiting effect on imports, contrary to Article XI:1 of the GATT 1994.[1110] New Zealand submits that MOA Recommendations and Import Approvals collectively specify a number of terms that importers must comply with during a quarter, in particular, the quantity of products permitted to be imported during the quarter; a description of the type, category, cut and HS Code for the product to be imported during the quarter; the country of origin of products permitted for importation during the quarter; and the port of entry into Indonesia to which products are permitted to be imported during the quarter.[1111]

7.329. New Zealand argues that the fixed licence terms restrict imports by imposing quarterly quantitative limits on bovine animals and animal products that may be imported into Indonesia and that these restrictions are imposed through Import Approvals, which specify the maximum quantity of products that may be imported by an importer during each quarter.[1112] For New Zealand, the specification of maximum permitted import quantities in Import Approvals effectively imposes a quota on imports of particular products for the duration of each quarter.[1113] New Zealand is of the view that the incentive for importers to ensure they do not overestimate their required quantity is very strong, since an overestimation of quantity required will result in an importer failing to satisfy the 80% realization requirement and this may result in the importer having its existing MOA Recommendations, Import Approvals and importer designation revoked, and having future applications for MOA Recommendations and Import Approvals declined.[1114]

[1106] New Zealand's first written submission, para. 154 (referring to Panel Reports, *Colombia – Ports of Entry*, para. 7.240; *China – Raw Materials*, para. 7.1081; *US – Poultry (China)*, para. 7.454).
[1107] New Zealand's first written submission, para. 154.
[1108] United States' first written submission, para. 272 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.274).
[1109] United States' first written submission, para. 272.
[1110] New Zealand's first written submission, para. 163.
[1111] New Zealand's first written submission, para. 155.
[1112] New Zealand's first written submission, para. 158 (referring to Beef Import Approval Example, Exhibit NZL-21).
[1113] New Zealand's first written submission, para. 159; second written submission, para. 71.
[1114] New Zealand's first written submission, para. 160.

7.330. New Zealand also submits that since MOA Recommendations and Import Approvals also require importers to specify the type, country of origin and port of entry of the products that each importer may import during the relevant quarter, these terms are "locked in" at the commencement of the relevant quarter, with the effect that, during that quarter, importers are not able to import products of a different type, from another country, or through a different port than is specified in their Import Approval.[1115] New Zealand argues that the panel in *Colombia – Ports of Entry* confirmed that restrictions on the ports into which goods may be imported constituted a restriction on imports in violation of Article XI:1.[1116] New Zealand claims that in the present dispute, the Fixed Licence Terms in MOA Recommendations and Import Approvals result in importers having fewer opportunities to import products into Indonesia and this has a limiting effect on imports contrary to Article XI:1.[1117] Responding to Indonesia's arguments distinguishing *Colombia – Ports of Entry* from the present dispute, New Zealand argues that a key component of the panel's decision in that case was that for periods of time, the ports available for use by importers were limited[1118], something New Zealand claims is also present in this dispute, and that, more importantly, in this dispute, the restriction on ports of entry is only one component of the Fixed Licence Terms, which also "lock in" the type of product, its quantity, and country of origin for the relevant validity period.[1119]

7.331. New Zealand responds to Indonesia's argument that importers can maintain flexibility by selecting "broad" licence terms by submitting that this is incorrect since each Import Approval specifies a specific type of product, quantity, port of entry and country of origin and each MOA Recommendations specify a single port of entry and country of origin for each product. For New Zealand, an importer must specify a "package" of terms comprising a single port, quantity and country of origin for each product it wishes to import when applying for an Import Approval.[1120] New Zealand contends that this is reflected in Indonesia's regulations.[1121]

7.332. Responding to Indonesia's argument regarding the decisions of private actors, New Zealand reiterates that, as with limited application windows and validity periods, the fixed licence term requirement is maintained through Indonesian regulations and does not result from the business decisions of private actors. New Zealand clarifies that it is not challenging the specific terms that are selected by private importers in their MOA Recommendations and Import Approvals, but the requirement that importers fix these terms at the start of each validity period.[1122]

7.2.16.1.2 United States

7.333. The United States claims that this measure is inconsistent with Article XI:1 of the GATT 1994 because it is a restriction on importation within the meaning of Article XI:1.[1123] Additionally, the United States claims that this requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[1124] The United States argues that 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 granted at the beginning of that period by prohibiting the importation of any animals and animal products if permits do not contain such specifications. The United States also argues that once an import period begins, importers cannot apply for new permits to import different or additional products and thus imports are strictly limited to the type and volume of products specified on outstanding permits.[1125] The United States submits that non-compliance with this requirement is sanctioned, including revocation of importers' Recommendations and ineligibility to

[1115] New Zealand's first written submission, para. 161.
[1116] New Zealand's first written submission, para. 163 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.275).
[1117] New Zealand's first written submission, para. 163.
[1118] *See* Panel Report*, Colombia – Ports of Entry*, para. 7.274, stating: "The uncertainties that arise from the ports of entry measure are substantial since importers may only access one seaport and one airport whenever the measure is temporarily imposed, instead of the 11 ports open to importers of goods from points of departure other than Panama".
[1119] New Zealand's second written submission, para. 75.
[1120] New Zealand's second written submission, para. 72.
[1121] New Zealand's second written submission, para. 72 (referring to Article 30(d) and (h) of MOA 139/2014 which mention "Country of Origin" and "Point of Entry").
[1122] New Zealand's second written submission, para. 73.
[1123] United States' first written submission, para. 274.
[1124] United States' first written submission, fn. 407.
[1125] United States' first written submission, para. 274.

obtain future Recommendations, revocation of Import Approvals and RI designations[1126], and re-exportation of non-conforming goods at the importer's expense.[1127] The United States argues that therefore, once a period begins, importers cannot modify their orders to account for market or other developments.[1128]

7.334. The United States contends that the effects of this requirement are that (i) imports that are not covered in valid Recommendations or Import Approvals granted at the beginning of the import period are effectively banned until the next period; (ii) only a set quantity of each type of product can be imported until the next period; (iii) products from WTO Members are restricted to the amounts originally requested by importers; and (iv) if the original port of entry is no longer commercially operational, the shipments cannot be redirected through a different port. The United States claims therefore that this requirement is a limitation or limiting condition on importation or a measure with a limiting effect on importation, and thus constitutes a "restriction" within the meaning of Article XI:1.[1129] The United States argues that in *India – Autos*, the panel found that a trade balancing requirement restricted imports because there was a practical limit to the amount of products that companies would have the "desire and ability to export", which would, in turn, limit the quantity of products that they would be permitted to import.[1130] The United States submits that the panel in *Argentina – Import Measures* found that the measure at issue was an import restriction because, *inter alia*, it did not "allow companies to import as much as they desire or need without regard to their export performance" and "impose[d] a significant burden on importers that is unrelated to their normal importing activity".[1131] The United States also argues that in *Colombia – Ports of Entry*, the panel found that a measure restricting the entry of imports from Panama to two Colombian ports had a "limiting effect" on imports because "uncertainties, including access to one seaport for extended periods of time and the likely increased costs that would arise from importers operating under the constraints of the port restrictions, limit competitive opportunities for imports arriving from Panama".[1132]

7.335. Responding to Indonesia's argument that the trade-restrictiveness of this measure is the result of private choices and, therefore, is not a measure "instituted or maintained" by Indonesia[1133], the United States submits that this assertion is incorrect because (i) a variety of restrictions imposed by Indonesia's import licensing regime severely curtail the ability of importers to freely determine the quantity, country of origin or other terms included in their applications for Recommendations or RIPHs and Import Approvals,[1134] and (ii) the measures the co-complainants are challenging are not the specific terms of any or each importer's licence but, rather, the inability of importers to import products of a different type, quantity, country of origin or port of entry than those specified on their import permits once an Import Approval validity period has begun.[1135]

7.2.16.1.3 Indonesia

7.336. Indonesia refers to its position under Article 4.2 of the Agreement on Agriculture on how the co-complainants' claims with respect to the application windows and validity periods for import licences, the self-selected import licence terms and the realization requirement for imports must fail.[1136] Indonesia contends that it maintains temporary "fixed" licence terms only for import administration purposes and that it gives freedom to the importers in respect of the products, the designated port of entry, and the country of origin they wish to import from. For these reasons, Indonesia submits that the import terms are fully self-determined. Indonesia also submits that importers are free to alter their terms of importation from one licence application to the next, meaning that the "terms" are only static for one validity period at a time. According to Indonesia,

[1126] United States' first written submission, para. 277 (referring to Article 39(e) of MOA 139/2014, as amended, Exhibit JE-28 and Article 30(1) of MOT 46/2013, as amended, Exhibit JE-21).
[1127] United States' first written submission, para. 277 (referring to Article 30(2)-(3) of MOT 46/2013, as amended, Exhibit JE-21).
[1128] United States' first written submission, para. 277.
[1129] United States' first written submission, para. 279.
[1130] United States' first written submission, para. 279 (referring to Panel Report, *India* – Autos, para. 7.268).
[1131] United States' first written submission, para. 279 (referring to Panel Report, *Argentina – Import Measures*, para. 6.474).
[1132] United States' first written submission, para. 279 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.274; Panel Report, *Argentina – Import Measures*, para. 7.274).
[1133] United States' second written submission, para. 77 (referring to Indonesia's first written submission, para. 138).
[1134] United States' second written submission, para. 78.
[1135] United States' second written submission, para. 79.
[1136] Indonesia's first written submission, para. 163.

importers can easily re-assess estimated shipment volumes and submit a new application for the current validity period (provided that the application windows are still open) or wait for the next validity period, and submit a new application.[1137]

7.2.16.2 Analysis by the Panel

7.337. The task before the Panel is to establish whether, as claimed by the co-complainants[1138], Measure 12 is inconsistent with Article XI:1 of the GATT 1994 because it constitutes a restriction having a limiting effect on importation of animals and animal products imported into Indonesia and limits the competitive opportunities of importers and imported products.

7.338. We note that the co-complainants argued that Measure 12 constitutes a restriction on importation[1139], and that it is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[1140] New Zealand argued that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 12, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure".[1141] The United States submitted that Article XI:1 applies to *any* "restriction," including those "made effective through quotas, import or export licenses *or other measures*."[1142]

7.339. We observe that Indonesia has not contested the co-complainants' characterisation of Measure 12.[1143] Rather, it has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[1144] We recall our conclusion in Section 7.2.3.2.1 above whereby automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. In addition, Indonesia has attempted to exclude Measure 12 from the scope of this provision by arguing that it is not a measure "instituted or maintained by Indonesia" but the result of decisions by private actors.[1145] We refer to Section 7.1.3 above where we concluded that Measure 12 is a measure taken by Indonesia. Given the description of Measure 12 in Section 2.3.3.3 above, we concur with the co-complainants that Measure 12 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

7.340. As with previous measures[1146], we proceed to examine whether the co-complainants have demonstrated that Measure 12 prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective. In doing so, we will determine whether the co-complainants have demonstrated that Measure 12 has a limiting effect on importation. To carry out this analysis, we recall that the Panel is to examine the design, architecture, and revealing structure of Measure 12, within its relevant context.

7.341. As described in Section 2.3.3.3 above, we observe that Measure 12 consists of the requirement to only import animals and animal products within the terms of the Recommendations and Import Approvals, the prohibition of importing types/categories of carcasses, meat, and/or their processed products other than as specified in Import Approvals and Recommendations, and the prohibition of requesting changes to the elements specified in Recommendations once they have been issued.[1147] This measure is implemented by Indonesia through Articles 30, 33(a)-(b) and 39(e) of MOA 139/2014, as amended, and Article 30 of MOT 46/2013, as amended.

7.342. Pursuant to these provisions, MOA Recommendations and Import Approvals must specify, *inter alia*, the quantity of products permitted to be imported; a description of the type, category, cut and HS Code for the products to be imported; the country of origin of products permitted for importation; and the port of entry into Indonesia through which products are permitted to be

[1137] Indonesia's second written submission, para. 168.
[1138] New Zealand's first written submission, paras. 157 and 163; United States' first written submission, para. 274.
[1139] New Zealand's first written submission, para. 163; United States' first written submission, para. 274.
[1140] New Zealand's first written submission, para. 208; United States' first written submission, fn. 407.
[1141] New Zealand's first written submission, para. 203.
[1142] United States' first written submission, para. 142.
[1143] Indonesia's response to Panel question No. 10.
[1144] Indonesia's second written submission, para. 165.
[1145] Indonesia's first written submission, paras. 138 and 163.
[1146] *See*, for instance, paragraph 7.76 above.
[1147] New Zealand's Panel Request, pp. 4-7; United States' Panel Request, pp. 4-7; New Zealand's first written submission, paras. 49-51; United States' first written submission, para. 117.

imported. Importers are prohibited from requesting changes to the country of origin, point of entry, type/category of carcasses, meat, and/or their processed products once a Recommendation has been issued. If the quantity, type, business unit, and/or country of origin of imports is not in accordance with the relevant Import Approval, those imports will have to be re-exported, at the importer's cost.

7.343. We observe that Indonesia does not deny that these terms cannot be modified but submits that importers are free to alter them from one licence application to the next.[1148] In response to a question from the Panel to clarify the extent to which these terms can be effectively modified, Indonesia replies that in case an importer desired to increase the original quantity of imports set out in the import documents, such an importer would have two options: (i) to submit another application specifying greater quantities, if the application window is still open and the RIPH has not been issued yet, or (ii) to submit an application specifying a greater quantity during the next application window. Similarly, if an importer seeks to reduce the quantity of its imports compared to the amount previously sought in its application, such an importer would have two options: (i) to reduce the quantity by up to 20% without penalty, or (ii) reduce the quantity by more than 20% and risk the imposition of a penalty.[1149]

7.344. We note that both co-complainants are focusing their argumentation on the operation of this Measure as a quota on the one hand, as well as its detrimental impact on competitive opportunities on the other.[1150] For instance, New Zealand considered that the specification of maximum permitted import quantities in Import Approvals effectively imposes a quota on imports of particular products for the duration of each quarter.[1151] New Zealand also argued that the incentive for importers to ensure they do not overestimate their required quantity is very strong, since an overestimation of quantity required will result in an importer failing to satisfy the 80% realization requirement and this may result in the importer having its existing MOA Recommendations, Import Approvals and Importer Designation revoked, and having future applications for MOA Recommendations and Import Approvals declined.[1152] In its view, the fixed licence terms in MOA Recommendations and Import Approvals have a limiting effect on importation contrary to Article XI:1 because importers have fewer opportunities to import products into Indonesia.[1153]

7.345. In the same vein, the United States contended that the results of this requirement are that (i) imports of certain products for which no Recommendations or Import Approvals were granted at the beginning of the import period are effectively banned until the next period; (ii) only a set quantity of each type of product can be imported until the next period; (iii) products from WTO Members are restricted to the amounts originally requested by importers; and (iv) if the original port of entry is no longer available or commercially feasible to use, the products cannot enter through a different port.[1154]

7.346. Similar to Measure 2, when examining the design, architecture and revealing structure of Measure 12, we observe that the various requirements it embodies and the way in which they interact, have the effect of an import quota as this measure limits the amount and type of products that can be imported and the ports of entry to those strictly specified in the given MOA Recommendation and Import Approval. The effect of fixing the quantity or the type of product that can be imported for each validity period, i.e. each quarter, is similar to that of a quota since for that period of time there is a maximum quantity and type of products that can be imported and these parameters cannot be modified during the four-month validity period. In other words, the effect of this measure can be compared to that of a four-month quota. We note that, as Indonesia is arguing, the amount of the quota would be set by the importers because they are the ones determining the amounts they request in their Import Approvals. In this sense, the actual amount of the quota is not being determined by Indonesia but rather by the actions of the importers. However, the existence of a system which has the effect of creating a quota for every four-month period is the result of the manner in which Indonesia designed and structured this

[1148] Indonesia's second written submission, para. 168.
[1149] Indonesia's response to Panel question No. 15. We note that Indonesia mentions that the 80% realization requirement for animals and animal products will be lifted imminently once a new regulation is adopted.
[1150] *See*, for instance, New Zealand's first written submission, para. 227; second written submission, para. 198; United States' first written submission, para. 164.
[1151] New Zealand's first written submission, para. 159; second written submission, para. 71.
[1152] New Zealand's first written submission, para. 160.
[1153] New Zealand's first written submission, para. 163.
[1154] United States' first written submission, para. 279.

Measure. We recall that in Section 7.1.3 above we observed that the fact that private actors are free to make various decisions in order to comply with a measure does not preclude a finding of inconsistency. On the contrary, "where private actors are induced or encouraged to take certain decisions *because of the incentives created by a measure*, those decisions are not 'independent' of that measure".[1155] The existence of a system which has the effect of creating a quota for every four-month period can be perceived as the result of the manner in which Indonesia designed and structured this measure. We thus remark the limiting effect of this Measure in terms of volume of imports.

7.347. We also observe that, by restricting the import licensing parameters within which importers operate, this Measure results in fewer opportunities to import animals and animal products into Indonesia, with such restrictions having significant impact on the competitive opportunities available to imported products.[1156] We agree with the co-complainants[1157] that the impossibility to change the listed specifications within the time-frame of a single validity period, or even apply to import new or additional products during the same validity period, means that importers cannot take advantage of market opportunities or mitigate risks inherent in the global supply chain and adjust to new developments in the market situation. As argued by the United States, once a validity period begins and the MOA Recommendations and Import Approvals have been issued, importers would be unable to make changes based on market or other developments that may be necessary to adjust to changes in the current demand, for instance because certain products are no longer needed, the original port of entry is no longer available or because there has been a change in the circumstances of the importer itself.[1158] Indonesia contended that importers are free to preserve flexibility by identifying broad terms on their import approvals.[1159] We note that this would not change the mentioned situation since the restrictions that the co-complainants are challenging occur not when the importer is applying for MOA Recommendations and Import Approvals, but rather, once they have been issued and the validity period has commenced.

7.348. Placing Measure 12 in the context of Indonesia's import licensing regime for animals and animal products, we observe that other requirements operate together with Measure 12 and exacerbate the effects of this Measure. As argued by New Zealand, Measure 13 (80% realization requirement) creates strong incentives for importers to ensure they do not overestimate their requested quantity, because an overestimation of the quantity requested in the import documents can lead to the importer failing to import enough products to satisfy the 80% realization requirement. This may result in the importer having its existing MOA Recommendations, Import Approvals and Importer Designation revoked, and having future applications for MOA Recommendations and Import Approvals declined.[1160]

7.2.16.3 Conclusion

7.349. For the reasons stated above, we find that Measure 12 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.2.17 Whether Measure 13 (80% realization requirement) is inconsistent with Article XI:1 of the GATT 1994

7.2.17.1 Arguments of the parties

7.2.17.1.1 New Zealand

7.350. New Zealand claims that the 80% realization obligation requires importers to import no less than 80% of the quantity of animals and animal products specified in their Import Approvals over a 12-month period[1161] and that this constitutes a "restriction" on imports within the meaning of Article XI:1, both as a discrete measure and in particular when viewed in conjunction with the

[1155] Appellate Body Report, *US – COOL*, para. 291. (emphasis original)
[1156] New Zealand's first written submission, para. 163.
[1157] New Zealand's first written submission, paras. 159 and 162; United States' first written submission, para. 277.
[1158] United States' first written submission, para. 277.
[1159] Indonesia's first written submission, para. 105.
[1160] New Zealand's first written submission, para. 160.
[1161] New Zealand's first written submission, para. 164 (referring to Article 13 of MOT 46/2013, Exhibit JE-18).

Fixed Licence Terms described earlier.[1162] According to New Zealand, the effect of the 80% realization requirement is to induce importers to reduce the quantities requested in their quarterly MOA Recommendations and Import Approvals.[1163] New Zealand submits that the Ministry of Trade has the ability to sanction importers for non-compliance with the realization requirement through (i) the suspension of an importer's Importer Designation if it does not satisfy the 80% realization requirement[1164]; (ii) the revocation of an importer's Importer Designation if it does not satisfy the 80% realization requirement twice[1165]; (iii) and the imposition of fines for not complying with the provisions of MOT 46/2013, including the 80% realization requirement.[1166]

7.351. New Zealand submits that these sanctions therefore impose strong incentives on importers to comply with this requirement, with failure resulting in an importer being effectively unable to continue to import animal products.[1167] New Zealand contends that because importers must anticipate the quantity of imports that they will require during the validity period of an Import Approval, they are induced to conservatively estimate, or underestimate, the quantities requested in Import Approvals to ensure they satisfy the 80% realization requirement during the applicable period. New Zealand explains that the ability to import a sufficient quantity to meet this threshold will necessarily be affected by a range of factors beyond an importer's control, including changes in domestic prices, world prices, supplier availability of supply, domestic demand, shipping availability, and port availability. For New Zealand, importers will naturally factor in these variables and underestimate the specified quantity to ensure with greater certainty, that they will meet the 80% realization requirement.[1168] For New Zealand, this has a limiting effect on imports, as it imposes a practical constraint on the quantity that importers are able to request within a fixed time-frame without being at risk of not satisfying this requirement and thus losing their ability to import.[1169]

7.352. New Zealand argues that in *India – Autos*, the panel considered that a measure which "induced [an importer] … to limit its imports of the relevant products" was a restriction within the meaning of Article XI:1.[1170] New Zealand claims that Indonesian importers are also imposed with a practical threshold on the quantity that they request in an Import Approval, as they must be certain that they will be able to import at least 80% of their aggregated Import Approval quantities over the course of a year.[1171] New Zealand also maintains that the limiting effect of the 80% realization requirement is magnified when combined with the periodic and fixed import terms since a number of import terms are locked in prior to the commencement of a quarter and the need to comply with these terms limits the flexibility available to importers to satisfy the 80% realization requirement and therefore further induces importers to reduce the quantities they request in Import Approvals.[1172]

7.353. Responding to Indonesia's arguments that the penalties it imposes for non-compliance with this requirement are "fair, balanced, and narrowly constructed"[1173], New Zealand submits that this argument is untenable since for an importer, whose business and livelihood is dependent on its ability to import, the threat of losing this right for two years is serious and disproportionate to Indonesia's vaguely stated objective of "administrative efficiency through import licensing".[1174]

7.354. Responding to Indonesia's argument that the measure "serves as a safeguard against importers grossly overstating their anticipated imports" and that the measure "is not meant to

[1162] New Zealand's first written submission, para. 164.
[1163] New Zealand's first written submission, para. 166.
[1164] New Zealand's first written submission, para. 166 (referring to Article 26 of MOT 46/2013, Exhibit JE-18).
[1165] New Zealand's first written submission, para. 166 (referring to Article 27(a) of MOT 46/2013, Exhibit JE-18).
[1166] New Zealand's first written submission, para. 166 (referring to Article 30 of MOT 46/2013, Exhibit JE-18).
[1167] New Zealand's first written submission, para. 167; second written submission, para. 88.
[1168] New Zealand's second written submission, para. 87.
[1169] New Zealand's first written submission, para. 168.
[1170] New Zealand's first written submission, para. 169; second written submission, para. 91 (referring to Panel Report, *India – Autos*, para. 7.268).
[1171] New Zealand's first written submission, para. 169.
[1172] New Zealand's first written submission, para. 160.
[1173] New Zealand second written submission, para. 89 (referring to Indonesia's first written submission, paras. 79 and 142).
[1174] New Zealand's second written submission, para. 89.

constrain imports; there is no upward limit to the amount an importer can import"[1175], New Zealand contends that this argument cannot be reconciled with its contention that the purpose of the measure is to prevent "overstatement" of imports by limiting the amount specified in Import Approval applications. For New Zealand, this is so since requiring importers to limit their estimates implies that the measure imposes a constraint on the maximum quantity that importers can specify in their Import Approvals, and thereby acts to limit the quantity that importers can import over that quarter.[1176]

7.355. Responding to Indonesia's arguments that its "concerns regarding overstatement of imports apply equally to imports of horticultural products, animals and animal products" and are specific to the risks posed by "perishable food items" that do not apply to other products such as "widgets"[1177], New Zealand submits that Indonesia does not apply the 80% realization requirement equally to imports of all animals and animal products since it only applies to the bovine animals and animal products listed in Appendix I of MOT 46/2013, and not to the wider range of animals and animal products listed in Appendix II of MOT 46/2013.[1178] For New Zealand, the fact that this requirement applies only to bovine products and not to other animal products of a similar nature, confirms that the measure is not intended to "guarantee proper quarantine processes" or "other administrative concerns", as Indonesia contends[1179], but rather that the measure is specifically directed at limiting imports of bovine animals.[1180]

7.356. Responding to Indonesia's arguments that the measure incorporates flexibility "to account for exigencies in the global supply chain" and that the "Complainants have been unable to point to a single instance in which a catastrophic supply chain event has caused an importer to fall below the 80% realization requirement"[1181], New Zealand submits that the 80% realization requirement systemically limits importation by requiring importers to conservatively estimate or underestimate their desired quantity every time they apply for an Import Approval and, accordingly, importation is limited at all times, not just in the event of a "catastrophic supply chain event".[1182]

7.2.17.1.2 United States

7.357. The United States claims that Indonesia's realization requirement for Appendix I products is a "restriction" under Article XI:1 of the GATT 1994 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. The United States submits that the requirement is therefore a limitation or limiting condition on importation or has a limiting effect on imports.[1183] Additionally, the United States claims that this requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[1184] The United States submits that each importer of Appendix I products (cattle, beef meat, and offal) is required to import "at least 80 percent" of the products covered by its Import Approvals each year.[1185] The United States argues that this requirement is monitored on a monthly basis, as each RI designee is required to submit monthly reports setting out all its imports of animals and animal products and the amount of products remaining under its Import Approval.[1186] The United States claims that the importer's RI designation is suspended if an RI designee does

[1175] New Zealand's second written submission, para. 90 (referring to Indonesia's first written submission, para. 79).
[1176] New Zealand's second written submission, para. 91.
[1177] New Zealand's second written submission, para. 92 (referring to Indonesia's response to Panel question No. 16).
[1178] New Zealand's second written submission, para. 92.
[1179] New Zealand's second written submission, para. 92 (referring to Indonesia's response to Panel question No. 16).
[1180] New Zealand's second written submission, para. 92.
[1181] New Zealand's second written submission, paras. 93-94 (referring to Indonesia's first written submission, paras. 79-80).
[1182] New Zealand second's written submission, paras. 93-94.
[1183] United States' first written submission, para. 283 (referring to Appellate Body Report, *Argentina – Import Measures*, para. 5.217 and *China – Raw Materials*, para. 320); second written submission, paras. 19 and 82.
[1184] United States' first written submission, fn. 418.
[1185] United States' first written submission, para. 284 (referring to Article 13 of MOT 46/2013, as amended, Exhibit JE-21).
[1186] United States' first written submission, para. 284 (referring to Appendix IV of MOT 46/2013, as amended, Exhibit JE-21).

not fulfil this reporting requirement three times[1187] and if at the end of the year, the importer has not met the 80% realization requirement.[1188]

7.358. According to the United States, if an importer fails to meet the requirement twice, its RI designation is revoked and the importer cannot reapply for at least two years.[1189] The United States argues that, similar to the same restriction on horticultural products, importers are concerned that over-supply of products at the end of an import period will force them to sell products at a loss or lose their eligibility to import.[1190] According to the United States, in the animal products context the reference price requirement makes importing large quantities during short periods of time to comply with the realization requirement even riskier, as it could cause the price to drop below the reference price and cut off imports altogether.[1191] For the United States, importers have a strong incentive to ensure that they do not apply for and obtain Import Approvals for greater quantities of products than they are certain they can profitably import and, therefore, apply to import lower quantities of products than they otherwise would, absent the 80% realization requirement. Consequently, the United States submits that the realization requirement has a limiting effect on imports.[1192]

7.359. The United States contends that the panel in *India – Autos* considered a measure with a similar limiting effect – namely, a trade balancing requirement placed on importers of auto kits and components – and found it to be a "restriction" under Article XI:1.[1193] The United States claims that the 80% realization requirement has a similar limiting effect, in that it causes importers to limit the amount that they request in their Import Approval applications, which then limits the amount they are allowed to import.[1194]

7.360. Responding to Indonesia's arguments that the realization requirement is not a restriction because it is "a function of importers' own estimates and because it can be changed by the importer at will from one validity period to the next"[1195], the United States argues that importers do not "choose" to have their eligibility to import revoked if they fail to import a set percentage of the products listed on their Import Approvals and, therefore, they do not "choose" to underestimate the quantity for which they apply in order to avoid this sanction. For the United States, the importers' decisions to reduce the quantities for which they apply is a compelled response to Indonesia's realization requirement.[1196] The United States also contends that, contrary to Indonesia's position, the evidence submitted by the co-complainants is not "anecdotal conjecture"[1197], but it represents the experience of market actors who regularly operate in the context of Indonesia's import licensing regime and who therefore know how the realization requirement operates in practice and can attest to its limiting effect on importation.[1198]

7.2.17.1.3 Indonesia

7.361. Indonesia refers to its position under Article 4.2 of the Agreement on Agriculture on how the co-complainants' claims must fail regarding the application windows and validity periods for import licences, the self-selected import licence terms and the realization requirement for imports.[1199] Indonesia contends that the 80% import realization requirement does not violate Article XI:1 of the GATT because there is no evidence to suggest that the realization requirement

[1187] United States' first written submission, para. 284 (referring to Article 26 of MOT 46/2013, as amended, Exhibit JE-21).
[1188] United States' first written submission, para. 284 (referring to Article 25 of MOT 46/2013, as amended, Exhibit JE-21).
[1189] United States' first written submission, para. 284 (referring to Articles 27(a) and 29 of MOT 46/2013, as amended, Exhibit JE-21).
[1190] United States' first written submission, para. 286 (referring to paras. 171-174 of United States' first written submission; NHC Statements, p. 3, Exhibit USA-21).
[1191] United States' first written submission, para. 286.
[1192] United States' first written submission, para. 287; second written submission, para. 19.
[1193] United States' first written submission, para. 288 (referring to Panel Report, *India – Autos*, para. 7.268).
[1194] United States' first written submission, para. 288.
[1195] United States' second written submission, para. 8 (referring to Indonesia's first written submission, para. 107).
[1196] United States' second written submission, para. 82.
[1197] United States' second written submission, para. 21 (referring to Indonesia's first written submission, para. 142).
[1198] United States' second written submission, para. 21.
[1199] Indonesia's first written submission, para. 163.

has had an adverse impact on trade flows.[1200] Indonesia contends that this requirement serves as a safeguard against importers grossly overstating their anticipated imports and that if there is any change in the market the importers can always change their requested volume in the next periods.[1201] Indonesia submits that it recognizes the need for flexibility to account for exigencies in the global supply chain and that is why the realization requirement only asks importers to achieve 80% instead of 100% of their anticipated imports. For Indonesia, this ratio provides the proper balance between incentivizing importers to provide realistic estimates of anticipated volume on the one hand, and allowing for a reasonable margin of error before penalties are applied.[1202] Indonesia also contends that the co-complainants have been unable to point to a single instance in which a catastrophic supply chain event has caused an importer to fail to comply with the 80% requirement and subsequently lose its importer designation.[1203]

7.362. Indonesia also submits that MOT 5/2016, for animals and animals products, and MOT 71/2015, for horticultural products, have eliminated the 80% realization requirement and, as such it is no longer in effect in Indonesia.[1204]

7.2.17.2 Analysis by the Panel

7.363. The task before the Panel is to establish whether, as claimed by the co-complainants[1205], Measure 13 is inconsistent with Article XI:1 of the GATT 1994 because it constitutes a restriction having a limiting effect on importation of animals and animal products imported into Indonesia. In particular, we are to determine whether Measure 13 compels importers to limit their imports, by inducing them to reduce the amounts they request in their applications for Import Approvals.

7.364. We commence by observing that the co-complainants argued that Measure 13 constitutes a restriction on importation[1206], and that it is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[1207] New Zealand argued that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 13, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure".[1208] The United States submitted that Article XI:1 applies to *any* "restriction," including those "made effective through quotas, import or export licenses *or other measures*".[1209]

7.365. We observe that Indonesia has not contested the co-complainants' characterisation of Measure 13.[1210] Rather, it has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[1211] We recall our conclusion in Section 7.2.3.2.1 above whereby automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. Given the description of Measure 13 in Section 2.3.3.4 above, we concur with the co-complainants that Measure 13 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

7.366. As with the previous measures[1212], we proceed to examine whether the co-complainants have demonstrated that Measure 13 prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective. In doing so, we will determine whether the co-complainants have demonstrated that Measure 13 has a limiting effect on importation. To carry out this analysis, we recall that the Panel is to examine the design, architecture, and revealing structure of Measure 13, within its relevant context.

[1200] Indonesia's second written submission, para. 172.
[1201] Indonesia's second written submission, para. 173.
[1202] Indonesia's second written submission, para. 173.
[1203] Indonesia's second written submission, para. 174.
[1204] Indonesia's second written submission, para. 176.
[1205] New Zealand's first written submission, para. 164; United States' first written submission, para. 283.
[1206] New Zealand's first written submission, para. 164; United States' first written submission, para. 283.
[1207] New Zealand's first written submission, para. 208; United States' first written submission, fn. 418.
[1208] New Zealand's first written submission, para. 203.
[1209] United States' first written submission, para. 142.
[1210] Indonesia's response to Panel question No. 10.
[1211] Indonesia's second written submission, para. 67.
[1212] *See*, for instance, paragraph 7.76 above.

7.367. As described in Section 2.3.3.4 above, Measure 13 consists of the requirement whereby RIs must import at least 80% of each type of product covered by their Import Approvals every year.[1213] This Measure is implemented by Indonesia by means of Articles 13, 25, 26 and 27 of MOT 46/2013, as amended. Pursuant to the above provisions, RIs are required to import, on an annual basis, 80% of the quantity of each type of animal and animal product specified in their Import Approvals. Failing to fulfil the 80% realization requirement carries the penalty of suspension or revocation of the RI designation.

7.368. We observe that central to the co-complainants' argumentation is the alleged limiting effect in the importers' competitive opportunities resulting from the 80% realization requirement. For instance, New Zealand contended that the effect of the 80% realization requirement is to induce importers to reduce the quantities requested in their quarterly MOA Recommendations and Import Approvals[1214] because, since importers must anticipate the quantity of imports that they will require during the validity period of an Import Approval, they are induced to conservatively estimate, or underestimate, the quantities requested in Import Approvals to ensure they satisfy the 80% realization requirement during the applicable period. New Zealand explained that the ability to import a sufficient quantity to meet this threshold will necessarily be affected by a range of factors beyond an importer's control, including changes in domestic prices, world prices, supplier availability of supply, domestic demand, shipping availability, and port availability. For New Zealand, importers will naturally factor in these variables and underestimate the requested quantity to ensure with greater certainty, that they will meet the 80% realization requirement.[1215]

7.369. Similarly, the United States contended that importers have a strong incentive to ensure that they do not apply for and obtain Import Approvals for greater quantities of products than they are certain they can profitably import and, therefore, apply to import lower quantities of products than they otherwise would, absent the 80% realization requirement. Consequently, the United States submitted that the realization requirement has a limiting effect on imports.[1216] We note that the United States argued that, similar to the same restriction on horticultural products, importers are concerned that over-supply of products at the end of an import period will force them to sell products at a loss or lose their eligibility to import.[1217] According to the United States, in the animal products context, Measure 16 (Beef reference price) makes importing large quantities during short periods of time to comply with the realization requirement even riskier, as it could cause the price to drop below the reference price and cut off imports altogether.[1218]

7.370. If we look at the design, architecture and revealing structure of this measure, we note that Measure 13, as was the case with Measure 3, does not *per se* limit the quantity of imports of animals and animal products that can come into Indonesia. Measure 13 requires importers to effectively import a large percentage of the amounts requested in their applications for Import Approvals but does not create an outright prohibition on the importation of animals and animal products. Nonetheless, this Measure includes enforcement rules which provide for severe penalties for not complying with the 80% realization requirement. Indeed, pursuant to Articles 26 and 27 of MOT 46/2013, as amended, confirmation as an RI can be either suspended or revoked. We note that, by its very nature, the possibility of experiencing severe penalties, which may mean the loss of the importer's commercial livelihood, reasonably constitutes an incentive for importers to comply with the 80% realization requirement.

7.371. We refer to our analysis in paragraph 7.130 above and note that similar to Measure 3, the effect of Measure 13 may also vary depending on the importer's situation; in particular, on its projections of how many animals and animal products it expects to sell and import in a given period of time, its competitive situation, market conditions and how risk-averse the importer might be. Nonetheless, we believe that in any case, though there might be a difference in the degree that Measure 13 affects the decisions of importers of how much to request in their applications for Import Approvals, any importer will be induced to be more conservative in its estimations. In our view, this Measure exacerbates the risk inherent in conducting trade transactions. We thus consider that the design, architecture and revealing structure of Measure 13 shows that this

[1213] New Zealand's Panel Request, pp. 4-7; United States' Panel Request, pp. 4-7; New Zealand's first written submission, para. 52; United States' first written submission, para. 122.
[1214] New Zealand's first written submission, para. 166.
[1215] New Zealand's second written submission, para. 87.
[1216] United States' first written submission, para. 287; second written submission, para. 19
[1217] United States' first written submission, para. 286 (referring to United States' first written submission, paras. 171-174; NHC Statements, p. 3, Exhibit USA-21).
[1218] United States' first written submission, para. 286.

Measure has a limiting effect in terms of volume of imports of animals and animal products into Indonesia.

7.372. Looking at the Measure in its context, we note that, as New Zealand explained, the limiting effect of the 80% realization requirement is "magnified" when combined with Measure 12 because a number of import terms are locked in prior to the commencement of a quarter and the need to comply with these terms limits the flexibility available to importers to satisfy the 80% realization requirement and therefore further induces importers to reduce the quantities they request in their applications for Import Approvals.[1219] We further note that, as explained by the United States, the limiting effect of Measure 13 can also be perceived as being exacerbated when combined with Measure 16 relating to the beef reference price. This is so because the reference price requirement for these products makes importing large quantities during short periods of time to comply with the realization requirement even riskier, as it could cause the price to drop below the reference price and cut off imports altogether.[1220] Similar to what we stated on paragraph 7.131 above, one can reasonably understand that the existence of the reference price requirement may make importing large quantities during short periods of time in order to satisfy the realization requirement even riskier because it may result in the price of beef dropping below the reference price.

7.373. Indonesia contends that there is no evidence to suggest that the realization requirement has had an adverse impact on trade flows.[1221] As explained in Section 7.2.3.2.2 above, the limitation on imports "need not be demonstrated by quantifying the effects of the measure at issue".[1222] Nonetheless, as pointed out by the United States, since the dynamics of this measure are the same as the ones for Measure 3[1223], the evidence presented by the co-complainants in the context of Measure 3[1224] may also serve to illustrate the limiting effect of Measure 13.

7.374. To conclude, we note that as with Measure 3, Measure 13 is similar to the measures examined by the panel in *India – Autos*. That panel found that a measure that did not set an absolute numerical limit on imports but induced importers to limit their imports as a consequence of the obligation to satisfy an export commitment imposed by India[1225] amounted to an import restriction, where the degree of effective restriction resulting from the measure varied from signatory to signatory depending on several factors. For the panel in that dispute, a manufacturer was in no instance free to import, without commercial constraint, as many products as it wished without regard to its export opportunities and obligations.[1226] The 80% realization requirement acts in a similar way by incentivizing importers to limit the amount that they request in their import approval applications, which, in turn, restricts the quantity of products they are allowed to import.

7.2.17.3 Conclusion

7.375. For the reasons stated above, we find that Measure 13 is inconsistent with Article XI: 1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.2.18 Whether Measure 14 (Use, sale and distribution of imported bovine meat and offal requirements) is inconsistent with Article XI: 1 of the GATT 1994

7.2.18.1 Arguments of the Parties

7.2.18.1.1 New Zealand

7.376. New Zealand claims that Indonesia prohibits the importation of animals and animal products for particular uses, and for sale and distribution through certain outlets and that this constitutes a "restriction" within the meaning of Article XI: 1 of the GATT 1994 as it has a "limiting effect" on the importation of such products. In particular, New Zealand submits that such

[1219] New Zealand's first written submission, para. 170.
[1220] United States' first written submission, para. 286.
[1221] Indonesia's second written submission, para. 172.
[1222] Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to the Appellate Body Reports, *China – Raw Materials*, para. 319-320).
[1223] United States' first written submission, para. 286.
[1224] *See* paragraph 7.132 above.
[1225] Panel Report, *India – Autos*, para. 7.268.
[1226] Panel Report, *India – Autos*, para. 7.277.

restrictions limit the competitive opportunities for importation of bovine meat and offal by prohibiting importation of these products for certain uses.[1227]

7.377. New Zealand submits that bovine meat and offal may only be imported into Indonesia for use by "industry, hotel, restaurant, catering, and/or other special needs", and may only be sold or distributed through these same channels or outlets. New Zealand claims that this requirement is reflected in Article 17 of MOT 46/2013 and in Article 32 of MOA 139/2014 as amended.[1228] New Zealand further submits that 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, in particular, 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.[1229] New Zealand claims that 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.[1230] New Zealand argues that the panel in *India – Quantitative Restrictions* has previously concluded that a measure which prohibited imports of certain products other than where the imported product was for the importer's "own use" constituted a restriction on imports of such products under Article XI: 1.[1231] New Zealand contends that such a measure is analogous to the use, sale and distribution restrictions applied by Indonesia, in that both measures only permit importation for a narrow range of applications, thereby prohibiting importation of products for certain uses, or from being sold or distributed through certain channels.[1232]

7.378. Responding to Indonesia's argument that this measure is not a quantitative restriction because it "does not place an absolute limit on the amount of animals and animal products that can be imported for permitted end uses"[1233], New Zealand submits that WTO jurisprudence is clear that a measure need not impose an "absolute limit" on importation to constitute a breach of Article XI:1 of the GATT 1994, but that a measure must have a "limiting effect" or impose a "limiting condition" on importation as evidenced by the measure's design, architecture and structure.[1234]

7.2.18.1.2 United States

7.379. The United States claims that this Measure is a limitation or limiting condition on importation or has a limiting effect on imports[1235], and is therefore a restriction inconsistent with Article XI: 1 of the GATT 1994.[1236] Additionally, the United States claims that this requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI: 1.[1237] The United States submits that Indonesia requires as a condition for importation that animals and animal products be imported only for certain specific uses. According to the United States, for all imported products the permitted uses do not include retail sale in traditional Indonesian markets where Indonesians purchase the vast majority of their meat.[1238] The United States argues that this condition limits the opportunities of imported products in the Indonesian market, thus limiting the quantity of imports, and may also render the importer ineligible to import products in the future if the condition is not met.[1239] The United States argues that under MOT 46/2013, as amended, and MOA 139/2014, as amended, animals can only be imported for purposes of improving genetic

[1227] New Zealand's first written submission, para. 172 (referring to Panel Report, *Colombia – Ports of Entry,* para. 7.238 and 7.240-7.241).
[1228] New Zealand's first written submission, paras. 172-173.
[1229] New Zealand's first written submission, para. 176; second written submission, para. 108.
[1230] New Zealand's first written submission, para. 176 (referring to Article 32(2) of MOA 139/2014 as amended, Exhibit JE-28); second written submission, para. 108.
[1231] New Zealand's first written submission, para. 177 (referring to Panel Report, *India – Quantitative Restrictions*, para. 5.142-5.143); second written submission, para. 108.
[1232] New Zealand's first written submission, para. 177; second written submission, para. 108.
[1233] New Zealand's second written submission, para. 106 (referring to Indonesia's first written submission, paras. 108, 110 and 165).
[1234] New Zealand's second written submission, para. 107 (referring to Appellate Body Reports, *China – Raw Materials*, para. 319; *Argentina – Import Measures*, para. 5.217; New Zealand's first written submission, paras. 123-128; response to Panel question No. 60).
[1235] United States' first written submission, para. 291 (referring to Appellate Body Reports, *Argentina – Import Measures,* para. 5.217 and *China – Raw Materials*, para. 320).
[1236] United States' first written submission, para. 290.
[1237] United States' first written submission, fn. 431.
[1238] United States' first written submission, para. 290.
[1239] United States' first written submission, para. 291.

diversity, overcoming domestic shortfalls, or for scientific or research purposes.[1240] The United States submits that animal products listed in Appendix I to MOT 46/2013 and MOA 139/2014 can be imported only for use in manufacturing, hotels, restaurants, or catering, or for other limited purposes.[1241] The United States also submits that animal products listed in Appendix II to MOT 46/2013 and MOA 139/2014 are permitted to be imported for the same purposes as Appendix I products, and also can be sold in modern markets (i.e. supermarkets and convenience stores).[1242]

7.380. The United States further submits that an importer that violates the provisions of MOA 139/2014, as amended, concerning the permitted uses of Appendix I and Appendix II products is subject to having its RI designation, Recommendation, and Import Approval revoked, and becomes ineligible to receive Recommendations in the future.[1243] The United States also submits that an Appendix I (beef products) importer that fails three times to submit its distribution report, specifying to whom and for what purpose they sold their products, has its RI designation suspended[1244], rendering the importer unable to import Appendix I products.[1245] The United States maintains that these use restrictions severely limit the opportunities available to imports in the Indonesian market because, for animals, the permitted purposes do not include ordinary retail sale or sale for slaughter, for beef carcasses and meat listed in Appendix I, the permitted purposes do not include any retail sale, and for Appendix II (non-beef) animal products, the list does not include sale in traditional markets, either in small family-owned stores (*warung*) or in "wet markets".[1246] According to the United States, reports by market analysts show that Indonesian consumers still do at least half of their food shopping at traditional retail outlets[1247], so that the use restrictions for Appendix II products bar imports from competing for a significant portion of the sales in the Indonesian retail food market, while the restrictions for Appendix I products exclude imports from the retail market altogether.[1248] According to the United States, a 2010 survey shows that Indonesian consumers make 70% of their fresh meat purchases at traditional markets.[1249]

7.381. The United States argues that the panel in *India – Quantitative Restrictions* found that the "actual user" requirement was "a restriction on imports because it precludes imports of products for resale by intermediaries"[1250] and that, in *Canada – Provincial Liquor Boards*, the GATT panel found that limitations on the points of sale available to imported beer were restrictions within the meaning of Article XI:1.[1251]

7.2.18.1.3 Indonesia

7.382. Indonesia argues that this Measure does not impose any quantitative limits on imports of animals and animal products and therefore is not a quantitative restriction within the meaning of Article XI:1.[1252]

7.383. Indonesia contends that it limits the end uses of imported animals and animal products to certain retail uses and in the production of other products and that imported animals and animal products are not permitted to be sold in traditional Indonesian markets because of the extremely

[1240] United States' first written submission, para. 292 (referring to Article 3(1) of MOT 46/2013, as amended, Exhibit JE-21).
[1241] United States' first written submission, para. 292 (referring to Article 17 of MOT 46/2013, as amended, Exhibit JE-21 and Article 32(1) of MOA 139/2014, as amended, Exhibit JE-28).
[1242] United States' first written submission, para. 292 (referring to Article 32(2) of MOA 139/2014, as amended, Exhibit JE-28); second written submission, para. 40.
[1243] United States' first written submission, para. 293 (referring to Article 39(d) of MOA 139/2014, Exhibit JE-28)
[1244] United States' first written submission, para. 293 (referring to Article 26 of MOT 46/2013, as amended, Exhibit JE-21).
[1245] United States' first written submission, para. 293.
[1246] United States' first written submission, para. 294.
[1247] United States' first written submission, para. 295 (referring to Rohit Razdan et al., McKinsey & Co, *The Evolving Indonesian Consumer*, p. 16, Exhibit USA-47; and Arief Budiman et al., McKinsey & Co., *The New Indonesian Consumer*, p. 11, Exhibit USA-48); second written submission, para. 40.
[1248] United States' first written submission, para. 295.
[1249] United States' second written submission, para. 40 (referring to Rahwani Y. Rangkuti & Thom Wright, U.S. Department of Agriculture Foreign Agriculture Service, *GAIN Report No. ID1450: Retail Foods 2014*, pp. 5-6, 19 December 2014, Exhibit USA-58).
[1250] United States' first written submission, para. 296 (referring to Panel Report, *India – Quantitative Restrictions,* para. 5.142).
[1251] United States' first written submission, para. 296 (referring to *Canada – Provincial Liquor Boards (EEC)*, adopted on 22 March 1988, BISD 35S/37, para. 4.24).
[1252] Indonesia's first written submission, para. 165; second written submission, paras. 191 and 194.

high risk of unsafe food handling. According to Indonesia, traditional markets in its territory do not have proper cold storage facilities and, in such environments, products must be extremely fresh in order to be safe for human consumption.[1253] Indonesia submits that the prohibition on sale of non-fresh meat (i.e. defrosted or thawed) applies to both imported and domestic meat and that this prohibition was maintained by Indonesia because these types of meat are deceptively similar to fresh meat. Indonesia contends that to ensure the quality of meat sold in traditional markets and to reduce consumer deception, Indonesia has banned entirely the display and sale of all defrosted or thawed meats in traditional markets due to the health risk posed.[1254]

7.2.18.2 Analysis by the Panel

7.384. Similar to Measure 6, the task before the Panel is to establish whether, as claimed by the co-complainants[1255], Measure 14 imposes a limiting condition on importation contrary to Article XI:1 of the GATT 1994. In particular, whether requiring as a condition for importation that animals and animal products be imported only for certain specific uses imposes a limiting condition on importation contrary to Article XI:1 of the GATT 1994.

7.385. We commence by observing that the co-complainants argued that Measure 14 constitutes a restriction on importation[1256], and that it is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[1257] New Zealand argued that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 14, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure".[1258] The United States submitted that Article XI:1 applies to *any* "restriction," including those "made effective through quotas, import or export licenses *or other measures*".[1259]

7.386. We also observe that Indonesia has not contested the co-complainants' characterisation of Measure 14.[1260] Rather, it has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[1261] We recall our conclusion in Section 7.2.3.2.1 above whereby automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. Given the description of Measure 14 in Section 2.3.3.5 above, we concur with the co-complainants that Measure 14 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

7.387. As with the previous measures[1262], we proceed to examine whether the co-complainants have demonstrated that Measure 14 prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective. In doing so, we will determine whether the co-complainants have demonstrated that Measure 14 has a limiting effect on importation. To carry out this analysis, we recall that the Panel is to examine the design, architecture, and revealing structure of Measure 14, within its relevant context.

7.388. As described in Section 2.3.3.5 above, Measure 14 consists of certain requirements that limit the use, sale and distribution of imported animals and animal products, including bovine meat and offal.[1263] This measure is implemented by Indonesia through Articles 3, 17, 25(2) and 26 of MOT 46/2013, as amended, and Articles 32 and 39(d) of MOA 139/2014, as amended. Pursuant to these above provisions, the animals listed in Appendix I and Appendix II of MOT 46/2013, as amended, can only be imported for the purposes of improving genetic quality and diversity; developing science and technology; overcoming domestic deficiencies of seeds, breeders and/or feeders; and/or fulfilling research and development needs.[1264] Furthermore, animal products,

[1253] Indonesia's second written submission, para. 192.
[1254] Indonesia's second written submission, para. 193.
[1255] New Zealand's first written submission, para. 172; United States' first written submission, para. 290.
[1256] New Zealand's first written submission, para. 172; United States' first written submission, para. 290.
[1257] New Zealand's first written submission, para. 208; United States' first written submission, fn. 431.
[1258] New Zealand's first written submission, para. 203.
[1259] United States' first written submission, para. 142.
[1260] Indonesia's response to Panel question No. 10.
[1261] Indonesia's second written submission, para. 165.
[1262] *See,* for instance, paragraph 7.76 above.
[1263] New Zealand's Panel Request, pp. 4-7; United States' Panel Request, pp. 4-7; New Zealand's first written submission, para. 55; United States' first written submission, para. 125.
[1264] Article 3. a.-d. of MOT 46/2013, as amended, Exhibit JE-21.

bovine carcasses, meats, and/or offals listed in Appendix I of MOT 46/2013, as amended, and in Appendix I of MOA 139/2014, can only be imported for the use and distribution of industry, hotels, restaurants, catering, and/or other special needs.[1265] The non-bovine carcasses, beefs and/or offals listed in Appendix II of MOA 139/2014, as amended by MOA 2/2015, can be imported only for the same purposes as the bovine products specified in Appendix I and additionally for sale in modern markets.

7.389. The co-complainants appear to consider that the structure and operation of Measure 14 is causing a limiting effect on importation by affecting the competitive opportunities of imported products. In short, we understand the co-complainants to take issue with Measure 14 because it impedes certain animals and animal products from reaching retail outlets and consequently, reduces the opportunities for imported products to reach the final consumer.

7.390. For instance, New Zealand argued that bovine meat and offal may only be imported into Indonesia for use by "industry, hotel, restaurant, catering, and/or other special needs", and may only be sold or distributed through these same channels or outlets. New Zealand further submitted that the effect of this Measure 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. In particular, these products are prohibited from being sold by importers to modern markets such as supermarkets and hypermarkets as well as traditional retail outlets such as wet markets, small stalls or shops and street carts.[1266] For New Zealand, this Measure 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.[1267]

7.391. Similarly, the United States submitted that for all imported products, the permitted uses do not include retail sale in traditional Indonesian markets where Indonesians purchase the vast majority of their meat.[1268] The United States argued that this condition limits the opportunities of imported products in the Indonesian market, thus limiting the quantity of imports, and may also render the importer ineligible to import products in the future if the condition is not met.[1269] The United States further submitted that an importer that violates the provisions of MOA 139/2014, as amended, concerning the permitted uses of Appendix I and Appendix II products is subject to having its RI designation, Recommendation, and Import Approval revoked, and becomes ineligible to receive Recommendations in the future.[1270] For the United States, an Appendix I (beef products) importer that fails three times to submit its distribution report, specifying to whom and for what purpose the products were sold, has its RI designation suspended[1271], rendering the importer unable to import Appendix I products.[1272] The United States thus maintained that these use restrictions severely limit the opportunities available to imports in the Indonesian market because, for animals, the permitted purposes do not include ordinary retail sale or sale for slaughter; for beef carcasses and meat listed in Appendix I, the permitted purposes do not include any retail sale, and for Appendix II (non-beef) animal products, the list does not include sale in traditional markets, either in small family-owned stores (*warungs*) or in "wet markets".[1273]

7.392. Indonesia confirmed that it limits the end uses of imported animals and animal products to certain retail uses and the production of other products and argued that imported animals and animal products are not permitted to be sold in traditional Indonesian markets because of the extremely high risk of unsafe food handling. According to Indonesia, traditional domestic markets do not have proper cold storage facilities and in such environments, products must be extremely fresh in order to be safe for human consumption.[1274] Indonesia contended that to ensure the quality of meat sold in traditional markets and to reduce consumer deception, Indonesia has

[1265] Article 17 of MOT 46/2013, as amended, Exhibit JE-21.
[1266] New Zealand's first written submission, para. 176; second written submission, para. 108.
[1267] New Zealand's first written submission, para. 176 (referring to Article 32(2), MOA 139/2014 as amended, Exhibit JE-28); second written submission, para. 108.
[1268] United States' first written submission, para. 290.
[1269] United States' first written submission, para. 291.
[1270] United States' first written submission, para. 293 (referring to Article 39(d) of MOA 139/2014, Exhibit JE-28).
[1271] United States' first written submission, para. 293 (referring to Article 26 of MOT 46/2013, as amended, Exhibit JE-21).
[1272] United States' first written submission, para. 293.
[1273] United States' first written submission, para. 294.
[1274] Indonesia's second written submission, para. 192.

banned entirely the display and sale of all defrosted or thawed meats in traditional markets due to the health risk posed.[1275]

7.393. We thus observe that, similar to Measure 6, the co-complainant's case is built around the notion that Measure 14 reduces the competitive opportunities of imported products. This is because Measure 14 substantially reduces the opportunities for these products to reach Indonesian consumers who buy their household food products at consumer retail outlets; effectively precludes importation of bovine products for domestic consumption[1276] and limits the opportunities of imported products in the Indonesian market. The Measure thus limits the quantity of imports and may also render the importer ineligible to import products in the future if the condition is not met.[1277]

7.394. As described in paragraph 7.388 above, Measure 14 imposes three types of restrictions on the use, sale and distribution depending on the type of product:

a. Pursuant to Article 3(1) of MOT 46/2013, as amended, Appendix I and II[1278] animals can *only* be imported for the purposes of improving genetic quality and diversity; developing science and technology; overcoming domestic deficiencies of seeds, breeders and/or feeders; and/or fulfilling research and development needs;

b. Pursuant to Article 17 of MOT 46/2013, as amended, and Article 32(1) of MOA 139/2014, as amended, the bovine meats and offal listed in both Appendix I of MOT 46/2013, as amended; and Appendix I of MOA 139/2014, as amended, can only be imported for the use and distribution of industry, hotels, restaurants, catering, and/or other "special needs"[1279]; and

c. Pursuant to Article 32(2) of MOA 139/2014, as amended, Appendix II[1280] non-bovine carcasses, meat, and/or meat as well as processed meat products may only be imported for the same end uses as specified in subparagraph (b) above and, additionally, for sale in modern markets.

7.395. We observe that, on its face, by restricting the potential uses of the various types of imported animals and animal products, the above regulations result in a prohibition for those imported products destined for any other uses than those prescribed therein. Accordingly:

a. imported animals and animal products listed in Appendix I and II of MOT 46/2013, as amended and imported bovine carcass, meat and offal listed in both Appendix I of MOT 46/2013, as amended, and Appendix I of MOA 139/2014, as amended, *cannot* be sold in both modern and traditional markets and, in general, directly to consumers, and

b. imported non-bovine carcass, meat, and/or offal listed in Appendix II of MOA 139/2014, as amended, although allowed to be sold in modern markets, *cannot* be sold in traditional markets and, in general, directly to consumers.

7.396. Consequently, animals and animal products falling under the scope of the mentioned regulations cannot reach certain retail outlets, which as shown by the co-complainants, are where Indonesian consumers do a substantive proportion of their purchases[1281], sometimes even

[1275] Indonesia's second written submission, para. 193.
[1276] New Zealand's first written submission, para. 176 (referring to Article 32(2) of MOA 139/2014, as amended, Exhibit JE-28); second written submission, para. 108.
[1277] United States' first written submission, para. 291.
[1278] Of MOT 46/2013, as amended.
[1279] Article 32(3) of MOA 139/2014, as amended, defines "special needs" as including gifts for public worship, charity, social services, mitigation of natural disasters; needs of foreign country or international representatives; scientific research and development needs; or sampling for trade fairs and exhibitions.
[1280] Only of MOA 139/2014, as amended.
[1281] *See also* "Indonesia's Modern Retail Sector: Interaction with Changing Food Consumption and Trade Patterns" United States Department of Agriculture, June 2012 (USDA Modern Retail Study), p. 10 (Exhibit NZL 33). Rohit Razdan et al., "The Evolving Indonesian Consumer" McKinsey & Company, Asia Consumer Insights Center, November 2013, p.16 (The Evolving Indonesian Consumer) (Exhibits NZL-34 and USA-47) states "traditional retail channels, including mom-and-pop stores (warungs) and wet markets, still dominate the retail landscape in Indonesia"; Arief Budiman et al, "The New Indonesian Consumer" McKinsey & Company, December 2012, p. 11 (Exhibits NZL-35 and USA-48) states that, as at 2011, "retail sales through traditional channels, including mom-and-pop and wet markets, account for an estimated 70 percent of the market" and that, "[f]or general food and beverage...the traditional channel remains important, with only about half of

amounting to at least half of their food shopping.[1282] Although it may be argued that the restrictions in the case of non-bovine carcass, meat, and/or offal listed in Appendix II of MOA 139/2014, as amended, are less comprehensive, as these products can be destined for sale in modern markets, they are still not able to reach traditional markets. To us, through its design, architecture and revealing structure, Measure 14 restricts the competitive opportunities for imported products because it impedes sale in modern stores or traditional markets or directly to the consumer.

7.397. We also note that, as the co-complainants point out, in *India – Quantitative Restrictions*, the panel examined a similar measure; namely India's "actual user requirement" which provided that some products could only be imported by the "Actual User", and thus did not allow the importation of products for resale by intermediaries. The panel, finding support in prior GATT 1947 reports[1283], concluded that the Indian measure was "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".[1284] We concur with that panel's analysis and make it our own for the purpose of Measure 14.

7.2.18.3 Conclusion

7.398. For the reasons stated above, we find that Measure 14 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.2.19 Whether Measure 15 (Domestic purchase requirement for beef) is inconsistent with Article XI:1 of the GATT 1994

7.2.19.1 Arguments of the Parties

7.2.19.1.1 New Zealand

7.399. New Zealand claims that Article 5 of MOA 139/2014 requires that all persons that wish to import beef must, as a condition of importation, purchase a specified amount of Indonesian beef[1285] and that this domestic purchase requirement constitutes a restriction on the importation of beef in breach of Article XI:1 of the GATT 1994.[1286] New Zealand argues that the quantity of Indonesian beef which must be purchased in order to obtain an MOA Recommendation is determined on a quarterly basis[1287] and that for the quarter commencing July 2015, the quantity

consumers preferring modern retail". *See also*: Suryadarma, D "Competition between traditional food traders and supermarkets in Indonesia" (paper presented to the Crawford Fund for international Agricultural Research Conference on The Supermarket Revolution in Food: Good, bad or ugly for the world's farmers, consumers and retailers) Canberra, August 2011, p. 51 (Exhibit NZL-36). This paper estimates that, as at 2006, traditional markets made up 50% of the total Indonesian food market.

[1282] United States' first written submission, para. 295 (referring to Rohit Razdan et al., McKinsey & Co, *The Evolving Indonesian Consumer*, p. 16, Exhibit USA-47; and Arief Budiman et al., McKinsey & Co., *The New Indonesian Consumer*, p. 11, Exhibit USA-48); second written submission, para. 40. We also note that a 2010 survey shows that Indonesian consumers make 70% of their fresh meat purchases at traditional markets. Rahwani Y. Rangkuti & Thom Wright, U.S. Department of Agriculture Foreign Agriculture Service, *GAIN Report No. ID1450: Retail Foods 2014*, pp. 5-6, 19 December 2014, Exhibit USA-58.

[1283] The panel observed that a minimum import price system has been considered to be a restriction within the meaning of Article XI:1. GATT Panel Report, *EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, adopted on 18 October 1978, BISD 25S/68, para. 4.9. Similarly, a panel found that a measure limiting exports below a certain price was within the scope of Article XI:1. GATT Panel Report, *Japan – Semi-conductors*, adopted 4 May 1988, BISD 35S/116, para. 105. In a case involving limitations on the points of sale available to imported beer, a panel found that such limitations were restrictions within the meaning of Article XI:1. GATT Panel Report, *Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, adopted on 22 March 1988, BISD 35S/37, para. 4.24. This case involved state trading operations and the panel emphasized that the Note Ad Articles XI, XII, XIII, XIV and XVIII referred to "restrictions" generally and not to "import restrictions". It accordingly considered restrictions on distribution as within the meaning of "other measures" under Article XI:1, even though such measures might be examined also under Article III:4. Here the restrictions at issue, although related to distribution, are on importation.

[1284] Panel Report, *India – Quantitative Restrictions*, paras. 5.142-5.143.

[1285] New Zealand's first written submission, para. 179 (referring to Article 5 of MOA 139/2014, Exhibit JE 26).

[1286] New Zealand's first written submission, para. 189.

[1287] New Zealand's first written submission, para. 180 (referring to Absorption Presentation, Slides 4 and 5, Exhibit NZL-38).

was set at 3% of total beef purchases (for beef used for all permitted purposes other than manufacturing) and 1.5% of total beef purchases (for beef imported for use in manufacturing processes).[1288] New Zealand further argues that the domestic purchase requirement is enforced by requiring importers to demonstrate, in their application for an MOA Recommendation, that they have "absorbed" the required quantity of Indonesian beef[1289] and that an application for an MOA Recommendation will be rejected if an importer requests to import a quantity of beef that would result in the proportion of imported beef relative to Indonesian beef purchased by that importer higher than the quantity that has been absorbed. New Zealand also argues that to fulfil the domestic purchase requirement, Indonesian beef must be purchased by an importer in the three-month period prior to the month in which an application for an MOA Recommendation is made.[1290]

7.400. New Zealand also submits that the limiting effect of the domestic purchase requirement is aggravated by the limited supply of beef derived from cattle that have been raised and slaughtered in Indonesia since, in many circumstances, importers are unable to obtain a sufficient quantity of this cattle beef to enable them to import their desired quantity of imports while still satisfying the domestic purchase requirement.[1291] New Zealand thus argues that through its architecture, the domestic purchase requirement is designed to restrict the volume of beef imports into Indonesia by substituting imports with domestically produced product, and thus cause a corresponding increase in the volume of beef that is domestically produced.[1292] New Zealand contends that the panel in *Argentina – Import Measures* confirmed that a suite of trade related requirements, which included a local content requirement, breached Article XI:1[1293], and that Indonesia's domestic purchase requirement is structurally akin to the local content requirement considered by that panel.[1294]

7.401. Responding to Indonesia's statements that Measure 15 cannot constitute a quantitative restriction because it was "suggested by the importers' association of Indonesia" and that "there is plenty of domestic supply to meet the domestic purchase requirement"[1295], New Zealand submits that it does not agree with Indonesia's position, and even if this were true, this requirement would still constitute a breach of Article XI:1 of the GATT 1994.[1296] Regarding the first statement, New Zealand sustains that Indonesia has provided no evidence to support its claim that the domestic purchase requirement was "suggested by the *importers' association* of Indonesia" and that the origin of the domestic purchase requirement is irrelevant, as New Zealand is challenging the measure as it is set out in MOA 139/2014.[1297] Regarding the second statement, New Zealand argues that Indonesia's response regarding availability of sufficient domestic beef for importers to satisfy the domestic purchase requirement is based on unreferenced data and even if the numbers provided by Indonesia were correct, when divided by Indonesia's population of over 255 million, this would amount to just over 1 gram of beef per Indonesian consumer per day.[1298] For New Zealand, irrespective of whether there is sufficient domestic beef available within Indonesia to enable importers to satisfy the domestic purchase requirement, the measure still constitutes a quantitative restriction because it imposes a limiting condition on importation by requiring importers to substitute imported product with domestically produced product and imposes additional costs for importers.[1299]

7.402. New Zealand contends that this requirement affects the competitive relationship between imported and domestic beef in the Indonesian market in three ways: (i) it requires importers to prioritise the purchase of domestic beef over imported beef, meaning that an importer is required to substitute imported beef with domestically produced beef and that, in its absence, the

[1288] New Zealand's first written submission, para. 180 (referring to Absorption Presentation, Slides 4 and 5, Exhibit NZL-38).
[1289] New Zealand's first written submission, para. 181 (referring to Article 24(1)(l) of MOA 139/2014, Exhibit JE-26).
[1290] New Zealand's first written submission, para. 183.
[1291] New Zealand's first written submission, para. 184.
[1292] New Zealand's first written submission, para. 186.
[1293] New Zealand's first written submission, para. 187 (referring to Panel Report, *Argentina – Import Measures*, para. 6.258).
[1294] New Zealand's first written submission, para. 189.
[1295] New Zealand's second written submission, para. 134 (referring to Indonesia's first written submission, paras. 111-112).
[1296] New Zealand's second written submission, para. 135.
[1297] New Zealand's second written submission, para. 136 (referring to Article 5 ofMOA 139/2014, Exhibit JE-26).
[1298] New Zealand's second written submission, para. 138 (referring to Indonesia's first opening statement, para. 4).
[1299] New Zealand's second written submission, para. 139.

purchaser's decision on whether to import beef or obtain beef from domestic sources, would be based entirely on commercial factors, (ii) the relative scarcity of domestic beef and the absence of sophisticated supply chains for domestic beef within Indonesia means that it can be difficult for importers to obtain sufficient beef to satisfy the Domestic Purchase Requirement[1300], meaning that an importer's ability to import beef is limited by whether it is able to obtain a sufficient quantity of domestic beef and (iii) the high cost of Indonesian beef means that the cost of complying with this requirement imposes additional costs on importers which discourages importation. For New Zealand, these costs are entirely unrelated to normal importing activity, and would not exist in the absence of this measure.[1301]

7.403. In response to Indonesia's argument that Measure 15 "was only included in the relevant regulations in March 2015" and "has not been enforced"[1302], New Zealand notes that this requirement is contained in MOA 139/2014. This regulation came into force in December 2014 and provided that the domestic purchase requirement would come into force on 1 March 2015.[1303] New Zealand contends that, whether the Domestic Purchase Requirement is *in fact* currently being enforced is irrelevant, as measures that are not enforced are not immune from challenge since WTO jurisprudence makes clear that mandatory measures that are in force but not being enforced may still be challenged as inconsistent *as such* with a Member's WTO obligations.[1304]

7.404. Commenting on Indonesia's response to a question from the Panel on whether this requirement was in force at the time of the establishment of this Panel, and on how much was required to be purchased at the time of the establishment of this Panel, New Zealand notes that Indonesia's regulations are clear that this requirement came into legal effect from "March 1, 2015"[1305] and therefore the measure was legally in effect prior to the establishment of the Panel.[1306] New Zealand also notes that although the "[t]he 3% domestic beef purchase requirement entered into force beginning June 2015 for the import period July-September 2015"[1307], importers were required to purchase domestic beef during the period from March - May 2015 in order for these purchases to be counted towards their fulfilment of the domestic purchase requirement in their June applications for MOA Recommendations.[1308]

7.405. Finally, to Indonesia's argument that this requirement has never been used to prevent the issuance of an import licence, New Zealand responds that it is not relevant that the Domestic Purchase Requirement has never been used to prevent the issuance of an import licence. Even if Indonesia's contention were accurate, it only demonstrates that importers are aware that they must comply with the domestic purchase requirement in order to obtain a Recommendation, thereby adjusting the requested import quantities, and their purchases of domestic beef, in a manner which ensures compliance with this requirement.[1309]

7.2.19.1.2 United States

7.406. The United States claims that under MOA 139/2014, as amended, Indonesia requires importers of beef to purchase beef from local slaughterhouses as a condition of being eligible to receive permission to import and that this requirement is a restriction within the meaning of Article XI:1 inconsistent with this provision.[1310] Additionally, the United States claims that this requirement is not a duty, tax, or other charge, and, therefore, is within the scope of

[1300] New Zealand's response to Panel question No. 112 (referring to "Ill-Advised Beef Self-Sufficiency Policies Have Depleted Indonesia Cattle Population by 30 Percent, Business Group Says" *Jakarta Globe,* Exhibit NZL-14).
[1301] New Zealand's response to Panel question No. 112.
[1302] New Zealand's second written submission, para. 140 (referring to Indonesia's first written submission, para. 111).
[1303] New Zealand's second written submission, para. 141 (referring to Article 41(1), MOA 139/2014 (Exhibit JE-26).
[1304] New Zealand's second written submission, para. 142 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82).
[1305] New Zealand's comments on Indonesia's response to Panel question No. 107 (referring to Article 41(2) of MOA 139/2014*,* Exhibit JE-26).
[1306] New Zealand's comments on Indonesia's response to Panel question No. 107.
[1307] New Zealand's comments on Indonesia's response to Panel question No. 107 (referring to Indonesia's responses to Panel question No. 106, para. 46).
[1308] New Zealand's comments on Indonesia's response to Panel question No. 107 (referring to Ministry of Agriculture Absorption Presentation, Exhibit NZL-38, Slide 5 stating "March - May: Period of local absorption which the absorbed volume later be required for proposal in June").
[1309] New Zealand's response to Panel question No. 112.
[1310] United States' first written submission, para. 298.

Article XI:1.[1311] The United States argues that importers are allowed to import beef only on the condition that they "absorb" (i.e. purchase) local beef in an amount equivalent to 3% of the quantity they import.[1312]

7.407. The United States submits that only purchases from certain designated abattoirs and only purchases of male cattle count towards this requirement[1313], and that in a Recommendation application, an importer must submit proof, verified by the provincial agency or the municipality from which the Indonesian domestic beef originates, that it has met this requirement.[1314] A Recommendation application without proof that the domestic purchase requirement has been met will be rejected,[1315] and an importer that does not comply with the requirement is subject to sanction by having its RI designation, Recommendation, and Import Approval revoked and by becoming ineligible for a future Recommendation.[1316] For the United States, this requirement operates as a limitation or limiting condition on imports, or has a limiting effect on imports, in three ways. First, the domestic purchase requirement is designed to substitute imports with domestic products.[1317] Second, the domestic purchase requirement is a limiting condition on imports because it ties the permissible quantity of beef imports to the supply of local beef that is available for purchase towards the requirement.[1318] And third, the domestic purchase requirement adds unnecessarily to the costs of importation by requiring importers to purchase local beef without any business purpose. For the United States, these costs can be significant because local beef is in short supply, and only male cattle from certain abattoirs qualify towards the requirement.[1319]

7.408. The United States contends that previous panels have found that measures imposing limits of this kind are restrictions under Article XI:1. The United States refers to the panel in *Argentina – Import Measures* and argues that the panel considered a similar measure, which included a requirement to incorporate a minimum level of local content into goods produced in Argentina and found that it had a direct limiting effect on imports.[1320] The United States also argues that the panel in *India – Autos* made a similar finding concerning a trade balancing requirement, under which companies were required to ensure that their exports were of at least equivalent value to their imports. According to the United States, the panel found that although the requirement did not set an explicit limit on the value of imports it was nevertheless a restriction.[1321]

7.409. Responding to Indonesia's argument that the domestic purchase requirement for beef products is not a "quantitative restriction" because there is "plenty of domestic supply" to meet the requirement"[1322], the United States sustains that Indonesia has provided no evidence to substantiate this assertion, and to the contrary, all of the relevant evidence on the record confirms that beef is scarce in Indonesia and prices are high. For the United States, in any event, even if Indonesian producers could provide abundant domestic beef for purchase by importers, this would not eliminate the restrictive effect of the domestic purchase requirement, which exists on the face of the Indonesian regulations irrespective of actual production volumes or trade flows.[1323]

7.410. Responding to Indonesia's statement that this requirement was not in force at the time of the Panel establishment on May 20, 2015, the United States contends that Article 5(1) of

[1311] United States' first written submission, fn. 443.
[1312] United States' first written submission, para. 300
[1313] United States' first written submission, para. 300 (referring to Wright, *GAIN Report ID1527: Beef and Horticultural Import License Update*, p. 2, Exhibit USA-40).
[1314] United States' first written submission, para. 300 (referring to Article 24(1)(l) of MOA 139/2014, as amended, Exhibit JE-28).
[1315] United States' first written submission, para. 300 (referring to Article 26 of MOA 139/2014, as amended, Exhibit JE-28).
[1316] United States' first written submission, para. 300 (referring to Article 39(b)-(c) of MOA 139/2014, as amended, Exhibit JE-28).
[1317] United States' first written submission, para. 301; response to Panel question No. 112.
[1318] United States' first written submission, para. 302; second written submission, para. 43; response to Panel question No. 112.
[1319] United States' first written submission, para. 303; second written submission, para. 44; response to Panel question No. 112.
[1320] United States' first written submission, para. 305 (referring to Panel Report, *Argentina – Import Measures*, para. 6.261)
[1321] United States' first written submission, para. 307 (referring to Panel Report, *India – Autos*, para. 7.268).
[1322] United States' second written submission, para. 45 (referring to Indonesia's first written submission, para. 112).
[1323] United States' second written submission, para. 45.

MOA 139/2014, as amended, requires importers that import beef ("large ruminant meat") to "absorb" (i.e. purchase) a certain amount of beef from local slaughterhouses in order to import beef into Indonesia and that Article 41(2) stipulates that "the provision on the requirement of local beef absorption, as described in Article 5, shall go into effect on March 1, 2015".[1324] Accordingly, the United States contends that the plain text of MOA 139/2014 is clear that the domestic purchase requirement went into force more than two months before the establishment of the Panel.[1325] The United States also argues that although Indonesia may not have determined the amount of domestic beef that importers would be required to purchase until the July-September 2015 import period, this does not suggest that Article 41(2) was not in force at the time of the Panel's establishment.[1326]

7.2.19.1.3 Indonesia

7.411. Indonesia claims that the domestic purchase requirement was adopted following a recommendation from the importers' association and is therefore not a measure that constitutes a restriction within the meaning of Article XI:1 of the GATT 1994. Indonesia also claims that its domestic purchase requirement does not violate Article XI:1 of the GATT 1994 because it does not restrict or limit any amount of beefs that can be imported into Indonesia.[1327]

7.412. Indonesia explains that the "domestic purchase" requirement dates back to MOA 139/2014, but that since the promulgation of this regulation on 24 December 2014, the Ministry of Agriculture understands that the implementation of this domestic purchase requirement is still uncertain.[1328] Indonesia contends that from January 2013 – March 2015 the domestic purchase requirement for beef pursuant to Article 5(1) of MOA 139/2014 has not been enforced and that no MOA recommendation application during that time has been rejected because the applicant has not met the domestic purchase requirement even throughout 2015.[1329] Indonesia also argues that the threshold of the 3% domestic purchase requirement was in fact suggested by the importers association and that therefore, both *de jure* and *de facto*, the "domestic purchase" requirement cannot be found to limit or restrict imports of beefs into Indonesia territory.[1330]

7.413. Indonesia further submits that it is well-documented that there is plenty of domestic supply to meet the domestic purchase requirement and that currently there are 31 certified slaughterhouses in Indonesia which are able to produce approximately 263,000kg of domestic beef daily.[1331] In the alternative, Indonesia claims that this measure is necessary to the protection of human, plant, and animal life or health under Article XX(b) of the GATT 1994 because it is an integral part of Indonesia's food safety and security plan[1332], and also justified under Article XX(a) of the GATT 1994.[1333]

7.414. Responding to a question from the Panel whether this requirement was in force at the time of the establishment of this Panel, and regarding how much was required to be purchased under this requirement at the time of the establishment of this Panel, Indonesia contends that although MOA 139/2014 entered into force on 24 December 2014, the 3% domestic beef purchase requirement entered into force beginning June 2015 for the import period July-September 2015 based on the outcome of a meeting between GOI officials and various meat associations on 27 February 2015. Indonesia also clarified that since the enactment of MOA 58/2015, which came into force on 7 December 2015 replacing MOA regulation 139/2014, an importer is obliged to source 3% of its beef locally from a slaughterhouse that has an API-U veterinary number, and 1.5% of its beef for API-P.[1334]

[1324] United States' comments on Indonesia's responses to Panel No. 107 (referring to Article 41(2) of MOA 139/2014, as amended, Exhibit JE-28).
[1325] United States' comments on Indonesia's responses to Panel No. 107.
[1326] United States' comments on Indonesia's responses to Panel No. 107.
[1327] Indonesia's second written submission, para. 180.
[1328] Indonesia's second written submission, para. 181.
[1329] Indonesia's second written submission, para. 182.
[1330] Indonesia's second written submission, para. 183. Indonesia's response to Panel question No. 107.
[1331] Indonesia's second written submission, para. 185.
[1332] Indonesia's first written submission, para. 169.
[1333] Indonesia's second written submission, para. 187.
[1334] Indonesia's response to Panel question No. 107.

7.2.19.2 Analysis by the Panel

7.415. The task before the Panel is to establish whether, as claimed by the co-complainants[1335], Measure 15 which requires importers to purchase local beef as a condition to be eligible to import products constitutes a restriction having a limiting effect on importation and is thus inconsistent with Article XI:1 of the GATT 1994.

7.416. We commence by observing that the co-complainants argued that Measure 15 constitutes a restriction on importation[1336], and that it is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[1337] New Zealand argued that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 15, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure".[1338] The United States submitted that Article XI:1 applies to *any* "restriction," including those "made effective through quotas, import or export licenses *or other measures*".[1339]

7.417. We also observe that Indonesia has not contested the co-complainants' characterisation of Measure 15.[1340] Rather, it has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[1341] We recall our conclusion in Section 7.2.3.2.1 above whereby automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. Given the description of Measure 15 in Section 2.3.3.6 above, we concur with the co-complainants that Measure 15 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

7.418. As with the previous measures[1342], we proceed to examine whether the co-complainants have demonstrated that Measure 15 prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective. In doing so, we will determine whether the co-complainants have demonstrated that Measure 15 has a limiting effect on importation. To carry out this analysis, we recall that the Panel is to examine the design, architecture, and revealing structure of Measure 15, within its relevant context.

7.419. As described in Section 2.3.3.6 above, Measure 15 consists of the requirement imposed upon importers of large ruminant meats to absorb local beef.[1343] Indonesia implements this Measure pursuant to Articles 5(1) 24(1), 26(1) and 39(b)−(c) of MOA 139/2014, as amended. Pursuant to these provisions, in applying for a Recommendation, importers must submit proof of local beef purchases duly verified by the provincial agency or municipality of origin. Accordingly, business operators, state-owned enterprises, or regional government-owned enterprises that import large ruminant meats must absorb local beef when applying for a Recommendation.

7.420. We note that the co-complainants emphasized the limiting effects on importation that derive from the architecture of the measure and its impact on the competitive opportunities of imported products. For instance, New Zealand argued that through its architecture, the domestic purchase requirement is designed to restrict the volume of beef imports by substituting imports with domestically produced product, thus causing a corresponding increase in the volume of beef that is domestically produced.[1344] New Zealand also contended that competitive opportunities are affected in three ways: (i) importers are required to prioritise the purchase of domestic beef over imported beef, meaning that an importer is required to substitute imported beef with domestically produced beef and that, absent the requirement, importers' choices and purchasing decisions would be based entirely on commercial factors; (ii) the relative scarcity of domestic beef and the absence of sophisticated domestic supply chains mean that it can be difficult for importers to

[1335] New Zealand's first written submission, para. 190; United States' first written submission, para. 298.
[1336] New Zealand's first written submission, para. 189; United States' first written submission, para. 298.
[1337] New Zealand's first written submission, para. 208; United States' first written submission, fn. 443.
[1338] New Zealand's first written submission, para. 203.
[1339] United States' first written submission, para. 142.
[1340] Indonesia's response to Panel question No. 10.
[1341] Indonesia's second written submission, para. 165.
[1342] *See* for instance, paragraph 7.76 above.
[1343] New Zealand's Panel Request, pp. 4-7; United States' Panel Request, pp. 4-7; New Zealand's first written submission, para. 59; United States' first written submission, paras. 129-130.
[1344] New Zealand's first written submission, para. 186.

obtain sufficient beef to satisfy the domestic purchase requirement[1345]; an importer's ability to import beef is thus limited by whether it is able to purchase a sufficient quantity of domestic beef, and (iii) the high cost of Indonesian beef signifies that the cost of complying with this requirement imposes additional costs on importers, which discourages importation. For New Zealand, these costs are entirely unrelated to normal importing activity, and would not exist but for this Measure.[1346]

7.421. For the United States, Measure 15 operates as a limitation or limiting condition on imports, or has a limiting effect on imports, in three ways: (i) it is designed to substitute imports with domestic products[1347]; (ii) it is a limiting condition on imports because it ties the permissible quantity of beef imports to the supply of local beef that is available for purchase towards the requirement[1348]; and (iii) it adds unnecessarily to the costs of importation by requiring importers to purchase local beef without any business purpose. The United States explained that these costs can be significant because local beef is in short supply, and only male cattle from certain abattoirs qualify towards the requirement.[1349]

7.422. Indonesia responded that, since the promulgation of regulation MOA 139/2014 on 24 December 2014, the Ministry of Agriculture understands that the implementation of the domestic purchase requirement is still uncertain.[1350] Indonesia thus explained that from January 2013–March 2015, the domestic purchase requirement for beef established pursuant to Article 5(1) of MOA 139/2014 had not been enforced and that no MOA Recommendation application during that time had been rejected because the applicant had not met the domestic purchase requirement, even throughout 2015.[1351] Indonesia also argued that, since the threshold of 3% domestic purchase requirement was in fact suggested by the importers' association, therefore, both *de jure* and *de facto*, it cannot be found to limit or restrict beef imports into Indonesia.[1352] Indonesia further submitted that it is well-documented that there is plenty of domestic supply to meet the domestic purchase requirement and that currently there are 31 certified slaughterhouses in Indonesia which are able to produce approximately 263,000 kg of domestic beef daily.[1353]

7.423. In light of Indonesia's arguments, the Panel sought to clarify whether this Measure was in force at the time of the establishment of this Panel.[1354] Indonesia responded that Measure 15 was not in force at the time of the establishment of the Panel because, although MOA 139/2014 entered into force on 24 December 2014, the 3% domestic beef purchase requirement entered into force in early June 2015 for the import period July-September 2015 based on the outcome of a meeting between government officials and various meat associations on 27 February 2015.[1355]

7.424. As we stated in paragraph 7.419 above, the Measure being challenged by the co-complainants is implemented through MOA 139/2014, as amended. Article 41(2) of this regulation stipulates that "the provision on the requirement of local beef absorption, as described in Article 5, shall go into effect on March 1, 2015".[1356] We thus agree with the co-complainants that the plain text of MOA 139/2014, as amended, is clear in that the domestic purchase requirement went into force more than two months before the establishment of the Panel.[1357] We therefore dismiss Indonesia's argument that Measure 15 was not in force at the time of the establishment of the Panel.

7.425. The Panel also sought to clarify how much was required to be purchased under this requirement at the time of the establishment of this Panel.[1358] Indonesia responded that since the

[1345] New Zealand's response to Panel question No. 112 (referring to "Ill-Advised Beef Self-Sufficiency Policies Have Depleted Indonesia Cattle Population by 30 Percent, Business Group Says" *Jakarta Globe,* Exhibit NZL-14).
[1346] New Zealand's response to Panel question No. 112.
[1347] United States' first written submission, para. 301.
[1348] United States' first written submission, para. 302; second written submission, para. 43.
[1349] United States' first written submission, para. 303; second written submission, para. 44.
[1350] Indonesia's second written submission, para. 181.
[1351] Indonesia's second written submission, para. 182.
[1352] Indonesia's second written submission, para. 183. Indonesia's response to Panel question No. 107.
[1353] Indonesia's second written submission, para. 185.
[1354] Panel questions No. 52 and 107.
[1355] Indonesia's response to Panel question No. 107.
[1356] Article 41(2) of MOA 139/2014, as amended, Exhibit JE-28.
[1357] New Zealand's comments on Indonesia's responses to Panel question No. 107; United States' comments on Indonesia's responses to Panel question No. 107.
[1358] Panel question No. 107.

enactment of MOA 58/2015, which came into force on 7 December 2015 replacing MOA 139/2014, as amended, importers are obliged to source 3% of beef locally from a slaughterhouse that has an API-U veterinary number, and 1.5% of beef for API-P.[1359]

7.426. Continuing with our analysis, we observe that Measure 15 compels importers to purchase domestic beef as a condition to receive an MOA Recommendation, and hence, as a condition to import beef into Indonesia. We note that, as a consequence of this requirement, importers would generally be faced with two options: they can either sell the local beef purchased in the ordinary course of their import business or they can find other alternatives to use it, not necessarily connected with their business. If they choose the first option, this will mean that they would not need to import such quantity to cover demand, and thus they would be effectively substituting imported products with domestic products. To us, such import substitution has a direct limiting effect on importation. If importers decide not to sell local beef, they will be forced to find alternative uses for it, which in turn will generate additional costs and affect their business plans. These additional costs are likely to discourage importation, thus creating a limiting effect on importation. We therefore agree with the co-complainants that the import substitution effect inherent to Measure 15 has a limiting effect contrary to Article XI:1 of the GATT 1994.[1360]

7.427. We also observe that Measure 15 is akin to a local content requirement analysed in *Argentina – Import Measures*, which included a requirement to incorporate a minimum level of local content into goods produced in Argentina. The Panel found that the "required increase of local content, either by purchasing from domestic producers or by developing local manufacture, [had] a direct limiting effect on importation, because the measure is designed to force the substitution of imports"[1361] and also noted that these type of measures may result in costs unrelated to the business activity of the particular operator. Likewise, Measure 15 also forces the substitution of imports.

7.2.19.3 Conclusion

7.428. For the reasons stated above, we find that Measure 15 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.2.20 Whether Measure 16 (Beef reference price) is inconsistent with Article XI:1 of the GATT 1994

7.2.20.1 Arguments of the Parties

7.2.20.1.1 New Zealand

7.429. New Zealand claims that 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. New Zealand claims that, through the beef reference price, Indonesia prohibits importation of bovine animals and animal products when the Indonesian market price of beef secondary cuts falls below a specified "reference price" (76,000 Rp per kilogram).[1362] For New Zealand, the beef reference price is functionally similar to a traditional "minimum import price", as both of these measures have the effect of establishing a minimum price below which imported beef cannot enter the market. New Zealand submits that 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".[1363] For New Zealand, minimum import and export prices have been determined to be inconsistent with Article XI:1 of the GATT by a number

[1359] Indonesia's response to Panel question No. 107. We note that MOA 58/2015 is not within our terms of reference because it came into force after the establishment of the Panel.

[1360] New Zealand's first written submission, para. 187; United States' first written submission, para. 301.

[1361] Panel Report, *Argentina – Import Measures*, para. 6.258.

[1362] New Zealand's first written submission, para. 191 (referring to Article 14(1) and 14(2), MOT 46/2013, Exhibit JE-18).

[1363] New Zealand's first written submission, para. 193 (referring to Appellate Body Report, *Chile – Price Band System*, para. 236).

of GATT and WTO panels.[1364] New Zealand argues that the panel in *China – Raw Materials* confirmed the "inherent" restrictiveness of a minimum export price.

7.430. New Zealand also submits that the beef reference price also limits imports by creating uncertainty for importers since they are unable to predict if, or when, importation of bovine animals and animal products will be prohibited as a consequence of the market price of beef falling below the reference price. According to New Zealand, this affects the ability of importers to plan their imports in advance, and leaves importers constantly at risk that imports will be prohibited entirely due to price fluctuations that are outside of their control.[1365] For New Zealand, measures such as this which "create uncertainty and affect investment plans" have the effect of limiting imports, and are therefore inconsistent with Article XI:1.[1366]

7.431. Responding to Indonesia's argument that "[t]o date there has never been an import of secondary cuts of beef that has been restricted or limited due to the reference price system in effect during 2013 - 2015"[1367], New Zealand contends that it is correct that no imports have been directly *prohibited* due to the beef reference price for the following two reasons:[1368] first, Indonesia's import regime limits imports through a range of other measures which have the effect of limiting supply of beef in the Indonesian market and thus increasing prices − thereby keeping the price of beef above the reference price[1369], and second, because since December 2014, imports of bovine secondary cuts have been prohibited by virtue of Measure 10 and accordingly, while it may be strictly correct that imports of beef have not been prohibited *by the reference price*, this is because there is a prohibition on imports of these products at all times.[1370] New Zealand also does not agree with Indonesia's contention that imports of secondary beef cuts have not been "restricted or limited" due to the beef reference price since this measure creates uncertainty for importers as to whether or when imports will be permitted.[1371] This uncertainty is enhanced by the fact that the reference price can be amended "at any time" by the beef price monitoring team. As a consequence, the beef reference price limits imports *at all times*, not only when the domestic price of secondary cuts is below the reference price.[1372]

7.2.20.1.2 United States

7.432. The United States argues that under MOT 46/2013, as amended, Indonesia allows importation of all cattle and beef products only on the condition that the Indonesian market price of secondary cuts of beef is above the "reference price" set by the Ministry of Trade and prohibits importation of all cattle and beef products when the Indonesian market price of secondary cuts of beef falls below the reference price. The United States claims that this requirement is a prohibition or restriction within the meaning of Article XI:1 and, therefore, is inconsistent with GATT 1994 Article XI:1.[1373] Additionally, the United States claims that this requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[1374]

7.433. The United States submits that MOT 46/2013, as amended, provides that if the market price of secondary cuts of beef falls below a reference price set by the Minister of Trade (Rp 76,000.00/kg, as set by MOT 46/2013), all imports of Appendix I products are prohibited until the market price again rises to the reference price. According to the United States, this requirement places an explicit limitation on imports of Appendix I products.[1375] For the United States, the reference price requirement is similar to a minimum import price requirement, which previous panels have considered in the context of Article XI:1. The United States submits that in *China – Raw Materials*, the panel recognized the "applicability of Article XI:1 to minimum price

[1364] New Zealand's first written submission, para. 194 (referring to GATT Panel Report, *EEC – Minimum Import Prices,* paras. 4.9 and 4.14; GATT Panel Report, *Japan – Semi-conductors*, para. 105; and Panel Report *China–Raw Materials*, paras. 7.1081-7.1082).
[1365] New Zealand's first written submission, para. 195.
[1366] New Zealand's first written submission, para. 196 (referring to Panel Report, *Colombia – Ports of Entry,* para.7.240).
[1367] New Zealand's second written submission, para. 156 (referring to Indonesia's additional response to the Panel question No. 55, para. 37).
[1368] New Zealand's second written submission, para. 156.
[1369] New Zealand's second written submission, para. 157.
[1370] New Zealand's second written submission, para. 158
[1371] New Zealand's second written submission, para. 159 (referring to New Zealand's first written submission, paras. 195-196).
[1372] New Zealand's second written submission, para. 159.
[1373] United States' first written submission, para. 309; second written submission, para. 42.
[1374] United States' first written submission, fn. 462.
[1375] United States' first written submission, para. 311.

requirements"[1376], and that the panel found that an analogous minimum export price requirement was a "restriction" under Article XI:1.[1377] The United States argues that the reference price requirement is even more categorical than the minimum import or export prices found by previous panels to be "restrictions" because it prohibits *any* imports once the reference price has been reached, and prohibits imports of *all* beef products, not merely secondary cuts, if the price of secondary cuts falls below the reference price.[1378]

7.434. The United States further contends that the reference price 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 since importers may refrain from contracting for these products given this risk that the price could fall below the reference price.[1379] The United States also claims that the reference price requirement would tend to limit importation by discouraging price competition because imports of all products are prohibited if the market price of secondary cuts falls to or below the reference price, and consequently, importers would be discouraged from competing to introduce lower price imports.[1380]

7.2.20.1.3 Indonesia

7.435. Indonesia has not presented substantial arguments in relation to this measure apart from a defense under Article XX(b) of the GATT 1994 and its reliance upon Article XI:2(c)(ii) of the GATT 1994.[1381]

7.2.20.2 Analysis by the Panel

7.436. The task before the Panel is to establish whether, as claimed by the co-complainants[1382], Measure 16 which provides for reference prices for beef products has a limiting effect on importation contrary to Article XI:1 of the GATT 1994, in particular because the importation of beef products is prohibited when the domestic price of secondary cuts of beef falls below the reference price.

7.437. We begin by observing that the co-complainants argued that Measure 16 constitutes a restriction on importation[1383], and that it is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[1384] New Zealand argued that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 16, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure".[1385] The United States submitted that Article XI:1 applies to *any* "restriction," including those "made effective through quotas, import or export licenses *or other measures*".[1386]

7.438. We note that Indonesia has not contested the co-complainants' characterisation of Measure 16.[1387] Rather, it has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[1388] We recall our conclusion in Section 7.2.3.2.1 above whereby automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. Given the description of Measure 16 in Section 2.3.3.7 above, we concur with the co-complainants that Measure 16 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

[1376] United States' first written submission, para. 312 (referring to Panel Report, *China – Raw Materials* , para. 7.1075 and GATT Panel *EEC – Minimum Import Prices*, para. 4.9).
[1377] United States' first written submission, para. 312 (referring to Panel Report, *China – Raw Materials*, para. 7.1081).
[1378] United States' first written submission, para. 313.
[1379] United States' first written submission, para. 314.
[1380] United States' first written submission, para. 315.
[1381] Indonesia's first written submission, para. 167; second written submission, para. 199.
[1382] New Zealand's first written submission, para. 192; United States' first written submission, para. 309; second written submission, para. 42.
[1383] New Zealand's first written submission, para. 192; United States' first written submission, para. 309; second written submission, para. 42.
[1384] New Zealand's first written submission, para. 208; United States' first written submission, fn. 462.
[1385] New Zealand's first written submission, para. 203.
[1386] United States' first written submission, para. 142.
[1387] Indonesia's response to Panel question No. 10.
[1388] Indonesia's second written submission, para. 165.

7.439. As with the previous measures[1389], we proceed to examine whether the co-complainants have demonstrated that Measure 16 prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective. In doing so, we will determine whether the co-complainants have demonstrated that Measure 16 has a limiting effect on importation. To carry out this analysis, we recall that the Panel is to examine the design, architecture and revealing structure of Measure 16, within its relevant context.

7.440. As described in Section 2.3.3.7 above, we observe that Measure 16 consists of the implementation of a reference price system on imports of Appendix I animals and animal products and the ensuing suspension of imports when the domestic market price of secondary beef cuts falls below the pre-established reference price.[1390] This Measure is implemented by means of Article 14 of MOT 46/2013, as amended. Pursuant to these provisions, in the event that the market price of secondary cuts of beef is below the established reference price, imports of animals and animal products, as included in Appendix I, are suspended. Imports are resumed when the market price reaches again the reference price. The reference price is set at 76,000 Rupiah/kg.[1391]

7.441. We observe that, as was the case with Measure 7, the co-complainants' challenge against Measure 16 appears to be two-fold; on the one hand, they consider that the design, structure and operation of Measure 16 results in a straight import ban when the reference price system is triggered[1392]; and, on the other hand, that same design, structure and operation results in restrictions having a limiting effect on importation even when the reference price system has not actually been triggered.[1393]

7.442. With respect to the consideration of Measure 16 as imposing an import ban when the reference price system is triggered, New Zealand argued that 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.[1394] The United States agreed with this argument.[1395]

7.443. Regarding the limiting effects on importation even where the reference price system has not been triggered, New Zealand argued that the reference price also limits imports by creating uncertainty for importers: importers are unable to predict if, or when, importation of bovine animals and animal products will be prohibited as a consequence of the market price of beef falling below the reference price. According to New Zealand, this affects their ability to plan their imports in advance, and leaves them constantly at risk that imports will be prohibited entirely due to price fluctuations that are outside of their control.[1396] The United States agreed that this is the case because the threat of such a broad restriction reduces the incentives for importation of these products overall since importers may refrain from contracting for these products given this risk that the domestic price could fall below the reference price. The United States also argued that this Measure would tend to limit importation by discouraging price competition because if imports of all products are prohibited when the market price of secondary cuts falls to, or below, the reference price, importers would be discouraged from competing to introduce lower priced imports.[1397]

7.444. Concerning the alleged import ban, we observe that pursuant to this Measure, importation is "postponed", which in practice means that imports are prohibited when the market price falls below the pre-established reference price. Whenever the reference price system is activated, imports are temporarily suspended or banned. Our understanding of the functioning of the reference price system is that imports are not exactly "postponed" in the sense of deferred or put on hold because, as we understand from the letter of the regulation, the authorized import volumes are not carried over to the next validity period. Imports are resumed when the market price reaches again the reference price. We observe that the ban extends to all animals and animal

[1389] *See,* for instance, paragraph 7.76 above.
[1390] New Zealand's Panel Request, pp. 4-7; United States' Panel Request, pp. 4-7; New Zealand's first written submission, para. 62; United States' first written submission, para. 131.
[1391] Article 14 of MOT 46/2013, as amended, Exhibit JE-21. This price level has remained unchanged since it became effective on 2 September 2013. Indonesia's response to Panel question No. 35.
[1392] New Zealand's first written submission, para. 191. United States' first written submission, para. 311.
[1393] United States' first written submission, para. 314.
[1394] New Zealand's first written submission, paras. 191 and 192 (referring to Article 14(1) of MOT 46/2013, Exhibit JE−18).
[1395] United States' first written submission, para. 309; second written submission, para. 42.
[1396] New Zealand's first written submission, paras. 195-196.
[1397] United States' first written submission, para. 315.

products listed in Appendix I of MOT 46/2013, as amended, whatever their price. Therefore, the ban is absolute even if some of the secondary cuts of beef are above the reference price.

7.445. We thus observe that the operation of the reference price system is rather simple: once the domestic price for secondary cuts of beef falls below the reference price established by the Ministry of Trade, imports of all bovine animals and animal products are suspended. Hence, once the reference price system is triggered, there is an absolute ban for the importation of these products and no procedures exist to defer imports of previously approved quantities to the next validity period.

7.446. We concur with the co-complainants that Indonesia's reference price is similar to minimum import price mechanisms that previous panels and GATT panels such as *EEC – Minimum Import Prices, Japan – Semi-conductors* and *China – Raw Materials*, have found to be inconsistent with Article XI:1 of the GATT.[1398] We recall that the panel in *China – Raw Materials* confirmed the "inherent" restrictiveness of a minimum export price.[1399] We further agree with the United States that Measure 16 is even more categorical than the minimum import or export prices found by previous panels to be "restrictions" because it prohibits *any* imports once the reference price system has been triggered, and prohibits imports of *all* beef products, not only secondary cuts, if the price of secondary cuts falls below the reference price.[1400]

7.447. We thus conclude that the design, architecture and revealing structure of Measure 16 results in a prohibition on importation each time the reference price system is triggered and it is therefore inconsistent with Article XI:1 of the GATT 1994.

7.448. Concerning the alleged restrictive effect of this measure in situations where the domestic price is above the reference price, we concur with the co-complainants that this Measure has limiting effects even when the reference price system has not been actually triggered, by creating uncertainty and affecting investment plans. The evidence supplied by Indonesia suggests that, in the course of 2013-2015, the domestic market price of secondary cuts of beef never dipped below the reference price; however, during the same period, the domestic price of beef moderately increased.[1401] Uncertainty arises from the lack of transparency of the reference price system: the calculation methodology remains largely unclear since its constitutive elements are not known or published by the Beef Price Monitoring Team[1402]; and the timing of the introduction of a new reference price remains imprecise because it can be re-evaluated at any time.[1403] Even if importers were able to predict price fluctuations in attempting to anticipate the activation of the system, the terms of importation are locked during three months and must be decided in the application window immediately preceding the import validity period, under Indonesia's import licensing regime.[1404]

7.449. The design and structure of Measure 16 also incentivises importers to be conservative in the volume of secondary cuts of beef they include in their applications for MOA Recommendations and Import Approvals because, similar to our analysis in paragraph 7.218 above regarding the reference price for chillies and shallots, an increase of the supply of secondary cuts of beef might increase the likelihood of the system being triggered and importation being "postponed". In this sense, the mere possibility that the importation of animals and animal products listed in Appendix I of MOT 46/2013, as amended, may be banned altogether creates incentives for importers to limit the requested volume of imports of secondary cuts of beef into Indonesia at any time and not just when the reference price is triggered.

[1398] New Zealand's first written submission, para. 194 (referring to GATT Panel Report, *EEC – Minimum Import Prices,* para. 4.9 and 4.14, GATT Panel Report, *Japan – Semi-conductors*, para. 105; and Panel Report *China–Raw Materials*, paras. 7.1081-7.1082). United States' first written submission, para. 312 (referring to Panel Report, *China – Raw Materials ,* para. 7.1075 and GATT Panel *EEC – Minimum Import Prices*, para. 4.9).

[1399] Panel Report, *China – Raw Materials*, para. 7.1081.

[1400] United States' first written submission, para. 313.

[1401] Exhibit IDN–33, submitted by Indonesia in support of its response to Panel question No. 56.

[1402] Indonesia's response to Panel Questions no. 35.

[1403] Article 14(3) of MOT 46/2013, as amended, Exhibit JE-21. Furthermore, in response to Panel Questions nos. 35 and 87, Indonesia confirms that the current reference price for beef is "effective from 2 September 2013 to 28 January 2016" and that "there has not been a recalculation of the price from 2 September 2013 to present."

[1404] United States' comments to Indonesia's responses to Panel question No. 87.

7.450. In this respect, as we explained with respect to Measure 7, the panel in *Argentina – Import Measures* confirmed the approach taken by earlier panels, including *Colombia – Ports of Entry*[1405], that "uncertainty" created by a measure may constitute a restriction within the meaning of Article XI:1.[1406] In our view, as concluded with respect to Measure 7, there is inherent uncertainty in the reference price system for beef products.

7.2.20.3 Conclusion

7.451. For the reasons stated above, we find that Measure 16 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.2.21 Whether Measure 17 (Import licensing regime for animals and animal products as a whole) is inconsistent with Article XI:1 of the GATT 1994

7.2.21.1 Arguments of the Parties

7.2.21.1.1 New Zealand

7.452. New Zealand claims that although each component of Indonesia's import licensing regime for animals and animal products constitutes an independent restriction on imports in violation of Article XI:1, these individual restrictions and prohibitions do not exist in a vacuum, but rather operate in conjunction with each other element to form an overarching trade restrictive measure inconsistent with Article XI:1 of the GATT 1994.[1407] New Zealand submits that in a decision upheld by the Appellate Body, the panel in *Argentina – Import Measures* considered the existence and content of the individual trade restrictive measures, the manner in which they operated in combination, and thereby determined the existence and content of a single measure.[1408] New Zealand claims that the measures in the present dispute are similar to those considered in *Argentina – Import Measures* since the individual components of Indonesia's import licensing regime each contribute towards realizing Indonesia's policy objective of reducing imports in order to achieve "self-sufficiency" in various food products, especially beef. According to New Zealand, this objective permeates each individual component of Indonesia's import licensing regime and it would therefore be artificial to consider each component of Indonesia's regime as independent and unrelated. New Zealand argues that, when viewed as a collective whole in light of its underlying objective, the true extent of the regime's restrictiveness becomes apparent.[1409]

7.453. New Zealand argues that Indonesia's import licensing regime, viewed as a whole, has a limiting effect on imports because the regime seeks to limit imports through three key mechanisms, reflected in the specific measures previously identified by New Zealand: (i) prohibition on the importation of certain beef products, (ii) market access limitations for animals and animal products and (iii) limitation on importation by creating uncertainty and imposing practical thresholds on importation.[1410] New Zealand maintains that through these mechanisms, Indonesia undermines its key market access obligation under Article XI:1 of the GATT 1994 and that by creating an overall environment which is hostile to imports and importers, Indonesia's import licensing regime imposes strong disincentives for commercial operators to conduct importation and invest in developing import businesses. New Zealand argues that in this sense, the regime is more restrictive when viewed as a whole than simply the sum of its parts.[1411]

7.454. According to New Zealand, components of Indonesia's import licensing regime, both when viewed as individual measures and as a single overarching measure, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure" within the meaning of Article XI:1 of the GATT 1994.[1412] New Zealand submits that Indonesia's import licensing regime, and each of its components, is made effective though applications for MOA Recommendations, Import Approvals and Importer Designations, which constitute conditions for the importation of certain products and that such measures fall within the ordinary meaning of the

[1405] Panel Report, *Colombia – Ports of Entry*, para. 7.240.
[1406] Panel Report, *Argentina – Import Measures*, para. 6.260.
[1407] New Zealand's first written submission, para. 198.
[1408] New Zealand's first written submission, para. 199 (referring to Panel Report, *Argentina – Import Measures*, paras. 6.223–6.225).
[1409] New Zealand's first written submission, para. 200; second written submission, para. 171.
[1410] New Zealand's first written submission, para. 201.
[1411] New Zealand's first written submission, para. 202; second written submission, para. 172.
[1412] New Zealand's first written submission, para. 203.

phrase *"made effective through … import … licences"*.[1413] For New Zealand, Indonesia has not rebutted the case established by the co-complainants that each of the measures at issue in this dispute are "restrictions" within the meaning of Article XI:1 of the GATT 1994 and that each element of Indonesia's import licensing regime for animals and animal products operates in conjunction with each other element to form an overarching trade-restrictive measure.[1414] In addition, New Zealand contends that Indonesia has not addressed the co-complainants' submission that the combined operation of the individual components of Indonesia's import licensing regime for animals and animal products creates a regime which is even more restrictive than the sum of its individual components.[1415]

7.455. New Zealand alternatively submits that even if Indonesia's import licensing regime for animals and animal products, and its individual components, are not considered to be made effective through an "import licence", it is clear that they are made effective through an "other measure" for the purposes of Article XI:1.[1416] New Zealand argues that the term "other measures" in Article XI:1 is a "broad residual category"[1417], which includes laws and regulations as well as any other measures which prohibit or restrict imports, irrespective of their form or legal status.[1418] New Zealand claims that the panel in *Argentina – Import Measures* confirmed the wide scope of "other measures", noting that the "only measures that are excluded from the scope of Article XI:1 of the GATT 1994 are those that take the form of duties, taxes or other charges".[1419]

7.2.21.1.2 United States

7.456. The United States claims that Indonesia imposes numerous restrictions and prohibitions on the importation of animals and animal products through its import licensing regime. The United States argues that as set out in its arguments relating to the discrete elements of Indonesia's Import Licensing System, it considers that the requirements that form part of that regime are each, when considered individually, inconsistent with Article XI:1 of the GATT 1994. The United States further argues that when Indonesia's import licensing regime for animals and animal products is considered as a whole, including these overlapping and interdependent requirements, that regime constitutes a restriction inconsistent with Article XI:1.[1420]

7.457. The United States submits that Indonesia's import licensing regime maintained through MOT 46/2013, as amended, and MOA 139/2014, as amended, imposes numerous limitations and limiting conditions on importation and has various limiting effects on the importation of animals and animal products. The United States argues that by imposing numerous requirements that importers must meet as conditions for permission to import and on the act of importation, the import licensing regime is, by its design and structure, an instrument through which Indonesia controls and limits the importation of animals and animal products.[1421] The United States contends that 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 on importation is greater than the sum of its individual components and thus the Indonesian regime is a "restriction" within the meaning of Article XI:1, and Indonesia breaches Article XI:1 by instituting or maintaining it.[1422]

7.2.21.1.3 Indonesia

7.458. Indonesia claims that, since the co-complainants have failed to establish that any of the component parts of Indonesia's import licensing regime for animals and animal products constitute restrictions on imports, it follows that its import licensing regime as a whole is not a "restriction" within the meaning of Article XI:1.

[1413] New Zealand's first written submission, para. 205.
[1414] New Zealand's second written submission, para. 171.
[1415] New Zealand's second written submission, para. 172.
[1416] New Zealand's first written submission, para. 206.
[1417] New Zealand's first written submission, para. 207 (referring to Panel Report, *Argentina – Hides and Leather*, para. 11.17).
[1418] New Zealand's first written submission, para. 207 (referring to GATT Panel Report, *Japan – Semi-conductors*, paras. 106 and 117).
[1419] New Zealand's first written submission, para. 207 (referring to Panel Reports, *Argentina – Import Measures*, para. 6.435,*India – Quantitative Restrictions,* para. 5.142).
[1420] United States' first written submission, para. 317; second written submission, para. 47.
[1421] United States' first written submission, para. 318.
[1422] United States' first written submission, para. 326; second written submission, para. 48.

7.459. Indonesia also submits two arguments to justify why its import licensing regime for animals and animal products, as a whole, is not in violation of Article XI:1 of the GATT 1994: (i) because it is an automatic import licensing regime, and (ii) because it is not a quantitative restriction.

7.460. Regarding its first argument, Indonesia claims that its import licensing regime for certain animals and animal products is automatic pursuant to Article 2 of the Import Licensing Agreement.[1423] For Indonesia, an automatic import licensing regime is expressly permitted under Article 2.2(a) of the Import Licensing Agreement and therefore it is excluded from the scope of Article XI:1 of GATT 1994.[1424] Indonesia contends that it has repeatedly submitted that no application for Import Approval has ever been rejected for certain animals and animal products provided that all legal requirements set forth under MOT 46/2013 or MOT 5/2016 have been fulfilled by the importers in their application.[1425] Indonesia argues that this shows that import licences for certain animals and animal products implemented through MOA Recommendations and Import Approvals have been granted in all cases pursuant to Article 2(1) of the Import Licensing Agreement and that the co-complainants have failed to submit any evidence indicating that an application of RIPH/MOA-Recommendation or Import Approval was rejected when all legal requirements are fulfilled.[1426]

7.461. Indonesia further contends that its import licensing system for certain animals and animal products implemented through MOA Recommendations and Import Approvals is not administered in such a manner as to have restricting effects on imports subject to automatic licensing pursuant to Article 2 (2)(a) of the Import Licensing Agreement because it complies with the elements of this provision.[1427] For Indonesia, the co-complainants have not argued that its import licensing for certain animals and animal products limits the eligibility of the person, firm, or institution to apply for, and obtain, an import licence because any person, firm or institution is equally eligible to apply for and to obtain import licences.[1428] With respect to the timing of applications, Indonesia contends that, pursuant to Article 11(3) of MOT 46/2013, Import Approvals must be granted within 2 working days and that, pursuant to Article 25 of MOA 139/2014, MOA Recommendations must be granted within 7 working days.[1429]

7.462. Responding to the co-complainants' argument that its import licensing regime for certain animals and animal products is not automatic because the licence applications cannot be submitted on any working day prior to the customs clearance of the goods and that this application window requirement has a restricting effect on imports[1430], Indonesia contends that this narrow interpretation of Article 2(2)(a)(ii) of the Import Licensing Agreement is incorrect for two reasons.[1431] First, pursuant to MOT 46/2013, the Import Approvals application window opens one month prior to the start of the validity periods and is only relevant to products listed under Appendix I. There is no application window for products listed under Appendix II.[1432] Second, Indonesia disagrees with the co-complainants' broad interpretation of Article 2(2)(a)(ii) of the Import Licensing Agreement, whereby an import licence application must be accepted on any working day prior to customs clearance, with indefinite time.[1433] For Indonesia, Article 2(2)(a)(ii) of the Import Licensing Agreement must be seen in conjunction with Article 1(6) of the Import Licensing Agreement, which acknowledges that an application window for import licensing application procedures is allowed. Indonesia contends that it allows a one-month application window to apply for MOA Recommendations for animal products, and a one-month application window for Import Approvals. For Indonesia, this is already in line with Article 1(6) of the Import Licensing Agreement.[1434]

[1423] Indonesia's second written submission, paras. 44 and 66.
[1424] Indonesia's second written submission, para. 67.
[1425] Indonesia's second written submission, para. 47 (referring to Indonesia's first written submission, paras. 63 and 176; opening statement during the first substantive meeting, para. 18; responses to Panel questions Nos. 8 and 52).
[1426] Indonesia's second written submission, paras. 50 and 51.
[1427] Indonesia's second written submission, para. 52.
[1428] Indonesia's second written submission, para. 53.
[1429] Indonesia's second written submission, para. 54.
[1430] Indonesia's second written submission, para. 55 (referring to United States' first written submission, paras. 386-387 and New Zealand's first written submission, paras. 423-426).
[1431] Indonesia's second written submission, para. 55.
[1432] Indonesia's second written submission, para. 68.
[1433] Indonesia's second written submission, para. 59.
[1434] Indonesia's second written submission, paras. 64-65.

7.463. Regarding the second argument, Indonesia contends that even if its import licensing regime for animal and animal products is considered to fall 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 its import licensing regime as a whole is not a "quantitative restriction".[1435] Indonesia submits 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 of products are inconsistent with Article XI. Indonesia contends that this limitation need not be demonstrated by quantifying the effects of the measure at issue, but rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.[1436] For Indonesia, a complainant must show through clear and convincing evidence that the measure at issue has a "limiting effect on importation" and that just because Article XI:1 does not require precise quantification of the trade effects of a challenged measure does not mean that a complainant is excused from demonstrating that the measure has some effect on trade.[1437] According to Indonesia, the co-complainants have failed to present sufficient pre- and post- implementation import data to support their assertion that its import licensing regime for animal and animal products "as a whole" operates to restrict the quantity of imports. Indonesia asserts that there is no reason to believe that there is a causal connection between the slowing of imports in the middle of the year, as presented by New Zealand[1438], and the application windows and validity periods for Indonesia's import licenses. Indonesia argues that, on the contrary, it has shown that the complainants' market share increased for certain animal and animal products, both fresh and processed.[1439]

7.464. In the alternative, Indonesia claims that its import licensing regime for animals and animal products as a whole falls within the general exceptions included in subparagraphs (a), (b) and (d) of Article XX of the GATT 1994.[1440]

7.2.21.2 Analysis by the Panel

7.465. The task before the Panel is to establish whether, as claimed by the co-complainants[1441], Measure 17, i.e. Indonesia's import licensing regime for animals and animal products as a whole, is a restriction inconsistent with Article XI:1 of the GATT 1994. In particular, the Panel is to determine whether Measure 17 has a limiting effect on importation as a result of the combined operation of the different requirements that compose Indonesia's import licensing regime for animals and animal products.

7.466. We commence by observing that the co-complainants argued that Measure 17 constitutes a restriction on importation[1442], and that it is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[1443] New Zealand argued that the components of Indonesia's import licensing regime for animals, animal products and horticultural products, which include Measure 17, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure".[1444] The United States submitted that Article XI:1 applies to *any* "restriction," including those "made effective through quotas, import or export licenses *or other measures*".[1445]

7.467. We observe that Indonesia has not contested the co-complainants' characterisation of Measure 17.[1446] Rather, it has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[1447] We recall our conclusion in

[1435] Indonesia's second written submission, para. 68.
[1436] Indonesia's second written submission, para. 70 (referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.217).
[1437] Indonesia's second written submission, para. 71.
[1438] Indonesia's second written submission, para. 73 (referring to New Zealand's first written submission, Annex 5).
[1439] Indonesia's second written submission, para. 74 (referring to Indonesia's first written submission, para. 178).
[1440] Indonesia's first written submission, para. 170.
[1441] New Zealand's first written submission, para. 198. United States' first written submission, para. 317; second written submission, para. 47.
[1442] New Zealand's first written submission, para. 198; second written submission, para. 171. United States' first written submission, para. 317; second written submission, para. 47.
[1443] New Zealand's first written submission, para. 208; United States' first written submission, fn. 467.
[1444] New Zealand's first written submission, para. 203.
[1445] United States' first written submission, para. 142.
[1446] Indonesia's response to Panel question No. 10.
[1447] Indonesia's second written submission, para. 165.

Section 7.2.3.2.1 above whereby automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. Given the description of Measure 17 in Section 2.3.3.8 above, we concur with the co-complainants that Measure 17 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

7.468. As with the previous measures[1448], we proceed to examine whether the co-complainants have demonstrated that Measure 17 prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective. In doing so, we will determine whether the co-complainants have demonstrated that Measure 17 has a limiting effect on importation. We further understand that the co-complainants are challenging Indonesia's import licensing regime for animals and animal products as a whole on grounds that it is distinct from Measures 10 through 16, inasmuch as it relates to the combined effect and operation of those measures to achieve certain policy goals.[1449]

7.469. In this respect, New Zealand claimed that although each component of Indonesia's import licensing regime for animals and animal products constitutes an independent restriction on imports in violation of Article XI:1, these individual restrictions and prohibitions do not exist in a vacuum, but rather operate in conjunction with each other to form an overarching trade restrictive measure inconsistent with Article XI:1 of the GATT 1994.[1450] New Zealand submitted that in a decision upheld by the Appellate Body, the panel in *Argentina – Import Measures* considered the existence and content of the individual trade restrictive measures, the manner in which they operated in combination, and thereby determined the existence and content of a single measure.[1451] New Zealand claimed that the measures in the present dispute are similar to those considered in *Argentina – Import Measures* since the individual components of Indonesia's import licensing regime each contribute towards realizing Indonesia's policy objective of reducing imports in order to achieve "self-sufficiency" in various food products, especially beef. According to New Zealand, this objective permeates each individual component of Indonesia's import licensing regime and it would therefore be artificial to consider each component of Indonesia's regime as independent and unrelated. New Zealand argued that it is when viewed as a collective whole in light of its underlying objective that the true extent of the regime's restrictiveness becomes apparent.[1452]

7.470. The United States shared the same view and explained that the various import requirements as maintained through MOT 46/2013, as amended, and MOA 139/2014, as amended, impose numerous limitations and limiting conditions on importation and have various limiting effects on the importation of animals and animal products.[1453] The United States contended that 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 on importation is greater than the sum of its individual components.[1454]

7.471. Indonesia submitted two sets of arguments to justify why its import licensing regime for animals and animal products, as a whole, is not in violation of Article XI:1 of the GATT 1994: (i) because it is an automatic import licensing regime, and (ii) because it is not a quantitative restriction. Regarding its first argument, we recall our conclusion in Section 7.2.3.2.1 above whereby automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. Regarding the second argument, Indonesia contended that even if its import licensing regime for animals and animal products is considered to fall 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 is not a "quantitative restriction".[1455] For Indonesia, a complainant must show through clear and convincing evidence that the measure at issue has a "limiting effect on importation" and that just because Article XI:1 does 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.[1456] According to Indonesia, the co-complainants have failed to present sufficient pre- and post-

[1448] *See* for instance, paragraph 7.76 above.
[1449] New Zealand's first written submission, para. 200; second written submission, para. 171. United States' first written submission, para. 325; Indonesia's response to Panel question No. 82, para. 5.
[1450] New Zealand's first written submission, para. 198.
[1451] New Zealand's first written submission, para. 199 (referring to Panel Report, *Argentina – Import Measures*, paras. 6.223-6.225).
[1452] New Zealand's first written submission, para. 200; second written submission, paras. 171 and 172.
[1453] United States' first written submission, para. 318.
[1454] United States' first written submission, para. 326; second written submission, para. 48.
[1455] Indonesia's second written submission, para. 68.
[1456] Indonesia's second written submission, para. 71.

implementation import data to support their assertion that its import licensing regime for animals and animal products "as a whole" operates to restrict the quantity of imports.

7.472. We therefore observe that central to the co-complainants' contention that Measure 17 is inconsistent with Article XI:1 of the GATT 1994 is their argument relating to the manner in which the different requirements operate in combination[1457] and how the restrictive effect of each of the components of Indonesia's import licensing regime for animals and animal products is exacerbated when combined.[1458] Their view is that Measures 10 to 16 are cumulatively more restrictive than the sum of each of the individual requirements due to the way in which the requirements interact with each other.[1459]

7.473. As was the case when we analysed Measure 9, we consider that the co-complainants challenge to Indonesia's import licensing system for animals and animal products as a whole, can be more easily understood from the standpoint of an importer wishing to import animals and animal products into Indonesia. As described in Section 2.2.2.2 above and illustrated in Annex E-2, this importer has to navigate through a number of requirements and procedures before it can effectively obtain all the necessary approvals and documents to import products into Indonesia. Among these requirements and procedures, the importer will need to comply with those encompassed in Measures 10 through 16. The design, architecture and revealing structure of Indonesia's import licensing regime for animals and animal products as a whole is such that it is not enough for the importer to comply with one of the requirements; it will need to comply with all of them in order to be able to import into Indonesia. We thus agree with the co-complainants that the various requirements and procedures constituting Indonesia's import licensing regime for animals and animal products are intrinsically related and intertwined.

7.474. As we have previously found, Measures 10 through 16 impose several restrictions and prohibitions on imports that not only limit the quantity of animals and animal products that can be imported into Indonesia, sometimes imposing an absolute ban; but also affect the competitive opportunities of imported products, increase the costs associated with importation, affect the investment plans of importers, cause uncertainty in the importation business, and create incentives among the importers to limit the amounts they effectively import. Although each of these measures is a prohibition or restriction under Article XI:1 of the GATT 1994, in its own right, we observe that the restrictive effects of each measure are compounded once they are seen as part of a system because they are interrelated and do not work in isolation.

7.475. For instance, as explained in paragraph 7.348 above and 7.372 above, the interaction of Measures 12 (Periodic fixed terms) and 13 (80% realization requirement) exacerbates the limiting effects of each measure. For instance, the limiting effect of the 80% realization requirement is "magnified" when combined with Measure 12 because a number of import terms are locked in prior to the commencement of a quarter and the need to comply with these terms limits the flexibility available to importers to satisfy the 80% realization requirement and therefore further induces importers to reduce the quantities they request in their applications for Import Approvals.[1460]. Also, as described in paragraph 7.372 above, Measure 13 and Measure 16 (beef reference price) mutually reinforce each other's limiting effects as importers may need to import large quantities of beef products during short periods of time in order to comply with the 80% realization requirement, but this may trigger the activation of the reference price because the market will have an increase in supply that may cause prices to drop.

7.476. This amplified or exacerbated limiting effect from the inherent interaction of Measures 10 through 16 needs to be taken into account by importers when taking import related decisions. This will logically lead to situations where due to the workings of these requirements, for instance, the prohibition of importation of unlisted products (Measure 10), or the activation of the reference price system (Measure 16), importers may be prohibited from importing certain products or may be subject to significant limitations as to the quantities or costs associated with importation. We can reasonably understand how by the end of an importation process, and after having tried to comply with the numerous trade-restrictive requirements imposed by Indonesia through Measures 10 through 16, an importer's ability to import can be severely impaired, if not impeded,

[1457] New Zealand's first written submission, para. 200; United States' first written submission, para. 317.

[1458] New Zealand's first written submission, paras. 198 − 202; response to Panel question No. 82.

[1459] New Zealand's first written submission, para. 202; second written submission, para. 172. United States' first written submission, para. 326; second written submission, para. 48; response to Panel question No. 82, paras. 15-16.

[1460] New Zealand's first written submission, para. 170.

and the importer itself may be materially discouraged from undertaking any business in Indonesia. In this sense, we agree with New Zealand that Indonesia's import licensing regime for animals and animal products is characterized by an overall environment which is unfavourable to imports and importers, imposing strong disincentives for commercial operators to conduct importation and affecting the investment plans of importers.[1461] Indonesia's argumentation either under the Import Licensing Agreement or that evidence of trade effects from the co-complainants is required[1462] does not change the above conclusion.

7.477. It thus seems to us that, as evidenced through its design, architecture and revealing structure, the limiting effect of each of the challenged components constituting Measure 17 is compounded or exacerbated as a result of their inherent interaction as part of Indonesia's import licensing regime as a whole.

7.2.21.3 Conclusion

7.478. For the reasons stated above, we find that Measure 17 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.2.22 Whether Measure 18 (Sufficiency of domestic production to fulfil domestic demand) is inconsistent with Article XI:1 of the GATT 1994

7.2.22.1 Arguments of the Parties

7.2.22.1.1 New Zealand

7.479. New Zealand claims that the domestic insufficiency conditions are prohibitions or restrictions other than duties, taxes, or other charges "made effective through … other measures" within the scope of Article XI:1 of the GATT 1994. New Zealand argues that the panel in *US – Poultry (China)* considered that laws enacted by the legislature can constitute "other measures" for the purposes of Article XI:1.[1463] New Zealand submits that Indonesia's legislative provisions restrict imports for animals and animal products and horticultural products when domestic production is deemed sufficient to meet domestic demand.[1464] New Zealand argues that Indonesia's domestic insufficiency condition is set out in the Animal Law, Animal Law Amendment, Horticulture Law, Food Law and Farmers Law and that these laws, both separately and collectively, restrict imports of certain animals and animal products and horticultural products in a manner inconsistent with Article XI:1 of the GATT 1994 because they (i) prohibit and restrict imports, as such and independent of the licensing regimes; and (ii) prohibit and restrict imports through import licensing regimes which are inconsistent with Article XI:1 as discrete restrictions and as a whole.[1465]

7.480. New Zealand argues that the domestic insufficiency condition prohibits and restricts imports, as such and independent of the licensing regimes, because (i) in circumstances when domestic production is deemed sufficient to meet domestic demand, the domestic insufficiency condition prohibits imports of certain products; and (ii) the domestic insufficiency condition limits market access for imported products by creating uncertainty for importers.[1466] New Zealand further submits that Indonesia's domestic insufficiency condition explicitly limits imports of animals, animal products and horticultural products to circumstances when domestic production is deemed insufficient to meet domestic demand.[1467]

7.481. For New Zealand, this domestic insufficiency condition limits the competitive opportunities of imported products as they are only given market access on the condition, and to the extent

[1461] New Zealand's first written submission, para. 202 (referring to Meat Industry Association Statement, p. 8, Exhibit NZL-12); second written submission, para. 172 (referring to European Union's first opening statement, paras. 4-5; Australia's third party written submission, para. 60).
[1462] Indonesia's second written submission, para. 71.
[1463] New Zealand's first written submission, para. 296 (referring to Panel Report, *US – Poultry (China)*, para. 7.451).
[1464] New Zealand's first written submission, para. 285 (referring to Article 36B of the Animal Law Amendment (Exhibit JE-5); Articles 14 and 36 of the Food Law (Exhibit JE-2); Articles 33 and 88 of the Horticulture Law (Exhibit JE-1); and Article 30 of the Farmers Law (Exhibit JE-3).
[1465] New Zealand's first written submission, para. 286.
[1466] New Zealand's first written submission, para. 287.
[1467] New Zealand's first written submission, para. 288.

that, domestic supply is deemed insufficient to satisfy Indonesian needs.[1468] New Zealand also argues that it is well established that the limiting effect of a measure can be demonstrated through its "design, architecture, and revealing structure"[1469] and that in this case the legislative provisions based on sufficiency of domestic production are structured in such a way as to prohibit or restrict imports of certain products and their purpose is to protect domestic production by permitting imports only in circumstances where domestic production is deemed insufficient.[1470] Regarding the uncertainties created by the domestic insufficiency condition, New Zealand argues that GATT and WTO panels have also found that a limiting effect on imports contrary to Article XI:1 of the GATT 1994 can occur through the "uncertainty" that the measures at issue creates for importers.[1471] New Zealand argues that the domestic insufficiency conditions have these limiting effects since the measures lack transparency and predictability and importers cannot predict when certain products will be prohibited from importation on the basis that domestic production is deemed sufficient by the government.[1472]

7.482. According to New Zealand, the domestic insufficiency conditions in the Animal Law, Animal Law Amendment, Horticulture Law, Food Law and Farmers Law also provide 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.[1473] According to New Zealand, the domestic insufficiency conditions in these laws thus prohibit and restrict imports, as applied through the import licensing regimes, since these licensing regimes are inconsistent with Article XI:1 of the GATT both as discrete elements and as a whole.[1474] New Zealand argues that the relevant import licensing regimes are specifically designed to limit imports in order to incentivise domestic production with the objective of achieving domestic self-sufficiency in the production of certain agriculture products. New Zealand submits that, just as the specific requirements in the import regime have a limiting effect on imports, the legislative provisions based on sufficiency of domestic production that guide and enable the import licensing regimes, have a limiting effect on imports.[1475]

7.483. Responding to Indonesia's arguments that the sufficiency requirements serve only as a general statement of Indonesia's commitment to food security and "are not 'measures' that have any impact on imports"[1476], New Zealand contends that the provisions of Indonesia's laws that restrict importation based on this requirement are much more than "general statements of Indonesia's commitment to food security" since they create mandatory and enforceable obligations which directly prohibit certain products in certain circumstances and restrict imports by creating uncertainty for importers as to when imports will be permitted.[1477] New Zealand also contends that irrespective of the examples it has provided to show how this requirement has been invoked in practice, WTO jurisprudence is also clear that measures may be challenged as such, irrespective of their application in a particular case. New Zealand finds support in the Appellate Body in *US-Corrosion-Resistant Steel Sunset Review*, which provided that challenges on an *as such* basis to "acts setting forth rules or norms that are intended to have general and prospective application" are permitted in order to "protect not only existing trade, but also the security and predictability needed to conduct future trade".[1478]

7.2.22.1.2 United States

7.484. The United States claims that Indonesia permits imports of horticultural products and animals and animal products only when, and to the extent that, domestic supply of those products is deemed insufficient to meet Indonesians' basic needs and that such conditioning of imports is

[1468] New Zealand's first written submission, para. 288.
[1469] New Zealand's first written submission, para. 289 (referring to Appellate Body Report, *Argentina – Import Measures*, para. 5.217).
[1470] New Zealand's first written submission, para. 289.
[1471] New Zealand's first written submission, para. 290 (referring to GATT Panel Report, *Japan – Leather (US II),* para. 55; Panel Reports, *Colombia – Ports of Entry*, para. 7.240, *Argentina – Import Measures*, para. 6.474); second written submission, para. 294.
[1472] New Zealand's first written submission, para. 290.
[1473] New Zealand's first written submission, para. 292.
[1474] New Zealand's first written submission, para. 293.
[1475] New Zealand's first written submission, para. 295 (referring to Appellate Body Report, *Argentina – Import Measures*, para. 5.217).
[1476] New Zealand's second written submission, para. 289 (referring to Indonesia's first written submission, para. 161).
[1477] New Zealand's second written submission, para. 290.
[1478] New Zealand's second written submission, para. 293 (referring to Appellate Body Report*, US – Corrosion-Resistant Steel Sunset Review*, para. 82).

inconsistent with Article XI:1 of the GATT 1994 because it is a "restriction" on imports.[1479] Additionally, the United States claims that this requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[1480]

7.485. The United States argues that Indonesia's domestic insufficiency requirement explicitly places a limiting condition on imports by conditioning all importation of horticultural products and animals and animal products on the insufficiency of domestic products to meet Indonesian consumers' needs, thereby severely limiting the opportunities for importation.[1481] The United States argues that Indonesia's domestic insufficiency condition is set out in four laws: the Horticulture Law, the Farmers' Law, the Animal Law, and the Food Law. The United States submits that individually and collectively, these laws provide that importation of horticultural products and animals and animal products is permitted only if domestic production of those products is deemed by the government not sufficient to fulfil the needs of Indonesian consumers. [1482] The United States submits that it considers that, as applied through the import licensing regimes, the domestic insufficiency condition set out in the Horticulture Law, the Farmers' Law, the Animal Law, and the Food Law is inconsistent with Article XI:1. However, the United States also considers that the domestic sufficiency condition, considered by itself, constitutes a restriction within the meaning of Article XI:1.[1483] The United States also submits that the lack of transparency and predictability in the implementation of the domestic insufficiency requirement itself has a limiting effect on imports because 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.[1484] The United States contends that contrary to Indonesia's arguments[1485], the co-complainants have submitted evidence demonstrating the domestic sufficiency requirement's limiting effect on imports.[1486]

7.486. The United States maintains that previous panels have confirmed that measures that limit the market access and competitive opportunities of imported products are "restrictions" under Article XI:1. The United States refers to the panel in *Argentina – Import Measures* and argues that it found that the "import reduction requirement involve[d] *per se* a limitation on imports"[1487], and noted that companies did not know when a restriction would be imposed and that the "uncertainty" generated by Argentina's measure was "an additional and significant element in limiting imports".[1488]

7.2.22.1.3 Indonesia

7.487. Indonesia claims that this measure does not have any impact on imports and that the co-complainants have not presented any evidence that this measure has had any adverse impact on trade flows. Indonesia also argues that the language cited by the co-complainants serves only as a general statement of Indonesia's commitment to food security.[1489] Consequently, Indonesia argues that this measure is not a restriction on imports within the meaning of Article XI:1.[1490]

7.2.22.2 Analysis by the Panel

7.488. The task before the Panel is to establish whether, as claimed by the co-complainants[1491], Measure 18, which imposes a requirement whereby importation of horticultural products, animals

[1479] United States' first written submission, para. 365; second written submission, para. 51.
[1480] United States' first written submission, fn. 514.
[1481] United States' first written submission, para. 366.
[1482] United States' first written submission, para. 368. (referring to Article 33(1)-(2) of the Horticulture Law, Exhibit JE-1, Article 30 of the Farmers Law, Exhibit JE-3, Animal Law, Exhibit JE-4, and Article 36 of the Food Law, Exhibit JE-2).
[1483] United States' first written submission, para. 369.
[1484] United States' first written submission, para. 372.
[1485] United States' second written submission, para. 52 (referring to Indonesia's first written submission, para. 161).
[1486] United States' second written submission, para. 52.
[1487] United States' first written submission, para. 373 (referring to Panel Report, *Argentina – Import Measures*, para. 6.257).
[1488] United States' first written submission, para. 368 (referring to Panel Report, *Argentina – Import Measures*, para. 6.260).
[1489] Indonesia's first written submission, para. 161 (referring to Article 36 of Law 18/2009, Exhibit IDN-13).
[1490] Indonesia's first written submission, para. 161.
[1491] New Zealand's first written submission, paras. 15-16 and 67; United States' first written submission, paras. 13 and 82-83.

and animal products depends upon the sufficiency of domestic supply to fulfil domestic consumption, is inconsistent with Article XI:1 of the GATT 1994. In particular, the Panel is to determine whether Measure 18 as such and in its application through Indonesia's import licensing regimes, constitutes a restriction within the meaning of Article XI:1 of the GATT 1994.

7.489. We begin by noting that the co-complainants argued that Measure 18 constitutes a restriction on importation[1492] and that it is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.[1493] We note that New Zealand considered that Measure 18 constitutes "other measures" for the purposes of Article XI:1.[1494]

7.490. We observe that Indonesia has not contested the co-complainants' characterisation of Measure 18.[1495] Rather, it has responded that its measures are outside the scope of Article XI:1 because they are automatic import licensing regimes.[1496] We recall our conclusion in Section 7.2.3.2.1 above whereby automatic import licensing procedures do not fall *per se* outside the scope of Article XI:1 of the GATT 1994. Given the description of Measure 18 in Section 2.3.4 above, we concur with the co-complainants that Measure 18 is not a duty, tax, or other charge and it is therefore not excluded explicitly from the scope of Article XI:1 of the GATT 1994.

7.491. As described in Section 2.3.4 above, we observe that Measure 18 consists of the requirement whereby importation of horticultural products, animals and animal products depends upon Indonesia's determination of the sufficiency of domestic supply to satisfy domestic demand.[1497] This measure is implemented through Articles 36B of the Animal Law Amendment, Article 88 of the Horticulture Law, Articles 14 and 36 of the Food Law and Article 30 of the Farmers Law. Pursuant to these provisions, importation of horticultural products and animals and animal products is contingent upon the sufficiency of domestic supply for consumption and/or Government food reserves.

7.492. As we described in Section 2.2.1 above, Indonesia's legal framework for the importation of horticultural products and animals and animal products consists of: (i) the overarching legislative instruments encompassed by the Animal Law, Animal Law Amendment, Horticulture Law, Food Law and Farmers Law and (ii) the regulations specifically issued by the Ministry of Trade and the Ministry of Agriculture that regulate the two import licensing regimes at issue. In this respect, we note that the co-complainants' challenge to Measure 18 is twofold: they claim that the sufficiency requirement, as set out in the Animal Law, Animal Law Amendment, Horticulture Law, Food Law and Farmers Law, both separately and collectively, restricts imports of certain horticultural products, animals and animal products (i) as such and independent of the import licensing regimes, and (ii) as applied through Indonesia's import licensing regimes for horticultural products, animals and animal products.[1498]

7.493. Concerning the limiting effect of Measure 18 as such, New Zealand argued that the domestic insufficiency requirement prohibits and restricts imports, as such and independent of the licensing regimes, because (i) in circumstances when domestic production is deemed sufficient to meet domestic demand, Measure 18 prohibits imports of certain products; and (ii) Measure 18 limits market access for imported products by creating uncertainty for importers[1499], as they are only given market access on the condition, and to the extent that, domestic supply is deemed insufficient to satisfy Indonesian needs.[1500] The United States also considered that Measure 18, considered by itself, constitutes a restriction within the meaning of Article XI:1.[1501]

7.494. When observing the wording of the various legislative instruments encompassing Measure 18, we note that the Animal Law, Animal Law Amendment, Horticulture Law, Food Law

[1492] New Zealand's first written submission, para. 286; United States' first written submission, paras. 13 and 82-83.
[1493] New Zealand's first written submission, para. 296; United States' first written submission, fn. 514.
[1494] New Zealand's first written submission, para. 296 (referring to Panel Report, *US – Poultry (China)*, para. 7.451).
[1495] Indonesia's response to Panel question No. 10.
[1496] Indonesia's second written submission, para. 165.
[1497] New Zealand's Panel Request, pp. 4-7; United States' Panel Request, pp. 4-7; New Zealand's first written submission, paras. 15-16 and 67; United States' first written submission, paras. 13 and 82-83.
[1498] New Zealand's first written submission, para. 286. United States' first written submission, paras. 368 and 369.
[1499] New Zealand's first written submission, para. 287.
[1500] New Zealand's first written submission, para. 288.
[1501] United States' first written submission, para. 369.

and Farmers Law explicitly provide that imports are made contingent on the availability of sufficient domestic supply to satisfy domestic demand. At the general level, we note that Article 36 of the Food Law establishes that imports of food "can only be done if the domestic [f]ood [p]roduction is insufficient and/or cannot be produced domestically".[1502] Similarly, Article 30 of the Farmers Law establishes a prohibition on importing agricultural commodities "when the availability of domestic Agricultural Commodities is sufficient for consumption and/or Government food reserves".[1503] On their face, both the Food Law and the Farmers Law clearly provide that importation of food and agricultural commodities must be restricted when domestic production is sufficient to fulfil domestic consumption or government reserves.

7.495. At the specific level of the laws regarding horticultural products and animals and animal products, the principle of sufficiency is also present. For instance, Article 36B(1) of the Animal Law Amendment provides that the "[i]mportation of [l]ivestock and [a]nimal [p]roduct 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 fulfill public consumption*" (emphasis added). Similarly, Article 88 of the Horticulture Law provides that imports of horticultural products must observe several criteria, including the availability of domestic horticultural products and the established production and consumption targets for horticultural products.[1504]

7.496. We thus agree with the co-complainants that, by conditioning the importation of food and agricultural commodities upon a determination of the sufficiency of domestic production to fulfil domestic demand, the above legislative instruments encompassing Measure 18, as such, constitute a restriction on importation and are thus inconsistent with Article XI:1 of the GATT 1994.

7.497. We note that the co-complainants have also argued that Measure 18 affects the competitive opportunities of imported products. New Zealand thus submitted that Measure 18 limits the competitive opportunities of imported products because they are only given market access on the condition, and to the extent that, domestic supply is deemed insufficient to satisfy Indonesian needs.[1505] For New Zealand, the domestic insufficiency conditions have these limiting effects since the measures lack transparency and predictability and importers cannot predict when certain products will be prohibited from importation on the basis that domestic production is deemed sufficient by the government.[1506] Similarly, the United States argued that the lack of transparency and predictability in the implementation of the domestic insufficiency requirement itself has a limiting effect on imports because 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.[1507]

7.498. As we found above, the legislative provisions constituting Measure 18 set out a general condition on imports whereby they are restricted depending on the sufficiency of domestic production to fulfil domestic demand. As stated in paragraph 7.492 above, our understanding of Indonesia's import licensing regimes is that these overarching legislative instruments constitute the legal basis for the implementing regulations issued by the Ministry of Trade and the Ministry of Agriculture that regulate the importation of horticultural products and animals and animal products. In this sense, we note Indonesia's contention that the language cited by the co-complainants serves only as a general statement of Indonesia's commitment to food security[1508] and agree that they do embody some of the principles that reflect the policy objectives pursued by Indonesia. Nonetheless, we disagree with Indonesia's statement that for this reason, Measure 18 cannot be inconsistent with Article XI:1 of the GATT 1994. As New Zealand argued[1509], the Animal Law, Animal Law Amendment, Horticulture Law, Food Law and Farmers Law, that explicitly restrict importation and underpin Indonesia's import licensing regimes, create mandatory and enforceable obligations which directly prohibit certain products in certain circumstances.

7.499. Furthermore, we also concur with the co-complainants that the mandatory language employed in these instruments may also have the effect of limiting importation because it may

[1502] Exhibit JE-2.
[1503] Exhibit JE-3.
[1504] Exhibit JE-1.
[1505] New Zealand's first written submission, para. 288.
[1506] New Zealand's first written submission, para. 290.
[1507] United States' first written submission, para. 372.
[1508] Indonesia's first written submission, para. 161 (referring to Article 36 of Law 18/2009, Exhibit IDN-13).
[1509] New Zealand's second written submission, para. 290.

create uncertainty for importers as to when imports will be permitted or banned. And this is so even in the absence of the implementing regulations that regulate Indonesia's import licensing regimes. Indeed, the lack of transparency and predictability derived from the language of the legislative instruments encompassing Measure 18 results in importers not being able to anticipate when certain products will be prohibited from importation on the basis that domestic production is deemed, or not deemed, sufficient by the government.[1510]

7.500. The Panel wishes to clarify that Members are free to pursue food and farm development objectives as they deem appropriate, provided they are not implemented through WTO-inconsistent measures. Nonetheless, the sufficiency of domestic production to fulfil domestic demand should not be achieved by restricting importation. In our view, the outright import prohibition stipulated in, for instance, Article 36 of the Food Law, Article 30 of the Farmers Law or Article 36B of the Animal Law Amendments to promote self-sufficiency objectives is not in line with Indonesia's WTO obligations and undermines the basic principles and objectives underlying the multilateral trading system.

7.2.22.3 Conclusion

7.501. For the reasons stated above, we find that Measure 18 is inconsistent *as such* with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation. Having concluded that Measure 18 is *as such* inconsistent with Article XI:1 of the GATT 1994, we consider that it is not necessary for us to continue our analysis and rule on whether Measure 18 is also inconsistent *as applied* with Article XI:1 of the GATT 1994.

7.3 Indonesia's defences under Article XX of the GATT 1994

7.3.1 Preliminary remarks

7.502. Indonesia raised several defences pursuant to Article XX(a), (b) and (d) of the GATT 1994 in response to the claims made under Article 4.2 of the Agreement on Agriculture[1511], Article XI of the GATT 1994[1512] and Article III of the GATT 1994.[1513] In this section of our Report, we examine Indonesia's defences under Article XX with respect to our findings of inconsistency of all 18 measures at issue with Article XI:1 of the GATT 1994.

7.503. We observe that when arguing the provisional justification under subparagraphs (a), (b) or (d) of Article XX of the GATT 1994, Indonesia chose to present some general arguments concerning its import licensing regimes for horticultural products and animals and animal products as a whole, but most of its argumentation focused on the individual measures at issue. Indonesia chose a different approach to defend its measures under the *chapeau* of Article XX of the GATT 1994. For this aspect of its defence, Indonesia presented argumentation with respect to its import licensing regime for horticultural products and animals and animal products as a whole, with limited reference to individual measures at issue in this dispute. Not surprisingly, the co-complainants, in responding to Indonesia's arguments, followed the approach adopted by Indonesia.

7.504. Under these circumstances, the Panel decided to also follow Indonesia's approach in considering Indonesia's defences. We shall therefore examine the defences under the relevant subparagraphs of Article XX of the GATT 1994 on a measure by measure basis, while examining whether the relevant challenged measures have been applied in a manner consistent with the *chapeau* of Article XX of the GATT 1994, taking into account Indonesia's import licensing regime for horticultural products and animals and animal products as a whole.

7.505. Before proceeding to examine Indonesia's defences, we address the co-complainants' objections concerning the admissibility of some of those defences because of the timing of their

[1510] New Zealand's first written submission, para. 290.
[1511] Indonesia's first written submission, paras. 61-62.
[1512] Indonesia's first written submission, paras. 121 and 133.
[1513] Indonesia's first written submission, paras. 186-188; Indonesia's second written submission, para. 89.

introduction and the alleged absence of supporting argumentation.[1514] We will then decide the order of our analysis of the various defences under Article XX of the GATT 1994.

7.3.2 Admissibility of Indonesia's defences due to late introduction and lack of argumentation

7.506. The co-complainants maintained that Indonesia introduced *seven new* Article XX defences in its response to a question from the Panel after the second substantive meeting. The co-complainants requested the Panel to dismiss them due to their late introduction and the absence of supporting argumentation.[1515]

7.507. Due to some apparent inconsistencies between the Article XX defences included in Indonesia's first and second written submissions, the Panel had sought to clarify the scope of Indonesia's defences with respect to each of the 18 measures at issue.[1516] Indonesia's response with respect to its defences regarding claims made by the co-complainants under Article XI:1 of the GATT 1994 was as follows:

MEASURE NO	DESCRIPTION	ARTICLE XX DEFENCE subparagraph :		
		(a)	(b)	(d)
1	Limited application windows and validity periods		X	X
2	Periodic and fixed import terms		X	X
3	80% realization requirement		X	X
4	Harvest period requirement		X	X
5	Storage ownership and capacity requirements	X	X	X
6	Use, sale and distribution requirements for horticultural products	X	X	X
7	Reference prices for chillies and fresh shallots for consumption		X	
8	Six-month harvest requirement		X	
9	Indonesia's import licensing regime for horticultural products *as a whole*.	X	X	X
10	Prohibition of importation of certain beef and offal products, except in emergency circumstances		X	X
11	Limited application windows and validity periods		X	X
12	Periodic and fixed import terms		X	X
13	80% realization requirement		X	X

[1514] New Zealand's comments on Indonesia's response to Panel question No. 115; United States' comments on Indonesia's response to Panel question No. 115.

[1515] New Zealand's comments on Indonesia's response to Panel question No. 115; United States' comments on Indonesia's response to Panel question No. 115.

[1516] Panel question no. 115 read as follows:

We observe that, in paragraphs 148 and 149 of its first written submission, Indonesia submits that Measure 5 is justified under Articles XX(b) and XX(d) of the GATT 1994. However, in paragraph 178 of its second written submission, Indonesia submits that Measure 5 is justified under Article XX(b) of the GATT for the maximum capacity requirement and Article XX(a) for the storage ownership requirement. This appears to also be the case with other measures. In order to clarify the scope of Indonesia's defence under Article XX of the GATT 1994, please complete the table below indicating which subparagraph(s) of Article XX of the GATT 1994 Indonesia is invoking in respect of each individual measure.

MEASURE NO	DESCRIPTION	ARTICLE XX DEFENCE subparagraph :		
		(a)	(b)	(d)
14	Use, sale and distribution of imported bovine meat and offal requirements	X	X	X
15	Domestic purchase requirement for beef	X	X	
16	Beef reference price		X	
17	Import licensing regime for animals and animal products *as a whole*	X	X	X
18	Sufficiency of domestic production to fulfil domestic demand		X	

7.508. As previously indicated, the co-complainants submitted that the above enumeration included *seven new* Article XX defences if compared with those in Indonesia's written submissions, namely: Article XX(b) (for Measures 1, 2, 11, 12) and Article XX(d) (for Measures 4, 10, 14).[1517] With reference to the principles of good faith and due process, New Zealand argued that it has had no meaningful opportunity to respond to these new defences, both because of the lack of "elaboration" and because of the "extremely late stage in the proceedings" at which such defences were introduced, i.e. as a response to a question from the Panel after the second substantive meeting.[1518] The United States also observed that Indonesia raised several wholly new Article XX defences in its response and that, in any event, the entirety of these defences consisted of a "bare reference to the relevant Article XX subparagraph in the chart presented" in response to the Panel's question or, at most, an "ambiguous word or two" in a previous submission.[1519]

7.509. We have carefully examined the various submissions filed by Indonesia and benchmarked them against the table above. The result of our examination coincides with the diagnostic provided by the co-complainants: in this table, Indonesia introduces for the first time new defences under Article XX(b) with respect to Measures 1 and 11 (Limited application windows and validity periods) as well as Measures 2 and 12 (Periodic and fixed import terms). The same can be said of the defences under Article XX(d) with respect to Measures 4 (Harvest period requirement), 10 (Prohibition of importation of certain beef and offal products, except in emergency circumstances and 14 (Use, sale and distribution of imported bovine meat and offal requirements). We also observe that, other than completing the table provided by the Panel, Indonesia did not offer any argumentation or evidence in support of the new defences raised in the table.

7.510. As New Zealand points out, the Appellate Body in *US – Gambling* emphasized that "the principles of good faith and due process oblige a responding party to articulate its defence promptly and clearly. This will enable the complaining party to understand that a specific defence has been made, 'be aware of its dimensions, and have an adequate opportunity to address and respond to it'".[1520] In the Appellate Body's view, "[w]hether a defence has been made at a sufficiently early stage of the panel proceedings to provide adequate notice to the opposing party will depend on the particular circumstances of a given dispute".[1521] In the present case, Indonesia did indeed introduce for the first time several new defences at a late stage of the proceedings, i.e. as a response to a question from the Panel after the second substantive meeting. According to the Panel's timetable, the sole opportunity for the co-complainants to respond to the new defences was within their comments on Indonesia's responses to the Panel's questions. These had to be filed within one week from receiving Indonesia's responses to the Panel's questions following the second substantive meeting. Although the co-complainants did provide comments, we do not consider that they had adequate opportunity to address and respond to the several new defences presented. We recall that under the Panel's timetable, Indonesia had seven weeks to file its first written submission following receipt of the co-complainants' first written submissions and that both

[1517] New Zealand's comments on Indonesia's response to Panel question No. 115; United States' comments on Indonesia's response to Panel question No. 115.

[1518] New Zealand's comments on Indonesia's response to Panel question No. 115 (referring to Appellate Body Report, *US – Gambling*, para. 272).

[1519] United States' comments on Indonesia's response to Panel question No. 115.

[1520] Appellate Body Report, *US – Gambling*, para. 272 (referring to Appellate Body Report, *Chile – Price Band System*, para. 164).

[1521] Appellate Body Report, *US – Gambling*, para. 272.

parties had four weeks to file rebuttal submissions following the first substantive meeting with the parties. In this light, we consider that one week is too short to prepare considered responses to the new defences, especially given the number of measures and defences concerned, one defence with respect to four measures and another with respect to three measures. Thus we are of the view that due process would not be served were we to consider these defences in our analysis.

7.511. In any event, even if we did not decline to consider these defences in our analysis, the practical result would be no different. We recall that, as explained by the Appellate Body in *Korea – Various Measures on Beef* and *Thailand – Cigarettes (Philippines)*, in order to justify an otherwise WTO-inconsistent measure, a Member invoking a subparagraph of Article XX as a defence bears the burden of establishing that the conditions prescribed therein are met.[1522] In this instance, Indonesia failed to provide any argumentation or evidence in support of the seven new defences. In our view, Indonesia failed to establish that the conditions prescribed by those defences were met and therefore failed to meet its burden of proof.

7.512. We therefore dismiss Indonesia's defences pursuant to Article XX(b) with respect to Measures 1, 2, 11 and 12 as well as Article XX(d) with respect to Measures 4, 10 and 14 because considering them in our analysis would be inconsistent with due process requirements.

7.3.3 Admissibility of Indonesia's unsubstantiated defences

7.513. In addition to their objections regarding the seven new defences, the co-complainants also argued that, generally, Indonesia's argumentation concerning all of its defences failed to meet the standard of Article XX of the GATT 1994 because it was "patently undeveloped"[1523] or unsubstantiated.[1524] As for Indonesia's defences under Article XX(b) with respect to Measures 3 and 13 (80% realization requirement) and Article XX(a) with respect to Measure 15 (Domestic purchase requirement for beef), the co-complainants decried the absence of argumentation in support of these defences.

7.514. With respect to Measures 3 and 13, we observe that Indonesia did not explicitly invoke Article XX(b) of the GATT 1994 as a defence.[1525] Rather, it indicated in its response to questions from the Panel after the first substantive meeting that it was raising Article XX(d) as a defence, and that the realization requirements were also "necessary for the protection of human health".[1526] This statement was not accompanied by any argumentation or attempt to establish the conditions prescribed by Article XX(b) of the GATT 1994. Nor did Indonesia offer any evidence in support of this assertion. In fact, the only mention of Article XX(b) in relation to these two measures appears within the table of defences provided by Indonesia in response to the question posed by the Panel after the second substantive meeting.[1527] As mentioned in Section 7.3.2 above, the table was not accompanied by supporting argumentation and/or evidence. As noted by the co-complainants, Indonesia's defence under Article XX(b) merely consisted of a reference to the protection of human health and the enumeration of that subparagraph in a table.

7.515. As a preliminary matter, we are reluctant to allow Indonesia to seek to rely on Article XX(b) of the GATT 1994 to justify Measures 3 and 13. In our view, a respondent must assert its defences in a timely and clear manner so that the complainant can know what defences have been asserted and be in a position to develop its response to them. We also consider that, in order to justify an otherwise WTO-inconsistent measure, a Member invoking a subparagraph of Article XX as a defence bears the burden of establishing that the conditions prescribed therein are met.[1528] We do not consider that Indonesia has done so with respect to its defences under Article XX(b) for Measures 3 and 13. We therefore conclude that Indonesia failed to make a *prima facie* defence and, thereby, failed to establish that Measures 3 and 13 are justified under Article XX(b) of the GATT 1994.

[1522] *See* Appellate Body Reports, *Korea – Various Measures on Beef*, para. 157; *Thailand – Cigarettes (Philippines)*, para. 179.

[1523] New Zealand's second written submission, para. 286 (referring to Appellate Body Report, *Thailand – Cigarettes*, para. 179).

[1524] United States' comments on Indonesia's response to Panel question No. 115.

[1525] Indonesia's second written submission, paras. 217-240 and 244, Indonesia's response to Advance Panel question No. 16, para. 12 (horticultural products); first written submission, paras. 145 and 163; second written submission, paras. 207 and 244 (beef products).

[1526] Indonesia's response to Panel questions Nos. 50 and 71.

[1527] Indonesia's response to Panel question No. 115.

[1528] *See* Appellate Body Reports, *Korea – Various Measures on Beef*, para. 157; *Thailand – Cigarettes (Philippines)*, para. 179.

7.516. Indonesia's defence under Article XX(a) of the GATT 1994 with respect to Measure 15 is similarly flawed. As the United States points out[1529], Indonesia's defence of this measure under Article XX(a) of the GATT 1994 consists entirely of two "bare" references to that subparagraph. Indonesia referred to Article XX(a) in its second written submission to seek to justify the domestic purchase requirement. This statement was not complemented by any argumentation or attempt to establish the conditions prescribed by Article XX(a); nor was any evidence offered supporting Indonesia's assertion. The second instance when Indonesia mentioned Article XX(a) with respect to Measure 15 was in the table of defences provided by Indonesia set forth in Section 7.3.2 above which, as mentioned, was devoid of any supporting argumentation and/or evidence. As we said in connection with Indonesia's purported defence under Article XX(b) with respect to Measures 3 and 13, in order to justify an otherwise WTO-inconsistent measure, a Member invoking a subparagraph of Article XX as a defence bears the burden of establishing that the conditions prescribed therein are met.[1530] We do not consider that Indonesia has done so with respect to its defence under Article XX(a) for Measure 15. We therefore conclude that Indonesia failed to make a *prima facie* defence and, thereby, failed to establish that Measure 15 is justified under Article XX(a) of the GATT 1994.

7.517. With respect to all other defences, we generally disagree with the co-complainants that they are "patently undeveloped"[1531] or unsubstantiated[1532] with the exception of Indonesia's purported justification of Measure 18 (Sufficiency of domestic production to fulfil domestic demand) under Article XX(b) of the GATT 1994. In our view, Indonesia failed to substantiate its defence under Article XX(b) with respect to Measure 18. In its first written submission[1533], Indonesia referred to Article XX(b) in defence of Measure 18. Its statement was not complemented by any argumentation or attempt to establish the conditions prescribed by Article XX(b) or by evidence supporting Indonesia's assertion. The second instance when Indonesia mentioned Article XX(b) with respect to Measure 18 was in the table of defences reproduced in Section 1.1.2.[1534] As we observed above, the table was not accompanied by supporting argumentation and/or evidence. We recall once again that, in order to justify an otherwise WTO-inconsistent measure, a Member invoking a subparagraph of Article XX as a defence bears the burden of establishing that the conditions prescribed therein are met.[1535] We do not consider that Indonesia has done so with respect to its defence under Article XX(b) for Measure 18. We therefore conclude that Indonesia failed to make a *prima facie* defence and, thereby, failed to establish that Measure 18 is justified under Article XX(b) of the GATT 1994.

7.518. In the light of the foregoing, we proceed to examine the remaining defences presented by Indonesia pursuant to Article XX(a), (b) and (d) of the GATT 1994.

7.3.4 Order of analysis of Indonesia's defences under Article XX(a), (b) and (d) of the GATT 1994

7.519. In the light of the foregoing, the overview of defences raised by Indonesia under Article XX of the GATT 1994 with respect to the claims pursuant to Article XI:I that we have not dismissed is as follows:

MEASURE NO	DESCRIPTION	ARTICLE XX DEFENCE subparagraph :		
		(a)	(b)	(d)
1	Limited application windows and validity periods			X
2	Periodic and fixed import terms			X
3	80% realization requirement			X

[1529] United States' comments on Indonesia's response to Panel question No. 115.
[1530] See Appellate Body Reports, *Korea – Various Measures on Beef*, para. 157; *Thailand – Cigarettes (Philippines)*, para. 179.
[1531] New Zealand's second written submission, para. 286, referring to Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 179.
[1532] United States' comments on Indonesia's response to Panel question No. 115.
[1533] Indonesia's first written submission, para. 161.
[1534] Indonesia's response to Panel question No. 115.
[1535] See Appellate Body Reports, *Korea – Various Measures on Beef*, para. 157; *Thailand – Cigarettes (Philippines)*, para. 179.

MEASURE NO	DESCRIPTION	ARTICLE XX DEFENCE subparagraph :		
		(a)	(b)	(d)
4	Harvest period requirement		X	
5	Storage ownership and capacity requirements	X	X	X
6	Use, sale and distribution requirements for horticultural products	X	X	X
7	Reference prices for chillies and fresh shallots for consumption		X	
8	Six-month harvest requirement		X	
9	Indonesia's import licensing regime for horticultural products *as a whole*.	X	X	X
10	Prohibition of importation of certain beef and offal products, except in emergency circumstances		X	
11	Limited application windows and validity periods			X
12	Periodic and fixed import terms			X
13	80% realization requirement			X
14	Use, sale and distribution of imported bovine meat and offal requirements	X	X	
15	Domestic purchase requirement for beef		X	
16	Beef reference price		X	
17	Import licensing regime for animals and animal products *as a whole*	X	X	X
18	Sufficiency of domestic production to fulfil domestic demand			

7.520. We will proceed to examine the defences raised by Indonesia following the order of our findings of inconsistency under Article XI:1 of the GATT 1994, starting with Measure 1.

7.3.5 Whether Measure 1 (Application windows and validity periods) is justified under Article XX(d) of the GATT 1994

7.3.5.1 Arguments of the Parties

7.3.5.1.1 Whether Measure 1 is provisionally justified under subparagraph (d) of Article XX of the GATT 1994

7.3.5.1.1.1 Indonesia

7.521. Indonesia contends that Members may derogate from the substantive obligations of the GATT 1994 in order to pursue certain legitimate public policy objectives, including customs enforcement.[1536] Indonesia further argues that the Panel should consider its arguments, and the application of its import licensing regime, in the present case while taking account of its developing country status[1537] and the unique circumstances under which the import licensing regime contributes to customs enforcement, including with regard to limited resources (i.e. customs and

[1536] Indonesia's second written submission, para. 127 (referring to Appellate Body Report, *Thailand — Cigarettes (Philippines)*, paras. 176-177).
[1537] Indonesia's second written submission, para. 127.

quarantine officials who maintain continuous control over numerous ports of entry) and geographical conditions.[1538]

7.522. Indonesia understands that the expression "laws and regulations" in subparagraph (d) encompasses the rules adopted by a WTO Member's legislative or executive branches of government[1539], particularly as they refer to the rules that are part of the domestic legal system.[1540] On this basis, Indonesia contends that its import licensing regime is designed to secure compliance with those laws and regulations.[1541] Indonesia observes that its Customs Law defines "customs" as "everything related to monitoring over flow of goods in or out of customs area and collection of import duty and export duty"[1542]; and that the Consideration of the Customs Law also stipulates that its implementation is intended to guarantee greater legal certainty, support the smooth flow of goods, and increase effective monitoring of the flow of goods into or out of Indonesian customs areas.[1543] Hence, Indonesia asserts that the challenged measures are not stand-alone regulations: they are expressly part of Indonesia's broader customs regime and were implemented to enhance effective customs controls.[1544]

7.523. Indonesia submits that customs enforcement in itself is not WTO-inconsistent and that it is well established that a responding Member's law must be presumed to be GATT/WTO-consistent.[1545] Since the complainants have not challenged its customs laws and regulations in a general manner, having only made claims in respect to certain specific aspects of such laws as they relate to horticultural and animal products, Indonesia concludes that its customs laws and procedures, including those intended to secure customs enforcement, are presumed to be consistent with Indonesia's WTO obligations.[1546] Moreover, Indonesia argues that, in order to meet its burden of proof, it is not required to demonstrate that each and every provision as well as the implementing regulations is WTO-consistent.[1547] Consequently, Indonesia deems its laws and regulations on customs enforcement consistent with the provisions of the GATT 1994.[1548]

7.524. Indonesia argues that the application windows and validity periods are a necessary component of its customs regime. Indonesia sustains that, as a developing country, it has limited resources to allocate to the processing of import licence applications. Such requirements contribute to Indonesia's ability to allocate resources effectively among its many ports, by

[1538] Indonesia's second written submission, para. 133. Indonesia submits that it has hundreds of ports of entry, and it has outfitted 87 international ports, 248 local river and sea ports, and 29 airports as ports of entry; Indonesia's responses to Panel question No. 45.

[1539] Indonesia's second written submission, paras. 129-135 (referring to Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 69).

[1540] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 69.

[1541] Indonesia's response to Panel question No. 71; oral statement at the second substantive meeting, para. 34-35, referring to Law No. 10/1995 concerning Customs, which was later amended by Law No. 17/2006 ("Customs Law", Exhibit IDN-66), and Ministry of Finance Regulation No. 139/2007 on the Customs Verification for Imported Products and its amendment MOA 113/2013 concerning Animal Quarantine for Beef, as well as other relevant regulations concerning quarantine and food safety. These are explicitly defined by Indonesia's cross-reference to its response to Panel question No. 20. In this regard, Indonesia states: "Please also note that MOT 71/2015 refers to other laws and regulations concerning Food Safety, such as:

a.Law 16/1992 concerning Animal, Fish and Plant Quarantine
b.Government Regulation 69/1999 concerning Labeling and Food Advertising
c.Government Regulation 14/2002 concerning Plant Quarantine
d.Government Regulation 28/2004 concerning Food Safety, Quality and Nutrition
e.MOA 88/2011 concerning Food Safety Control over the Import and Export of Fresh Food of Plant Origin
f.MOT 48/2015 concerning General Provisions in Import Sector
g.MOT 24/2010 concerning Inclusion of Food Grade Logo and Recycling Code of Plastic Food Packaging
h.MOA Regulation 42/2012 concerning Plant Quarantine Measures for Entry of Fresh Fruits and Vegetables into the Republic of Indonesia Territory
i.MOT 46/2014 concerning General Provisions of Verification or Technical Surveillance in Trading Sector
j.MOA 43/2012 concerning Plant Quarantine Measures for Importation of Fresh Bulbs Vegetables into the Republic of Indonesia Territory."

[1542] Article 1(1) of Law 17/2006, Exhibit IDN-66.

[1543] Indonesia's oral statement at the second substantive meeting, para. 36, referring to Consideration (a) of Law 17/2006, Exhibit IDN-66.

[1544] Indonesia's oral statement at the second substantive meeting, para. 37.

[1545] Indonesia's second written submission, paras. 136-137; Panel Report, *Colombia – Ports of Entry*, para. 7.527; Appellate Body Report, *US – Carbon Steel*, para. 157; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 111; and Appellate Body Report, *US – Gambling*, para. 138.

[1546] Indonesia's second written submission, paras. 136.

[1547] Indonesia refers to the Panel Report, *Colombia – Ports of Entry*, para. 7.529.

[1548] Indonesia's second written submission, paras. 136.

providing advance notice of expected import volumes in a timely fashion. Indonesia further states that it cannot effectively manage unspecified import volumes on a rolling basis.[1549] In Indonesia's view, the administrative burden placed on importers by the application windows and validity periods was carefully balanced against the reality of Indonesia's capacity to administer and enforce its import licensing regime.[1550]

7.525. Indonesia submits that measures that are "necessary" are understood not to be limited to those "indispensable" or "of absolute necessity" or "inevitable".[1551] In this light, Indonesia contends that its import licensing regime effectively contributes to the monitoring of the trade flows through customs: it provides customs officials with information needed for the purpose of, *inter alia*, monitoring trade inflows; allocating the number of officials in accordance with anticipated import volumes; curbing tax evasion, smuggling and import data distortions[1552]; and easier and more reliable determination of product origin and quality through additional labelling requirements, including trademarks, Halal and food safety.[1553] Indonesia thus asserts that establishing and upholding its trade monitoring system by implementing an import licensing regime is necessary. Indonesia also observes that the relative importance of the common interests or values that may be addressed within the scope of Article XX does not adhere to any hierarchical ranking or prioritization, and that an assessment of their importance must take into account the evidence presented as well as the prevailing circumstances faced by the respondent.[1554]

7.526. Elaborating on the necessity element with respect to the application windows and validity periods, Indonesia contends that its import licensing regime serves the widely shared purpose of obtaining data for statistical purposes. In this light, Indonesia submits that this Measure was incorporated in the regime in order to improve the accuracy of statistics on perishable products. According to Indonesia, data would be more accurate if collected closer to the import date.[1555]

7.3.5.1.1.2 New Zealand

7.527. New Zealand contends that Indonesia's arguments do not meet the standard of Article XX(d) of the GATT 1994.[1556] New Zealand submits that the continued lack of specificity in Indonesia's Article XX(d) defence in its second written submission makes it challenging for the co-complainants to respond.[1557] According to New Zealand, Indonesia cannot simply "deem" its laws and regulations relating to customs enforcement consistent with the provisions of the GATT 1994.[1558] Hence, a Member invoking Article XX(d) has the burden of demonstrating that its requirements are met, including that the "laws and regulations" invoked are "not inconsistent" with the GATT 1994[1559], and precisely identifying the "laws or regulations" referred to in support of such defence.[1560] In particular, New Zealand submits that simply naming three general customs instruments and ten other regulations without specifying what aspects of these legal instruments are relevant to the Panel's analysis does not satisfy Indonesia's burden to prove Article XX(d) elements.[1561] In this respect, New Zealand argues that the legal instruments and specific provisions that are relevant to the laws relating to customs, quarantine and food safety enumerated by Indonesia to justify its measures have not been identified or provided to the Panel

[1549] Indonesia's Response to Panel question No. 14.
[1550] Indonesia's first written submission, para. 136; Indonesia's second written submission, para. 207.
[1551] Indonesia's second written submission, paras. 138-145. In support of this view, Indonesia refers to Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.
[1552] Indonesia's second written submission, paras. 138 and 142. In relation to the last example, Indonesia relies on Panel Report *Colombia – Ports of Entry*, paras. 7.553-7.562.
[1553] Indonesia's second written submission, para. 144.
[1554] Indonesia's second written submission, para. 143. In support of this view, Indonesia refers to Panel Report, *Colombia – Ports of Entry*, para. 7.563.
[1555] Indonesia's second written submission, para. 242.
[1556] New Zealand's second written submission, para. 184.
[1557] New Zealand's opening statement at the second substantive meeting, paras. 41-42 (referring to Indonesia's second written submission, para. 130); New Zealand's second written submission, para. 52).
[1558] New Zealand's opening statement at the second substantive meeting, para. 47 (referring to Indonesia's second written submission, para. 137).
[1559] New Zealand's opening statement at the second substantive meeting, para. 47 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 157).
[1560] New Zealand's opening statement at the second substantive meeting, para. 47.
[1561] New Zealand refers to the Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16; Indonesia's second written submission, para. 130; additional responses to the Panel questions No. 20, para. 12 and 71, para. 46. New Zealand's second written submission, para. 185.

and the parties as exhibits.[1562] Hence, the fact that some of Indonesia's agriculture and trade regulations refer to the Customs Law[1563] is insufficient to demonstrate that each specific trade-restrictive measure before the Panel is designed to secure compliance with the Customs Law, let alone that the measures are necessary to achieve that objective.[1564] New Zealand finds it problematic that Indonesia does not place such laws on record as Exhibits.[1565]

7.528. New Zealand contends that, even if the first element of Article XX(d) were satisfied, Indonesia has not explained why the measures are "necessary to secure compliance" with such laws or regulations. New Zealand considers that "it is difficult to make detailed arguments to demonstrate the 'necessity' of a measure under Article XX(d) in the absence of a clear identification of the laws or regulations with which that measure is purportedly necessary to secure compliance".[1566] Hence, it is difficult to see how the application windows and validity periods would permit Indonesia to allocate resources for customs enforcement, especially since the two regimes appear to be completely independent regimes operated by separate entities. Moreover, New Zealand is of the view that this regime will only provide an indication of trade volumes over the entire 6-month period, without greater specificity relating to volumes in each anticipated shipment. According to New Zealand, Indonesia should have shown what contribution the measures make to the objective of customs enforcement, and why they are necessary to secure compliance with those laws, weighed against their trade restrictiveness.[1567] In New Zealand's view, Indonesia's assertion that its import licensing regime "would indeed serve to 'secure compliance' with the customs enforcement"[1568] is vague and unclear: it does not explain what element of customs enforcement is involved, particularly given the wide-ranging nature of the Customs Law[1569] and Indonesia's wide definition of "customs".[1570] From New Zealand's standpoint[1571], the measures at issue are unrelated to the collection of import and export duties and do not appear to have been adopted to serve the "purpose of attaining data for statistical purposes"[1572] or the "rightful oversight of" the flow of goods.[1573] Even if the measures were aimed at such objectives, New Zealand argues that there are less trade-restrictive mechanisms by which import data could be gathered for statistical purposes, many of which already exist independently.[1574]

7.529. New Zealand further submits that Indonesia has failed to demonstrate that customs enforcement is the objective of its limited application windows and validity periods for RIPHs and import approvals; to identify the provisions of its customs enforcement laws and regulations, not inconsistent with the GATT 1994, with which the measure is designed to secure compliance; and to demonstrate that such laws are "not inconsistent with the provisions of [the GATT 1994]", as required by Article XX(d) if the GATT 1994. In New Zealand's view, WTO jurisprudence confirms that a panel is not bound by Indonesia's assertion of the objective of its measures, but should rather look at all relevant evidence, including the text, structure, and legislative history of the measure at issue.[1575] In that sense, mere assertions concerning the purpose of a challenged measure are not sufficient to establish that a measure is designed to promote an objective protected by Article XX of the GATT 1994. In this instance, New Zealand holds that, nothing in the sources referred to by Indonesia suggests a connection between the measure and customs enforcement. New Zealand cites Indonesia's own notifications to the WTO Import Licensing

[1562] New Zealand's opening statement at the second substantive meeting, para. 42 (referring to the list of laws relating to customs, quarantine and food safety mentioned in Indonesia's additional responses to the Panel's questions after the first substantive meeting, para. 46).

[1563] Law 10/1995 Concerning Customs, as amended by Law No 17/2006; Indonesia's second written submission, para. 134; Exhibits IDN-65 and IDN-66.

[1564] New Zealand's opening statement at the second substantive meeting, para. 43.

[1565] New Zealand's second written submission, para. 185 (referring to Panel Report, *Colombia – Ports of Entry*, paras. 7.516-7.525).

[1566] New Zealand's second written submission, para. 188 (referring to Appellate Body Report, *Thailand – Cigarettes*, fn. 272).

[1567] New Zealand's opening statement at the second substantive meeting, para. 47.

[1568] Indonesia's second written submission, para. 135

[1569] New Zealand's second written submission, para. 56.

[1570] New Zealand's opening statement at the second substantive meeting, paras. 43-44 (referring to Indonesia's second written submission, para. 131, in turn, referring to Article 1(1) of Law 17/2006 (Exhibit IDN-66), covering "everything related to monitoring over flow of goods in or out of customs area and collection of import duty and export duty").

[1571] New Zealand's opening statement at the second substantive meeting, para. 45.

[1572] Indonesia's second written submission, para. 242.

[1573] Indonesia's second written submission, para. 132.

[1574] New Zealand's opening statement at the second substantive meeting, para. 46; New Zealand's second written submission, para. 105.

[1575] New Zealand's second written submission, para. 186 (referring to Appellate Body Report, *EC – Seal Products*, para. 5.144).

Committee, as proof that Indonesia did not list "customs enforcement" as one of the objectives of the regime.[1576]

7.530. New Zealand notes that, in its second written submission, Indonesia claims for the first time that its 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".[1577] New Zealand maintains, however, that the measures at issue require importers to provide information up to six months in advance of importation.[1578] New Zealand suggests that the removal of limited application windows and validity periods would actually enhance data accuracy because information would be obtained closer to the time of importation. New Zealand also observes that, for the first time in its second written submission, Indonesia acknowledges that its limited application windows apply only to certain animal products (namely bovine meat, offal and carcass) and only certain fresh horticultural products.[1579] According to New Zealand, Indonesia's inconsistent application of this measure shows that avoiding food spoilage or data collection is not its true objective.[1580]

7.531. New Zealand reiterates that the basis and rationale for the import licensing restrictions on horticultural products is found in the legislative provisions based on sufficiency of domestic production. According to New Zealand, the specific import licensing restrictions were promulgated in contemplation of these laws, and thus, their purpose is contrary to that alleged by Indonesia.[1581]

7.532. Accordingly, weighing the lack of contribution to the stated objective against its significant trade-restrictiveness[1582], New Zealand submits that Indonesia has failed to discharge its burden to establish that the measure at issue is "necessary" to secure compliance, and to demonstrate the existence of "a genuine relationship of ends and means between the objective pursued and the measure at issue".[1583] Consequently, New Zealand does not consider that it is necessary to elaborate on a less trade-restrictive alternative measure. New Zealand suggests, however, two reasonably available and less trade-restrictive alternatives: (i) removing the import licensing regime for horticultural products: New Zealand notes that a large number of horticultural products are not subject to import licensing and Indonesia has given no reason why this approach could not be applied to all imported horticultural products[1584]; (ii) operating a truly automatic import licensing regime, in which applications could be submitted on any working day prior to customs clearance.[1585]

7.3.5.1.1.3 United States

7.533. According to the United States, Indonesia has not satisfied the elements of the test under paragraph (d) of Article XX.[1586] In analyzing whether the challenged measure was designed to secure compliance with a WTO-consistent law or regulation, the United States notes that, after the first Panel hearing[1587], Indonesia presented a non-exhaustive list of 13 legal instruments covering numerous distinct topics including customs generally, import quarantine, labelling, food safety, recycling, and verification or technical surveillance in the trading sector.[1588] For the United States, apart from the Customs Law, Indonesia fails to provide for the record the text of the 12 other legal instruments. For the United States, the mere listing of legal instruments and cursory references to

[1576] New Zealand's second written submission, para. 186 (referring to G/LIC/N/2/IDN/14, Exhibit US 54, stating no administrative purpose for MOT 16/2013).
[1577] Indonesia's second written submission, para. 242.
[1578] New Zealand's opening statement at the second substantive meeting, para. 62.
[1579] Indonesia's second written submission, paras. 57 and 58.
[1580] New Zealand's opening statement at the second substantive meeting, para. 63.
[1581] New Zealand's second written submission, para. 187 (referring to its first written submission, paras. 70-71).
[1582] As described in New Zealand's first written submission,paras. 214-217.
[1583] New Zealand's second written submission, para. 190 (referring to Appellate Body Report, *EC – Seal Products*, para. 5.180,in turn referring to Appellate Body Report, *Brazil – Retreaded Tyres*, paras 145-157).
[1584] New Zealand's second written submission, para. 191 (referring to its first written submission, para. 73, referring to Attachment II, *MOA 86/2013* (Exhibit JE-15) and Appendix I, MOT 16/2013 (Exhibit JE-8)).
[1585] New Zealand's second written submission, para. 192.
[1586] United States second written submission, para. 123 (referring to Appellate Body Report, *Korea – Beef*, para. 157); oral statement at the second substantive meeting, paras. 54-66.
[1587] United States' second written submission, paras. 125-129 (referring to Indonesia's first written submission, paras. 136, 140,142-145, 149, 160 and 163).
[1588] United States' second written submission, para. 126 (referring to Indonesia's second written submission, para. 130; responses to Panel questions No. 20 and 71); oral statement at the second substantive meeting, para.56.

general provisions fall short of identifying the relevant law or regulation the measures at issue seek to enforce.[1589] The United States holds that no panels or the Appellate Body have found that a WTO-consistent law or regulation was identified based solely on the type of general references that Indonesia has made.[1590] The United States thus considers that Indonesia has not articulated any explanation of how its import licensing regimes and measures contribute to securing compliance with any requirement of a customs or food safety law or regulation.[1591] Merely asserting that the import licensing regimes "effectively contributed to the monitoring of the flow of goods through Indonesian customs" is not sufficient.[1592]

7.534. For the United States, the only evidence put forward is the Customs Law[1593], referenced in three import licensing regulations enacted after the Panel was established.[1594] Recalling that previous panels have looked to evidence surrounding the enactment and operation of a challenged measure, the United States considers that Indonesia has tabled almost no evidence showing that the challenged measures were taken "to secure compliance" with the Customs Law.[1595] Indonesia does not explain how these measures would establish that the import licensing regimes as of the date of panel establishment were taken to secure compliance with the Customs Law.[1596] Also, among the instruments cited by Indonesia, MOA 58/2015 does not actually include even this bare reference among the 20 laws that it "notes", and does not contain the word "customs" at all.[1597] No other laws were submitted for the record, and Indonesia did not specify what aspects of its laws were relevant to the Panel's analysis, or how the challenged measures were necessary to secure compliance with these laws.[1598]

7.535. As Indonesia points to nothing else in the text of any of the instruments suggesting any connection with customs enforcement[1599], the United States observes that previous panels have confirmed that general references to "customs enforcement", "health laws," and entire pieces of legislation do not satisfy the requirements of Article XX(d).[1600] Arguing that the term "to secure

[1589] United States' oral statement at the second substantive meeting, paras. 56-58 (referring to Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 179, fn. 271; Panel Report, *Colombia – Ports of Entry*, paras. 7.516-517, 7.521, where it was found that general references to entire pieces of complex legislation are not sufficient to identify a "law or regulation" for purposes of Article XX(d)).

[1590] United States' oral statement at the second substantive meeting, para. 60 (referring to Panel Report, *Colombia – Textiles*, paras. 7.505-508; Appellate Body Report*, Thailand – Cigarettes* (Philippines), para. 179,fn 271; Panel Reports, *Colombia – Ports of Entry*, para. 7.523; *US – Shrimp* (Thailand), paras. 7.175-179; *Dominican Republic – Import and Sale of Cigarettes*, para. 7.210; *US – Gambling*, para. 6.550; *Canada – Wheat Exports and Grain Imports*, para. 6.221; *Argentina – Hides and Leather*, para. 11.292; *Korea – Various Measures on Beef*, para. 655.

[1591] United States' oral statement at the second substantive meeting, para. 65.

[1592] United States' oral statement at the second substantive meeting, para. 65 (referring to Indonesia's second written submission, paras. 142).

[1593] Exhibits IDN-65 and IDN-66.

[1594] United States' oral statement at the second substantive meeting, para. 62 (referring to Indonesia's second written submission, para. 134).

[1595] United States' oral statement at the second substantive meeting, para. 61 (referring to Panel Reports, *Korea – Various Measures on Beef*, paras. 657-658; *Colombia – Ports of Entry*, paras. 7.539-7.542); *China – Auto Parts*, paras. 7.299, 7.310, 7.312, 7.306.7.308, 7.345).

[1596] United States' oral statement at the second substantive meeting, para. 62 (referring to Appellate Body Report, *EC – Selected Customs Matters*, paras. 188-189, the United States points out that these instruments were enacted after the Panel was established and thus are not part of the measures within the Panel's terms of reference. They would only be relevant to the extent they bear on the legal situation as it existed as of the date of panel establishment.

[1597] United States' oral statement at the second substantive meeting, paras. 63-64 (referring to Exhibit IDN-40).

[1598] United States' second written submission, paras. 127-128 (referring to Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 69, where the term "laws and regulations", as used in Article XX(d), was found to refer to "rules that form part of the domestic legal system of a WTO Member"; Appellate Body Report*, Thailand – Cigarettes (Philippines)*, para. 179).

[1599] United States' oral statement at the second substantive meeting, para. 63.

[1600] United States' second written submission, para. 129 (referring to Panel Report, *Colombia – Ports of Entry*, paras. 7.516-517 and 7.521), where Colombia's general references to "laws and regulations relating to customs enforcement" were found insufficient for purposes of the first element Article XX(d); and where only after Colombia cited relevant legal provisions and submitted the text into evidence did the panel consider that it had adequately identified the relevant laws and regulations; Panel Report*, Colombia – Textiles*, paras. 7.505. and 7.507, where Colombia referred generally to "legislation against money laundering," and named two articles of its Criminal Code as "laws or regulations" under Article XX(d), and where the panel found that Colombia had not identified sufficiently one of the articles, explaining: "Colombia has not reproduced its text in any of its submissions or statements, nor has it presented any exhibit containing the text. In other words, the content of [the article] is not on the record." The United States notes that these findings are on appeal and have not been adopted.

compliance" also informs the interpretation of "laws and regulations", which must be "rules" with which compliance can be "secure[d]", the United States contends that the two provisions of the Customs Law (i.e. the definition of "customs" and a statement in the Preamble) that are specifically identified by Indonesia, do not set out any rule or obligation with which compliance can be secured.[1601] The United States asserts that it is not sufficient for a challenged measure merely to secure compliance with the objectives of WTO-consistent laws and regulations. "To secure compliance" "means 'to enforce obligations under laws and obligations' and not 'to ensure the attainment of the objectives of the laws and regulations.'"[1602] Hence, the United States considers that a definition or a preamble that does not contain a relevant obligation is not sufficient, because it is not a "rule" with which compliance is capable of being secured.[1603] Also, submitting the entire text of the Customs Law is insufficient to meet the identification element given the variety of topics addressed therein.[1604]

7.536. The United States observes that the lack of connection to customs enforcement is confirmed in a number of other ways. First, none of the regulations establishing the various restrictions mentions customs enforcement as one of its purposes.[1605] Second, 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. The United States notes that the relevant regulation states explicitly that the pre-shipment verification of horticultural products "does not reduce the authority of the Directorate General of Customs and Excise of the Finance Ministry for conducting customs inspections."[1606] Third, when notifying its import regulations for horticultural products and animals and animal products to the WTO Import Licensing Committee, Indonesia did not list customs enforcement as a purpose of either regime.[1607] Hence, while Indonesia asserts that the application windows and validity periods are related to customs enforcement, it points to no evidence that this is, in fact, the case.[1608] Mere assertions concerning the purpose of the challenged measure are insufficient to establish that a measure is maintained under an Article XX subparagraph.[1609] Finally, Indonesia has made no assertions concerning the WTO-consistency of the relevant laws and regulations.[1610] In this light, the United States contends that the Panel should rather look to the text, structure, and history of the challenged measure to determine whether the stated objective is, in fact, the objective of the

[1601] United States' oral statement at the second substantive meeting, paras. 56 and 59 (referring to Appellate Body Report, *Mexico – Taxes on Soft Drinks* , paras. 69 and 72).

[1602] United States' oral statement at the second substantive meeting, para. 59 (referring to GATT Panel Report, *EEC –Parts and Components*, para. 5.17; Panel Reports, *Korea – Various Measures on Beef*, para. 658; *Colombia – Ports of Entry*, para. 5.17; *Canada – Wheat Exports and Grain Imports*, para. 6.248; *EC – Trademarks and Geographical Indications*, para. 7.447; *Canada – Periodicals*, para. 5.9; *Colombia – Textiles*, para. 7.482).

[1603] United States' oral statement at the second substantive meeting, para. 59.

[1604] United States' oral statement at the second substantive meeting, paras. 57-58. According to the United States, the Customs Law contains many obligations and addresses topics as wide-ranging as export declarations (art. 10), transportation of goods within Indonesia (art. 11), tariffs and import duties (arts. 12-17), anti–dumping and countervailing duties (arts. 18-23), storage of products under customs supervision (arts. 42-48), IPR infringement (arts. 54-64), and the customs appeal process (arts. 93-101).

[1605] United States' second written submission, para. 132 (referring to MOT 16/2013, as amended by MOT 47/2013, pp. 1 (Exhibit JE-10) (stating the purpose as "to protect consumers, promote business certainty and transparency, and simplify the licensing process and the administration of imports"); MOA 86/2013, pp. 1 (Exhibit JE-15) (stating the purpose as "to simplify the import process . . . and provid[e] certainty in servicing Import Recommendation[s]"); MOT 46/2013, as amended, pp. 1, Exhibit JE-21) (stating the purpose as "to improve consumer protection, preserve natural resources, provide business certainty, transparency, and simplify the licensing process and the administration of imports"); MOA 139/2014, as amended, pp. 1, Exhibit JE-28) (stating the purpose as "to optimize the importation services of carcasses, meat, and/or their processed products").

[1606] United States' second written submission, para. 130-134 (referring to Article 23 MOT 16/2013, as amended by MOT 47/2013, Exhibit JE-10).

[1607] United States second written submission, para. 132; G/LIC/N/2/IDN/14, Exhibit USA-54 (specifying no administrative purpose for MOT 16/2013); and G/LIC/N/2/IDN/19, Exhibit USA-55 (specifying the administrative purpose of MOT 46/2013 as "to establish healthy trade, conducive business environment and orderly import and administration").

[1608] United States second written submission, para. 131 (referring to Indonesia's first written submission, paras. 136, 140,142-145, 149 and 163).

[1609] United States' second written communication, para. 131, referring to Appellate Body Report, *EC – Seal Products,* para. 5.144 (stating that panels "should take into account the Member's articulation of the objective or the objectives it pursues through its measures, but it is not bound by that Member's characterization of such objective(s)")).

[1610] United States second written submission, para. 129.

measure.[1611] According to the United States, it is clear from the text, structure, and history of the import licensing regulations and the framework legislation pursuant to which both import licensing regimes were established that their actual purpose is to protect domestic producers from competition from imports:[1612] (i) The Horticulture Law states that the Indonesian government must maintain the balance of horticultural supply and demand by "controlling import and export" of horticultural products, and must "give priority to the selling of local horticultural products"[1613]; (ii) The Animal Law states that importation of animals and animal products should be done only "if local production and supply of animals or cattle and animal products is not sufficient to fulfill consumption needs of the society"[1614]; (iii) The import licensing regulations were promulgated pursuant to these statutes[1615], and Indonesian officials have confirmed that the purpose of the regimes is to restrict food imports in order to achieve self-sufficiency in food production.[1616]

7.537. The United States argues that, even if the Panel found that any of the challenged measures were designed to secure compliance with some WTO-consistent law or regulation, Indonesia would have to show that the measure was "necessary" to the achievement of that objective.[1617] The United States argues that it is unclear that the application windows and validity periods would make any contribution to Indonesia's ability to allocate customs resources among its ports. According to Indonesia's own argument, importers do not in practice limit their imports to the particular ports specified on their import approvals.[1618] Therefore, due to the operation of the application windows and validity periods, Indonesian officials would only know at the beginning of the period the maximum permitted imports for that period and the ports where such imports could possibly be brought in. The United States contends that, based on this information, it is unclear how resources could be allocated among ports. In its view, a less trade-restrictive way to achieve the objective of providing timely 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 could receive permission to import goods of the type and quantity requested through the port of entry specified. According to the United States, such a regime could be administered in the same way as the current regime, would be "reasonably available"[1619] to Indonesia, and would provide more accurate and timely notice of the products importers plan to bring in, and, therefore, would better assist Indonesia in allocating its resources.

7.538. The United States fails to see how Indonesia's argument, i.e. that it has limited resources to devote to processing import licensing applications, is related to customs enforcement.[1620] The United States notes that import licensing applications are processed by the Ministry of Agriculture and the Ministry of Trade, not the Directorate General of Customs and Excise in the Finance Ministry.[1621] Thus, even if the application windows and validity periods conserve resources for officials processing the import licensing applications (and Indonesia has not explained how that would be the case), that would make no contribution to customs enforcement. Moreover, the United States argues that application windows and validity period requirements are very trade-restrictive, effectively halting US products' access to the Indonesian market for several weeks out of each import period and several months out of the year. According to the United States, a measure would have to make a significant contribution to its covered objective to justify this level of trade-restrictiveness.[1622] Thus, the United States contends that, even putting aside Indonesia's failure to identify a relevant law or regulation or demonstrate that the application windows and validity periods relate to customs enforcement in any way, the application window and validity

[1611] United States' second written submission, para. 131 (referring to Appellate Body Report, *EC – Seal Products,* para. 5.144).
[1612] United States' second written submission, para. 133.
[1613] Articles 90 and 92(1), Horticulture Law, Exhibit JE–1.
[1614] Article 36(4), Animal Law (Exhibit JE–4).
[1615] Preamble (4) of MOA 86/2013, Exhibit JE-15, and Preamble (5) of MOT 16/2013, as amended by MOT 47/2013 (referring to the Horticulture Law); Preamble (b), (5) of MOA 139/2014, Exhibit JE-28, and Preamble (9) of MOT 46/2013, as amended, Exhibit JE-21 (referring to the Animal Law).
[1616] United States' second written submission, para. 133 (referring to paras. 16, 84-85 of its first written submission and Exhibits USA-7, USA-11, USA-13, and USA-14).
[1617] United States' second written submission, para. 135.
[1618] United States' second written submission, para. 137 (referring to Indonesia's first written submission, para. 139).
[1619] United States' second written submission, para. 138, referring to Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 156; *US – Gambling*, para. 308.
[1620] United States' second written submission, para. 139.
[1621] United States' first written submission, paras. 37-44, 100-103.
[1622] United States' second written submission, para. 140.

period requirements could not be justified as meeting the "necessary" standard with respect to this objective.[1623]

7.3.5.1.2 Whether Measure 1 is applied in a manner consistent with the *chapeau* of Article XX

7.3.5.1.2.1 Indonesia

7.539. Indonesia asserts that its measures are applied in a manner consistent with the *chapeau* of Article XX of the GATT 1994. In this regard, Indonesia argues that the chapeau of Article XX of the GATT 1994 expressly addresses the manner in which a particular measure is applied[1624]; and that it reflects the need to maintain a balance between a Member's right to invoke an exception of Article XX and the substantive rights of other Members under the GATT 1994.[1625] In this light, Indonesia submits first that its import licensing regime for horticultural products and animals and animal products complies with the requirements of the chapeau of Article XX because it is not applied in a manner that constitutes arbitrary or unjustifiable discrimination or amounts to a disguised restriction on international trade.[1626] Recalling the benchmarks used to assess arbitrary or unjustifiable discrimination between countries where the same conditions prevail[1627], Indonesia argues that with regards to[1628] subparagraph (a), there is no discrimination between imported or domestic products because, pursuant to Law No 33/2014, domestic products are also required to have a Halal label.[1629] Regarding subparagraph (b), Indonesia argues that the distinctions existing between imported and domestic products are not in any way more onerous than necessary. In this respect, Indonesia points out that the regulation concerning quarantine of animal and plant products applies to all imports, exports, as well as domestic transportation.[1630] Concerning subparagraph (d), Indonesia submits that no discrimination exists between importing countries because the import licensing regime is applied invariably between all importing countries. In its view, it would logically follow that customs enforcement, by virtue of its definition, refers to the import or export of goods.[1631]

7.540. In arguing that the application of its import licensing regime does not result in discrimination, Indonesia considers that it is unnecessary to further determine if the discrimination is unjustifiable or arbitrary, or if it takes place between countries in which like conditions prevail.[1632] Should the Panel find otherwise, then Indonesia considers that the resulting discrimination would not be arbitrary or unjustifiable because the chapeau of Article XX does not prohibit discrimination *per se*, but rather arbitrary or unjustifiable discrimination.[1633] Indonesia further contends that, in contrast to the *US – Shrimp* case, information on its import licensing regime, the application procedures, as well as the rationale underpinning the granting of import licences, are readily accessible to all.[1634] For this reason, the Panel should find that its measures do not constitute an "arbitrary discrimination". Furthermore, Indonesia contends that it should not be obliged to engage in negotiations with the complainants regarding a domestic law over which it has full autonomy.[1635]

[1623] United States' second written submission, para. 141.
[1624] Indonesia's second written submission, para. 146 (referring to Appellate Body Report, *US – Gasoline*, p. 22).
[1625] Indonesia's second written submission, para. 146 (referring to Appellate Body Report, *US – Shrimp*, para. 156).
[1626] Indonesia's second written submission, paras. 146-148 (referring to Appellate Body Report, *EC – Seal Products*, para. 5.299).
[1627] Indonesia's second written submission, para. 149 (referring to Appellate Body Reports on *US – Shrimp*, para. 150; Panel Report, *EC – Tariff Preferences*, paras. 7.225-7.235; and Panel Report, *Brazil – Retreaded Tyres*, paras. 7.226-7.251). Indonesia submits that the benchmarks are: (i) the application of the measure at issue must result in discrimination; (ii) this discrimination must be arbitrary or unjustifiable in character; and (iii) this discrimination must occur between countries where the same conditions prevail.
[1628] Indonesia's second written submission, para. 150.
[1629] Indonesia cites Article 4 of Law No. 33/2014 concerning Halal Product Assurance states: "products that enter, circulate, and traded in the territory of Indonesia must be certified halal", Exhibit IDN-47.
[1630] Indonesia cites Consideration (d) of Law 16/1992 concerning Animal, Fish and Plant Quarantine, Exhibit IDN-67.
[1631] Indonesia refers to Article 1(1) of Law No. 17/2006 concerning Customs, Exhibit IDN-66.
[1632] Indonesia's second written submission, para. 151.
[1633] Indonesia's second written submission, para. 152 (referring to Appellate Body Report, *US – Gasoline*, p. 23).
[1634] Indonesia's second written submission, paras. 153-154 (referring to Appellate Body in *US – Shrimp)*.
[1635] Indonesia's second written submission, paras. 153-154.

7.541. In assessing whether measures constitute a *disguised restriction on international trade*, Indonesia contends that the focus should lie on the word "disguised" rather than on the word "restriction", given that only trade-restrictive measures are to be examined under the chapeau.[1636] Recalling specific legal guidance[1637], Indonesia submits that the purpose of prohibiting a "disguised restriction" is not only to ensure transparency but also to supplement the prohibition of "unjustifiable discrimination" among GATT contracting parties. Indonesia argues that nothing in its import licensing regime (for horticultural and animal products) qualifies as a "disguised" restriction on trade. Indonesia reiterates that the reasons for rejecting applications, as well as all legal or administrative requirements, are duly publicized before their application[1638], respectively on the website as well as in domestic laws. Moreover, Indonesia sustains that the measure has been applied in good faith, and in a transparent manner, among all trading partners.

7.542. With regards to the individual elements of its import licensing regime, and citing a specific Appellate Body ruling[1639], Indonesia submits that the measures that comprise its import licensing regime do not result in discrimination, because the same legal, technical and administrative requirements are applied on all trading partners. Indonesia holds that customs enforcement measures understandably do not apply to domestic products as they are border measures. However, Indonesia clarifies that for Halal assurance as well as for food safety concerns, Indonesia applies these requirements on a non-discriminatory basis. On whether a measure constitutes a disguised restriction of international trade, Indonesia asserts that the question is whether a Member applies its regulations in a transparent manner.[1640] In this regard, Indonesia argues that in the present case, its measures are fully transparent because each requirement and each response to import licence applications is published. Indonesia considers that it has established that its import licensing regime does not result in arbitrary or unjustifiable discrimination, nor does it constitute a disguised restriction on international trade. Indonesia thus asserts that it has fulfilled the cumulative elements of the chapeau of Article XX, and that its import licensing regime can be justified under Article XX(a), (b) and (d) of GATT 1994.[1641]

7.3.5.1.2.2 New Zealand

7.543. New Zealand observes that, in Indonesia's first written submission, the *chapeau* was barely mentioned.[1642] Thus Indonesia has not only failed to establish that its measures are necessary to protect or secure compliance with the objectives in paragraphs (a), (b) or (d) of Article XX, but has also failed to discharge its burden of demonstrating that its measures meet the requirements of the chapeau to Article XX of the GATT 1994. [1643] Given the function of the chapeau to prevent abuse or misuse of a Member's right to invoke the exceptions contained in Article XX's paragraphs, New Zealand contends that the party invoking Article XX has the burden of showing that a measure is applied consistently with the chapeau. [1644] Indonesia would thus have to demonstrate that: any measure justified under an Article XX paragraph is not a disguised restriction on trade; that the measure does not discriminate "between countries where the same

[1636] Indonesia's second written submission, para. 155; Panel Report, *EC – Asbestos*, para. 8.236; Exhibit IDN-68 at p. 27.

[1637] Indonesia's second written submission, para. 155. Appellate Body Report, *Japan – Alcoholic Beverages*, p. 29, suggesting that, as the aim of a measure may not be easily ascertained, the protective application of a measure can most often be discerned from its design, architecture and revealing structure.

[1638] Indonesia's second written submission, paras. 156-157, referring to GATT Panel Report, *US – Taxes on Automobiles,* para. 56, where the Panel held that, since the measure was duly publicized and not applied before publication, it could not be considered as "disguised". Indonesia emphasizes that it publicly announced its measure by enacting MOT or MOA Regulations, and that MOA 58/2015 was notified to the SPS Committee (G/SPS/N/IDN/105), Exhibit IDN-69.

[1639] Indonesia's second written submission, paras. 248-249, referring to Appellate Body Report in *US – Shrimp*, para. 150, stating that "The precise language of the chapeau requires that a measure not be applied in a manner which would constitute a means of 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' or a 'disguised restriction on international trade.'"

[1640] Indonesia's second written submission, para. 250, referring to GATT Panel Report, *US – Taxes on Automobiles*, para. 56.

[1641] Indonesia's second written submission, para. 251; Indonesia's oral statement at the second substantive meeting, para. 38.

[1642] New Zealand's second written submission, para. 300, where New Zealand observes that the sole reference to the chapeau is at para. 124 of Indonesia's first written submission. In *Thailand – Cigarettes*, the Appellate Body noted the fact that Thailand had only referred to the chapeau once, concluding that "[t]his cannot suffice to establish that the additional administrative requirements fulfil the requirements of the chapeau of Article XX" (para. 179).

[1643] New Zealand's second written submission, para. 309.

[1644] New Zealand's second written submission, para. 301, referring to Appellate Body Report, *EC – Seal Products*, para. 5.297.

conditions prevail", including between Indonesia and other Members; and that such discrimination is not "arbitrary or unjustifiable".[1645] New Zealand recalls that the standard to examine whether a measure is applied consistently with the chapeau requires an objective determination based, most often, on the "design, the architecture, and the revealing structure of a measure"[1646]; and that the burden to demonstrate that a measure provisionally justified under one of the Article XX exceptions does not constitute an abuse of such an exception under the chapeau is a "heavier task than that involved in showing that an exception … encompasses the measure at issue".[1647]

7.544. New Zealand submits that the text, structure and history of the import licensing regulations and the framework legislation pursuant to which Indonesia's import licensing regimes were established, show that the actual purpose of the challenged measures is to restrict imports of agricultural products when domestic production is deemed sufficient as part of Indonesia's policy to achieve self-sufficiency in food.[1648] Thus, according to New Zealand, the import licensing regimes at issue are implemented through regulations made under these overarching laws[1649], which carry into effect, through the challenged measures, the self-trade-restricting objectives.

7.545. Considering whether the challenged measures are applied in a manner which constitutes a disguised restriction on international trade, New Zealand submits that Indonesia has failed to discharge its burden of proof.[1650] Rather, New Zealand has identified that the real purpose of each of Indonesia's measures is as part of a regime designed to restrict imports of agricultural products where domestic production is deemed sufficient to fulfil domestic demand.[1651] New Zealand also sustains that Indonesia's measures are "disguised" restrictions in the sense that Indonesia has invoked Article XX to justify them; and that the measures are "taken under the guise of" measures formally within the terms of an exception listed in Article XX.[1652] New Zealand considers that it has demonstrated, in its measure-by-measure responses, that in each case Indonesia has failed to make a *prima facie* case that Article XX applies.

7.546. With respect to arbitrary or unjustifiable discrimination between countries where the same conditions prevail, New Zealand contends that the relevant legal standards are:[1653] (i) the application of the measure must result in discrimination; (ii) the discrimination must be arbitrary or unjustifiable in character; and (iii) the discrimination must occur between countries where the same conditions prevail. New Zealand submits that Indonesia has the burden of proving that Article XX provides a justification for each of its measures, demonstrating that each of these elements does not apply. In New Zealand's view, Indonesia has not done so, nor has Indonesia demonstrated that any of the challenged measures apply to domestic products or explained the basis for discriminating between domestic and local products. For example, Indonesia has not explained why it restricts the use, sale and distribution of imported products alone. In relation to the third element, New Zealand observes that Indonesia makes frequent reference to its equatorial climate. According to New Zealand, this does not justify, for example, the Indonesian harvest period measure, as the same climatic conditions prevail for domestic as well as imported products, once they are in Indonesia.[1654]

[1645] New Zealand's second written submission, para. 301 (referring to Appellate Body Report in *US – Gasoline*, pp. 23, which held that the concepts of "disguised restriction on international trade" and "arbitrary or unjustifiable discrimination" are related concepts which "impart meaning to one another").

[1646] New Zealand's second written submission, para. 302 (referring to Appellate Body Report, *EC – Seal Products*, para. 5.302).

[1647] New Zealand's second written submission, para. 302 (referring to Appellate Body, *US – Gasoline*, p. 23).

[1648] New Zealand's second written submission, para. 303 (referring to its first written submission, paras. 2, 15-18, 67-71).

[1649] For example, New Zealand cites: Article 36B(1) of the Animal Law Amendment (Exhibit JE-5), stating that importation of animals and animal products should only be done "if domestic production and supply of Livestock and Animal Product has not fulfill public consumption"; Articles 14 and 36 of the Food Law (Exhibit JE-2), providing that imports of food are only allowed to the extent of any domestic shortfall; Article 30(1), Farmers Law (Exhibit JE-3), prohibiting importation of agricultural commodities when the availability of domestic agricultural commodities is sufficient for consumption and/or government food reserves.

[1650] New Zealand's second written submission, paras. 304-306.

[1651] New Zealand's second written submission, para. 305, and footnote 428, where New Zealand recalls the sections of its first written submission that relate to each challenged measure.

[1652] New Zealand's second written submission, para. 306 (referring to Appellate Body Report, *US – Gasoline*, p. 23).

[1653] New Zealand's second written submission, para. 307 (referring to Appellate Body Report, *US – Shrimp*, para. 150).

[1654] New Zealand's second written submission, para. 308.

7.547. New Zealand considers that, in its second written submission, Indonesia fails to provisionally justify its import licensing regimes as a whole in terms of the subparagraphs of Article XX, so the Article XX chapeau is not even reached.[1655] In any event, New Zealand claims that Indonesia also fails to show that its measures are applied consistently with the chapeau.[1656]

7.548. Noting that Indonesia affirms, based on the first element of the chapeau, that its import licensing regime is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail[1657], New Zealand argues that this assertion should be rejected because the Appellate Body has confirmed that one of the most important factors in such assessment 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 subparagraphs of Article XX of the GATT 1994.[1658] New Zealand contends that it has demonstrating that 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.[1659]

7.549. On the second element of the *chapeau*, New Zealand takes issue with Indonesia's argument that because its measures are "publicly announced each time through the enforcement of a MOT or MOA Regulation", they are not disguised restrictions on trade.[1660] New Zealand recalls that a "*concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of 'disguised restriction'" under the chapeau.[1661] In this regard, New Zealand advocates a broader reading of "disguised restriction", which it views as consistent with the purpose of "avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX".[1662] Accordingly, New Zealand asserts that it has demonstrated that Indonesia's measures are "disguised restrictions".[1663]

7.3.5.1.2.3 United States

7.550. The United States submits that, as the party invoking an Article XX exception, Indonesia has the burden to demonstrate that it has met the requirements of the chapeau of Article XX of the GATT 1994. This means that Indonesia must demonstrate that the measures at issue are not (i) applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or (ii) disguised restrictions on international trade.[1664] The United States also notes that Indonesia has not made any attempt to meet its burden under the chapeau in its first written submission, and its limited arguments in its second submission are insufficient to sustain its claim.[1665] Recalling the legal standards for assessing the elements of *arbitrary or unjustifiable discrimination*[1666] and *disguised restriction on trade*[1667], the

[1655] New Zealand's opening statement at the second substantive meeting, para. 48.
[1656] New Zealand's opening statement at the second substantive meeting, para. 48; New Zealand's second written submission, para. 300.
[1657] Indonesia's second written submission, para. 148.
[1658] New Zealand's opening statement at the second substantive meeting, paras. 49-50 (referring to Appellate Body Report, *EC – Seal Products*, para. 5.306).
[1659] New Zealand's opening statement at the second substantive meeting, para. 50; second written submission, paras. 307-309.
[1660] Indonesia's second written submission, paras. 157 and 250.
[1661] New Zealand's opening statement at the second substantive meeting, paras. 51-52 (referring to Appellate Body Report, *US – Gasoline,* p. 25 (where the Appellate Body 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.")
[1662] Appellate Body Report, *US – Gasoline,* p. 25.
[1663] New Zealand's opening statement at the second substantive meeting, paras. 51-52; New Zealand's second written submission, paras. 300-306.
[1664] United States' second written submission, para. 231.
[1665] United States' oral statement at the second substantive meeting, para. 67.
[1666] United States' second written submission, para. 232-234, referring to Appellate Body Report, *EC – Seals*, para. 5.306, where the Appellate Body found that "[o]ne of the most important factors…is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX."; and the Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 1791 (stating: "In its entirety, this reference consisted of Thailand's argument that, '[g]iven that these measures are applied to all products, imported or domestic, subject to VAT, they are not applied in a manner that constitutes an arbitrary or unjustifiable discrimination or a disguised restriction on international trade.' This cannot suffice to establish that the additional administrative requirements fulfil the requirements of the chapeau of Article XX.")
[1667] United States' second written submission, para. 233 (referring to Appellate Body Report, *US – Gasoline*, p. 25, where the Appellate Body found that this phrase "may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of

United States argues that, in the present dispute, Indonesia has yet to offer any explanation or evidence with respect to whether the measures at issue meet the requirements of the chapeau. Thus, according to the United States, all of Indonesia's claims fail to establish the requisite elements of an Article XX defence.[1668]

7.551. The United States considers that, to the extent that Indonesia subsequently offers arguments or evidence on the chapeau, it remains difficult to see how it can meet its burden, given the facts on the record. The United States argues that the measures at issue arbitrarily or unjustifiably discriminate against imports because they impose significant restrictions on trade and bear little or no relationship to the policy objectives with respect to which Indonesia seeks to justify them under the Article XX subparagraphs.[1669]

7.552. Regarding the public morals exception under Article XX(a), the United States argues that the end-use and use, sale and transfer restrictions, which prohibit or restrict imported products' access to retailers and consumers, result in arbitrary and unjustifiable discrimination. Such restrictions serve only to impose burdens on importation that do not exist for domestic products.[1670] In fact, domestic horticultural products are not required to be sold through distributors, and domestic animal products are not barred from traditional and other markets. Responding to Indonesia's assertion that domestic products are also required to have a halal label[1671], the United States clarifies that compliance with halal labelling or other requirements is not at issue in this dispute: the challenged measures are restrictions on the sale, use, and transfer of imported horticultural products; prohibition on the sale of imported beef and other animal products in traditional or modern markets; and limitation on the total quantities of imported horticultural products based the importer's ownership of storage capacity.[1672] Indonesia has offered no arguments under the chapeau to address the arbitrary and unjustifiable nature of these restrictions.

7.553. Regarding the protection of human health under Article XX(b), the United States submits that restrictions based on the domestic harvest period, importers' storage capacity, the use, sale and transfer of imported products, and the six-month harvest requirement, 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 or plant life or health. Because the restrictions are not rationally connected to the objective, they result in burdensome costs and limitations on the importation of horticultural and animal products.[1673] Countering Indonesia's assertion that "[t]he distinctions which exist between imported and domestic products are not in any way more onerous than necessary", citing a provision of its quarantine law as an example[1674], the United States asserts that Indonesia provides no evidence or explanation of what distinctions exist between imported and domestic products under this and other laws, or how these distinctions apply to the measures Indonesia seeks to justify under Article XX(b).[1675] Moreover, Indonesia's purpose for citing the quarantine law remains unclear, as none of the measures at issue relates to quarantine of imports.[1676]

7.554. With respect to Article XX(d), the United States contends that Indonesia has shown no rational connection between the application windows and validity periods, fixed licence terms, realization requirements, storage capacity requirements, and use, sale, and transfer restrictions, on the one hand, and the stated objective of securing compliance with customs laws, on the other. Because these restrictions do not relate to the objective of securing compliance with Indonesia's customs laws, they exist solely to restrict imports and protect the domestic industry and, therefore, result in arbitrary and unjustifiable discrimination. [1677]

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a measure formally within the terms of an exception listed in Article XX."; Panel Report, *EC – Asbestos*, para. 8.236, finding that "to disguise" means "to deceive" and "to misrepresent," the panel in EC– Asbestos considered that a restriction "which formally meets the requirements of Article XX[] will constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives").

[1668] United States' second written submission, para. 234.

[1669] United States' second written submission, para. 235.

[1670] United States' second written submission, para. 236.

[1671] United States' oral statement at the second substantive meeting, para. 68 (referring to Indonesia's second written submission, para. 150).

[1672] United States' oral statement at the second substantive meeting, para. 68.

[1673] United States' second written submission, para. 237.

[1674] Indonesia's second written submission, para. 150.

[1675] United States' oral statement at the second substantive meeting, para. 69.

[1676] United States' oral statement at the second substantive meeting, para. 69.

[1677] United States' second written submission, para. 238.

7.555. Turning to Indonesia's argument that no discrimination arises from any of its measures because its import licensing regimes apply equally to all importing countries, the United States considers that it does not address the fact that Indonesia's regimes do result in discrimination against imported products vis-à-vis domestic products.[1678] In any event, the United States observes that Indonesia has not submitted all the relevant customs or food safety laws or regulations related to its Article XX(d) defences, or specified what aspects of these laws are relevant to the analysis under the chapeau.[1679] Therefore, the United States contends that the Panel (and the co-complainants) have no basis upon which to evaluate Indonesia's assertion.

7.556. Responding to Indonesia's contention that discrimination, if it exists, is not arbitrary because the import licensing requirements and the rationale of the Indonesian decision-makers regarding certifications are "available to all applicants"[1680], the United States recalls that, in assessing the arbitrary or unjustifiable discrimination element of the chapeau, one of the most important factors is whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.[1681] The United States believes that Indonesia's arguments do not explain how the discrimination arising from the measures it seeks to justify under Article XX is rationally related to protecting halal, ensuring food safety, or securing compliance with customs enforcement. Thus, Indonesia has failed to show that its measures do not constitute arbitrary and unjustifiable discrimination.[1682]

7.557. Finally, as to Indonesia's assertion that none of its measures constitutes a disguised restriction on international trade because Indonesia makes public the relevant import licensing laws and regulations as well as its reasons for rejecting an application[1683], and recalling previous Appellate Body findings[1684], the United States considers that Indonesia's mere assertion that "there is no lack of transparency" falls short of meeting this element. The United States points out that the official government policies, the texts of the measures, and statements from government officials confirm that the true objective behind Indonesia's import restrictions is the protection of its own domestic producers and Indonesia's post hoc justifications cannot conceal this fact.[1685]

7.558. Accordingly, for the reasons described above, the United States holds that the challenged measures constitute disguised restrictions on trade.[1686] Evidence from official government policies, the texts of the measures, and statements from government officials confirms that the true objective behind Indonesia's measures is protecting domestic producers. The United States recalls its description of Indonesia pursuit of a "self-sufficiency" policy with respect to food, aiming at gradually reducing and ultimately ending the importation of all agricultural products.[1687] The United States considers that the most revealing evidence of Indonesia's trade restrictive objectives is an intra-ministry communication concerning the imposition of seasonal restrictions on horticultural products.[1688] The United States believes that it is difficult to see how Indonesia could

[1678] United States' oral statement at the second substantive meeting, para. 70.
[1679] United States' oral statement at the second substantive meeting, para. 70.
[1680] Indonesia's second written submission, paras. 153-154.
[1681] United States' oral statement at the second substantive meeting, para. 71 (referring to Appellate Body Report, *EC – Seals,* para. 5.306).
[1682] United States' oral statement at the second substantive meeting, para. 71.
[1683] Indonesia's second written submission, paras. 156, 250.
[1684] United States' oral statement at the second substantive meeting, para. 72 (referring to Appellate Body Report, *US – Gasoline*, p. 25, where the Appellate Body stated "[i]t is . . . clear that concealed or unannounced restrictions or discrimination on international trade does not exhaust the meaning of 'disguised restriction.'"; the United States holds that, instead, this element of the chapeau may be read to encompass restrictions taken under "the guise of a measure formally within the terms of an exception listed in Article XX.").
[1685] United States' oral statement at the second substantive meeting, para. 72 (referring to its second written submission, paras. 239-240).
[1686] United States' second written submission, para. 239.
[1687] United States' second written submission, para. 239 (referring to its first written submission, paras. 10, 13-16, 82-83 (the United States contends that the "self-sufficiency" objective underpins the measures at issue, with the Horticulture Law, the Animal Law, the Food Law, and the Farmers' Law all containing imperatives to allow importation only if local production or supply is insufficient to meet demand.); and paras. 16, 85 (the United States cites statements from Indonesian Government officials, from cabinet ministers to civil servants, who have expressed the government's goal of reducing imports of beef, horticultural products and other foods)).
[1688] United States' second written submission, para. 240 (referring to its first written submission, paras. 62, 63; and Exhibit US-25 (In this letter, government officials charged with administering these restrictions openly discuss how and why they restrict imported products. Specifically, the Ministry of Agriculture Director of

meet its burden to show that the measures do not constitute arbitrary or unjustifiable discrimination or disguised restrictions on trade, given the significant amount of evidence on the record to the contrary.[1689]

7.3.5.2 Analysis by the Panel

7.3.5.2.1 Introduction

7.559. The task before the Panel is to determine whether Measure 1 (Limited application windows and validity periods) is justified under Article XX(d) of the GATT 1994. We commence with the text of the relevant provision and the ensuing legal standard.

7.3.5.2.2 The relevant legal provision

7.560. Article XX of the GATT 1994 reads, in relevant part, as follows:

> Article XX
>
> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (*a*) ...
>
> ...
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices; ...

7.561. As we explained in Section 7.3.5.2.2 above, the assessment of a claim of justification under Article XX involves a two-tiered analysis in which a measure must (i) be provisionally justified under one of the subparagraphs of Article XX, in this case subparagraph (d), and then (ii) analysed under the *chapeau* of Article XX.[1690] Hence, in order to justify an otherwise WTO-inconsistent measure, the Member invoking a subparagraph of Article XX as a defence bears the burden of establishing that the conditions prescribed therein are met.[1691] Therefore, it is incumbent upon Indonesia to demonstrate that the relevant measure is provisionally justified under subparagraph (d) and that the measure is applied in a manner consistent with the *chapeau* of Article XX.

7.562. Concerning the first tier of the test, in *Korea – Various Measures on Beef*, the Appellate Body explained that, for a respondent to provisionally justify a measure under Article XX(d) of the GATT 1994, the following two elements must be shown: (i) 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; and (ii) the measure must be "necessary" to secure such compliance.[1692] In *Argentina – Financial Services*, the Appellate Body, in the context of a similar exception set out in Article XIV(c) of the General Agreement on Trade in Services (GATS), found that, with respect to the first element that the phrase "to secure compliance" circumscribes the scope of Article XIV(c) of the GATS, as it speaks to the function of the measures that a Member

Horticulture explains that he imposes these restrictions to ensure that imported horticultural products do not compete with local products during their harvest season))

[1689] United States' second written submission, para. 241.

[1690] Appellate Body Report, *EC – Seal* Products, para. 5.169 (referring to Appellate Body Reports, *US – Gasoline*, p. 22, DSR 1996:I, p. 20; *US – Shrimp*, paras. 119 and 120; *US – Gambling*, para. 292).

[1691] Appellate Body Reports, *Korea – Various Measures on Beef*, para. 157; *Thailand – Cigarettes*, para. 179.

[1692] Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

can seek to justify under this provision. This phrase calls for an initial examination of the relationship between the inconsistent measure and the relevant laws or regulations and, for this purpose, directs panels to scrutinize the design of the measures sought to be justified. According to the Appellate Body, a measure can be said "to secure compliance" with laws or regulations when its design reveals that it secures compliance with specific rules, obligations, or requirements under such laws or regulations, even if the measure cannot be guaranteed to achieve such result with absolute certainty.[1693] Since it is incumbent upon the respondent to identify specific rules, obligations, or requirements contained in the WTO-consistent laws or regulations, the more precisely a respondent is able to do so, the more likely it will be able to elucidate how and why the inconsistent measure secures compliance with such laws or regulations. Yet, where the assessment of the design of the measure, including its content and expected operation, reveals that the measure is incapable of securing compliance with specific rules, obligations, or requirements under the relevant law or regulation, as identified by a respondent, there is not a relationship that meets the requirements of this step.[1694] Further analysis with regard to whether this measure is "necessary" to secure such compliance may not be required. The Appellate Body is of the view that this is because there is no justification under Article XIV(c) for a measure that is not designed to "secure compliance" with a Member's laws or regulations. The Appellate Body further insists that a panel must not, however, structure its analysis of the first element in such a way as to lead it to truncate its analysis prematurely and thereby foreclose consideration of crucial aspects of the respondent's defence relating to the "necessity" analysis.[1695]

7.563. Concerning the second element, the Appellate Body in *Argentina – Financial Services* also explained that it entails a more in-depth, holistic analysis of the relationship between the inconsistent measure and the relevant laws or regulations. In particular, this element entails an assessment of whether, in the light of all relevant factors in the "necessity" analysis, this relationship is sufficiently proximate, such that the measure can be deemed to be "necessary" to secure compliance with such laws or regulations.[1696] In this respect, the "necessity test" involves a process of "weighing and balancing" a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure.[1697] The weighing and balancing exercise can be understood as "a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement."[1698] The Appellate Body has further explained that, in most cases, a comparison between the challenged measure and possible alternatives should subsequently be undertaken.[1699]

7.564. Regarding the specific factors of the "necessity" analysis, the Appellate Body has indicated that it entails "an assessment of the 'relative importance' of the interests or values furthered by the challenged measure".[1700] The more vital or important the interests or values that are reflected in the objective of the measure, the easier it would be to accept a measure as "necessary".[1701] In *Korea – Various Measures on Beef*, the Appellate Body explained that one factor to also be considered in the weighing and balancing of the relevant factors when evaluating whether a measure is "necessary" under Article XX(d) of the GATT 1994 is "the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue".[1702] In assessing this factor, "a panel's duty is to assess, in a qualitative or quantitative manner, the extent of the measure's contribution to the end pursued, rather than

[1693] Appellate Body Report, *Argentina – Financial Services*, para. 6.203. (fns omitted)
[1694] Appellate Body Report, *Colombia – Textiles*, para. 5.126.
[1695] Appellate Body Report, *Argentina – Financial Services*, para. 6.203. (fns omitted)
[1696] Appellate Body Report, *Argentina – Financial Services*, para. 6.204. (fns omitted)
[1697] Appellate Body Report, *EC – Seal* Products, para. 5.169 (referring to Appellate Body Reports, *Korea – Various Measures on Beef*, para. 164; *US – Gambling*, para. 306; and *Brazil – Retreaded Tyres*, para. 182).
[1698] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 182. *See also,* Appellate Body Report, *Colombia – Textiles*, para. 5.75. The Appellate Body explains that, whether a particular degree of contribution is sufficient for a measure to be considered "necessary" cannot be answered in isolation from an assessment of the degree of the measure's trade–restrictiveness and of the relative importance of the interest or value at stake. Appellate Body Report, *Colombia – Textiles*, para. 5.77.
[1699] Appellate Body Reports, *EC – Seal Products*, para. 5.169 (referring to Appellate Body Reports, *US – Gambling*, para. 307; and *Korea – Various Measures on Beef*, para. 166). *See also,* Appellate Body Report, *Colombia – Textiles*, para. 5.70.
[1700] Appellate Body Report, *US – Gambling*, para. 306 (referring to Appellate Body Reports, *Korea – Various Measures on Beef*, para. 162; and *EC – Asbestos*, para. 172). *See also,* Appellate Body Report, *Colombia – Textiles*, para. 5.71.
[1701] Appellate Body Report, *Korea – Various Measures on Beef*, para. 162. *See also,* Appellate Body Report, *Colombia – Textiles*, para. 5.71.
[1702] Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

merely ascertaining whether or not the measure makes any contribution."[1703] This is because "[t]he greater the contribution, the more easily a measure might be considered to be 'necessary'".[1704] The Appellate Body has counselled that there is no "generally applicable standard requiring the use of a pre-determined threshold of contribution in analysing the necessity of a measure under Article XX of the GATT 1994".[1705] Since a measure's contribution is only one component of the necessity calculus under Article XX, the assessment of whether a measure is "necessary" cannot be determined by the degree of contribution alone, but will depend on the manner in which the other factors of the "necessity" standard inform the analysis.[1706] Another relevant factor that we must take into account in conducting a "necessity" analysis is the restrictiveness of the measure in respect of international commerce. In assessing this factor, we "must seek to assess the degree of a measure's trade-restrictiveness, rather than merely ascertaining whether or not the measure involves some restriction on trade".[1707] In most cases, a panel must also compare the challenged measure and possible alternative measures that achieve the same level of protection while being less trade restrictive.[1708] The Appellate Body has explained that an alternative measure may be found not to be "reasonably available" where "it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties".[1709] The complaining party bears the burden of identifying any alternative measures that, in its view, the responding party should have taken.[1710]

7.565. Regarding the second tier of the test, the *chapeau* requires that the measure not be applied in a manner that would constitute a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", or "a disguised restriction on international trade". The Appellate Body has stated that the function of the *chapeau* of Article XX of the GATT 1994 "is to prevent the abuse or misuse of a Member's right to invoke the exceptions contained in the subparagraphs of that Article".[1711] According to the Appellate Body, the *chapeau* "imposes additional disciplines on measures that have been found to violate an obligation under the GATT 1994, but that have also been found to be provisionally justified under one of the exceptions set forth in the subparagraphs of Article XX."[1712] The *chapeau* does so by requiring that measures are not "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".[1713] The burden of demonstrating that a measure that is provisionally justified under one of the exceptions of Article XX does not constitute an abuse of such an exception under the *chapeau* rests with the party invoking the exception.[1714] This is "a heavier task than that

[1703] Appellate Body Report, *Argentina – Financial Services*, para. 6.234. *See also,* Appellate Body Report, *Colombia – Textiles*, para. 5.72.

[1704] Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

[1705] Appellate Body Reports, *EC – Seal Products*, para. 5.213.

[1706] Appellate Body Reports, *EC – Seal Products*, para. 5.215.

[1707] Appellate Body Report, *Argentina – Financial Services*, para. 6.234. *See also,* Appellate Body Report, *Colombia – Textiles*, para. 5.73. As with the assessment of a measure's contribution to its objective, the examination of a measure's trade–restrictiveness may be done in a qualitative or quantitative manner. In this vein, the Appellate Body has stated that "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects." Appellate Body Report, *Korea – Various Measures on Beef*, para. 163. *See also,* Appellate Body Report, *Colombia – Textiles*, para. 5.73.

[1708] Appellate Body Reports, *EC – Seal Products*, para. 5.169. In *EC – Seal Products*, the Appellate Body recalled that, in *US – Tuna II (Mexico)*, it had identified in the context of Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement) circumstances in which a comparison with possible alternative measures may not be required, for instance, when the challenged measure is not trade restrictive, or when it makes no contribution to the objective (Appellate Body Reports, *EC – Seal Products*, fn 1181 to para. 5.169 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, fn 647 to para. 322)).

[1709] Appellate Body Report, *US – Gambling*, para. 308. *See also,* Appellate Body Report, *Colombia – Textiles*, para. 5.74.

[1710] Appellate Body Report, *EC – Seal* Products, para. 5.169 (referring to Appellate Body Report, *US – Gambling*, paras. 309-311). The Appellate Body has observed that "the very utility of examining the interaction between the various factors of the necessity analysis, and conducting a comparison with potential alternative measures, is that it provides a means of testing these factors as part of a holistic weighing and balancing exercise". Appellate Body Reports, *EC – Seal Products*, para. 5.215. (fn omitted) *See also,* Appellate Body Report, *Colombia – Textiles*, para. 5.75.

[1711] Appellate Body Report, *EC – Seal Products*, para. 5.296 (referring to Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, pp. 20-21).

[1712] Appellate Body Report, *EC – Seal Products*, para. 5.296.

[1713] Appellate Body Report, *EC – Seal Products*, para. 5.169.

[1714] Appellate Body Report, *EC – Seal Products*, para. 5.297 (referring to Appellate Body Report, *US – Gasoline*, pp. 22-23, DSR 1996:I, p. 21).

involved in showing that an exception … encompasses the measure at issue."[1715] The Appellate Body has explained that the *chapeau* of Article XIV of the GATS, which shares similar language with Article XX, refers to "the *application* of a measure already found by the Panel to be inconsistent with one of the obligations under the GATS but falling within one of the paragraphs of Article XIV".[1716] The Appellate Body has clarified that "[a]lthough this suggests that the focus of the inquiry is on the manner in which the measure is *applied*, the Appellate Body has noted that whether a measure is *applied* in a particular manner 'can most often be discerned from the design, the architecture, and the revealing structure of a measure' ".[1717] It is thus relevant to consider the design, architecture, and revealing structure of a measure in order to establish whether the measure, in its actual or expected application, constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. This involves a consideration of "both substantive and procedural requirements" under the measure at issue.[1718]

7.566. We recall that the *chapeau* provides that measures must not be applied in a manner which would constitute a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". The first two situations (i.e. arbitrary discrimination or unjustifiable discrimination) have often been addressed together.[1719] The existence of one of these situations suffices to conclude that a measure cannot be justified under Article XX of the GATT 1994.[1720] The Appellate Body has indicated that in order for a measure to be applied in a manner which constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", three elements must exist: (i) the application of the measure must result in discrimination; (ii) the discrimination must be arbitrary or unjustifiable in character; and (iii) this discrimination must occur between countries where the same conditions prevail.[1721] As the Appellate Body indicated, "t]he assessment of these factors … was part of an analysis that was directed at the cause, or the rationale, of the discrimination".[1722] The Appellate Body has explained that the analysis of whether discrimination is arbitrary or unjustifiable within the meaning of the chapeau "should focus on the cause of the discrimination, or the rationale put forward to explain its existence".[1723] Furthermore, according to the Appellate Body, one of the most important factors in an assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.[1724] For the Appellate Body, in determining which "conditions" prevailing in different countries are relevant in the context of the *chapeau*, the subparagraphs of Article XX, and in particular the subparagraph under which a measure has been provisionally justified, provide pertinent context in the sense that the "conditions" relating to the particular policy objective under the applicable subparagraph are relevant for the analysis under the chapeau.[1725] Subject to the particular nature of the measure and the specific circumstances of the case, the provisions of the GATT 1994 with which a measure has been found to be inconsistent may also provide useful guidance on the question of which "conditions" prevailing in different countries are relevant in the context of the chapeau. In particular, the type or cause of the violation that has been found to exist may inform the determination of which countries should be compared with respect to the conditions that prevail in them.[1726]

[1715] Appellate Body Report, *EC – Seal Products*, para. 5.297 (referring to Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, p. 21).

[1716] Appellate Body Report, *US – Gambling*, para. 339 (referring to Appellate Body Report, *US – Gasoline*) (emphasis original). We recall that the text of the chapeau of Article XIV of the GATS is drafted in terms virtually identical to the chapeau of Article XX of the GATT 1994. Accordingly, the case law developed under Article XX of the GATT 1994 is relevant for our analysis.

[1717] Appellate Body Report, *EC – Seal Products*, para. 5.302 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29).

[1718] Appellate Body Report, *EC – Seal Products*, para. 5.302 (referring to Appellate Body Report, *US – Shrimp*, para. 160).

[1719] See, for example, Appellate Body Reports, *US – Gasoline*, *US – Shrimp (Article 21.5 – Malaysia)*, *US – Gambling*, and *Brazil – Retreaded* Tyres; and Panel Reports, *US – Gambling*, *EC – Tariff Preferences*, *EC – Asbestos* and *Brazil – Retreaded Tyres*.

[1720] Appellate Body Report, *US – Shrimp*, para. 184.

[1721] Appellate Body Report, *US – Shrimp*, para. 150.

[1722] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 225. (fn. omitted)

[1723] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226 (referring to Appellate Body Reports, *US – Gasoline*; *US – Shrimp*; and *US – Shrimp (Article 21.5 – Malaysia)*).

[1724] See Appellate Body Reports, *US – Shrimp*, para. 165; and *Brazil – Retreaded Tyres*, paras. 227, 228, and 232; *EC – Seal Products*, para. 5.306.

[1725] Appellate Body Report, *EC – Seal Products*, para. 5.300.

[1726] *See* Appellate Body Report, *US – Gasoline*, p. 23-24, DSR 1996:I, pp. 21-22; and Appellate Body Reports, *US – Shrimp*, para. 150; *EC – Seal Products*, para. 5.300.

7.567. In *US – Gasoline*, the Appellate Body held that the concepts of "arbitrary or unjustifiable discrimination" and "disguised restriction on international trade" were related concepts which "imparted meaning to one another".[1727] For the Appellate Body, it is clear that "disguised restriction" includes disguised discrimination in international trade and that concealed or unannounced restriction or discrimination in international trade does *not* exhaust the meaning of "disguised restriction". The Appellate Body further clarified that the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination" may also be taken into account in determining the presence of a "disguised restriction" on international trade. "The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX".[1728]

7.568. In conducting our analysis, we bear in mind that Article XX of the GATT 1994 applies to "measures" that are to be analysed under the subparagraphs and the *chapeau*, not to any inconsistency with the GATT 1994 that might arise from such measures. In this respect, the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994.[1729] Our analysis of Measure 1 under Article XX(d) of the GATT 1994 will therefore focus on the aspects of the measure that have given rise to the findings of inconsistency with Article XI:1 of the GATT 1994, particularly those aspects concerning the design and operation of measure.

7.569. We shall therefore proceed to examine whether Indonesia has demonstrated that Measure 1 is justified under Article XX(d) of the GATT 1994. As we indicated in Section 7.3.1 above, Indonesia has only provided arguments on a measure by measure basis with respect to the first tier of the analysis for each of the relevant subparagraphs of Article XX. The second tier, i.e. whether the measures at issue are applied in a manner consistent with the *chapeau* of Article XX, has been argued by Indonesia for its import licensing regime as a whole, thus making no distinctions between measures or defences. Under these circumstances, we are driven to follow the same approach in our analysis.

7.3.5.2.3 Whether Measure 1 (Limited application windows and validity periods) is provisionally justified under subparagraph (d) of Article XX of the GATT 1994

7.570. The task before the Panel is to determine whether Measure 1 is provisionally justified under subparagraph (d) of Article XX of the GATT 1994. As explained before, we shall examine whether Indonesia has demonstrated that Measure 1 is designed to secure compliance with Indonesia's WTO-consistent laws and regulations and, if so, whether it is necessary to secure such compliance.

7.571. We commence with the first element of this tier. We recall that this entails an initial examination of the relationship between Measure 1 and the WTO-consistent laws or regulations identified by Indonesia with which compliance is to be secured. In order to do so, we are to scrutinize the design of Measure 1, including its content and expected operation. We recall that a measure can be said "to secure compliance" with laws or regulations when its design reveals that it secures compliance with specific rules, obligations, or requirements under such laws or regulations, even if the measure cannot be guaranteed to achieve such result with absolute certainty.[1730]

7.572. A key step in this analysis is to establish whether and, if so, how precisely Indonesia has identified the WTO-consistent laws and regulations. We recall that recourse to Article XX(d) requires the identification of "specific" rules, obligations or requirements of laws or regulations that are not themselves WTO-inconsistent[1731] and that it is incumbent upon Indonesia to do so. In this respect, the more precisely Indonesia is able to identify specific rules, obligations or requirements contained in the WTO-consistent laws or regulations, the more likely we will be able to elucidate how and why Measure 1 secures compliance with such laws or regulations.

[1727] Appellate Body Report, *US – Gasoline*, p. 25.
[1728] Appellate Body Report, *US – Gasoline*, p. 25.
[1729] Appellate Body Report, *EC – Seal Products*, para. 5.185 (referring to Appellate Body Report, *US – Gasoline*, pp. 12 and 13); *see also*, Appellate Body Report, *Argentina – Financial Services*, para. 6.169.
[1730] Appellate Body Report, *Argentina – Financial Services*, para. 6.203. (fns omitted)
[1731] Appellate Body Report, *Argentina – Financial Services*, para. 6.203. *See also*, Appellate Body Report, *Colombia – Textiles,* para. 5.126.

7.573. Concerning the identification of the WTO-consistent laws and regulations, Indonesia, in its response to a question from the Panel after the first substantive meeting, submitted the following:

> The WTO-consistent laws and regulations which the realization requirement is designed to secure compliance with include Law 10/1995 on Customs and its amendment, Ministry of Finance Regulation 139 /2007 on the Customs Verification for Imported Products and its amendment, MoA 113/2013 concerning Animal Quarantine for Beef and other relevant regulations concerning quarantine and food safety as mentioned in our answer in paragraph 12 above. Compliance with these laws and regulations also provides the justification for several other measures challenged by Complainants, including application windows and validity periods, the terms of import licenses, and storage capacity requirements.[1732]

7.574. In the cited paragraph 12 of its responses to questions, Indonesia provided a list of ten legal instruments dealing with issues such as quarantine, labelling, food safety, quality, nutrition, packaging recycling etc. as follows:

> Please also note that MOT 71/2015 refers to other laws and regulations concerning Food Safety, such as:
>
> a. Law 16/1992 concerning Animal, Fish and Plant Quarantine
>
> b. Government Regulation 69/1999 concerning Labeling and Food Advertising
>
> c. Government Regulation 14/2002 concerning Plant Quarantine
>
> d. Government Regulation 28/2004 concerning Food Safety, Quality and Nutrition
>
> e. MOA 88/2011 concerning Food Safety Control over the Import and Export of Fresh Food of Plant Origin
>
> f. MOT 48/2015 concerning General Provisions in Import Sector
>
> g. MOT 24/2010 concerning Inclusion of Food Grade Logo and Recycling Code of Plastic Food Packaging
>
> h. MOA Regulation 42/2012 concerning Plant Quarantine Measures for Entry of Fresh Fruits and Vegetables into the Republic of Indonesia Territory
>
> i. MOT 46/2014 concerning General Provisions of Verification or Technical Surveillance in Trading Sector
>
> j. MOA 43/2012 concerning Plant Quarantine Measures for Importation of Fresh Bulbs Vegetables into the Republic of Indonesia Territory.[1733]

7.575. Subsequently, in its second written submission[1734], Indonesia refers to the same legal instruments as above, adding this time in a footnote[1735] a new regulation, MOA 113/2013, concerning Animal Quarantine for Beef, as follows:

> Indonesia argues that its import licensing regime is *designed to* secure compliance with those laws and regulations, namely Law No. 10/1995 concerning Customs, which is later amended by Law No. 17/2006 ("Customs Law"),[1736] Ministry of Finance Regulation No. 139/2007 on the Customs Verification for Imported Products and its

[1732] Indonesia's Additional response to Panel question No. 71 (footnotes omitted).
[1733] Indonesia's Additional response to Panel question No. 20.
[1734] Indonesia's second written submission, para. 130.
[1735] Indonesia's second written submission, para. 130, fn. 175.
[1736] (footnote original) *See* Exhibit IDN-65 and Exhibit IDN-66 for English translation of Indonesia Customs Law.

> amendment, as well as other relevant regulations concerning quarantine and food safety.[1737]

7.576. In its oral statement at the second substantive meeting[1738], Indonesia further indicated as follows:

> … Indonesia's import licensing regime is designed to secure compliance with those laws and regulations, namely Law No. 10/1995 concerning Customs, which was later amended by Law No. 17/2006 ("Customs Law"), and Ministry of Finance Regulation No. 139/2007 on the Customs Verification for Imported Products and its amendment, as well as other relevant regulations concerning quarantine and food safety.
>
> According to Indonesia's Customs Law, customs means "everything related to monitoring over flow of goods in or out of customs area and collection of import duty and export duty".[1739] Moreover, the consideration of the Customs Law also stipulates that its implementation is intended to guarantee greater legal certainty, support the smooth flow of goods, and increase effective monitoring of the flow of goods into or out of Indonesian customs areas.[1740]

7.577. The account included in paragraphs 7.573 through 7.576 above totalizes the laws and regulations that Indonesia has put forward in order to meet the identification standard of subparagraph (d). We recall that the concept of "laws and regulations" was examined by the Appellate Body in *Mexico – Taxes on Soft Drinks*, which concluded that those terms "cover rules that form part of the domestic legal system of a WTO Member".[1741] We agree with Indonesia in that all the instruments it has mentioned form part of its domestic legal system. We observe that leaving aside a passing reference to Measure 1, Indonesia refers to the above laws and regulations generally with respect to all the challenged measures. Notably, MOT 71/2015, which, according to Indonesia (*see* paragraph 7.574 above), is the instrument referring to the list of ten regulations concerning quarantine and food safety, is not a measure at issue in this dispute. Indeed, MOT 71/2015 was enacted after the establishment of this Panel and is therefore not within our terms of reference.

7.578. Indonesia has argued that customs enforcement in itself is not WTO-inconsistent and that it is well established that a responding Member's law must be presumed to be WTO-consistent.[1742] In Indonesia's view, since the complainants have not challenged its customs laws and regulations in a general manner, having only made claims in respect to certain specific aspects of such laws as they relate to horticultural and animal products, Indonesia concluded that its customs laws and

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[1737] (footnote original) As stated in Indonesia's additional response to the first set of questions from the panel submitted on 25 February 2016, the other relevant regulations concerning quarantine and food safety includes:

a. Law 16/1992 concerning Animal, Fish and Plant Quarantine;
b. Government Regulation 69/1999 concerning Labeling and Food Advertising;
c. Government Regulation 14/2002 concerning Plant Quarantine;
d. Government Regulation 28/2004 concerning Food Safety, Quality and Nutrition;
e. MOA 88/2011 concerning Food Safety Control over the Import and Export of Fresh Food of Plant Origin;
f. MOT 48/2015 concerning General Provisions in Import Sector;
g. MOT 24/2010 concerning Inclusion of Food Grade Logo and Recycling Code of Plastic Food Packaging;
h. MOA Regulation 42/2012 concerning Plant Quarantine Measures for Entry of Fresh Fruits and Vegetables into the Republic of Indonesia Territory;
i. MOT 46/2014 concerning General Provisions of Verification or Technical Surveillance in Trading Sector;
j. MOA 43/2012 concerning Plant Quarantine Measures for Importation of Fresh Bulbs Vegetables into the Republic of Indonesia Territory.
h. MOA 113/2013 concerning Animal Quarantine for Beef

[1738] Indonesia's second oral statement, paras. 35-36.

[1739] (footnote original) Law 17/2006 Article 1(1), see Exhibit IDN-66.

[1740] (footnote original) Consideration (a) of Law 17/2006, see Exhibit IDN-66.

[1741] The Appellate Body added that "laws and regulations" also include "rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system". See Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79.

[1742] Indonesia's second written submission, paras. 136-137 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.527; Appellate Body Report, *US – Carbon Steel*, para. 157; *Dominican Republic – Import and Sale of Cigarettes*, para. 111; *US – Gambling*, para. 138).

procedures, including those intended to secure customs enforcement, are presumed to be consistent with Indonesia's WTO obligations.[1743] We note that none of the measures at issue, including Measure 1, is a provision of Indonesia's Customs Laws or the other regulations mentioned by Indonesia. We also note that we have not been provided with any evidence that would contradict Indonesia's statement about the WTO-consistency of the listed laws and regulations. In this respect, we recall that the Appellate Body has emphasized that the legislation of a defending Member shall be considered WTO-consistent until proven otherwise.[1744] We therefore accept Indonesia's contention that the listed laws and regulations are not WTO-inconsistent for the purpose of our analysis under Article XX(d) of the GATT 1994.

7.579. We note that the co-complainants[1745] have argued that Indonesia has failed to properly identify the WTO-consistent laws and regulations for the purpose of Article XX(d). Their main contention is that Indonesia has listed the above laws and regulations and referred to them in a general manner without identifying relevant provisions as well as failed to provide the text of the majority of those laws and regulations.

7.580. We observe that, as remarked by the co-complainants[1746], out of the legal instruments enumerated by Indonesia, *only* the following instruments are within our record:

a. Indonesia's Customs Law (Exhibit IDN-65 and Exhibit IDN-66)

b. Law 16/1992 concerning Animal, Fish and Plant Quarantine (Exhibit IDN-67);

c. Government Regulation 69/1999 concerning Labelling and Food Advertising (Exhibit USA-104);

d. MOA Regulation 42/2012 concerning Plant Quarantine Measures for Entry of Fresh Fruits and Vegetables into the Republic of Indonesia Territory (Exhibit IDN-89);

e. MOT 46/2014 concerning General Provisions of Verification or Technical Surveillance in Trading Sector (Exhibit IDN-88);

7.581. We agree with the co-complainants in that merely listing a number of legal instruments falls short of the identification standard of laws or regulations for the purpose of Article XX(d). As considered by the panel in *Argentina – Financial Services*[1747], in order to meet such standard, it is not enough to refer to the laws and regulations or to their provisions; rather, the respondent must provide their texts, either by way of an exhibit (unless it is already in the panel's record) or by quoting their wording in its submissions. On these grounds, we are unable to take into account for the purpose of our analysis the remaining laws and regulations listed by Indonesia for which it has failed to provide the texts, either by way of an exhibit or by quoting their wording in its submissions.[1748]

7.582. We are thus left with Indonesia's reference to the laws and regulations that we do have on the record, namely Indonesia's Customs Law; Law 16/1992 concerning Animal, Fish and Plant Quarantine; Government Regulation 69/1999 concerning Labelling and Food Advertising; MOA Regulation 42/2012 concerning Plant Quarantine Measures for Entry of Fresh Fruits and

[1743] Indonesia's second written submission, paras. 136.

[1744] Appellate Body Report, *US – Carbon Steel*, para. 157. *See also* Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 111, and *US – Gambling*, para. 138.

[1745] New Zealand's second written submission, para. 185; United States' second written submission, para. 141.

[1746] New Zealand's second written submission, para. 185 (referring to Panel Report, *Colombia – Ports of Entry*, paras. 7.516-7.525). United States' oral statement at the second substantive meeting, paras. 56-58 (referring to Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 179, fn.271; Panel Report, *Colombia – Ports of Entry*, paras. 7.516-517 and 7.521).

[1747] Panel Report, *Argentina – Financial Services*, para. 7.609. *See also* Panel Report, *Colombia – Textiles*, paras. 7.505. and 7.507.

[1748] These regulations are: Ministry of Finance Regulation No. 139/2007 on the Customs Verification for Imported Products and its amendment, as well as other relevant regulations concerning quarantine and food safety; Government Regulation 14/2002 concerning Plant Quarantine; Government Regulation 28/2004 concerning Food Safety, Quality and Nutrition; MOA 88/2011 concerning Food Safety Control over the Import and Export of Fresh Food of Plant Origin; MOT 48/2015 concerning General Provisions in Import Sector; MOT 24/2010 concerning Inclusion of Food Grade Logo and Recycling Code of Plastic Food Packaging; MOA 43/2012 concerning Plant Quarantine Measures for Importation of Fresh Bulbs Vegetables into the Republic of Indonesia Territory; and MOA 113/2013 concerning Animal Quarantine for Beef.

Vegetables into the Republic of Indonesia Territory; and MOT 46/2014 concerning General Provisions of Verification or Technical Surveillance in Trading Sector.

7.583. We observe that, as the co-complainants contended, Indonesia has simply listed those laws and regulations without identifying the specific rules, obligations or requirements with which the measures at issue, in this case Measure 1, are to secure compliance. The sole provisions pinpointed by Indonesia in its argumentation pertained to its Customs Law and consisted of Article 1(1), which includes a definition of the term "customs" as "everything related to monitoring over flow of goods in or out of customs area and collection of import duty and export duty"; and Consideration (c) in its Preamble which, according to Indonesia, stipulates that its implementation is intended to guarantee greater legal certainty, support the smooth flow of goods, and increase effective monitoring of the flow of goods into or out of Indonesian customs areas.[1749] In our view, both provisions do not include specific rules, obligations or requirements. For all the other four legal instruments listed by Indonesia and present in our records, Indonesia has not specified any relevant rules, obligations, or requirements.

7.584. We observe that all these laws and regulations deal with a vast array of issues, some being very extensive with numerous articles, as is the case of the Customs Law[1750] or Law 16/1992.[1751] We recall that it is incumbent upon the respondent, and not the Panel, to identify "specific" rules, obligations or requirements contained in the WTO-consistent laws or regulations.[1752] This is of crucial importance to allow the Panel to elucidate how and why the measure at issue secures compliance with such laws or regulations. Indeed, a measure can be said to secure compliance with laws or regulations when its design reveals that it secures compliance with specific rules, obligations, or requirements under such laws or regulations.[1753] Without the respondent identifying such specific rules, obligations or requirements in WTO-consistent laws or regulations, the Panel cannot perform the relevant analysis.

7.585. We therefore conclude that Indonesia has failed to identify specific rules, obligations, or requirements contained in WTO-consistent laws or regulations and has therefore not demonstrated that Measure 1 is provisionally justified under subparagraph (d) of Article XX of the GATT 1994. We therefore refrain from continuing our analysis under this provision.

7.3.5.2.4 Conclusion

7.586. In the light of the foregoing, we find that Indonesia has failed to demonstrate that Measure 1 is justified under Article XX(d) of the GATT 1994.

[1749] We note that Indonesia referred to Consideration (a) in its oral statement. However, Consideration (a) reads that "the Unitary State of the Republic of Indonesia is a country based on Pancasila and Constitution of 1945 with the purpose to create a safe, orderly, and national welfare based on justice". We thus think that Indonesia meant to refer to Consideration (c) that reads: "that, in an effort to guarantee more legal certainty, justice, transparency and accountability of public services, to support efforts of improvement and enhancement of national economy in relation to global trade, to support smooth flow of goods, and to increase effective monitoring over flow of goods into or out from Indonesian customs area, and to maximize prevention of and action taking against smuggling, better regulations are heeded for customs operations".

[1750] Indonesia's Customs Law include over a 100 articles and deals with very different matters such as export declarations (art. 10), transportation of goods within Indonesia (art. 11), tariffs and import duties (arts. 12-17), anti-dumping and countervailing duties (arts. 18-23), storage of products under customs supervision (arts. 42-48), IPR infringement (arts. 54-64), and the customs appeal process (arts. 93-101). United States' oral statement at the second substantive meeting, paras. 57-58.

[1751] This regulation includes over 60 provisions.

[1752] Appellate Body Report, *Argentina – Financial Services*, para. 6.203. (fns omitted)

[1753] Appellate Body Report, *Argentina – Financial Services*, para. 6.203. (fns omitted)

7.3.6 Whether Measure 2 (Periodic and fixed import terms) is justified under Article XX(d) of the GATT 1994

7.3.6.1 Arguments of the parties

7.3.6.1.1 Whether Measure 2 is provisionally justified under subparagraph (d) of Article XX of the GATT 1994[1754]

7.3.6.1.1.1 Indonesia

7.587. Indonesia considers that specifying import licence terms in advance is necessary for the purposes of national customs enforcement. As such, Indonesia maintains that, as a developing country, Indonesia has limited resources to devote to customs enforcement. Importantly, the measure gives national customs authorities an opportunity to allocate limited resources accordingly in a situation where coordination of government effort across the vast archipelago requires a significant amount of advance planning.[1755] In addition, Indonesia also argues that the measure allows it to "partner with importers to ensure safe and efficient customs administration".[1756] Elaborating on the necessity element, Indonesia contends that the fixed licence terms requirement facilitates the work of customs officials in assessing customs classification, import eligibility, and collecting information for statistical purposes. In this context, Indonesia submits that fixed licence terms serve customs enforcement. Indonesia's Central Bureau of Statistics receives information from the applications mandated by the fixed licence terms requirement. The importance of information gathering is reflected in Article 1(1) of Law No. 17/2006 which states that customs is "everything related to monitoring over flow of goods".[1757]

7.3.6.1.1.2 New Zealand

7.588. New Zealand contends that Indonesia's defence does not meet the standard of Article XX(d) of the GATT 1994. As outlined above in relation to Measure 1, New Zealand finds that Indonesia has not demonstrated that customs enforcement is in fact the objective being pursued by fixed licence terms. New Zealand thus reiterates its arguments as they relate to: Indonesia's listing of a few titles of laws and regulations relating to customs, quarantine and food safety that it says are included among "[t]he WTO-consistent laws and regulations" with which the measure is designed to secure compliance; its failure to identify the specific provisions in the customs enforcement laws and regulations it claims the fixed licence terms are designed to secure compliance with; and its failure to establish that the measure was adopted to secure compliance with laws and regulations relating to customs enforcement. Likewise, New Zealand holds that, even if the first element of Article XX(d) were satisfied, the "necessary" standard would not be met due to Indonesia's failure to demonstrate how the measure contributes to the objective of securing compliance with those laws and regulations.[1758]

7.589. Responding to Indonesia's claims that the measure is intended to give customs authorities an opportunity to allocate resources, New Zealand counters that the measure requires that certain terms, such as the country of origin, are fixed and cannot be amended for the length of the validity period. In New Zealand's view, fixing the country of origin of projected imports over six months does not meet the need claimed by Indonesia to allocate customs resources. Furthermore, the customs regime and horticultural import licensing regime appear to be completely independent and operated by separate entities. Thus, it is not clear to New Zealand how the operation of the import licensing regime could contribute to enforcement of a separate customs regime.[1759] Weighing the lack of contribution of the measure to the objective in Article XX(d) against the trade-restrictiveness of this measure, New Zealand submits that Indonesia has failed to discharge its burden of establishing that the measure is necessary to secure compliance with customs laws.[1760]

[1754] For the general arguments concerning this step in Indonesia's defence under Article XX(d) of the GATT 1994, *see* Section 7.3.5.1.1 above.

[1755] Indonesia's first written submission, para. 140; Indonesia's first opening statement, para. 31; Indonesia's second written submission, para. 207.

[1756] Indonesia's first opening statement, para. 8.

[1757] Indonesia's second written submission, paras. 241 and 243.

[1758] New Zealand's second written submission, paras. 203-205.

[1759] New Zealand's second written submission, para. 205.

[1760] New Zealand's first written submission, paras. 224-226; second written submission, para. 206.

7.590. Consequently, New Zealand does not consider that it needs to elaborate on a less trade-restrictive alternative measure. However, for the sake of argument, New Zealand suggests that a fully automatic import licensing regime would allow importers to apply on any day to import products of any type, quantity, and country of origin, providing Indonesia with more information about the products to be imported, and be simpler to administer and be less trade-restrictive than the current import licensing regime.[1761] New Zealand takes note of Indonesia's expanded argumentation in its second written submission, stating 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".[1762] In New Zealand's view, however, Indonesia could readily obtain better information from existing data collection processes.[1763]

7.3.6.1.1.3 United States

7.591. The United States argues that Indonesia's explanations of the relationship between the challenged measures and customs enforcement do not meet the necessary standard.[1764] The United States fails to see how the fixed licence terms make any contribution to securing compliance with customs enforcement, let alone one rising to the level of "necessary."[1765] In the United States' view, the measure is not a schedule of what products will be imported when and where, such that Indonesia could use the fixed licence terms to allocate its customs resources. Rather, it is a restriction on all the products that could possibly be imported during a given period: importers are required to predict in advance precisely the type, quantity, and country of origin of all the products that they want to import for the coming import period of six or three months, and are then prohibited from importing products any different from those they applied to import, or from applying for additional import permits. According to the United States, such high level of trade-restrictiveness is not in proportion to any minimal contribution the measure could theoretically make to customs enforcement.[1766]

7.592. The United States suggests that a reasonably available and less trade-restrictive alternative would consist in allowing importers to apply for truly automatic licences to import products of the chosen type, quantity, or country of origin. Furthermore, allowing importers to adjust this information based on market considerations would ensure its accuracy and timeliness. The United States considers that this would give Indonesia better information about the products to be imported; require fewer resources to manage; and eliminate the trade-restrictiveness of the measure by allowing importers to take timely import decisions based on commercial considerations and current market conditions.[1767] As the United States explained with respect to Measure 1 above, the Indonesian offices responsible for processing import licence applications are not the same as those responsible for customs enforcement. In its view, even if the fixed licence terms requirements did make processing import permit applications easier, it is unclear how that would make any contribution to the objective of customs enforcement.[1768] The United States thus submits that, even if Indonesia had identified a WTO-consistent law or regulation relating to customs enforcement with which the fixed licence terms are supposedly "necessary to secure compliance", and even if the Panel found that the measure was designed to secure compliance with that law or regulation, the measure still could not be justified as meeting the "necessary" standard with respect to this objective. [1769]

7.3.6.1.2 Whether Measure 2 is applied in a manner consistent with the *chapeau* of Article XX

7.593. Concerning the parties' arguments about the *chapeau* of Article XX of the GATT 1994, *see* Section 7.3.5.1.2 above.

[1761] New Zealand's second written submission, paras. 206-207.
[1762] Indonesia's second written submission, para. 243.
[1763] New Zealand's opening statement at the second substantive meeting, para. 64 (referring to its second written submission, para. 105).
[1764] United States' second written submission, paras. 142-146.
[1765] United States' second written submission, para. 143.
[1766] United States' second written submission, para. 143.
[1767] United States' second written submission, para. 144.
[1768] United States's second written submission, para. 145.
[1769] United States' second written submission, para. 146.

7.3.6.2 Analysis by the Panel

7.594. We have found in Section 7.3.5.2.3 above that Indonesia has failed to identify specific rules, obligations, or requirements contained in WTO-consistent laws or regulations for the purpose of its defence under Article XX(d) of the GATT 1994. Given that Indonesia's arguments concerning the identification of WTO-consistent laws or regulations for the purpose of its defence under Article XX(d) of the GATT 1994 were submitted with respect to all the relevant measures at issue, including Measure 2, we find that Indonesia has not demonstrated that Measure 2 is provisionally justified under subparagraph (d) of Article XX of the GATT 1994.

7.595. We therefore find that Indonesia has failed to demonstrate that Measure 2 is justified under Article XX(d) of the GATT 1994.

7.3.7 Whether Measure 3 (80% realization requirement) is justified under Article XX(d) of the GATT 1994

7.3.7.1 Arguments of the parties

7.3.7.1.1 Whether Measure 3 is provisionally justified under subparagraph (d) of Article XX of the GATT 1994[1770]

7.3.7.1.1.1 Indonesia

7.596. Indonesia claims that the 80% realization requirement is necessary to its customs enforcement.[1771] Indonesia sustains that the measure is fair, balanced, and narrowly constructed to fulfill Indonesia's legitimate objective of administrative efficiency through import licensing. According to Indonesia, the measure is a safeguard against importers grossly overstating anticipated imports. Notably, the measure helps address Indonesia's concerns over the impacts that overstatement of imports might have on its ability to guarantee proper quarantine and food safety inspection procedures as a first-level defence against the transmission of diseases through the food supply. Indonesia observes that the realization requirement, which existed under MOT 16/2013 for perishable horticultural products, did not apply "across the board" to other products because the same risks to the domestic food supply were not present. [1772]

7.597. Elaborating on the link between the 80% realization requirement and Indonesia's ability to guarantee proper quarantine procedures, Indonesia confirms that the measure was designed to ensure that importers adhere to the terms specified in their import licence applications. This in turn guarantees that the Indonesian government has reliable information upon which to base its resource allocation decisions, including those related to provision of resources to ensure proper quarantine procedures (e.g. staffing and training at various ports of entry).[1773] As a developing country with limited resources to assign to import administration, Indonesia relies on estimates of expected trade volumes corresponding to each validity period. Indonesia argues that the measure balances the need to induce importers to submit realistic estimates of anticipated import quantities, and the need for a reasonable margin of error before penalties are applied.[1774] Hence, Indonesia argues that the 80% realization requirement supplements Measures 1 and 2 above: as the precise terms of importation have been established, this measure is implemented to ensure that importers do not deviate from the information submitted in response to the fixed licence terms requirement.[1775] Explaining how the mentioned food safety risks are currently managed, i.e. after the measure was terminated under MOT 71/2015, Indonesia notes that the Indonesian government has not yet adopted alternative measures, although it is monitoring the impact of the repeal of the 80% realization requirement on importer behaviour.[1776]

[1770] For the general arguments concerning this step in Indonesia's defence under Article XX(d) of the GATT 1994, *see* Section 7.3.5.1.1 above.
[1771] Indonesia's first written submission, para. 145; response to Panel question No. 32(b).
[1772] Indonesia's response to Panel question No. 32.
[1773] Indonesia's response to Panel question No. 95.
[1774] Indonesia's first written submission, para. 142.
[1775] Indonesia's second written submission, paras. 241 and 244.
[1776] Indonesia's response to Panel question No. 96.

7.3.7.1.1.2 New Zealand

7.598. New Zealand argues that Indonesia's argumentation does not met the standard of Article XX(d) of the GATT 1994. First, Indonesia has not demonstrated that customs enforcement is the objective of the 80% realization requirement; and has not identified the specific "laws or regulations" with which the measure is "necessary to secure compliance"; and has not pointed to any specific provisions of the relevant legal instruments, or to any other official documents, showing that the measure was adopted to promote the objective of customs enforcement. Thus, New Zealand contends that the design and structure of the measure does not lend any support to Indonesia's Article XX(d) argument.[1777]

7.599. Rather, in New Zealand's view, the design of the 80% realization requirement measure suggests an import-limiting objective: combined with the fixed licence terms, the measure creates an environment which induces importers to limit the quantities they import, particularly because of the sanctions that can be imposed for non-compliance.[1778] Furthermore, Indonesia's incomplete responses to Panel Questions[1779] confirm that the 80% realization requirement only applies in respect of 22 fresh and 17 processed horticultural products.[1780] Indonesia does not explain why the same requirement does not apply to the non-listed horticultural products which might cause similar quarantine concerns. According to New Zealand, such inconsistent application of the measure also suggests that its real purpose is to protect local producers in furtherance of Indonesia's self-sufficiency laws, rather than to secure compliance with customs or quarantine laws.

7.600. New Zealand maintains that, even if the first element of Article XX(d) were established, Indonesia has not explained why the measure is "necessary to secure compliance" with such laws or regulations. In New Zealand's view, the relationship between the 80% realization requirement and the interests Indonesia claims to protect is insufficient. Even assuming, *arguendo*, that importers did overstate the quantity requested on the import approval, if the overstated quantity were not imported, this would not impose an additional burden on customs enforcement according to New Zealand.[1781] As Indonesia has not shown how the measure contributes to, or is necessary to meet, the objective in Article XX(d), New Zealand submits that little weight can be given to these factors in analyzing whether the measure is "necessary". In New Zealand's view, the trade-restrictiveness of the measure outweighs any minimal contribution it may make towards the objectives in Article XX(d).[1782] Further, in view of Indonesia's failure to establish that the 80% realization requirement was adopted for the cited objective, New Zealand does not consider it necessary to elaborate on a less trade-restrictive alternative measure. However, New Zealand observes that a less restrictive and readily available measure would be, for example, using information already supplied on customs forms to obtain data on anticipated import quantities. Such information would be more precise because it would relate to the actual quantity in a specific shipment, rather than the estimated quantity over an entire validity period.[1783]

7.3.7.1.1.3 United States

7.601. The United States argues that Indonesia refers to general objectives, such as proper quarantine procedures and "other administrative concerns," without identifying the WTO-consistent law or regulation with which the realization requirement is allegedly securing compliance.[1784] Indonesia has not provided any evidence that a problem with importers grossly overstating their anticipated imports exists, or explained how, if such a problem did exist, this would impose a burden on customs officials. Even assuming that an importer overstated the requested quantity on its import approval application, Indonesia's argument presumes that he would not be importing a large volume of horticultural products. Thus, to the United States,

[1777] New Zealand's second written submission, para. 213.
[1778] New Zealand's second written submission, para. 214. New Zealand's first written submission, paras. 228–236.
[1779] New Zealand's response to Panel question No. 97 (commenting on Indonesia's response to Panel question No. 32, paras. 11-12).
[1780] Horticultural products listed in Attachment II, MOA 86/2013 (Exhibit JE-15) and Appendix I, MOT 16/2013 (Exhibit JE-8).
[1781] New Zealand's second written submission, para. 215.
[1782] New Zealand's second written submission, para. 216.
[1783] New Zealand's second written submission, para. 220.
[1784] United States' response to Panel question No. 97, para. 71 (referring to United States' oral statement at the second substantive meeting, paras. 55-58; Indonesia's first written submission, paras. 136, 140,142-145, 149, 160, 163; second written submission, para. 244).

overstatement would not necessarily mean *any* increased burden on the customs officials processing imports.[1785]

7.602. Concerning the alleged misallocation of limited resources as a result of overstatement, the United States considers that this argument is based on the assumption that the import licensing requirements operate to provide customs officials with appropriate information about planned imports.[1786] However, as highlighted above in relation to Measures 1 and 2, this is not the case: importers are *not* required to provide details on precisely when and where products will be imported; rather, like the fixed licence terms requirement, the realization requirement is simply a quantitative restriction, forcing importers to reduced their planned imports. According to the United States, no evidence has been presented showing that customs officials obtain any information at all from the realization requirement, on when and where imports will occur such that they could make appropriate resource allocation decisions. Second, no evidence is presented to substantiate Indonesia's claim that overstatements in relation to proper quarantine procedures and other administrative issues were a factor driving the establishment of the realization requirement.[1787] No evidence is advanced from the text, structure, or history of Indonesia's import licensing regulations suggesting that they were introduced to address any quarantine or inspection problems. Moreover, Indonesia did not refute the evidence submitted by the co-complainants showing that the actual purpose of the import licensing regime is to protect domestic producers from competition from imports.[1788] Third, in the light of WTO jurisprudence[1789], Indonesia's articulation of the relationship between the measure and its purported objectives does not meet the "necessary to secure compliance" standard.[1790]Indonesia's statements about the operation of the realization requirement and how it could contribute to resource allocation for food safety inspections, made in the context of Indonesia's Article XX(d) defence, lack any evidentiary basis and are premised on an incorrect understanding of how the requirements operate.[1791] These defects in evidence and reasoning would apply equally to an Article XX(b) defence relating to food safety. Even if substantiated, the United States argues that Indonesia's assertion that "concern" about the impact of overstatement would not meet this "necessary" standard. For the United States, Indonesia's argument[1792] must fail even if Indonesia were able to satisfy the first element of Article XX(d).[1793]

7.603. Further, the United States holds that any overestimation problem (and noting that Indonesia has not presented evidence that one exists) would not exist without the application windows and validity periods and the fixed licence term requirements imposed by the import licensing regimes. That is, if importers were not prohibited from applying for additional permits once a period started, or from importing products other than those specified on their permits, there would be no incentive for over-estimation, and in fact, no need for estimation at all, as importers could seek permits based on their actual imports. The United States thus considers that a less trade-restrictive and more accurate way to collect information on import volumes would be to allow importers to apply for permits at any time prior to customs clearance, and on a rolling basis. The United States argues that, if Indonesia removed the challenged measures at issue in this dispute, all of which restrict importation, such would almost certainly provide more accurate

[1785] United States' second written submission, para. 148.
[1786] United States' second written submission, para. 149 (referring to Indonesia's response to Panel question No. 50).
[1787] United States' response to Panel question No. 97, paras. 72-73.
[1788] United States' response to Panel question No. 97, para. 72 (referring to its second written submission, para. 133).
[1789] The United States referred to the Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 210; *EC – Seal Products*, para. 5.180 (referring to Panel Report, *EC – Seal Products*, para. 7.633, ruling that, for a measure to be "necessary" to its covered objective, it must make a contribution to that objective - i.e. there must be a "genuine relationship of ends and means" between the measure and the objective); *Korea – Various Measures on Beef*, para. 161; *Brazil – Retreaded Tyres,* para. 141 (clarifying that the contribution must be "significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to.'"); *Korea – Various Measures on Beef*, paras. 161-163; *Brazil – Retreaded Tyres*, para. 141; *EC – Seal Products*, para. 5.169 (clarifying that the contribution must be assessed in light of the measure's trade-restrictiveness).
[1790] United States' response to Panel question No. 97, para. 73, referring to United States' oral statement at the second substantive meeting, paras. 65-66; United States' second written submission, paras. 147-151.
[1791] United States' comments on Indonesia's response to Panel question No. 115, referring to its second written submission, paras. 147-151; and United States' response to Panel question No. 97, paras. 69-74.
[1792] *See* Indonesia's first written submission, paras. 142, 145, 163; Indonesia's oral statement at the first substantive meeting, paras. 22, 31; Indonesia's response to Panel question No. 50, para. 32.
[1793] United States' second written submission, paras. 147–152.

and timely information regarding importation.[1794] The United States contends that any marginal contribution the realization requirement could make to saving customs resources must be weighed against the highly trade restrictive nature of the measure, which induces importers to reduce the quantity sought on their Import Approval, thereby restricting overall import volumes for every import period.[1795] The United States recalls that the measure also makes importers who do not meet the requirement ineligible to import in future periods. Such a trade-restrictive measure would be outweighed only by a significant contribution to the covered objective.[1796]

7.3.7.1.2 Whether Measure 3 is applied in a manner consistent with the *chapeau* of Article XX

7.604. Concerning the parties' arguments about the *chapeau* of Article XX of the GATT 1994, see Section 7.3.5.1.2 above.

7.3.7.2 Analysis by the Panel

7.605. We have found in Section 7.3.5.2.3 above that Indonesia has failed to identify specific rules, obligations, or requirements contained in WTO-consistent laws or regulations for the purpose of its defence under Article XX(d) of the GATT 1994. Given that Indonesia's arguments concerning the identification of WTO-consistent laws or regulations for the purpose of its defence under Article XX(d) of the GATT 1994 were submitted with respect to all the relevant measures at issue, including Measure 3, we find that Indonesia has not demonstrated that Measure 3 is provisionally justified under subparagraph (d) of Article XX of the GATT 1994.

7.606. We therefore find that Indonesia has failed to demonstrate that Measure 3 is justified under Article XX(d) of the GATT 1994.

7.3.8 Whether Measure 4 (Indonesia's harvest period requirements) is justified under Article XX(b) of the GATT 1994

7.3.8.1 Arguments of the parties

7.3.8.1.1 Whether Measure 4 is provisionally justified under subparagraph (b) of Article XX of the GATT 1994[1797]

7.3.8.1.1.1 Indonesia

7.607. Indonesia argues that its import licensing regime is necessary to protect public health as contemplated by subparagraph (b) of Article XX of the GATT 1994.[1798] According to Indonesia, its import licensing regulations clearly state that one of the objectives is to fulfill food safety requirements and to establish quality and nutrition requirements for food for consumption.[1799] Indonesia submits that MOT 71/2015 and MOA 86/2013 for horticultural products and MOT 5/2016 and MOA 58/2015 for animals and animal products as a whole were enacted to protect food safety for human consumption.[1800] In Indonesia's view, the WTO jurisprudence has clearly established the importance that Members assign to national autonomy in protecting health, as well as their right to determine the level of health protection they deem appropriate, as confirmed by the public health exception in subparagraph (b).[1801]

7.608. Specifically with respect to Measure 4, Indonesia submits that it is justified by Article XX(b) of the GATT 1994 and contends that, given the prevailing equatorial climate, the oversupply of fresh horticultural produce in a particular region of its vast archipelago could have disastrous

[1794] United States' second written submission, para. 150.
[1795] United States' second written submission, para. 151 (referring to United States' first written submission, paras. 171-174, 284-287; Exhibits USA-21 and USA-28).
[1796] United States' second written submission, para. 151.
[1797] For the general arguments concerning this step in Indonesia's defence under Article XX(d) of the GATT 1994, *see* Section 7.3.5.1.1 above.
[1798] Indonesia's opening statement at the second substantive meeting, para. 33.
[1799] Indonesia's opening statement at the second substantive meeting, para. 32 (referring to Article 4(b) and Article 37 of Law 18/2012, Exhibit IDN-6.)
[1800] Indonesia's opening statement at the second substantive meeting, para. 32.
[1801] Indonesia's second written submission, para. 104 (referring to Exhibit IDN-48 and Appellate Body Report, *EC – Asbestos*, para. 172; Indonesia's opening statement at the second substantive meeting, para. 30).

health consequences due to the accelerated rate of decomposition and the risk posed by the spread of pathogenic bacteria. According to Indonesia, in the absence of national coordination of imports with domestic harvest times, stockpiles of "rotting fresh" horticultural products are likely to cause serious public health threats. Indonesia considers that it is taking a proactive approach against such risks by ensuring that imports are re-directed within its territory during domestic harvest periods. In that sense, Indonesia denies prohibiting or restricting imports of horticultural products.[1802] Rather, it argues, Indonesia is regulating the timing of imports, taking account of domestic harvest periods, in order to protect Indonesian citizens from public threats.[1803]

7.3.8.1.1.2 New Zealand

7.609. For New Zealand, Indonesia has presented no pertinent evidence to show that its measures contribute to food safety objectives under Article XX(b) of the GATT 1994; even if it had, Indonesia has failed to establish that any of its measures were necessary to the achievement of that objective, or that they satisfy the chapeau of Article XX.[1804] In this regard, New Zealand notes that Indonesia's defence takes the form of a series of statements that five of its measures were enacted to protect food safety for human consumption, allegedly showing that its regulations "as a whole" were enacted to protect food safety.[1805] New Zealand submits that such statements can be taken into account as Indonesia's articulation of the objective of its measures but that the Panel is not bound by Indonesia's characterization and must make its own determination based on the evidence.[1806] New Zealand argues further that the exhibits supplied by Indonesia in support of each of its assertions do not show that Indonesia enacted the measures to protect food safety for human consumption.[1807]

7.610. Specifically with respect to Measure 4, New Zealand submits that Indonesia's mere assertion that the objective of the measure is public health is insufficient to satisfy the first element of Article XX(b).[1808] According to New Zealand, nothing in the design or structure of the measure indicates that it was adopted or enforced to protect human health; and Indonesia has produced no evidence that "stockpiles of rotting horticultural products" have previously resulted, or would result in the future, from imports during domestic harvest seasons or that this was the reason for introducing the measure. New Zealand argues that the evidence it has presented rather shows that the real reason for the measure is to protect domestic farmers from import competition.[1809]

7.611. In New Zealand's view, even if the first element of Article XX(b) were satisfied, there is no evidence that the measure is "necessary" to protect human health, contrary to Indonesia's claims. While agreeing that the protection of human health from food-borne disease is an important objective, New Zealand maintains that Indonesia has not established that the measure contributes to that objective, 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.[1810] New Zealand argues that the measure is disproportionately trade-restrictive in relation to the objective now claimed. Imports of certain horticultural products have been completely banned, as New Zealand has showed[1811], rather than "redirected elsewhere in Indonesia" as Indonesia claims.[1812] Therefore, New Zealand considers that it is not required to elaborate on an alternative measure. However, even if the measure made some contribution to human health, a less trade-restrictive alternative would be for Indonesia to rely on market forces to resolve any issues of over-supply, and mitigate the hypothetical risk identified by Indonesia in a less trade restrictive manner.[1813]

[1802] Indonesia's first written submission, para. 155; Indonesia's second written submission, para. 222.
[1803] Indonesia's second written submission, paras. 222-223.
[1804] New Zealand's response to Panel question No. 123.
[1805] Indonesia's second written statement, para. 110; Indonesia's oral statement at the second substantive meeting, para. 33.
[1806] Appellate Body Report, *EC – Seal Products*, para. 5.144.
[1807] New Zealand's response to Panel question No. 123, referring to Exhibits IDN-53 to IDN-59.
[1808] New Zealand's second written submission, para. 228, referring to Appellate Body Report, *EC – Seal Products*, para. 5.144.
[1809] New Zealand's first written submission, para. 237, referring to Exhibit NZL-73.
[1810] New Zealand's second written submission, para. 229, referring to Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 150-151.
[1811] New Zealand's first written submission at para. 238, referring to Exhibit NZL–39.
[1812] New Zealand's second written submission, para. 230, referring to Indonesia's first written submission, para. 155.
[1813] New Zealand's second written submission, paras. 231-232.

7.3.8.1.1.3 United States

7.612. According to the United States, Indonesia has not met any of the elements of the test under Article XX(b) with respect to any of its defences, despite asserting in its second written submission, that its import licensing regimes, as a whole, and seven of the individual requirements, are necessary to protect human health under Article XX(b) of the GATT 1994 because they are food safety measures.[1814] With respect to the first element of Article XX(b), the United States questions that the challenged measures are food safety measures merely because the import licensing regulations refer to the Food Law[1815], and argues that the text of the Law does not lend support to such an assertion[1816] because: (i) the Food Law is a broad statute that covers a variety of topics[1817] and the title of Part 5, the text, structure and operation of the import licensing regimes, and statements by Indonesian officials, all show that this is the section that is relevant to Indonesia's import licensing regimes[1818]; (ii) while food safety is covered in Chapter VII of the Food Law, Indonesia has submitted no evidence tying the import licensing regimes to the requirements of that Chapter[1819];(iii) the list enumerating the 13 legal instruments adopted by Indonesia to promote food safety and security do not include the import licensing regulations.[1820] In the United States' view, Indonesia has simply asserted that the objective of the measure is protecting human health, but has introduced no evidence substantiating that assertion.[1821] Hence, Indonesia has failed to justify its import restricting measures, as a whole, or as individual measures, because, other than unsupported *post hoc* assertions, it has not provided any evidence that demonstrates that the objective pursued by its measures is to protect food safety or that the measures are necessary to protect food safety.[1822]

7.613. Specifically with respect to Measure 4, the United States contends that Indonesia's arguments do not satisfy the elements of a defence under Article XX(b). Indonesia has not demonstrated that the seasonal restrictions on horticultural products pursue the objective of protecting human health, let alone that they are "necessary" to such an objective.[1823] In relation to the "objective pursued by" the measure, the United States takes note of Indonesia's reference to the Food Security Council's publication of "regular points summarizing its goals and directives," which are allegedly considered by the Ministry of Agriculture in determining when importation of particular products is permitted.[1824] However, the United States also notes that this exhibit does not refer to the Ministry of Agriculture's seasonal restrictions on importation or to over-supply of horticultural products at all.[1825] The United States asserts that the co-complainants have demonstrated that the actual purpose of the measure, and the basis on which the Ministry of Agriculture implements the seasonal restrictions, is the protection of domestic producers from competition with imported products.[1826] For example, in a letter dated 3 December 2015 to the head of the Indonesia Horticultural Products Importers Association, the Ministry of Agriculture's Director of General of Horticulture stated that "commodities not produced domestically may be imported" during the 2016 RIPH issuance period.[1827] The letter also discussed the domestic production of oranges and called for prioritizing the use of oranges of domestic origin to supply the demand during Chinese New Year.[1828] Subsequent letters confirmed that oranges cannot be

[1814] United States' oral statement at the second substantive meeting, para. 42 (referring to Indonesia's second written submission, paras. 89 and 207(b)).
[1815] *See* Indonesia's first written submissions, paras. 107-111.
[1816] United States' oral statement at the second substantive meeting, para. 43.
[1817] United States' oral statement at the second substantive meeting, para. 44.
[1818] United States' oral statement at the second substantive meeting, para. 44; second written submission, paras. 133, 172; first written submission, paras. 16 and 84-85.
[1819] United States' oral statement at the second substantive meeting, para. 44.
[1820] Exhibit IDN-25.
[1821] United States' second written submission, para. 171 (referring to *EC – Seal Products*, para. 5.144 (stating that panels "should take into account the Member's articulation of the objective or the objectives it pursues through its measures, but it is not bound by that Member's characterization of such objective(s)")). As the Appellate Body has recognized, a bare assertion of the measure's objective does not satisfy the first element of Article XX(b).
[1822] United States' response to Panel question No. 123.
[1823] United States' second written submission, paras. 170 and 175.
[1824] United States' second written submission, para. 171 (referring to Indonesia's response to Panel question No. 17).
[1825] United States' second written submission, para. 171 (referring to Exhibit IDN-25).
[1826] United States' second written submission, para. 172.
[1827] Exhibit USA-70.
[1828] Exhibit USA-70.

imported during January.[1829] Other Indonesian ministers have also confirmed that the purpose of the harvest period restriction is to "protect local horticultural products".[1830]

7.614. According to the United States, even if the first element of Article XX(b) were satisfied, the restriction would not meet the "necessary" standard.[1831] Although Indonesia asserts that oversupply of fresh horticultural products "could have disastrous consequences," it has not presented any evidence showing that oversupply either occurs or has any negative consequences for human health. Thus, the United States argues that it is not clear that the measure would make any "contribution" to its purported objective. Without a "genuine relationship of ends and means" between the measure and the objective, a measure is not "necessary" to the achievement of that objective.[1832] Even if the measure made some contribution to the protection of human health, the United States sustains that several less trade-restrictive alternative measures are available.[1833] As Indonesia has not justified the measure as challenged by the co-complainants, in that the Ministry of Agriculture exercises authority to prohibit completely into all regions the importation of horticultural products, based on their harvest period[1834], the United States suggests confining harvest period restrictions to those regions in which the harvest was occurring. As no evidence was presented to show the occurrence of oversupply, or that over-supply would not be resolved by market forces, another suggestion would be to eliminate the seasonal restrictions and allow market forces to resolve any oversupply situation.[1835]

7.3.8.1.2 Whether Measure 4 is applied in a manner consistent with the *chapeau* of Article XX

7.615. Concerning the parties' arguments about the *chapeau* of Article XX of the GATT 1994, *see* Section 7.3.5.1.2 above.

7.3.8.2 Analysis by the Panel

7.3.8.2.1 Introduction

7.616. The task before the Panel is to determine whether Measure 4 (Harvest period requirement) is justified under Article XX(b) of the GATT 1994. We commence with the text of the relevant provision and the ensuing legal standard.

7.3.8.2.2 The relevant legal provision

7.617. Article XX of the GATT 1994 reads, in relevant part, as follows:

> Article XX
>
> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (*a*) ...
>
> (*b*) necessary to protect human, animal or plant life or health;
>
> ...

[1829] Exhibits USA-71 and USA-72.
[1830] Exhibits USA-13 and USA-14.
[1831] United States' second written submission, para. 173.
[1832] United States' second written submission, para. 173, referring to Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 210; *EC – Seal Products*, para. 5.180 (referring to Panel Report, *EC – Seal Products*, para. 7.633).
[1833] United States' second written submission, para. 174.
[1834] United States' second written submission, para. 174, referring to its first written submission, paras. 180-181; Article 5 of MOA 86/2013, Exhibit JE-15; and Exhibits USA-70 and USA-71.
[1835] United States' second written submission, para. 174.

7.618. As we explained in Section 7.3.5.2.2 above, the assessment of a claim of justification under Article XX involves a two-tiered analysis in which a measure must (i) be provisionally justified under one of the subparagraphs of Article XX, in this case subparagraph (b), and then (ii) analysed under the *chapeau* of Article XX.[1836] As we explained before, in order to justify an otherwise WTO-inconsistent measure, the Member invoking a subparagraph of Article XX as a defence bears the burden of establishing that the conditions prescribed therein are met.[1837] Therefore, it is incumbent upon Indonesia to demonstrate that the relevant measure is provisionally justified under subparagraph (b) and then that the measure is applied in a manner consistent with the *chapeau* of Article XX.

7.619. Complying with the first tier of the test implies that Indonesia must show that the relevant measure is "necessary to protect human, animal or plant life or health". In this respect, the Appellate Body has clarified that the provisional justification under one of the subparagraphs of Article XX requires that a challenged measure "address[es] the particular interest specified in that paragraph" and that "there be a sufficient nexus between the measure and the interest protected".[1838] Furthermore, "[t]he required nexus – or 'degree of connection' – between the measure and the interest is specified in the language of the paragraphs themselves, through the use of terms such as 'relating to' and 'necessary to'" in Article XX".[1839] Mirroring the analysis proposed by the Appellate Body with respect to subparagraphs (a) and (d)[1840], we consider that in order to establish whether the measures at issue are provisionally justified under Article XX(b), we need to examine first whether Indonesia has demonstrated that the measures at issue are "designed" to protect human, animal or plant life or health; and second, whether the measures at issue are "necessary" to protect human, animal or plant life or health.[1841]

7.620. With respect to the analysis of the "design" of the measure, following the Appellate Body's guidance, the phrase "to protect human, animal or plant life or health" calls for an initial, threshold examination in order to determine whether there is a relationship between an otherwise WTO-inconsistent measure and the protection of human, animal or plant life or health.[1842] If this initial, threshold examination reveals that the measure is incapable of protecting human, animal or plant life or health, there is not a relationship between the measure and the protection of human, animal or plant life or health that meets the requirements of the "design" step. In this situation, further examination with regard to whether this measure is "necessary" to protect human life or health would not be required. This is because there can be no justification under Article XX(b) for a measure that is not "designed" to protect human, animal or plant life or health.[1843] However, if the measure is not incapable of protecting human, animal or plant life or health, this indicates the existence of a relationship between the measure and the protection of human, animal or plant life or health. In this situation, further examination of whether the measure is "necessary" is required under Article XX(b).[1844] In order to determine whether such a relationship exists, we must examine the evidence regarding the design of the measure at issue, including its content, structure, and

[1836] Appellate Body Reports, *EC – Seal* Products, para. 5.169 (referring to Appellate Body Reports, *US – Gasoline*, p. 22, DSR 1996:I, p. 20; *US – Shrimp*, paras. 119 and 120; Appellate Body Report, *US – Gambling*, para. 292).

[1837] Appellate Body Reports, *Korea – Various Measures on Beef*, para. 157; *Thailand – Cigarettes*, para. 179.

[1838] Appellate Body Reports, *EC – Seal* Products, para. 5.169 (referring to Appellate Body Report, *US – Gambling*, para. 292).

[1839] Appellate Body Report, *Colombia – Textiles*, para. 5.67 (referring to Appellate Body Report, *US – Gambling*, para. 292).

[1840] *See* Appellate Body Report, *Colombia – Textiles*, paras. 5.67-5.69.

[1841] Appellate Body Report, *Colombia – Textiles*, para. 5.67. In this Report, the Appellate Body also clarified that the "design" and "necessity" steps of the analysis under Article XX(a) are conceptually distinct, yet related, aspects of the overall inquiry to be undertaken into whether a respondent has established that the measure at issue is "necessary to protect public morals". The Appellate Body explained that, as the assessment of these two steps is not entirely disconnected, there may be some overlap in the sense that certain evidence and considerations may be relevant to both aspects of the defence under Article XX(a). In the context of the "design" step of the analysis, a panel is not precluded from taking into account evidence and considerations that may also be relevant to the examination of the contribution of the measure in the context of the "necessity" analysis. Appellate Body Report, *Colombia – Textiles*, para. 5.76. We are of the view that the same analysis applies in our examination of Indonesia's defences under Article XX(b).

[1842] *See* Appellate Body Report, *Colombia – Textiles*, para. 5.67, in the context of Article XX(a) of the GATT 1994 and *Argentina – Financial Services*, para. 6.203, in the context of Article XIV(c) of the GATS, which mirrors Article XX(d) of the GATT 1994.

[1843] *See* Appellate Body Reports, *Argentina – Financial Services*, para. 6.203; and *Mexico – Taxes on Soft Drinks*, para. 72.

[1844] Appellate Body Report, *Colombia – Textiles*, para. 5.68.

expected operation.[1845] We note that a measure may expressly mention an objective falling within the scope of human, animal or plant life or health.[1846] However, an express reference to such objective may not, in and of itself, be sufficient to establish that the measure is "designed" to protect human life or health for purposes of substantiating the availability of the defence under Article XX(b). Conversely, a measure that does not expressly refer to a human, animal or plant life or health objective may nevertheless be found to have such a relationship with human, animal or plant life or health following an assessment of the design of the measure at issue, including its content, structure, and expected operation.[1847]

7.621. The assessment of the "necessity" of a measure entails an in-depth, holistic analysis of the relationship between the measure and the protection of human, animal or plant life or health.[1848] The "necessity test" involves a process of "weighing and balancing" a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure.[1849] In this sense, whether a particular degree of contribution is sufficient for a measure to be considered "necessary" cannot be answered in isolation from an assessment of the degree of the measure's trade-restrictiveness and of the relative importance of the interest or value at stake.[1850] The Appellate Body has further explained that, in most cases, a comparison between the challenged measure and possible alternatives should subsequently be undertaken.[1851] Regarding the specific factors of the "necessity" analysis, we refer to our discussion in paragraph 7.564 above.

7.622. As mentioned above, in most cases, a panel must then compare the challenged measure and possible alternative measures that achieve the same level of protection while being less trade restrictive.[1852] The Appellate Body has explained that an alternative measure may be found not to be "reasonably available" where "it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties".[1853] The burden of proving that the measure at issue is necessary resides with the responding party, a complaining party bears the burden of identifying any alternative measures that, in its view, the responding party should have taken.[1854] The Appellate Body has observed that "the very utility of examining the interaction between the various factors of the necessity analysis, and conducting a comparison with potential alternative measures, is that it provides a means of testing these factors as part of a holistic weighing and balancing exercise".[1855] In this respect, the weighing and balancing exercise can be understood as "a holistic operation that involves putting all the variables of the equation

[1845] *See* Appellate Body Reports, *US − Shrimp*, paras. 135−142; *EC − Seal Products*, para. 5.144; *Colombia − Textiles*, para. 5.68.

[1846] In discerning the objective of a measure, a panel is not limited to the text or preamble of a measure, or to a respondent's characterization of the objective in WTO dispute settlement proceedings; it may also look at other evidentiary elements such as the design, structure, and operation of the measure in making its own determination of a measure's objective. Appellate Body Reports, *EC − Seal Products*, para. 5.144.

[1847] Appellate Body Report, *Colombia − Textiles*, para. 5.69, in the context of Article XX(a) of the GATT 1994.

[1848] Appellate Body Report, *Colombia − Textiles*, para. 5.70.

[1849] Appellate Body Report, *EC − Seal* Products, para. 5.169 (referring to Appellate Body Reports, *Korea − Various Measures on Beef*, para. 164; *US − Gambling*, para. 306; and *Brazil − Retreaded Tyres*, para. 182).

[1850] *See also,* Appellate Body Report, *Colombia − Textiles*, para. 5.77.

[1851] Appellate Body Reports, *EC − Seal Products*, para. 5.169 (referring to Appellate Body Reports, *US − Gambling*, para. 307; and *Korea − Various Measures on Beef*, para. 166). *See also* Appellate Body Report, *Colombia − Textiles*, para. 5.70.

[1852] Appellate Body Reports, *EC − Seal Products*, para. 5.169. In *EC − Seal Products*, the Appellate Body recalled that, in *US − Tuna II (Mexico)*, it had identified in the context of Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement) circumstances in which a comparison with possible alternative measures may not be required, for instance, when the challenged measure is not trade restrictive, or when it makes no contribution to the objective. Appellate Body Reports, *EC − Seal Products*, fn 1181 to para. 5.169 (referring to Appellate Body Report, *US − Tuna II (Mexico)*, fn 647 to para. 322.

[1853] Appellate Body Report, *US − Gambling*, para. 308. *See also,* Appellate Body Report, *Colombia − Textiles*, para. 5.74.

[1854] Appellate Body Report, *EC − Seal* Products, para. 5.169 (referring to Appellate Body Report, *US − Gambling*, paras. 309-311).

[1855] Appellate Body Reports, *EC − Seal Products*, para. 5.215. (fn omitted) *See also,* Appellate Body Report, *Colombia − Textiles*, para. 5.75.

together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement."[1856]

7.623. Regarding the second tier of the test, i.e. whether Measure 4 is applied in a manner consistent with the *chapeau*, we refer to paragraphs 7.565-7.567 above. In conducting our analysis, we bear in mind that Article XX of the GATT 1994 applies to "measures" that are to be analysed under the subparagraphs and the *chapeau*, not to any inconsistency with the GATT 1994 that might arise from such measures.

7.624. We shall therefore proceed to examine whether Indonesia has demonstrated that Measure 4 is justified under Article XX(b) of the GATT 1994. As we indicated in Section 7.3.1 above, Indonesia has only provided arguments on a measure by measure basis with respect to the first tier of the analysis, i.e. whether the measures at issue are provisionally justified under subparagraph (b) of Article XX of the GATT 1994. The second tier, i.e. whether the measures at issue are applied in a manner consistent with the *chapeau* of Article XX, has been argued by Indonesia for its import licensing regimes as a whole, thus making no distinctions between measures. Under these circumstances, we are driven to follow the same approach in our analysis.

7.625. We commence by examining whether Indonesia has demonstrated that Measure 4 is provisionally justified under subparagraph (b) of Article XX of the GATT 1994

7.3.8.2.3 Whether Indonesia has demonstrated that Measure 4 is provisionally justified under Article XX(b) of the GATT 1994

7.626. Under this tier of our analysis, the task before the Panel is to establish whether, as claimed by Indonesia, Measure 4 is provisionally justified under subparagraph (b). As explained before, we shall examine whether Indonesia has demonstrated that Measure 4 is designed to protect human, animal or plant life or health and, if so, whether it is necessary for such protection.

7.627. Concerning the first element, i.e. whether Measure 4 is designed to protect human, animal or plant life or health[1857], we note that Indonesia has argued that it is regulating the timing of imports, taking account of domestic harvest periods, in order to protect Indonesian citizens from public threats.[1858] Indonesia submits that given the prevailing equatorial climate, the oversupply of fresh horticultural produce in a particular region of its vast archipelago could have disastrous health consequences due to the accelerated rate of decomposition and the risk posed by the spread of pathogenic bacteria. According to Indonesia, in the absence of national coordination of imports with domestic harvest times, stockpiles of "rotting fresh" horticultural products are likely to cause serious public health threats. Indonesia considers that it is taking a proactive approach against such risks by ensuring that imports are re-directed within its territory during domestic harvest periods.[1859]

7.628. New Zealand responded that Indonesia's mere assertion that the objective of the measure is public health is insufficient to satisfy the first element of Article XX(b).[1860] According to New Zealand, nothing in the design or structure of the measure indicates that it was adopted or enforced to protect human health; and Indonesia has produced no evidence that "stockpiles of rotting horticultural products" have previously resulted, or would result in the future, from imports during domestic harvest seasons or that this was the reason for introducing the measure. Rather, the evidence presented by New Zealand shows that the real objective of the measure is to protect

[1856] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 182. *See also,* Appellate Body Report, *Colombia – Textiles*, para. 5.75.

[1857] In its second written submission, Indonesia indicated as follows:

> ...
> (b)the requirement that imports of fresh horticultural products not be harvested more than six months from the date of importation, the domestic harvest period limitations, restrictions on end-use, the harvest time period, limitations for animal products, the storage capacity requirement, the positive list, and the reference price are justified under Article XX (b) of the GATT because these measures are necessary for food safety and food security.

Indonesia's second written submission, para. 207(b). The Panel observes that, although Indonesia has indicated a food security objective for Measure 4, the specific argumentation put forward by Indonesia with respect to Measure 4 does not appear to include food security concerns.

[1858] Indonesia's second written submission, paras. 222-223.

[1859] Indonesia's first written submission, para. 155; second written submission, para. 222.

[1860] New Zealand's second written submission, para. 228 (referring to Appellate Body Report, *EC – Seal Products*, para. 5.144).

domestic farmers from import competition.[1861] The United States agreed with New Zealand and contended that Indonesia has not demonstrated that the seasonal restrictions on horticultural products pursue the objective of protecting human health.[1862]

7.629. We recall that this first step in the analysis calls for an initial, threshold examination in order to determine whether there is a relationship between an otherwise WTO-inconsistent measure and the protection of human, animal or plant life or health.[1863] We note that Indonesia has identified public health as the policy objective addressed by this Measure. The co-complainants do not question that public health falls under the purview of the protection of human, animal or plant life or health under paragraph (b) of Article XX.

7.630. What the co-complainants question is the existence of a relationship between Measure 4 and the protection of human health.[1864] We proceed to examine the evidence regarding the design of the measure at issue, including its content, structure, and expected operation to establish whether such a relationship exists.[1865] In our analysis, we understand that a measure that does not expressly refer to a public moral objective may still be found to have such a relationship following an assessment of the design of the measure at issue, including its content, structure, and expected operation.[1866] In this respect, as described in Section2.3.2.4 above, Measure 4 consists of the requirement that the importation of horticulture products takes place prior to, during and after the respective domestic harvest seasons within a certain time period.[1867] Indonesia implements this measure mainly by means of Articles 5 and 8 of MOA 86/2013. We recall that, in Section 7.2.8.3 above, we concluded that Measure 4 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.631. We observe that nothing in the text of the regulations implementing this measure and, in particular, Articles 5 and 8 of MOA 86/2013, refers to the protection of human, animal or plant life or health as the policy objective of this measure. On the contrary, we note that that this regulation refers generally to the simplification of the "import process of horticulture products" and to "providing certainty in the servicing of Import Recommendation of Horticulture Products" as its rationale.[1868] What is more, Article 2 expressly confirms the underlying rationale by stating that "[t]his Regulation is intended to be the legal basis for issuing RIPH as a requirement for the issuance of import approval" and, similarly, Article 3 provides that "this Regulation is intended to … increase the effectiveness and efficiency of horticulture product import management; and … provide certainty in RIPH issuing service".[1869] In its initial part, MOA 86/2013 also refers to several domestic regulations and laws concerning a wide array of subjects, including quarantine measures for the importation of fresh fruits and vegetables, the Horticulture Law and the Food law, and even the law regarding the ratification of the WTO Agreement. We fail to see, however, how any these legal instruments constitutes relevant evidence that the harvest period requirement was formulated to protect public health in the sense of addressing Indonesia's purported concerns on the oversupply of some products during the harvest periods and its pernicious effects on public health.

7.632. Having examined the design of Measure 4, we fail to see any connection with human, animal or plant life or health that could lead us to conclude that Measure 4 is "not incapable"[1870] of protecting human, animal or plant life or health. Rather, this measure appears to relate mainly to import procedures and specifically govern the timing when some products might enter Indonesia's customs territory. Indeed, Measure 4 allows Indonesian authorities to reduce or altogether ban imports of horticultural products depending on Indonesia's own harvest season. Indonesia argued

[1861] New Zealand's second written submission, para. 228 (referring to Exhibit NZL−73).
[1862] United States' second written submission, paras. 170 and 175.
[1863] *See* Appellate Body Report, *Colombia − Textiles*, para. 5.67, in the context of Article XX(a) and *Argentina − Financial Services*, para. 6.203, in the context of Article XIV(c) of the GATS, which mirrors Article XX(d) of the GATT 1994.
[1864] New Zealand's second written submission, para. 228; United States' second written submission, paras. 170 and 175.
[1865] See Appellate Body Reports, *US − Shrimp*, paras. 135-142; *EC − Seal Products*, para. 5.144; *Colombia − Textiles*, para. 5.68.
[1866] Appellate Body Report, *Colombia − Textiles*, para. 5.69, in the context of Article XX(a) of the GATT 1994.
[1867] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, paras. 95-96; United States' first written submission, para. 60.
[1868] Exhibit JE-15.
[1869] Article 2 and 3, Exhibit JE-15.
[1870] Appellate Body Report, *Colombia − Textiles*, para. 5.68.

that it was concerned with the consequences of oversupply of fresh horticultural produce and the stockpiles of rotting horticultural products during domestic harvest times.[1871] Indonesia did not, however, provided us with any evidence regarding any occurrence of such situations in the past during domestic harvest seasons, or evidence that preventing serious public health threats arising from rotting stockpiles of horticultural products was the policy objective behind Measure 4.

7.633. We are mindful that Indonesia has presented evidence purporting to show the goals and directives of the Food Security Council, that, as alleged by Indonesia, are taken into account by the Ministry of Agriculture when establishing the "specific time periods" under Article 5 of MOA 86/2013.[1872] We note that Exhibit IDN-25 presents an overview of the Indonesian Agency for Food Security, including its structure, policy strategies and strategic programmes. However, as underlined by the United States[1873], the cited exhibit does not contain any reference to Measure 4, seasonal restrictions on importation or to over-supply of horticultural products and generally, the public health issues that Indonesia has argued to justify this measure under Article XX(b) of the GATT 1994.

7.634. As pointed out by the co-complainants[1874], the evidence on the record does not support Indonesia's contention that the policy objective of Measure 4 is related to the protection of human, animal or plant life or health. Rather, the evidence points to the objective as being to ensure that no importation takes place unless Indonesian authorities deem domestic production insufficient to fulfill domestic demand. For instance, Exhibit USA-70 includes a letter dated 3 December 2015 addressed to the Head of the Indonesian Horticultural Products Importers Association where the Ministry of Agriculture's Director General of Horticulture refers to the states that "commodities not produced domestically may be imported" during the 2016 RIPH issuance period and that the domestic production of oranges would suffice to meet consumers' demand.[1875]

7.635. We therefore conclude that Indonesia has not demonstrated that there is a relationship between Measure 4 and the protection of human, animal or plant life or health. Accordingly, we find that Indonesia has not demonstrated that Measure 4 is provisionally justified under subparagraph (b) of Article XX of the GATT 1994.

7.3.8.2.4 Conclusion

7.636. In the light of the foregoing, we find that Indonesia has failed to demonstrate that Measure 4 is justified under Article XX(b) of the GATT 1994.

7.3.9 Whether Measure 5 (Storage ownership and capacity requirement) is justified under Article XX(a) of the GATT 1994

7.3.9.1 Arguments of the Parties

7.3.9.1.1 Whether Measure 5 is provisionally justified under subparagraph (a) of Article XX of the GATT 1994

7.3.9.1.1.1 Indonesia

7.637. Indonesia holds that, given the diversity of domestic political structures, ethical, moral, or religious beliefs and values, which underpin the adoption of legislation among the WTO Membership, the preservation of public morals is central to achieving social cohesion.[1876] Indonesia further argues that, to fully exercise the right to regulate for the preservation of public morals, Members should be given some scope to define and apply this principle according to their

[1871] Indonesia's first written submission, para. 155; Indonesia's second written submission, para. 222.
[1872] Indonesia's response to Panel question No. 17; Exhibit IDN-25.
[1873] United States' second written submission, para. 171 (referring to Exhibit IDN-25).
[1874] United States' second written submission, para. 172.
[1875] Exhibit US-70. Similarly, we note that the co-complainants have submitted several news articles where Indonesian government officials are reported as stating that the policy goal pursued by some of the challenged measures in this dispute are the protection of farmers and the principle of self-sufficiency. *See* Exhibits NZL-11, NZL-73, USA-10, USA-11, USA-13, USA-14, USA-15.
[1876] Indonesia's second written submission, para. 92 (referring to Panel Report, *China – Audiovisual*, para. 7.794; Panel Report, *US – Gambling*, para. 6.465; Appellate Body Report, *US – Gambling*, para. 299 ("the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation")).

respective values and changing factors[1877], and to determine the level of protection they deem appropriate in given situations.[1878] As a predominantly Muslim country[1879], it argues, freedom of worship is guaranteed[1880], and in order to protect this right, the Indonesian Government has enacted some laws and regulations in relation to Halal requirements. Indonesia asserts that, according to Islamic law, eating is an act of worship.[1881] As its import licensing regime was designed with these considerations in mind, Indonesia maintains that its regime is necessary for the protection of public morals in accordance with Article XX(a), which is a crucial policy issue for Indonesia.[1882]

7.638. Indonesia contends that, given the meaning and significance of Halal[1883], food is generally considered Halal unless it is specifically prohibited by the Qur'an. Hence, many foodstuffs are inherently Halal. Other products can be Halal, if the ingredients are carefully selected and sourced, for example by adopting appropriate manufacturing, handling and storage procedures.[1884] In this regard, Indonesia observes that, under Islamic Law, Halal products should be properly separated and clearly identified.[1885] Citing the FAO Guidelines on the use of the term "Halal"[1886], Indonesia maintains that horticultural products that are either "prepared, processed, transported or stored using any appliance or facility that was not free from anything unlawful according to Islamic Law", or otherwise considered "intoxicating or hazardous", are unlawful.[1887]

7.639. Indonesia contends that in conducting the necessity test, the factors to be considered include the contribution of the measure to the realization of the ends pursued by it, and its trade-restrictiveness.[1888] According to Indonesia, all the challenged measures contribute to the objective of protecting public morals without any discernible impact on trade.[1889]

7.640. Specifically with respect to Measure 5, Indonesia argues that the storage ownership requirement is necessary to ensure Halal compliance and to protect the Halal status of food sold in Indonesia and that it therefore falls within the scope of public morals.[1890] On this basis, Indonesia argues that its import licensing regime requires importers to own their storage for horticultural products (and cold storage for animal products) and that this requirement is necessary to show importers' commitment in following Halal guidelines.[1891] Indonesia alleges that products may even lose their Halal status due to improper storage and misplacement.[1892] Due to relatively low consumer awareness, Indonesia contends that the Government has assumed a leading role in ensuring that products sold in Indonesia are Halal and safe, for example by enacting Law 33 of 2014 on Halal Product Assurance.[1893]

[1877] Indonesia's opening statement at the second substantive meeting, paras. 25-26; second written submission, paras. 93-94 (referring to Panel Report, *US – Gambling*, para. 6.461; Appellate Body Reports *Brazil – Retreaded Tyres*, para. 210; *EC – Asbestos*, para. 168; *Korea – Various Measures on Beef*, para. 176).

[1878] Indonesia's second written submission, paras. 93–94 (referring to Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 210; *EC – Asbestos*, para. 168; *Korea – Various Measures on Beef*, para. 176; Panel Report, *China – Audiovisual*, para. 7.817); and Indonesia's opening statement at the second substantive meeting, para. 26.

[1879] Indonesia's second written submission, paras. 210-213 (referring to Exhibit IDN-43).

[1880] Indonesia second written submission, paras. 95-96, where Indonesia points to Article 29(2) of the Indonesian Constitution (UUD 1945) which guarantees the freedom of worship to all people, each according to his or her own religion or belief; Indonesia's opening statement at the second substantive meeting, para. 27.

[1881] Indonesia's second written submission, para. 96.

[1882] Indonesia's second written submission, para. 92; Indonesia's opening statement at the second substantive meeting, paras. 25 and 28.

[1883] Indonesia's second written submission, paras. 211-212 (referring to Exhibits IDN-44 to IDN-46).

[1884] Indonesia's second written submission, paras. 211-212 (referring to Exhibit IDN-70).

[1885] Indonesia's second written submission, para. 212.

[1886] Exhibit IDN-23.

[1887] Indonesia's second written submission, para. 212.

[1888] Indonesia's second written submission, para. 97; Indonesia's opening statement at the second substantive meeting, para. 29 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, paras. 161 and 164).

[1889] Indonesia's opening statement at the second substantive meeting, para. 29.

[1890] Indonesia's second written submission, paras. 209-216.

[1891] Indonesia's second written submission, para. 214.

[1892] Indonesia's second written submission, para. 214 (referring to Exhibits IDN-71 and IDN-72).

[1893] Indonesia's second written submission, para. 215 (referring to Article 21 of Law 33/2014 which states: "Location, place, and equipment of PPH must be separated from the location, place, and equipment for slaughtering, processing, storing, packaging, distributing, selling, and presenting of non-halal Product", Exhibit IDN-47).

7.3.9.1.1.2 New Zealand

7.641. New Zealand points out that Indonesia fails to identify the Halal requirements that are applicable to horticultural products in many instances.[1894] For New Zealand, Indonesia's failure to reference any regulations on Halal requirements for horticultural products is consistent with its understanding that there are no such requirements.[1895] New Zealand recalls that its challenge to Indonesia's storage ownership and capacity requirement is confined to horticultural products which are inherently Halal and requests the Panel to reject Indonesia's public morals arguments under Article XX(a).[1896]

7.3.9.1.1.3 United States

7.642. In the United States' view, the fact that Halal is a public moral is not sufficient to establish that any of Indonesia's import licensing measures were taken "to protect" that public moral.[1897] Further, the additional arguments and exhibits submitted by Indonesia in its second written submission in attempting to justify certain measures as necessary to protect Halal requirements, are not availing.[1898] The United States holds that such attempts are entirely devoted to establishing the existence of Halal as a public moral in Indonesia, which is not in dispute.[1899] To the contrary, the co-complainants have great respect for the observance of Halal and duly comply with Indonesia's Halal requirements, including with regards to Halal certification.[1900]

7.643. The United States argues that Indonesia has not even identified the Halal standards for horticultural products that the import licensing measures purportedly protect.[1901] Furthermore, nothing in the text, structure, or history of the legal instruments establishing the measures applicable to horticultural products even mentions Halal, let alone suggests that the objective of the regime is to uphold Halal standards.[1902] The United States contends that, although Indonesia asserts that "Law 13/2010" (the Horticulture Law) "refers to the Halal provisions in Law 18/2012,"[1903] this statement appears to be inaccurate since Law 13/2010 does not refer to Halal or to any provisions of Law 18/2012.[1904] From the United States' perspective, not only has Indonesia failed to demonstrate that its import licensing measures were adopted or enforced to protect the Halal requirements, but it has also failed to show that these measures are necessary to achieve that objective.[1905] The United States argues that Indonesia has not explained how its measures contribute to the protection of Halal requirements, much less made its case that their contribution is approaching "indispensable" on the continuum of assessing necessity.[1906]

7.644. Specifically with respect to Measure 5, the United States recalls that the storage capacity requirement that the co-complainants are challenging applies only to importation of horticultural

[1894] New Zealand's comments on Indonesia's response to Panel question No. 86 (a)(iii), paras. 12-13, noting that, while Indonesia cross-refers its response to that already supplied to Panel Question no. 116, the information provided therein does not refer to any halal requirements that would be applicable to horticultural products. Indonesia's responses to questions Nos. 116(a) and (b) describe halal assurance processes in relation to beef cuts. In question No. 116(c), the Panel specifically asked Indonesia to identify the regulations on halal requirements applicable to horticultural products. Indonesia's response was to set out the regulations providing the legal basis for halal certification for animals and animal products (para. 59). Likewise, although question No. 86(c) refers to horticultural products, Indonesia's response relates to post-shipment requirements for animals and animal products.

[1895] New Zealand's second written submission, para. 253.

[1896] New Zealand's opening statement at the second substantive meeting, paras. 74-75.

[1897] United States' oral statement at the second substantive meeting, para. 35.

[1898] United States' oral statement at the second substantive meeting, para. 33.

[1899] United States' oral statement at the second substantive meeting, para. 34 (referring to Indonesia's second written submission, paras. 92-96).

[1900] New Zealand's oral statement at the second substantive meeting, para. 29; United States' oral statement at the second substantive meeting, para. 35; oral statement at the first substantive meeting, para. 32; and second written submission, paras. 207 and 229.

[1901] United States' oral statement at the second substantive meeting, para. 36.

[1902] United States' oral statement at the second substantive meeting, para. 36; and second written submission, paras. 208-209.

[1903] Indonesia's second written submission, para. 101.

[1904] United States' oral statement at the second substantive meeting, para. 36 (referring to the Horticulture Law, Exhibit JE-1).

[1905] United States' oral statement at the second substantive meeting, para. 37 (referring to Indonesia's second written submission, para. 101).

[1906] United States' oral statement at the second substantive meeting, para. 37.

products.[1907] By contrast, the entire defence presented by Indonesia in this respect is based on requirements or incidents relating to animal products.[1908] To date, Indonesia has not identified any relevant Halal requirements for horticultural products, or presented evidence demonstrating that the protection of Halal standards is, in fact, the objective of the storage ownership requirement for horticultural products.[1909] Moreover, the evidence submitted by Indonesia refers to animal products and does not support Indonesia's defense.[1910] Importantly, in the United States' view, Indonesia has not even attempted to show how Measure 5 could relate to Halal.[1911]

7.3.9.1.2 Whether Measure 5 is applied in a manner consistent with the *chapeau* of Article XX

7.645. Concerning the parties' arguments about the *chapeau* of Article XX of the GATT 1994, *see* Section 7.3.5.1.2 above.

7.3.9.2 Analysis by the Panel

7.3.9.2.1 Introduction

7.646. The task before the Panel is to determine whether Measure 5 (Storage ownership and capacity requirement) is justified under Article XX(a) of the GATT 1994. We commence with the text of the relevant provision and the ensuing legal standard.

7.3.9.2.2 The relevant legal provision

7.647. Article XX of the GATT 1994 reads, in relevant part, as follows:

> Article XX
>
> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (*a*) necessary to protect public morals
>
> ...

7.648. As we explained in Section 7.3.5.2.2 above, the assessment of a claim of justification under Article XX involves a two-tiered analysis in which a measure must (i) be provisionally justified under one of the subparagraphs of Article XX, in this case subparagraph (a), and then (ii) analysed under the *chapeau* of Article XX.[1912] Hence, in order to justify an otherwise WTO-inconsistent measure, the Member invoking a subparagraph of Article XX as a defence bears

[1907] United States' first written submission, paras. 186-191; and second written submission, paras. 25-27.
[1908] United States' oral statement at the second substantive meeting, para. 39 (referring to Indonesia's second written submission, paras. 213-216).
[1909] United States' oral statement at the second substantive meeting, para. 39 (referring to its comments on Indonesia response to Panel Questions nos. 68 and 69; United States' response to Panel question No. 76; and second written submission, paras. 208-210).
[1910] United States' oral statement at the second substantive meeting, para. 40 (referring to two Indonesian newspaper articles: Exhibit IDN-71: concerning a meat plant in Australia, its failure to segregate halal and non-halal meats during processing and the alleged corruption among Indonesian halal certification officials; Exhibit IDN-72: concerning domestic producers not applying for halal certification of their meat products).
[1911] United States' oral statement at the second substantive meeting, para. 40 (referring to Appellate Body Reports in *Brazil – Retreaded Tyres*, para. 210; *EC – Seal Products*, para. 5.180 (in turn referring to Panel Report on *EC – Seal Products*, para. 7.633)).
[1912] Appellate Body Report, *EC – Seal Products*, para. 5.169 (referring to Appellate Body Reports, *US – Gasoline*, p. 22, DSR 1996:I, p. 20; *US – Shrimp*, paras. 119 and 120;*US – Gambling*, para. 292).

the burden of establishing that the conditions prescribed therein are met.[1913] Therefore, it is incumbent upon Indonesia to demonstrate that the relevant measure is provisionally justified under subparagraph (a) and that the measure is applied in a manner consistent with the *chapeau* of Article XX. Given that the legal standard to demonstrate that a measure complies with the requirements of Article XX(a) is similar to that of Article XX(b), with the difference of the objective being the protection of "public morals" rather than "human, animal or plant life or health", we refer to our discussion in paragraphs 7.619 through 7.623 above.

7.649. We shall therefore proceed to examine whether Indonesia has demonstrated that Measure 5 is justified under Article XX(a) of the GATT 1994. As we indicated in Section 7.3.1, Indonesia has only provided arguments on a measure by measure basis with respect to the first tier of the analysis, i.e. whether the measures at issue are provisionally justified under subparagraph (a) of Article XX of the GATT 1994. The second tier, i.e. whether the measures at issue are applied in a manner consistent with the *chapeau* of Article XX, has been argued by Indonesia for its import licensing regimes as a whole, thus making no distinctions between measures. Under these circumstances, we are driven to follow the same approach in our analysis.

7.3.9.2.3 Whether Indonesia has demonstrated that Measure 5 (Storage ownership and capacity requirement) is provisionally justified under subparagraph (a) of Article XX of the GATT 1994

7.650. Under this tier of our analysis, the task before the Panel is to establish whether, as claimed by Indonesia, Measure 5 is provisionally justified by subparagraph (a) of Article XX of the GATT 1994. As explained before, we shall examine whether Indonesia has demonstrated that Measure 5 is designed to protect public morals and, if so, whether it is necessary for such protection.

7.651. Concerning the first element, i.e. whether Measure 5 is designed to protect public morals, we note that Indonesia has argued that the storage ownership requirement is necessary to ensure Halal compliance and to protect the Halal status of food sold in Indonesia, and that it is a measure falling within the scope of public morals.[1914] On this basis, Indonesia argued that its import licensing regime requires importers to own their storage for horticultural products and that this requirement is necessary to show importers' commitment to following Halal guidelines.[1915] Indonesia explained that products may even lose their Halal status due to improper storage and misplacement.[1916] Indonesia further contended that, due to relatively low consumer awareness, the Government has assumed a leading role in ensuring that products sold in Indonesia are Halal and safe, for example by enacting Law 33 of 2014 on Halal Product Assurance.[1917]

7.652. The co-complainants disagreed and requested that we reject Indonesia's defence under Article XX(a) for Measure 5 because this measure deals with horticultural products which are inherently Halal.[1918] New Zealand thus argued that Indonesia has failed to reference any regulations on Halal requirements that apply to horticultural products.[1919] The United States recalled that the storage capacity requirement that the co-complainants are challenging applies only to importation of horticultural products[1920] but that Indonesia's entire defence is based on requirements or incidents relating to animal products.[1921] For the United States, Indonesia has not

[1913] Appellate Body Reports, *Korea – Various Measures on Beef*, para. 157; *Thailand – Cigarettes*, para. 179.
[1914] Indonesia's second written submission, paras. 209-216.
[1915] Indonesia's second written submission, para. 214.
[1916] Indonesia's second written submission, para. 214 (referring to Exhibits IDN-71 and IDN-72).
[1917] Indonesia's second written submission, para. 215 (referring to Article 21 of Law 33/2014 which states: "Location, place, and equipment of PPH must be separated from the location, place, and equipment for slaughtering, processing, storing, packaging, distributing, selling, and presenting of non-halal Product", Exhibit IDN-47).
[1918] New Zealand's opening statement at the second substantive meeting, paras. 74-75; United States' oral statement at the second substantive meeting, para. 39.
[1919] New Zealand's second written submission, para. 253.
[1920] United States' first written submission, paras. 186-191; and second written submission, paras. 25-27.
[1921] United States' oral statement at the second substantive meeting, para. 39 (referring to Indonesia's second written submission, paras. 213-216); United States' oral statement at the second substantive meeting, para. 40 (referring to two Indonesian newspaper articles: Exhibit IDN-71: concerning a meat plant in Australia, its failure to segregate halal and non-halal meats during processing and the alleged corruption among Indonesian halal certification officials, and Exhibit IDN-72: concerning domestic producers not applying for halal certification of their meat products).

identified any relevant Halal requirements for horticultural products, or presented evidence demonstrating that the protection of Halal standards is, in fact, the objective of the storage ownership requirement for horticultural products.[1922] In the United States' view, Indonesia has not even attempted to show how these requirements could relate to Halal.[1923]

7.653. We recall that this first step in our analysis calls for an initial, threshold examination in order to determine whether there is a relationship between an otherwise WTO-inconsistent measure and the protection of public morals.[1924] We note that Indonesia has identified the public moral at issue as being the protection of Halal. The co-complainants do not question that Halal is a public moral; on the contrary, they have expressed their utmost respect for the protection of Halal regulations and certification.[1925]

7.654. What the co-complainants question is the existence of a relationship between Measure 5 and the protection of Halal.[1926] For the co-complainants, there are *no* Halal regulations applicable to horticultural products because they are inherently Halal. We have thus attempted to confirm this fact with Indonesia to no avail.[1927]. We note, however, that Indonesia recognizes that many foodstuffs are inherently Halal, and Indonesia's own exhibits imply that horticultural products are inherently Halal. For example, "ICWA Halal Guidelines" state that "all plants and their products" are Halal "unless containing or come into contact with a Haram substance".[1928] Moreover, Article 20(1) of the Law No. 33/ 2014 on Halal Product Assurance confirms that "[m]aterial which originate from plant [...] is halal, except those which intoxicate and/or endanger the health of the people that consume it".[1929] We also note that, to our repeated inquiries about the existence of Halal requirements applicable to horticultural products, Indonesia only supplies responses that refer to Halal requirements applicable to animals and animal products. For instance, responding to our question about the fulfilment of Halal requirements before, and after importation specifically with respect to "carrots"[1930], Indonesia cross-refers to its response to another question [1931] which exclusively recounts the requirements applicable to animals and animal products. Furthermore, in response to another question[1932] related in particular to post-shipment requirements for carrots, Indonesia again responded by explaining the requirements applicable to "carcasses, meat, and processed animal products"[1933], obviously not horticultural products.

[1922] United States' oral statement at the second substantive meeting, para. 39, referring to its comments on Indonesia response to Panel Questions nos. 68 and 69; United States' response to Panel question No. 76; United States' second written submission, paras. 208-210.

[1923] United States' oral statement at the second substantive meeting, para. 40 (referring to Appellate Body Reports on *Brazil – Retreaded Tyres*, para. 210; *EC – Seal Products*, para. 5.180 (in turn referring to Panel Report on *EC – Seal Products* , para. 7.633)).

[1924] *See* Appellate Body Report, *Colombia – Textiles*, para. 5.67, in the context of Article XX(a) and *Argentina – Financial Services*, para. 6.203, in the context of Article XIV(c) of the GATS, which mirrors Article XX(d) of the GATT 1994.

[1925] New Zealand's oral statement at the second substantive meeting, para. 29; United States' oral statement at the second substantive meeting, para. 35; oral statement at the first substantive meeting, para. 32; second written submission, paras. 207 and 229.

[1926] New Zealand's opening statement at the second substantive meeting, paras. 74-75; United States' oral statement at the second substantive meeting, para. 39, referring to its comments on Indonesia's response to Panel questions Nos. 68 and 69; United States' response to Panel question No. 76; and second written submission, paras. 208–210.

[1927] *See* Panel questions Nos. 86 and 116.

[1928] "ICWA Halal Guidelines", pp. 2, Exhibit IDN-46.

[1929] Law No. 33/2014 on Halal Product Assurance, Exhibit IDN-47. Poisonous or intoxicating plants are not Halal.

[1930] Panel question No. 86(a)(iii) read: "If an importer wished to import 10,000 tons of carrots into Indonesia, what would it need to do/obtain to do so, including with regards to the following aspects: ... (iii) Fulfilment of halal requirements before, and after importation."

[1931] Panel question No. 116(c) read: "Please identify the government regulations on Halal requirements that specifically apply to horticultural products? In particular, are domestically-produced or imported horticultural products required to bear a Halal logo? If so, at which stage(s) of the distribution and/or importation processes, are the relevant inspection, certification, and Halal approval procedures completed?" Indonesia commenced its answer by indicating: "For animal and animal products, the legal basis for halal certification can be found in several different regulations: ...".

[1932] Panel question No. 86(c) read: "If an importer wished to import 10,000 tons of carrots into Indonesia, what would it need to do/obtain to do so, including with regards to the following aspects: ... c.Post-shipment requirements, including i. Transportation ii. Distribution chain iii.Ad hoc auditing".

[1933] Indonesia responded:

> For post-shipment requirements, please refer to Articles 34-38 of MOA Regulation 139/2014. Pursuant to Article 36, post-shipment supervision occurs with respect to the physical condition of

7.655. In the context of its arguments concerning Measure 6 (Use, sale and distribution requirements for horticultural products), Indonesia explained that, while most Halal requirements pertain to the production and consumption of animal products, strict storage and transportation requirements apply to all food products.[1934] Indonesia has nevertheless not provided the Panel with the legal instruments within its domestic legislation showing the application of Halal requirements to horticultural products. As also established in paragraph 7.654 above, the Law on Halal Product Assurance, which requires that all products circulated or traded within Indonesia be Halal-certified, recognizes that "Material which originate from plant [...] is halal [...]".[1935] We recall that it is incumbent upon Indonesia to demonstrate that there is a relationship between Measure 5 and the protection of Halal. In our view, the bare assertion of an objective is insufficient to meet the burden of demonstrating that a relationship exists between the inconsistent measure and a given public moral objective. Indonesia has therefore not identified the Halal requirements for horticultural products which Measure 5 or for that matter, its import licensing regime for horticultural products, must purportedly protect.

7.656. We have nevertheless examined Measure 5 to establish whether such a relationship can be deduced from its design, including its content, structure, and expected operation.[1936] In our analysis, we understand that a measure that does not expressly refer to a public moral objective may still be found to have such a relationship following an assessment of the design of the measure at issue, including its content, structure, and expected operation.[1937] In this respect, as described in Section 2.3.2.5 above, we observe that Measure 5 consists of the requirement that importers must own their storage facilities with sufficient capacity to hold the full quantity requested on their Import Application.[1938] This requirement is implemented by Indonesia through Article 8(1)(e) of MOT 16/2013, as amended[1939], and by Article 8(2)(c) and (d) of MOA 86/2013, as amended.[1940] We recall that, in Section 7.2.9.3 above, we concluded that Measure 5 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.657. We observe that nothing in the wording of the regulations implementing this Measure and, in particular, Article 8(1)(e) of MOT 16/2013, as amended, and Article 8(2)(c) and (d) of MOA 86/2013, refer to the protection of Halal as a policy objective of this measure. For instance, MOT 16/2013, as amended, provides as its goals the protection of consumers, promotion of business certainty and transparency, and the simplification of the licensing process and the administration of imports.[1941] We note that, MOT 16/2013, as amended, also refers to several domestic regulations concerning a wide variety of subjects, including consumer protection, quarantine measures for the importation of fresh fruits and vegetables, the Horticulture and Food laws, and even the law regarding the ratification of the WTO Agreement. Turning to MOA 86/2013, its stated goals are to simplify the import process of horticultural products, and provide certainty in servicing the MOA Recommendations.[1942]

7.658. We recall that Indonesia has argued that its Horticulture Law "refers to the Halal provisions in Law 18/2012".[1943] As argued by the United States, this statement appears to be inaccurate

carcasses, meat, and processed animal products; including the packaging and labeling, documents, storage and transportation of the same.

[1934] Indonesia's first written submission, para. 158.

[1935] Article 21 of Law 33/2014 on Halal Product Assurance, Exhibit IDN-47, states: "Location, place, and equipment of PPH must be separated from the location, place, and equipment for slaughtering, processing, storing, packaging, distributing, selling, and presenting of non-halal Product". *See also* Article 20(1).

[1936] *See* Appellate Body Reports, *US – Shrimp*, paras. 135-142; *EC – Seal Products*, para. 5.144; *Colombia – Textiles*, para. 5.68.

[1937] Appellate Body Report, *Colombia – Textiles*, para. 5.69, in the context of Article XX(a).

[1938] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 99; United States' first written submission, para. 66.

[1939] Article 8 of MOT 16/2013, as amended by MOT 47/2013, provides as follows that: "(1) To receive Confirmation as a RI-Horticultural Products, as described in Article 3, a company must submit an electronic application to the Minister and the UPP Coordinator and Implementer, and attach ... e. Proof of ownership of storage facilities appropriate for the product's characteristics..." Exhibit JE-10.

[1940] Article 8(2)(c) and (d) of MOA 86/2013 relevantly provides: "(2) Issuance of RIPH for fresh produce for consumption, in addition to meeting the administrative requirements as intended in paragraph (1) item a must be accompanied with the following technical requirements: ... c. statement of ownership of storage and distribution facilities for horticulture products according to their characteristics and product type; d. statement of suitability of storage capacity ...", Exhibit JE-15.

[1941] Consideration (a) of MOT 16/2013, as amended, Exhibit JE-10.

[1942] Consideration (b) of MOA 86/2013, Exhibit JE-15.

[1943] Indonesia's second written submission, para. 101.

because the Horticulture Law does not refer to Halal or to any provisions of Law 18/2012.[1944] Indonesia contends that Article 69 of the Food Law regulates the implementation of food safety, including through a Halal requirement.[1945] Examining the context of Article 69, we understand that it comes under CHAPTER VII of the Food Law, which addresses "food safety" and brings "community religion" and "beliefs" under its scope.[1946] However, we understand that Article 69 relates to food in general, and not specifically to horticultural products or the import licensing measures at issue.[1947] Hence, despite Indonesia's assertions to the contrary, the Horticulture Law and the MOA and MOT regulations that we have just examined, does not identify Halal among its objectives, and does not specifically point to any Halal provisions that would specifically apply to horticultural products and that would inform the objective behind Measure 5.

7.659. Having examined the design of Measure 5, we fail to see any connection with the public moral of Halal that could lead us to conclude that Measure 5 is "not incapable"[1948] of protecting public morals. Rather, this measure appears to relate mainly to conditions that importers must meet to be able to obtain the necessary permits; conditions that do not relate to the imported products themselves or their Halal certification but rather to the property title of the importer's infrastructure to store the imported goods.

7.660. We therefore conclude that Indonesia has not demonstrated that there is a relationship between Measure 5 and the protection of the public moral of Halal. Accordingly, we find that Indonesia has not demonstrated that Measure 5 is provisionally justified under subparagraph (a) of Article XX of the GATT 1994.

7.3.9.2.4 Conclusion

7.661. In the light of the foregoing, we find that Indonesia has failed to demonstrate that Measure 5 is justified under Article XX(a) of the GATT 1994.

7.3.10 Whether Measure 5 (Storage ownership and capacity requirement) is justified under Article XX(b) of the GATT 1994

7.3.10.1 Arguments of the Parties

7.3.10.1.1 Whether Measure 5 is provisionally justified under subparagraph (b) of Article XX of the GATT 1994

7.3.10.1.1.1 Indonesia

7.662. Indonesia claims that Measure 5 is justified by Article XX(b) of the GATT 1994. Indonesia argues that the "maximum capacity" requirement is necessary to protect human, animal, or plant life or health. This stems from a combination of factors, i.e. (i) Indonesia's limited capacity to store imported fresh horticultural products after their arrival, but before their transfer to distributors or other end-users, and (ii) the prevailing equatorial climate, compelling Indonesia to ensure the availability of proper storage facilities. In Indonesia's view, the heightened risk of spoilage under these conditions far outweighs any nominal imposition on importers.[1949] The storage requirement is intended to ensure that fruits, vegetable and meat products for consumption are safe, nutritious and of good quality, using proper cold chain systems.[1950] Focusing on the necessity element, Indonesia argues that proper cold storage, transportation and handling are needed at all stages of

[1944] United States' oral statement at the second substantive meeting, para. 36 (referring to the Horticulture Law, Exhibit JE-1).

[1945] Article 69 of the Food Law 18/2012, Exhibit JE-2. Article 69 states: "Implementation of Food Safety through: a. Food Sanitation; b. regulation of additives Food; c. regulation of Genetically Engineered Food Products; d. regulation of Irradiated Food; e. determination of Food Packaging standard; f. granting guarantees of Food Safety and Food Quality; and g. guarantees for the halal required products."

[1946] In particular, Article 67(1) of the Food Law states: "Food Safety organized to keep the Food remains safe, hygienic, high quality, nutritious, and does not conflict with community religion, beliefs, and culture."

[1947] Other provisions of the Food Law address Halal-related product guarantee and certification mechanisms, labelling and advertising. *See* for example, Articles 95, 97, 101 and 105.

[1948] Appellate Body Report, *Colombia – Textiles*, para. 5.68.

[1949] Indonesia's first written submission, para. 148.

[1950] Indonesia's second written submission, para. 110; Exhibit IDN-53; opening statement at the second substantive meeting, para. 33.

the food chain to protect public health, in particular to avoid food contamination or poisoning.[1951] In this light, Indonesia contends that the objective of its import licensing regime, as well as its storage ownership and capacity requirement, is to ensure product safety and compliance with all applicable laws and regulations.[1952] In particular, Indonesia adduces that it requires ownership, rather than lease, to ensure that foodstuffs are treated and stored based on the product characteristics. In this regard, Indonesia argues that importers are the most familiar with the storage conditions appropriate for their products and thus are best placed to prevent health risks. Indonesia enforces this measure as evidence of the importers' commitment to provide food that is safe for human consumption.

7.3.10.1.1.2 New Zealand

7.663. New Zealand argues that Indonesia has not met the standard of Article XX(b) of the GATT 1994. In particular, Indonesia has not demonstrated, and provided no evidence showing, that the protection of life and health is indeed the objective being pursued by the measure. In addition, Indonesia's characterization of its measure as a food safety measure is insufficient to demonstrate that it does indeed have that purpose.[1953] Assuming for the sake of argument that the purpose of the measure is directed at maintaining food safety, New Zealand holds that Indonesia has not explained why the measure is "necessary" to protect human health. In its view, there is insufficient relationship of ends and means between the measure and the interests protected in Article XX(b) of the GATT 1994. [1954] To New Zealand, the two most objectionable aspects are that an importer must own the storage facilities for the horticultural imports; and that the volume allocations in its import approvals are limited to the importer's verified cold-storage capacity on a one-to-one ratio, with no allowance for product turnover during the six-month validity period.[1955] According to New Zealand, keeping storage facilities empty for several months after the stored products have been sold, but before the next validity period, makes no contribution to food safety. Also, Indonesia has not explained how ownership of storage facilities contributes to food safety and why other sorts of access to storage (such as rental or lease arrangements) would not make an equal, but less trade-restrictive, contribution to this objective.[1956]

7.664. New Zealand observes that, in its second written submission, Indonesia argues that the measure "is to ensure that fruits and meat products for consumption are safe, nutritious and also of good quality."[1957] Recalling that its challenge exclusively relates to horticultural products and the requirement that importers own storage facilities with capacity equalling the quantity of product imported over a six-month period in a one-to-one ratio[1958], New Zealand contends that none of the presented evidence supports the need for such a requirement.[1959] For example, Exhibit IDN-53 is an article about extending the shelf life of fresh red meat, and thus does not support Indonesia's requirement[1960] while Exhibit IDN-82 relates to home storage and says nothing about ownership of storage by importers.[1961] From New Zealand's perspective, 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.[1962] Finally, New Zealand reiterates that Indonesia's explanation of why importers are only allowed to import products up to the maximum capacity of their storage – to "show the importer's commitment to provide food that is safe for consumption" - is inadequate.[1963] New Zealand shares the United States' view[1964] that importers could simply transfer their products directly to a distributor's warehouse, and therefore might not need direct access to storage at all.[1965] In this respect, New Zealand holds that the combination of the

[1951] Indonesia's second written submission, paras. 230-232; Food Safety Fact Sheet: Storing Foods, Exhibit IDN-80; Food Safety – storage, Exhibit IDN-81; Storage Guidelines for Fruits & Vegetables, Exhibit IDN-82.
[1952] Indonesia's second written submission, para. 233.
[1953] New Zealand's second written submission, para. 242 (referring to Appellate Body Report, *EC – Seal Products,* para. 5.144).
[1954] New Zealand's second written submission, para. 243.
[1955] New Zealand's second written submission, para. 244.
[1956] New Zealand's second written submission, paras. 245-246.
[1957] Indonesia's second written submission, paras. 110, 116-119 and 233.
[1958] See New Zealand's first written submission, paras. 99.
[1959] New Zealand's opening statement at the second substantive meeting, paras. 74, 76-77.
[1960] New Zealand's response to Panel question No. 123.
[1961] Exhibit IDN-82.
[1962] New Zealand's opening statement at the second substantive meeting, para. 77.
[1963] Indonesia's second written submission, paras. 119, 178, 207(a) and 214.
[1964] United States' first opening statement, para. 28.
[1965] New Zealand's second written submission, para. 245.

ownership requirement and the one-to-one ratio of imports per validity period has a significant trade-restrictive effect on import volumes.[1966]

7.665. From New Zealand's viewpoint, Indonesia has not adopted this measure to protect or secure compliance with the objectives cited in Article XX(b), nor has it shown the contribution of this measure to such objectives. New Zealand finds that the trade-restrictiveness of the measure outweighs Indonesia's purported justification for it. Consequently, New Zealand considers that it is not required to elaborate on an alternative measure. However, New Zealand suggests that a less trade-restrictive alternative could involve Indonesia being more flexible about the types of storage arrangements it regards as acceptable, both as to ownership and volume. These storage arrangements would need to be non-discriminatory, applying equally to imported and domestically-produced horticultural products. [1967]

7.3.10.1.1.3 United States

7.666. The United States contends that Indonesia's Article XX(b) defence fails because Indonesia has not demonstrated that the requirement pursues the objective of human health and has not shown that it is "necessary" to such an objective.[1968] The United States considers that Indonesia has presented no evidence that the objective of the challenged measure is indeed the protection of human health. The United States asserts that all the evidence presented by the co-complainants suggests that the true objective of Indonesia's import licensing regime for horticultural products is the protection of domestic producers from competition from imported products.[1969] Indonesia's bare assertion to the contrary is not sufficient to satisfy the first element of Article XX(b).[1970] With respect to the second element of Article XX(b), the United States holds that Indonesia's arguments for the regimes, as a whole, focus on the importance of cold storage for meat[1971], observing that the co-complainants are not challenging the cold storage requirement for animal products, either as an individual measure, or as part of the licensing regimes as a whole. Hence, in the United States' view, the majority of Indonesia's defence is irrelevant to the measures at issue in this dispute.[1972] The other evidence advanced by Indonesia in support of its assertion that the storage requirement "is to ensure that fruits and meat products for consumption are safe, nutritious and also of good quality" is an article that shows that meat spoils without refrigeration and that quickly cooling carcasses after slaughter maximizes shelf life.[1973] In the United States' view, this article does not address the storage requirement for horticultural products at all, which is the only storage requirement being challenged in this dispute. Further, the evidence bears no relationship to Indonesia's measure and does not suggest that the storage ownership requirement was actually adopted to address any food safety purpose. [1974]

7.667. Even if the Panel were to find that the measure did, in part, pursue the objective of protecting human health, the United States argues that it remains unclear how the challenged measure could be "necessary" to the achievement of that objective.[1975] Indonesia requires that importers own storage capacity sufficient to hold all the horticultural products they will import during an entire import period.[1976] However, the United States considers that an importer's ownership of storage facilities has no relationship with the sufficiency of storage capacity: rather, it is common practice under normal market conditions for importers to lease storage capacity[1977]; and importers would generally empty and refill storage space several times over the course of the semester. Responding to Indonesia's assertion that its measures will "ensure all of the imported . .

[1966] New Zealand's second written submission, para. 246.
[1967] New Zealand's second written submission, para. 247.
[1968] United States' second written submission, paras. 176 and 178.
[1969] United States' second written submission, para. 177 (referring to its first written submission, paras. 16 and 84-85).
[1970] United States' second written submission, para. 177, referring to Appellate Body Report, *EC – Seal Products*, para. 5.144, stating that panels "should take into account the Member's articulation of the objective or the objectives it pursues through its measures, but it is not bound by that Member's characterization of such objective(s)".
[1971] United States' oral statement at the second substantive meeting, para. 47 (referring to Indonesia's second written submission, paras. 116-118).
[1972] United States' oral statement at the second substantive meeting, para. 47.
[1973] United States' response to Panel question No. 123 (referring to Indonesia's second written submission, para. 110, referring to Exhibit IDN-53).
[1974] United States' response to Panel question No. 123.
[1975] United States' second written submission, para. 178 (referring to Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 210; *EC – Seal Products*, para. 5.180).
[1976] Article 8(1)(e) MOT 16/2013, as amended, Exhibit JE-21; Exhibit USA-28.
[1977] ASEIBSSINDO Letter (Exhibit USA-28).

. products are stored properly", and emphasizing the lack of evidence or argument as to how or why this would be the case[1978], the United States counters that the condition of the storage has no necessary relationship to whether it is owned or rented.[1979] The United States finds it entirely unclear how requiring importers to purchase excess capacity, only to have it lie empty for most of the semester, could contribute to food safety.[1980] Consequently, the United States maintains that requiring importers to own enough storage to hold, at the same time, all the horticultural products imported for the entire semester would not be necessary. From this perspective therefore, requiring ownership of storage capacity, and in such large amounts, cannot be said to be "necessary to protect human health".[1981]

7.668. The United States suggests that a significantly less trade-restrictive way to achieve the objective of ensuring storage of imported horticultural products on arrival and providing officials with advance information on these facilities would be to remove both the ownership and one-to-one ratio requirements and to allow importers to lease as much storage capacity as needed at any given time during an import period. Importers could continue to provide storage capacity information for each semester in their import approval applications. This requirement would contribute to the stated objective to at least the same degree as Indonesia's current measures, would be no more difficult to administer, and would be significantly less trade-restrictive than the current requirement.[1982] Another less trade-restrictive alternative that would contribute to food safety would be to require importers to obtain appropriate storage adequate to the products they import – whether or not owned by the importer – or to allow importers to ship their products directly to distributors' or retailers' warehouses.[1983]

7.3.10.1.2 Whether Measure 5 is applied in a manner consistent with the *chapeau* of Article XX

7.669. Concerning the parties' arguments about the *chapeau* of Article XX of the GATT 1994, *see* Section 7.3.5.1.2 above.

7.3.10.2 Analysis by the Panel

7.3.10.2.1 Introduction

7.670. The task before the Panel is to determine whether Measure 5 (Storage ownership and capacity requirement) is justified under Article XX(b) of the GATT 1994. We commence with the text of the relevant provision and the ensuing legal standard.

7.3.10.2.2 The relevant legal provision

7.671. Article XX of the GATT 1994 reads, in relevant part, as follows:

> Article XX
>
> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (*a*) ...
>
> (*b*) necessary to protect human, animal or plant life or health;
>
> ...

[1978] Indonesia's second written submission, para. 119.
[1979] United States' oral statement at the second substantive meeting, para. 48.
[1980] United States' oral statement at the second substantive meeting, para. 48.
[1981] United States' second written submission, para. 178.
[1982] United States' second written submission, para. 179.
[1983] United States' oral statement at the second substantive meeting, para. 48.

7.672. Concerning the legal standard under this provision, we refer to Section 7.3.8.2.2 above. The task before the Panel is therefore to determine whether Measure 5 (Storage ownership and capacity requirements) is justified under Article XX(b) of the GATT 1994. We commence by examining whether Indonesia has demonstrated that Measure 5 is provisionally justified by subparagraph (b) of Article XX of the GATT 1994.

7.3.10.2.3 Whether Indonesia has demonstrated that Measure 5 is provisionally justified under Article XX(b) of the GATT 1994

7.673. Under this tier of our analysis, the task before the Panel is to establish whether, as claimed by Indonesia, Measure 5 is provisionally justified by subparagraph (b). As explained before in Section 7.3.1 above, we shall examine whether Indonesia has demonstrated that Measure 5 is designed to protect human, animal or plant life or health and, if so, whether it is necessary for such protection.

7.674. Concerning the first element, i.e. whether Measure 5 is designed to protect human, animal or plant life or health[1984], we observe that Indonesia has argued that this Measure is intended to ensure that fruits, vegetable and meat products for consumption are safe, nutritious and of good quality, using proper cold chain systems.[1985] Indonesia explained that this stems from a combination of factors, i.e. (i) Indonesia's limited capacity to store imported fresh horticultural products after their arrival, but before their transfer to distributors or other end-users, and (ii) the prevailing equatorial climate, compelling Indonesia to ensure the availability of proper storage facilities. In Indonesia's view, the heightened risk of spoilage under these conditions far outweighs any nominal imposition on importers.[1986]

7.675. In response, the co-complainants argue that Indonesia has not demonstrated, and provided no evidence showing, that the protection of life and health is indeed the objective being pursued by the measure.[1987] Responding to Indonesia's contention that the objective of the measure "is to ensure that fruits and meat products for consumption are safe, nutritious and also of good quality".[1988] New Zealand recalls that its challenge exclusively relates to horticultural products and the requirement that importers own storage facilities with capacity equalling the quantity of product imported over a six-month period in a one-to-one ratio.[1989] New Zealand reiterates that Indonesia's explanation of why importers are only allowed to import products up to the maximum capacity of their storage, to "show the importer's commitment to provide food that is safe for consumption", is inadequate.[1990] In the same vein, the United States asserts that all the evidence presented by the co-complainants suggests that the true objective of Indonesia's import licensing regime for horticultural products is the protection of domestic producers from competition from imported products[1991] and that Indonesia's bare assertion to the contrary is not sufficient to satisfy the first element of Article XX(b).[1992]

[1984] In its second written submission, Indonesia indicated as follows:

> ...
> (b)the requirement that imports of fresh horticultural products not be harvested more than six months from the date of importation, the domestic harvest period limitations, restrictions on end-use, the harvest time period, limitations for animal products, the storage capacity requirement, the positive list, and the reference price are justified under Article XX (b) of the GATT because these measures are necessary for food safety and food security.

Indonesia's second written submission, para. 207(b). The Panel observes that, although Indonesia has indicated a food security objective for Measure 5, the specific argumentation put forward by Indonesia with respect to Measure 5 does not appear to include food security concerns.

[1985] Indonesia's second written submission, para. 110; Exhibit IDN-53; opening statement at the second substantive meeting, para. 33.

[1986] Indonesia's first written submission, para. 148.

[1987] New Zealand's second written submission, para. 242 (referring to Appellate Body Report, *EC – Seal Products,* para. 5.144). United States' second written submission, paras. 176-177.

[1988] Indonesia's second written submission, paras. 110, 116-119 and 233.

[1989] *See* New Zealand's first written submission, paras. 99.

[1990] New Zealand's opening statement at the second substantive meeting of the Panel, para. 78 (referring to Indonesia's second written submission, paras. 119, 178, 207(a) and 214).

[1991] United States' second written submission, para. 177 (referring to its first written submission, paras. 16, 84–85).

[1992] United States' second written submission, para. 177 (referring to Appellate Body Report, *EC – Seal Products*, para. 5.144, stating that panels "should take into account the Member's articulation of the objective or the objectives it pursues through its measures, but it is not bound by that Member's characterization of such objective(s)").

7.676. We recall that this first step in the analysis calls for an initial, threshold examination in order to determine whether there is a relationship between an otherwise WTO-inconsistent measure and the protection of human, animal or plant life or health.[1993] We note that Indonesia has identified public health in the sense of food safety as being the objective of this measure. The co-complainants do not question that food safety falls under the purview of the protection of human, animal or plant life or health under paragraph (b) of Article XX.

7.677. Similar to Measure 4, the co-complainants take issue with the existence of a relationship between Measure 5 and the protection of human health. We proceed to examine the evidence regarding the design of the measure at issue, including its content, structure, and expected operation.[1994] In our analysis, we understand that a measure that does not expressly refer to a public moral objective may still be found to have such a relationship following an assessment of the design of the measure at issue, including its content, structure, and expected operation.[1995] In this respect, as described in Section 2.3.2.5 above, Measure 5 consists of the requirement that importers must own their storage facilities with sufficient capacity to hold the full quantity requested on their Import Application.[1996] This requirement is implemented by Indonesia through Article 8(1)(e) of MOT 16/2013, as amended[1997], and by Article 8(2)(c) and (d) of MOA 86/2013, as amended.[1998]. We recall that, in Section 7.2.9.3 above, we concluded that Measure 5 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.678. We observe that nothing in the text of the regulations implementing this measure and, in particular, Article 8(1)(e) of MOT 16/2013, as amended, and Article 8(2)(c) of MOA 86/2013, as amended, refers to the protection of human, animal or plant life or health as the policy objective of Measure 5. We note that in its initial section, MOT 16/2013, as amended, mentions the "protect[ion of] consumers, promot[ion] [of] business certainty and transparency, and [the] simplif[ication] [of] the licensing process and the administration of imports"[1999] as the basis of this regulation. Although it could be argued that the protection of consumers may fall under the scope of the protection of human, animal or plant life or health, an argument that we note Indonesia has not put forward, we see no other basis allowing us to conclude that Measure 5 was designed to protect human, animal or plant life or health.

7.679. Regarding MOA 86/2013, as amended, we recall our analysis in paragraph 7.631 above where we found that the text of this regulation does not lend itself to a conclusion that it was formulated to protect human, animal or plant life or health or to address Indonesia's alleged concerns on the oversupply of some products during the harvest periods and its effects on public health. Similarly, we find no support in the text of this regulation to conclude that Measure 5 was designed to ensure that fruits, vegetable and meat products for consumption are safe, nutritious and of good quality, using proper cold chain systems.

7.680. Having examined the design of Measure 5, we fail to see any connection with human, animal or plant life or health that could lead us to conclude that Measure 5 is "not incapable"[2000] of protecting human, animal or plant life or health. Indeed, Measure 5 is concerned with requiring ownership of the storage facilities and limiting the quantities importers may request in their MOA Recommendations and Import Approvals, not with requiring products to be stored in cold facilities.

[1993] *See* Appellate Body Report, *Colombia – Textiles*, para. 5.67, in the context of Article XX(a) and *Argentina – Financial Services*, para. 6.203, in the context of Article XIV(c) of the GATS, which mirrors Article XX(d) of the GATT 1994.

[1994] *See* Appellate Body Reports, *US – Shrimp*, paras. 135-142; *EC – Seal Products*, para. 5.144; *Colombia – Textiles*, para. 5.68.

[1995] Appellate Body Report, *Colombia – Textiles*, para. 5.69, in the context of Article XX(a) of the GATT 1994.

[1996] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 99; United States' first written submission, para. 66.

[1997] Article 8 of MOT 16/2013, as amended by MOT 47/2013, provides as follows that: "(1) To receive Confirmation as a RI-Horticultural Products, as described in Article 3, a company must submit an electronic application to the Minister and the UPP Coordinator and Implementer, and attach ... e. Proof of ownership of storage facilities appropriate for the product's characteristics..." Exhibit JE-10.

[1998] Article 8(2)(c) and (d) of MOA 86/2013 relevantly provides: "(2) Issuance of RIPH for fresh produce for consumption, in addition to meeting the administrative requirements as intended in paragraph (1) item a must be accompanied with the following technical requirements: ... c. statement of ownership of storage and distribution facilities for horticulture products according to their characteristics and product type; d. statement of suitability of storage capacity ...", Exhibit JE-15.

[1999] Exhibit JE-15.

[2000] Appellate Body Report, *Colombia – Textiles*, para. 5.68.

7.681. We observe that Indonesia supports its contention that Measure 5 is intended to ensure that fruits, vegetable and meat products for consumption are safe, nutritious and of good quality, using proper cold chain systems, by submitting Exhibit IDN-53 and IDN-82. We observe that Exhibit IDN-53 contains a scientific publication about antimicrobial and antioxidative strategies to reduce pathogens and extend the shelf life of fresh red meats and how chiller storage inhibits the growth of some bacteria responsible for the spoilage of meat. We agree with the co-complainants that this Exhibit is irrelevant for the purpose of defending Measure 5 because it refers to meat in cold storage facilities instead of horticultural products. Furthermore, Exhibit IDN-53 does not address the core elements of Measure 5, namely requiring ownership of storage facilities with sufficient capacity to hold the full quantity requested on Import Applications.[2001] Similarly, Exhibit IDN-82, which contains certain guidelines to assure maximum quality and minimum spoilage of fruits and vegetables, does not explain how ownership of storage by importers is connected to the protection of human, animal or plant life or health.[2002]

7.682. We therefore conclude that Indonesia has not demonstrated that there is a relationship between Measure 5 and the protection of human, animal or plant life or health. Accordingly, we find that Indonesia has not demonstrated that Measure 5 is provisionally justified under subparagraph (b) of Article XX of the GATT 1994.

7.3.10.2.4 Conclusion

7.683. In the light of the foregoing, we find that Indonesia has failed to demonstrate that Measure 5 is justified under Article XX(b) of the GATT 1994.

7.3.11 Whether Measure 5 (Storage ownership and capacity requirement) is justified under Article XX(d) of the GATT 1994

7.3.11.1 Arguments of the parties

7.3.11.1.1 Whether Measure 5 is provisionally justified under subparagraph (d) of Article XX of the GATT 1994[2003]

7.3.11.1.1.1 Indonesia

7.684. Indonesia asserts that the storage capacity requirement is necessary to secure compliance with customs enforcement, especially considering Indonesia's limited administrative, economic and human resources available for that purpose. Hence, Indonesia claims that ensuring that all importers have facilities to store horticultural imports immediately upon arrival and providing government officials with advance information about such facilities (i.e. before arrival), is necessary to the proper operation of its customs laws and regulations.[2004] Furthermore, the storage capacity requirement "is essential to ensure customs officials"[2005] that proper storage related to human health is being carried out. Indonesia asserts that, in essence, this requirement fulfils the technical and administrative aspects of import health requirements.[2006]

7.3.11.1.1.2 New Zealand

7.685. New Zealand asserts that Indonesia has not demonstrated that customs enforcement is the objective of its measure and failed to identify the specific provisions of the "laws or regulations" with which the storage ownership and capacity requirement is "necessary to secure compliance", merely listing a few titles of laws and regulations relating to customs, quarantine and food safety and claiming that these provide the justification for the storage capacity requirements.[2007] According to New Zealand, the design of the measure suggests that its real objective is to limit imports.[2008] New Zealand argues that, even if the first element of Article XX(d)

[2001] New Zealand's' response to Panel question No. 123. United States' response to Panel question No. 123.

[2002] Exhibit IDN-82.

[2003] For the general arguments concerning this step in Indonesia's defence under Article XX(d) of the GATT 1994, *see* Section 7.3.5.1.1 above.

[2004] Indonesia's first written submission, para. 149; second written submission, para. 207.

[2005] Indonesia's second written submission, para. 246.

[2006] Indonesia's second written submission, paras. 241 and 246.

[2007] New Zealand's second written submission, paras. 237 and 239 (referring to Indonesia's responses to Panel question No. 71).

[2008] *See* New Zealand's first written submission, paras. 243-248.

of the GATT 1994 were satisfied, Indonesia has not explained why the measure is "necessary to ensure compliance" with customs laws and regulations. New Zealand considers that the connection between the storage ownership and capacity requirement and customs enforcement remains unclear, including with respect to the contribution of the measure towards fulfilling the objective. For these reasons, New Zealand submits that Indonesia has not established that its storage ownership and capacity requirement is "necessary" for customs enforcement purposes.[2009]

7.686. From New Zealand's viewpoint, Indonesia has not adopted this measure to protect or secure compliance with the objectives cited in Article XX(d), nor has it shown the contribution of this measure to such objectives. New Zealand finds that the trade-restrictiveness of the measure outweighs Indonesia's purported justification for it. Consequently, New Zealand considers that it is not required to elaborate on an alternative measure. However, New Zealand suggests that a less trade-restrictive alternative could involve Indonesia being more flexible about the types of storage arrangements it regards as acceptable, both as to ownership and volume. These storage arrangements would need to be non-discriminatory, applying equally to imported and domestically-produced horticultural products.[2010]

7.3.11.1.1.3 United States

7.687. The United States submits that Indonesia's defence of the storage capacity requirement is based on flawed legal and factual premises and is insufficient to sustain a defence under Article XX(d) of the GATT 1994. Indonesia has not shown that the measure is, in fact, designed "to secure compliance" with customs enforcement, let alone that it is "necessary". According to the United States, Indonesia's defence would fail even if it had identified a WTO-consistent law or regulation.[2011]

7.688. The United States argues that Indonesia has not explained the relevance of importers' ownership of storage capacity to enforcement of Indonesia's customs laws. Even assuming that problems may arise due to inadequate storage of horticultural products, a theoretical problem about which Indonesia has not presented any evidence, such problems would presumably arise after the products have already entered Indonesia – that is, after customs clearance. Thus, from the perspective of the United States, it is unclear how a storage capacity ownership requirement could contribute to customs enforcement. [2012]

7.689. The United States argues that Indonesia does not explain or justify the two most trade-restrictive aspects of the storage capacity requirement, i.e., the requirement to own storage capacity and the one-to-one ratio of owned storage capacity to total allowed imports during a semester. In its view, both features significantly limit the quantity of horticultural products that importers can apply for, compared to what they would import under normal commercial circumstances.[2013] The United States observes, however, that neither of these requirements relate to Indonesia's explanation of the purpose of the measure.

7.690. The United States suggests two less trade-restrictive alternatives to achieve the objective of ensuring importers can store their horticultural products on arrival and providing officials with information on these facilities in advance: (i) to remove the ownership and one-to-one ratio requirements and to allow importers to lease storage capacity and to account for inventory turnover during a semester in their import approval applications; (ii) to allow importers to transfer products directly to a distributor's warehouse from the port of entry.[2014]

7.3.11.1.2 Whether Measure 5 is applied in a manner consistent with the *chapeau* of Article XX

7.691. Concerning the parties' arguments about the *chapeau* of Article XX of the GATT 1994, see Section 7.3.5.1.2 above.

[2009] New Zealand's second written submission, paras. 239-240.
[2010] New Zealand's second written submission, para. 247.
[2011] United States' second written submission, paras. 153 and 156.
[2012] United States' second written submission, para. 154.
[2013] United States' second written submission, para. 155 (referring to its first written submission, paras. 187-191).
[2014] United States' second written submission, para. 155; opening statement, para. 28.

7.3.11.2 Analysis by the Panel

7.692. We have found in Section 7.3.5.2.3 above that Indonesia has failed to identify specific rules, obligations, or requirements contained in WTO-consistent laws or regulations for the purpose of its defence under Article XX(d) of the GATT 1994. Given that Indonesia's arguments concerning the identification of WTO-consistent laws or regulations for the purpose of its defence under Article XX(d) of the GATT 1994 were submitted with respect to all the relevant measures at issue, including Measure 5, we find that Indonesia has not demonstrated that Measure 5 is provisionally justified under subparagraph (d) of Article XX of the GATT 1994.

7.693. We therefore find that Indonesia has failed to demonstrate that Measure 5 is justified under Article XX(d) of the GATT 1994.

7.3.12 Whether Measure 6 (Use, sale and distribution requirements for horticultural products) is justified under Article XX(a) of the GATT 1994

7.3.12.1 Arguments of the Parties

7.3.12.1.1 Whether Measure 6 is provisionally justified under subparagraph (a) of Article XX of the GATT 1994

7.3.12.1.1.1 Indonesia

7.694. Indonesia asserts that the end-use limitations are necessary to protect public morals in that they protect the people of Indonesia from non-Halal horticultural products.[2015] Indonesia explains that, while most Halal requirements pertain to the production and consumption of animal products, strict storage and transportation requirements apply to all food products.[2016] According to Indonesia, consumers generally assume that all the food sold in traditional open-air markets is Halal, and no widely-used labelling system is in place to warn them about non-Halal food. In Indonesia's view, implementing such a labelling system would be logistically impossible to monitor or enforce. For this reason, Indonesia believes that preventing consumer deception is best achieved by limiting imported horticultural products to end uses that naturally require some degree of labelling, for example listing food items on restaurant menus.[2017]

7.3.12.1.1.2 New Zealand

7.695. New Zealand submits that Indonesia's argument does not meet the standard of Article XX(a) of the GATT 1994.[2018] In its view, Indonesia has not demonstrated that the objective of the measure is to protect public morals or the religious beliefs of the Indonesian people and the bare assertion of an objective is insufficient.[2019] New Zealand does not consider that preventing consumer deception regarding the Halal status of horticultural products is the real objective of the restrictions on use, sale, and distribution of imported horticultural products. New Zealand observes that the relevant legal instruments through which the measure is implemented do not include a reference to Halal and, to New Zealand's knowledge, Indonesia has no Halal certification requirements for imported horticultural products.[2020]

7.696. New Zealand contends that, even if the first element of Article XX(a) of the GATT 1994 were satisfied, Indonesia has not explained why the measure is "necessary to protect public morals". In New Zealand's view, the design of the measure suggests otherwise: the measure forbids RIs from selling imported horticultural products directly to consumers or retailers, instead requiring them to trade and/or transfer such products to a distributor.[2021] However, it argues, "there is no restriction on such products being on-sold in traditional markets by the distributor".[2022] New Zealand therefore holds that Indonesia's claim that the measure is necessary

[2015] Indonesia's first written submission, paras 158–159 and 166; oral statement at the first substantive meeting, para. 34; response to Advanced question No. 35.
[2016] Indonesia's first written submission, para. 158.
[2017] Indonesia's first written submission, para. 159.
[2018] New Zealand's second written submission, paras. 252–256.
[2019] New Zealand's second written submission, para. 253 (referring to Appellate Body Report, *EC – Seal Products*, para. 5.144).
[2020] New Zealand's second written submission, para. 253.
[2021] New Zealand's second written submission, para. 254 (referring to its first written submission, para. 106 and referring to Article 15 of MOT 16/2013 (Exhibit JE-8)).
[2022] New Zealand's second written submission, para. 254.

to prevent consumer deception in traditional open-air markets does not make sense since imported horticultural products *can* be sold in traditional open-air markets. Further, Indonesia does not even attempt to justify on Halal grounds the prohibition on PIs trading or transferring horticultural products imported as raw materials or supplementary materials for industrial production processes.[2023] Accordingly, in New Zealand's view, Indonesia's restrictions on the use, sale and distribution of imported horticultural products make no contribution to the protection of public morals by preventing consumer deception.[2024] New Zealand concludes that, in view of its lack of contribution to the objectives in Article XX(a), weighed against its significant trade-restrictiveness, the measure is not "necessary" in terms of Article XX. In these circumstances, New Zealand is not required to elaborate on an alternative measure. [2025]

7.3.12.1.1.3 United States

7.697. While agreeing that upholding the Halal food requirements in Indonesia constitutes a "public moral" under Article XX(a) of the GATT 1994, the United States submits that Indonesia has failed to demonstrate that the use, sale, and transfer restrictions of Measure 6 were adopted, enforced, or designed to protect Halal requirements for horticultural products.[2026] Recalling the premises under which RIs are required to sell imported horticultural products to distributors (prohibiting them from selling directly to consumers and retailers); and PIs to only use imported horticultural products as materials in their production process (prohibiting them from selling or transferring these products)[2027], the United States argues that Indonesia must first show that the objective of the use restrictions is to protect consumers from mistakenly consuming non-Halal foods. In its view, only after this demonstration is made may the Panel inquire as to whether the measure is "'necessary' to protect such public morals".[2028]

7.698. Based on the design, architecture and revealing structure of the measure, beginning with the text of the measure itself, as well as all other available evidence in assessing the connection between the measure at issue and the protection of the public moral[2029], the United States contends that the texts of the legal instruments setting forth the use, sale, and transfer restrictions, do not indicate that the objective of the restrictions is to uphold Halal requirements for horticultural products.[2030] Further, the referenced Horticulture Law, statutory authority for the MOA and MOT regulations, also does not identify Halal as one of its objectives.[2031] The United States could not identify any reference to Halal requirements in these texts. The United States argues that Indonesia fails to provide any legislative history, public statements, reports or other evidence

[2023] New Zealand's second written submission, para. 254.
[2024] New Zealand's second written submission, para. 255.
[2025] New Zealand's second written submission, para. 261.
[2026] United States' second written submission, para. 207.
[2027] United States' second written submission, paras. 205 (referring to United States' first written submission, para. 193; and New Zealand's first written submission, para. 251).
[2028] United States' second written submission, para. 206 (referring to Appellate Body Report, *EC – Seal Products,* para. 5.169).
[2029] United States' second written submission, para. 208 (referring to Appellate Body Report, *EC – Seal Products*, para. 5.144).
[2030] United States' second written submission, para. 208 (referring to MOA 86/2013, Exhibit JE-15; MOT 16/2013, as amended by MOT 47/2013, Exhibit JE-10).
[2031] United States' second written submission, para. 208 (referring to the Horticulture Law, Exhibit JE-1). The United States notes that Indonesia has yet to explain how the Halal standards requirements and labelling requirements apply to fresh horticultural products. The two measures cited by Indonesia in its response to the Panel's questions appear to apply primarily to "packed foods." Article 10 of Government Regulation No. 69/1999 on Food Labels and Advertisements, 1999, Exhibit USA-104 (stating: "Anybody producing or importing packed food into…Indonesia for trading and declaring that the said food is permissible for Moslems, shall…put the information or word 'halal' on labels."); Decree of the Minister of Religious Affairs No. 518/ 2001 on the Guidelines and Procedures for Auditing and Stipulating Halal Food, Exhibit USA-105 (Article 2.1 states that: "to support the truth of halal statements issued by producers or importers of food packed for trading, the Auditing Agency audits the food first").
The United States also notes that Indonesia has failed to respond to Advanced Panel Question no. 35(a) regarding whether the "technical enquiries" carried out by surveyors on all horticultural products include verifying whether the products comply with Halal requirements. Under MOT 16/2013, as amended by MOT 47/2013, the required verification or technical inquiry must include examining and verifying the country of origin, port of origin, type, volume, shipping time, port of destination, and various health and technical certificates of the prospective horticultural product imports. Article 22(1) of MOT 16/2013, as amended (Exhibit JE-10). In keeping with this scope, the documents importers must submit for verification include the companies taxpayer ID number, registration card, business license, import identification number, PI or RI license, and Import Approval for the relevant period; SUCOFINDO, "Horticulture," (updated Feb. 11, 2016, Exhibit USA-80 (there is no mention of any Halal requirements in either MOT 16/2013 or in SUCOFINDO's application documents).

to show the connection between the restrictions on imported products and Halal requirements. The United States notes that the measures referenced by Indonesia relate to Halal food labelling, speaking to the existence of Halal requirements as a public moral in Indonesia, a point that the United States does not dispute. According to the United States, these measures do not show that the use, sale and transfer restrictions were adopted to protect consumers from non-Halal foods.[2032] In the United States' view, Indonesia has failed to demonstrate the connection between these restrictions and the protection of Halal requirements. [2033]

7.699. The United States considers that, even if Indonesia could show that the protection of Halal requirements is an objective, the restrictions are not necessary to protect consumers from purchasing non-Halal horticultural products in traditional, open air, or other markets. Under a necessity analysis, the Panel should consider the contribution of the restrictions to protecting consumers from non-Halal products and the trade restrictiveness imposed by the challenged measures.[2034] In this regard, the United States stresses that the sales restrictions limit the person to whom the imported horticultural products may be sold upon entry, not the products' ultimate points of sales, meaning that the measure does not prohibit the distributors from later selling the same imported products to consumers or retailers at traditional or other markets. Because the measure does not restrict the ultimate points of sale to consumers, the United States considers that restricting the initial sale to distributors does not contribute to consumers' ability to distinguish Halal from non-Halal horticultural products in the markets.[2035]

7.700. Countering Indonesia's contention that its measures operate by limiting imported horticultural products to "uses that naturally require some degree of labelling (e.g. listing food items on restaurant menus)" [2036], the United States finds that the argument is inapposite to the restrictions at issue[2037]: none of the relevant legal instruments or available evidence suggest that distributors of imported horticultural products are subject to a stricter Halal labelling requirement, or explain how restricting sales to distributors is a use that "naturally require[s] some degree of labelling." Therefore, requiring imported horticultural products to pass through distributors does not further distinguish Halal from non-Halal products. Hence, since the same imported horticultural products reach consumers in the traditional and other markets, the United States maintains that the restrictions do not contribute to the protection of public morals.[2038]

7.701. Since Indonesia premises its necessity argument on the assertion that "there is no widely-used labelling system that could warn consumers" about non-Halal products[2039], the United States counters that Indonesia's responses to the Panel appear to suggest otherwise. On whether imported horticultural products must comply with Halal requirements, Indonesia said that "food producers are responsible for verifying the Halal compliance of any products they wish to label as 'Halal'" and that importers must receive a certificate from the Indonesian Council of Ulama (MUI) to obtain Halal labelling.[2040] Also, on whether distributors must comply with Halal regulations with respect to local products, Indonesia responded that the Halal regulation "applies equally for local and imported products".[2041] For the United States, it remains unclear from Indonesia's responses whether it requires Halal-labelling for imported horticultural products.[2042]

7.702. The United States argues that, if Indonesia asserts that a Halal labelling system applies to horticultural products, and that the system applies to both locally produced and imported horticultural products (and is therefore "widely used"), this assertion would also conflict with its argument that the use, sale, and transfer restrictions are necessary. The United States therefore argues that, if an existing Halal labelling system already warns consumers that certain products, including imported products, may not be Halal, then restricting the sale of imported horticultural

[2032] United States' second written submission, para. 209 (referring to Indonesia's response to Advanced Panel question No. 35, and its responses to Panel question No. 68).
[2033] United States' second written submission, para. 209.
[2034] United States' second written submission, para. 210.
[2035] United States' second written submission, para. 211.
[2036] Indonesia's first written submission, para. 159.
[2037] United States' second written submission, para. 211.
[2038] United States' second written submission, para. 212.
[2039] United States' second written submission, para. 213 (referring to Indonesia's first written submission, para. 159).
[2040] Indonesia's response to Advanced Panel question No. 35.
[2041] United States' second written submission, para. 213 (referring to Indonesia's response to Panel question No. 68).
[2042] United States' second written submission, para. 214.

products only to distributors would not seem to contribute further to the protection the Halal standards.[2043]

7.703. With respect to trade restrictiveness, the United States considers that requiring RIs to sell only to distributors imposes significant limitations on importation of horticultural products, forcing all economic actors into one distribution model, while adding an artificial level in the supply chain increases the cost of imported horticultural products and reduces their competitive opportunities.[2044] The United States suggests that, because the restrictions bear minimal connection to the protection of Halal requirements and do not make any contribution to achieving the objective asserted by Indonesia, a reasonably available alternative would be simply to remove such requirements, while maintaining the existing Halal labelling requirements[2045] identified by Indonesia. The United States believes that this would make an equivalent contribution to public morals and would eliminate the unjustifiable trade-restrictive effect of the measure.

7.704. As far as PIs are concerned, the United States notes that Indonesia has not offered any evidence or explanation in support of its assertion that the use, sale and transfer restrictions on horticultural products imported by PIs is justified under Article XX(a). The United States submits that Indonesia also fails to articulate how requiring PIs to use imported horticultural products only in their own industrial production, and prohibiting them from selling or transferring imported products to another entity, is necessary. Thus, the United States maintains that Indonesia has also failed to make its Article XX(a) *prima facie* case with respect to the use, sale and transfer restrictions for PIs.[2046]

7.3.12.1.2 Whether Measure 6 is applied in a manner consistent with the *chapeau* of Article XX

7.705. Concerning the parties' arguments about the *chapeau* of Article XX of the GATT 1994, *see* Section 7.3.5.1.2 above.

7.3.12.2 Analysis by the Panel

7.3.12.2.1 Introduction

7.706. The task before the Panel is to determine whether Measure 6 (Use, sale and distribution requirements for horticultural products) is justified under Article XX(a) of the GATT 1994. We commence with the text of the relevant provision and the ensuing legal standard.

7.3.12.2.2 The relevant legal provision

7.707. Article XX of the GATT 1994 reads, in relevant part, as follows:

> Article XX
>
> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (*a*) necessary to protect public morals
>
> ...

[2043] United States' second written submission, para. 214.
[2044] United States' second written submission, para. 215 (referring to its first written submission, para. 194).
[2045] United States' second written submission, para. 216 (referring to Government Decree 69/1999 on Food Labels and Advertisements (Exhibit USA-104); and Decree of the Minister of Religious Affairs No. 518/2001 on the Guidelines and Procedures for Auditing and Stipulating Halal Food (Exhibit USA-105)).
[2046] United States' second written submission, para. 217.

7.708. Concerning the legal standard under this provision, we refer to Section 7.3.9.2.2 above. We shall therefore proceed to examine whether Indonesia has demonstrated that Measure 6 is justified under Article XX(a) of the GATT 1994. As we indicated in Section 7.3.1 above, Indonesia has only provided arguments on a measure by measure basis with respect to the first tier of the analysis, i.e. whether the measures at issue are provisionally justified under the relevant subparagraph of Article XX of the GATT 1994. The second tier, i.e. whether the measures at issue are applied in a manner consistent with the *chapeau* of Article XX, has been argued by Indonesia for its import licensing regimes as a whole, thus making no distinctions between measures. Under these circumstances, we are driven to follow the same approach in our analysis.

7.3.12.2.3 Whether Indonesia has demonstrated that Measure 6 (Use, sale and distribution requirements for horticultural products) is provisionally justified under subparagraph (a) of Article XX of the GATT 1994

7.709. Under this tier of our analysis, the task before the Panel is to establish whether, as claimed by Indonesia, Measure 6 is provisionally justified by subparagraph (a) of Article XX of the GATT 1994. As explained before, we shall examine whether Indonesia has demonstrated that Measure 6 is designed to protect public morals and, if so, whether it is necessary for such protection.

7.710. Concerning the first element, i.e. whether Measure 6 is designed to protect public morals, we note that Indonesia has argued that the end-use limitations are necessary to protect public morals from non-Halal horticultural products.[2047] According to Indonesia, consumers generally assume that all the food sold in traditional open-air markets is Halal, and no widely-used labelling system is in place to warn them about non-Halal food. Indonesia believes that preventing consumer deception is best achieved by limiting imported horticultural products to end uses that naturally require some degree of labelling, for instance listing food items on restaurant menus.[2048]

7.711. The co-complainants disagreed and argued that Indonesia has not demonstrated that Measure 6 is designed to protect consumers from mistakenly consuming non-Halal foods.[2049] In particular, New Zealand submitted that a bare assertion of an objective is insufficient.[2050] New Zealand did not consider that preventing consumer deception regarding the Halal status of horticultural products is the real objective of the restrictions on use, sale, and distribution of imported horticultural products. New Zealand observed that the relevant legal instruments through which the measure is implemented do not include a reference to Halal and, to New Zealand's knowledge, Indonesia has no Halal certification requirements for imported horticultural products.[2051] The United States, while agreeing that upholding the Halal food requirements in Indonesia constitutes a "public moral" under Article XX(a) of the GATT 1994, submitted that Indonesia has failed to demonstrate that the use, sale, and transfer restrictions were adopted, enforced, or designed to protect Halal requirements for horticultural products.[2052] Furthermore, the United States noted that Indonesia has yet to explain how the Halal standards requirements and labelling requirements apply to fresh horticultural products.[2053]

7.712. We recall that this first step in our analysis calls for an initial, threshold examination in order to determine whether there is a relationship between an otherwise WTO-inconsistent measure and the protection of public morals.[2054] We note that Indonesia has identified the public moral at issue as being the protection of Halal and, in particular, preventing consumer deception from non-Halal horticultural products.[2055] As observed in paragraph 7.653 above, the co-complainants do not question that Halal is a public moral. What the co-complainants question is the existence of a relationship between Measure 6 and preventing consumer deception from non-

[2047] Indonesia's first written submission, paras. 158-159 and 166; oral statement at the first substantive meeting, para. 34; response to Advanced question No. 35.
[2048] Indonesia's first written submission, para. 159.
[2049] New Zealand's second written submission, paras. 252-256; United States' second written submission, para. 209.
[2050] New Zealand's second written submission, para. 253 (referring to Appellate Body Report, *EC – Seal Products*, para. 5.144).
[2051] New Zealand's second written submission, paras. 253-254.
[2052] United States' second written submission, para. 207.
[2053] United States' second written submission, fn. 318.
[2054] *See* Appellate Body Report, *Colombia – Textiles*, para. 5.67, in the context of Article XX(a) and *Argentina – Financial Services*, para. 6.203, in the context of Article XIV(c) of the GATS, which mirrors Article XX(d) of the GATT 1994.
[2055] Indonesia's first written submission, paras. 158-159 and 166; oral statement at the first substantive meeting, para. 34; response to Advanced question No. 35.

Halal horticultural products.[2056] For the co-complainants, there are *no* Halal regulations applicable to fresh horticultural products because they are inherently Halal. As mentioned in paragraph 7.654 above, Indonesia itself recognizes that many foodstuffs (in particular, meat-free and alcohol-free foodstuffs) are inherently Halal, while the Law on Halal Product Assurance confirms that plants that do not pose health risks are Halal. In several instances, we have attempted to confirm the existence of Halal regulations that would be applicable to horticultural products, to no avail. As also explained in paragraph 7.654 above, Indonesia invariably responds with references to Halal requirements applicable to animals and animal products. Hence, we consider that Indonesia has not identified the Halal requirements for horticultural products which Measure 6 purportedly protects.

7.713. Indonesia has explained that, while most Halal requirements pertain to the production and consumption of animal products, strict storage and transportation requirements apply to all food products.[2057] We understand that such requirements effectively apply but this does not explain the relationship, if any, between Measure 6 and the objective of preventing consumer deception from non-Halal horticultural products. We reiterate that it is incumbent upon Indonesia to demonstrate the existence of a relationship between Measure 6 and the protection of Halal. In our view, the bare assertion of an objective is insufficient to meet the burden of demonstrating that a relationship exists between the inconsistent measure and a given public moral objective.

7.714. We have nevertheless examined Measure 6 to establish whether such a relationship can be deduced from its design, including its content, structure, and expected operation.[2058] We understand that a measure that does not expressly fulfil a public moral objective may still be found to be connected to that objective following an assessment of the design of the measure at issue, including its content, structure, and expected operation.[2059] We observe that, as described in Section2.3.2.6 above, Measure 6 consists of the requirements on the importation by PIs and RIs of listed horticultural products that limit the use, sale and distribution of the imported products.[2060] Indonesia implements this Measure by means of Articles 7, 8, 15 and 26(e)-(f) of MOT 16/2013, as amended.[2061] Pursuant to these provisions, an importer that obtains the recognition as a PI can only import horticultural products as raw materials or auxiliary materials for its industrial production processes and is thus prohibited from trading and/or transferring them. Likewise, an importer that obtains the recognition as an RI can only import horticultural products for consumption provided they are traded or transferred to a distributor and not directly to consumers or retailers. Designation as RI or PI can be revoked where the relevant importer is proven to have traded and/or transferred imported horticultural products.[2062] We recall that, in Section 7.2.10.3 above, we concluded that Measure 6 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.715. We note that the wording of the above provisions does not indicate that the objective of the end-use restrictions is to protect the Halal requirements for horticultural products.[2063] Article 7 of MOT 16/2013, as amended, provides: "Businesses that have received Recognition as a PI-Horticultural Products can only import Horticultural Products as raw materials or as supplementary materials for the needs of its industrial production process and are prohibited from trading and/or transferring these Horticultural Products",[2064] Article 15 of the same regulation provides: "Businesses that have received Confirmation as an RI-Horticultural Products: a. Only can trade

[2056] New Zealand's second written submission, para. 254; opening statement at the second substantive meeting, paras. 74-75; United States' oral statement at the second substantive meeting, para. 39, referring to its comments on Indonesia's responses to Panel questions No. 68 and 69; United States' response to Panel question No. 76; second written submission, paras. 208-210.

[2057] Indonesia's first written submission, para. 158.

[2058] See Appellate Body Reports, *US – Shrimp*, paras. 135–142; *EC – Seal Products*, para. 5.144; *Colombia – Textiles*, para. 5.68.

[2059] Appellate Body Report, *Colombia – Textiles*, para. 5.69, in the context of Article XX(a).

[2060] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, paras. 106-109; United States' first written submission, paras. 70-72.

[2061] Article 15 of MOT 16/2013, as amended by MOT 47/2013, provides: "Businesses that have received Confirmation as a RI-Horticultural Products: a. Only can trade and/or transfer imported Horticultural Products to a Distributor; and b. Are forbidden from trading and/or transferring imported Horticultural Products directly to consumers or retailers", Exhibit JE-10.

[2062] Articles 26(e) and 26(f) of MOT 16/2013, as amended, Exhibit JE-10.

[2063] United States' second written submission, para. 208 (referring to MOA 86/2013, Exhibit JE-15; MOT 16/2013, as amended by MOT 47/2013, Exhibit JE-10).

[2064] Exhibit JE-10.

and/or transfer imported Horticultural Products to a Distributor; and b. Are forbidden from trading and/or transferring imported Horticultural Products directly to consumers or retailers".[2065]

7.716. Turning to the broader framework of MOT 16/2013, as amended by MOT 47/2013, we recall having already examined its stated goals, the laws and regulations that are enumerated in the introductory section, as well as the overarching legislation (i.e. Horticulture Law and Food Law) in the context of our examination of Measure 5 above.[2066] In this respect, we recall that we found no reference indicating that consumer protection specifically relates to Halal requirements that would be applicable to horticultural products; and that there is no mention of regulations addressing Halal-related requirements, certification or monitoring and surveillance processes in any of the relevant MOT and MOA regulations, the Horticulture Law, or the Food Law.

7.717. We also observe that MOT 16/2013, as amended mandates that "technical enquiries" be carried out by Surveyors on all horticultural product imports at the port of origin.[2067] In this respect, Article 22(1) of the same regulation provides that the technical inquiry must include examining and verifying the country of origin, port of origin, type, volume, shipping time, port of destination, and various health and technical certificates of the prospective horticultural product imports. There is no mention of any Halal requirements. As signalled by the United States, the accompanying documentation that importers must submit in that respect also appears to indicate that the verification does not concern, or even take into account, proof of compliance with Halal requirements, as far as horticultural products are concerned.[2068] We asked Indonesia to clarify whether these "technical enquiries" include verifying if horticultural products destined to Indonesia comply with Halal requirements.[2069] Indonesia did not respond. We also asked Indonesia to identify the specific laws and regulations that require imported horticultural products to comply with Halal requirements, whether for fresh or processed products.[2070] Again, Indonesia opted not to respond to the question. Instead, Indonesia explained that:

> Under GR 69/1999 concerning Food Labelling and Advertisement, food producers are responsible for verifying the halal-compliance of any products they wish to label as "Halal". To obtain Halal labelling, importers are required to obtain a certificate from the Indonesian Council of Ulama ("MUI"). Before issuing a certificate, MUI conducts a verification that covers the facilities used for production, storage, transportation, distribution, and presentation. For horticultural products, MUI focuses its verification on ensuring that these facilities are separate from facilities used for non-Halal food products. Imported horticultural products that are not labelled as Halal are generally presumed to be non-Halal.

7.718. We observe that Indonesia's answer refers to domestic food producers, not to the technical inquiries at the country of origin as formulated in our question.

7.719. Having examined the design of Measure 6, we fail to see any connection with Halal requirements that could lead us to conclude that Measure 6 is "not incapable"[2071] of protecting the public moral of Halal. Indeed, this measure does not protect consumers from non-Halal food but rather relates to the limitations imposed by Indonesia on to whom imported horticultural products can be sold directly by importers. In this sense, the final destination of the products is not controlled by Measure 6. We understand that ensuring compliance with Halal requirements is done through other means than Measure 6. Indeed, GR 66/1999 concerning Food Labelling and

[2065] Exhibit JE-10.
[2066] *See* paragraph 7.657.
[2067] Articles 21-23 and 25 of MOT 16/2013, as amended by MOT 47/2013, Exhibit JE-10.
[2068] SUCOFINDO, "Horticulture," (updated 11 February 2016), Exhibit USA-80, showing that the relevant application documents include the company taxpayer ID number, registration card, business license, import identification number, PI or RI license, and Import Approval for the relevant period.
[2069] Panel question No. 35(a) read as follows:
With respect to horticultural products,
(a) Articles 21-23 and 25 of MOT 16/2013, as amended by MOT 47/2013 mandate that "technical enquiries" be carried out by Surveyors on all horticultural product imports at the port of origin. Does this activity include verifying whether horticultural products destined to Indonesia comply with Halal requirements?
[2070] Panel question No. 35(b) read as follows:
With respect to horticultural products,
...
(b) Please identify the specific laws and regulations that require imported horticultural products to comply with Halal requirements, whether for fresh or processed products.
[2071] Appellate Body Report, *Colombia – Textiles*, para. 5.68.

Advertisement specifically provides that "[a]nybody producing or importing packed food into the territory of Indonesia for trading and declaring that the said food is permissible for Moslems, shall be responsible for the truth of the statement and put the information or word 'halal' on labels".[2072] It also provides that "anybody producing or importing packed food into the territory of Indonesia for trading shall have the said food first examined by accredited inspection agencies pursuant to the laws in force".[2073] Hence, in both RI and PI cases, we do not see any relationship between the end-use limitations and the need to ensure compliance with Halal requirements.

7.720. We therefore conclude that Indonesia has not demonstrated the existence of a relationship between Measure 6 and the protection of the public moral of Halal. Accordingly, we find that Indonesia has not demonstrated that Measure 6 is provisionally justified under subparagraph (a) of Article XX of the GATT 1994.

7.3.12.2.4 Conclusion

7.721. In the light of the foregoing, we find that Indonesia has failed to demonstrate that Measure 6 is justified under Article XX(a) of the GATT 1994.

7.3.13 Whether Measure 6 (Use, sale and distribution requirements for horticultural products) is justified under Article XX(b) of the GATT 1994

7.3.13.1 Arguments of the Parties

7.3.13.1.1 Whether Measure 6 is provisionally justified under subparagraph (b) of Article XX of the GATT 1994

7.3.13.1.1.1 Indonesia

7.722. Indonesia argues that its end use limitations are necessary to protect human, animal or plant life or health, and to secure compliance with Indonesia's food safety requirements in accordance with Article XX subparagraphs (b) and (d). In particular, Indonesia contends that Measure 6 is necessary to secure compliance with food safety requirements. Indonesia submits that, by limiting the distribution channels available to certain imports, Indonesian officials with limited resources are better able to track the origin of products that contain pathogenic bacteria and therefore reduce the spread of such bacteria into the food supply of the general public. According to Indonesia, these measures ensure that imported horticultural products are moved through channels of distribution that are highly traceable, as opposed to through the ephemeral network of open air markets, and are vital to protect the public from the consequences of food-borne pathogens.[2074]

7.723. Indonesia submits that MOT 71/2015 and MOA 86/2013 for horticultural products and MOT 5/2016 and MOA 58/2015 for animals and animal products as a whole were enacted to protect food safety for human consumption.[2075] In particular with respect to the end-use requirements, Indonesia argues that preventing frozen meats from being sold in traditional markets also protects food safety for the Indonesian people because of the danger that arises from freezing, thawing, and refreezing meats. Indonesia maintains that its traditional markets have a very limited, if any, cold chain system, which affects meat quality and texture.[2076]

7.3.13.1.1.2 New Zealand

7.724. Further to New Zealand's observation regarding Indonesia's tendency to conflate its defences under Article XX(b) and Article XX(d)[2077], New Zealand submits that Indonesia's argument does not meet the standards of Articles XX(b) or (d), and that, in any case, Indonesia

[2072] Article 10(1) of GR 66/1999, Exhibit USA-104.
[2073] Article 11(1) of GR 66/1999, Exhibit USA-104.
[2074] Indonesia's first written submission, para. 160; first opening statement, para. 34.
[2075] Indonesia's second written submission, para. 110.
[2076] Indonesia's second written submission, para. 110 (referring to Corina Gambuteanu, Daniela Borda and Petru Alexe, The Effect of Freezing and Thawing on Technological Properties of Meat: Review, p. 89, available at http://www.journal-of-agroalimentary.ro/admin/articole/48037L15_Vol_19_1_2013_88-92.pdf, Exhibit IDN-57).
[2077] New Zealand's second written submission, para. 256 (referring to Indonesia's first written submission, para. 160; Indonesia's first opening statement, para. 34).

has not demonstrated that the restrictions are intended to protect human health under Article XX(b).[2078] According to New Zealand, there is no evidence from the text of the regulations or their operation that the restrictions have the objective of protecting human health. Even if the first element of Article XX(b) were satisfied, Indonesia has not explained how the measure contributes to protecting human health; and there is no evidence that the requirements would indeed reduce the spread of pathogens into the food supply. In New Zealand's view, the requirements add an extra distribution layer in the supply chain for fresh horticultural products imported for consumption, which would even appear to add to the difficulties of tracking pathogens in the food supply.[2079]

7.725. Responding to Indonesia's concerns regarding the risks posed by the sale of frozen meats and by the limited cold chain system in its traditional markets[2080], New Zealand contends that no relevant evidence was produced that demonstrated 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.[2081] Furthermore, exhibits supplied by Indonesia either: (i) show that frozen meat is safe provided it was safe when frozen, and that when thawed, microbes will become active and multiply, but at the same rate as in fresh meat[2082]; or (ii) relate to food quality not food safety. [2083] In this respect, New Zealand holds that Indonesia's repeated arguments based on "meat quality and texture"[2084] are not only unsubstantiated but also irrelevant to an Article XX(b) defence.[2085]

7.726. New Zealand concludes that, in view of its lack of contribution to the objectives in Article XX(b) weighed against its significant trade-restrictiveness, the measure is not "necessary". Thus, New Zealand believes that it is not required to elaborate on an alternative measure. However, New Zealand suggests that a less trade-restrictive alternative measure might involve public education programmes on the importance of safe food handling and for the Indonesian Government to take any practicable further steps to improve the standards of hygiene at traditional markets, for both imported and domestic products.[2086]

7.3.13.1.1.3 United States

7.727. The United States argues that Indonesia's defence under Article XX(b) of the GATT must fail as Indonesia has not shown that the use, sale, and transfer restrictions on horticultural products are necessary to protect human health, or even that they pursue this objective.[2087] According to the United States, Indonesia does not point to any evidence in the text, structure, or operation of the measure that "the objective pursued by" the measure is the protection of human health: for example, there is no evidence that Indonesia imposes any requirements on distributors to track in any way the products that they buy from importers and sell to retail markets, including traditional wet markets; nor are there any statements on the record, or in the text of the regulations, suggesting that these requirements serve a health-related purpose.[2088]

7.728. The United States considers that, even if the measure pursued an objective covered by Article XX(b) of the GATT 1994, no contribution to that objective has been shown, and certainly not one that meets the "necessary" standard.[2089] In its view, Indonesia appears to be justifying the wrong measure.[2090] The United States explains that the challenged measure limits the persons to whom imported horticultural products can be sold, not the products' ultimate destination. Thus, imported products can be, and are, sold through open air markets, provided they are first sold to a

[2078] New Zealand's second written submission, para. 260.
[2079] New Zealand's second written submission, para. 260.
[2080] Indonesia's second written submission, para. 110.
[2081] New Zealand's opening statement at the second substantive meeting, paras. 68-69; response to Panel question No. 123.
[2082] Exhibit IDN-79.
[2083] Exhibit IDN-57.
[2084] Indonesia's second written submission, paras. 109 ("establish quality… requirements"), 110, 193 and 225.
[2085] New Zealand's opening statement at the second substantive meeting, paras. 69-71.
[2086] New Zealand's second written submission, para. 261.
[2087] United States' second written submission, paras. 181 and 184.
[2088] United States' second written submission, para. 182 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 144-145; Appellate body Report, *EC – Seal Products*, para. 5.169, clarifying that, for a defence under Article XX(a), the responding Member had to show: (1) "that it has adopted or enforced a measure 'to protect public morals;'" and, (2) that the measure is "'necessary' to protect such public morals").
[2089] United States' second written submission, para. 183.
[2090] United States' oral statement at the first substantive meeting, para. 35.

distributor. In that sense, the United States finds that the requirement lengthens the supply chain, likely making tracking more difficult. Further, Indonesia has not justified the prohibition on PIs to transfer or sell imported products not used in their production process. Thus, because the measure makes no, or little, contribution to the objective, the United States suggests that a less trade-restrictive alternative would be to eliminate the requirement and for Indonesia to continue to rely on its health and SPS requirements for preventing the spread of pathogenic bacteria.[2091]

7.3.13.1.2 Whether Measure 6 is applied in a manner consistent with the *chapeau* of Article XX

7.729. Concerning the parties' arguments about the *chapeau* of Article XX of the GATT 1994, see Section 7.3.5.1.2 above.

7.3.13.2 Analysis by the Panel

7.3.13.2.1 Introduction

7.730. The task before the Panel is to determine whether Measure 6 (Use, sale and distribution requirements for horticultural products) is justified under Article XX(b) of the GATT 1994. We commence with the text of the relevant provision and the ensuing legal standard.

7.3.13.2.2 The relevant legal provision

7.731. Article XX of the GATT 1994 reads, in relevant part, as follows:

> Article XX
>
> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (*a*) ...
>
> (*b*) necessary to protect human, animal or plant life or health;
>
> ...

7.732. Concerning the legal standard under this provision, we refer to Section 7.3.8.2.2 above. The task before the Panel is therefore to determine whether Measure 6 (Use, sale and distribution requirements for horticultural products) is justified under Article XX(b) of the GATT 1994. We commence by examining whether Indonesia has demonstrated that Measure 6 is provisionally justified by subparagraph (b) of Article XX of the GATT 1994.

7.3.13.2.3 Whether Indonesia has demonstrated that Measure 6 is provisionally justified under Article XX(b) of the GATT 1994

7.733. Under this tier of our analysis, the task before the Panel is to establish whether, as claimed by Indonesia, Measure 6 is provisionally justified by subparagraph (b). As explained before in Section 7.3.1 above, we shall examine whether Indonesia has demonstrated that Measure 6 is designed to protect human, animal or plant life or health and, if so, whether it is necessary for such protection.

7.734. Concerning the first element, i.e. whether Measure 6 is designed to protect human, animal or plant life or health[2092], we note that Indonesia has argued that its end use limitations are

[2091] United States' second written submission, para. 183.
[2092] In its second written submission, Indonesia indicated as follows:
...

necessary to protect human, animal or plant life or health, and to secure compliance with food safety requirements.[2093] According to Indonesia, by limiting the distribution channels available to certain imports, Indonesian officials with limited resources are better able to track the origin of products that contain pathogenic bacteria and therefore reduce the spread of such bacteria into the food supply of the general public. Indonesia contends that Measure 6 ensures that imported horticultural products are moved through channels of distribution that are highly traceable, as opposed to through the ephemeral network of open air markets, and that the Measure is vital to protect the public from the consequences of food-borne pathogens health-related risks.[2094]

7.735. The co-complainants disagreed and submitted that Indonesia has not demonstrated that Measure 6 is intended to protect human health under Article XX(b).[2095] New Zealand made an observation regarding Indonesia's tendency to conflate its defences under Article XX(b) and Article XX(d)[2096] and argued that there is no evidence from the text of the regulations or their operation that the restrictions have the objective of protecting human health.[2097] The United States agreed and indicated that Indonesia does not point to any evidence in the text, structure, or operation of the measure that supports that "the objective pursued by" the measure is the protection of human health. For instance, the United States argued, there is no evidence that Indonesia imposes any requirements on distributors to track in any way the products that they buy from importers and sell to retail markets, including traditional wet markets; nor are there any statements on the record, or in the text of the regulations, suggesting that these requirements serve a health-related purpose.[2098]

7.736. We recall that this first step in the analysis calls for an initial, threshold examination in order to determine whether there is a relationship between an otherwise WTO-inconsistent measure and the protection of human, animal or plant life or health.[2099] We note that Indonesia has identified food safety[2100] as being the objective of this Measure. The co-complainants do not question that food safety falls under the purview of the protection of human, animal or plant life or health under paragraph (b) of Article XX.

7.737. What the co-complainants question is the existence of a relationship between Measure 6 and the protection of human health.[2101] We proceed to examine the evidence regarding the design of the measure at issue, including its content, structure, and expected operation to establish whether such a relationship exists.[2102] We understand that a measure that does not expressly fulfil a public moral objective may still be found to be connected to that objective following an assessment of the design of the measure at issue, including its content, structure, and expected operation.[2103] In this respect, as described in Section 2.3.2.6 above, Measure 6 consists of the requirements on the importation by PIs and RIs of listed horticultural products that limit the use,

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(b) the requirement that imports of fresh horticultural products not be harvested more than six months from the date of importation, the domestic harvest period limitations, restrictions on end-use, the harvest time period, limitations for animal products, the storage capacity requirement, the positive list, and the reference price are justified under Article XX (b) of the GATT because these measures are necessary for food safety and food security.

Indonesia's second written submission, para. 207(b). The Panel observes that, although Indonesia has indicated a food security objective for Measure 6, the specific argumentation put forward by Indonesia with respect to Measure 6 does not appear to include food security concerns.

[2093] Indonesia's first written submission, para. 160.

[2094] Indonesia's first written submission, para. 160; Indonesia's first opening statement, para. 34.

[2095] New Zealand's second written submission, para. 260; United States' second written submission, paras. 181 and 184.

[2096] New Zealand's second written submission, para. 256 (referring to Indonesia's first written submission, para. 160 and Indonesia's first opening statement, para. 34).

[2097] New Zealand's second written submission, para. 260.

[2098] United States' second written submission, para. 182 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 144-145; *EC – Seal Products* , para. 5.169, clarifying that, for a defence under Article XX(a), the responding Member had to show: (1) "that it has adopted or enforced a measure 'to protect public morals;'" and, (2) that the measure is "'necessary' to protect such public morals".

[2099] *See* Appellate Body Report, *Colombia – Textiles*, para. 5.67, in the context of Article XX(a) and *Argentina – Financial Services*, para. 6.203, in the context of Article XIV(c) of the GATS, which mirrors Article XX(d) of the GATT 1994.

[2100] Indonesia's first written submission, para. 160.

[2101] New Zealand's second written submission, para. 260. United States' second written submission, para. 182.

[2102] See Appellate Body Reports, *US – Shrimp*, paras. 135-142; *EC – Seal Products*, para. 5.144; *Colombia – Textiles*, para. 5.68.

[2103] Appellate Body Report, *Colombia – Textiles*, para. 5.69, in the context of Article XX(a).

sale and distribution of the imported products.[2104] Indonesia implements this Measure by means of Articles 7, 8, 15 and 26(e)-(f) of MOT 16/2013, as amended.[2105] Pursuant to these provisions, an importer that obtains the recognition as a PI can only import horticultural products as raw materials or auxiliary materials for its industrial production processes and is thus prohibited from trading and/or transferring them. Likewise, an importer that obtains the recognition as an RI can only import horticultural products for consumption provided they are traded or transferred to a distributor and not directly to consumers or retailers. Designation as RI or PI can be revoked where the relevant importer is proven to have traded and/or transferred imported horticultural products.[2106] We recall that, in Section 7.2.10.3 above, we concluded that Measure 6 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.738. We note that the wording of the above provisions does not indicate that the objective of the restrictions is to protect food safety with respect to horticultural products.[2107] Article 7 of MOT 16/2013, as amended, provides: "Businesses that have received Recognition as a PI-Horticultural Products can only import Horticultural Products as raw materials or as supplementary materials for the needs of its industrial production process and are prohibited from trading and/or transferring these Horticultural Products".[2108] Article 15 of MOT 16/2013, as amended, provides: "Businesses that have received Confirmation as an RI-Horticultural Products: a. Only can trade and/or transfer imported Horticultural Products to a Distributor; and b. Are forbidden from trading and/or transferring imported Horticultural Products directly to consumers or retailers".[2109]

7.739. If we examine the text of MOT 16/2013, as amended, we see that its goal appears to be the protection of consumers, promotion of business certainty and transparency, and the simplification of the licensing process and the administration of imports.[2110] Although the text does mention the protection of consumers, we find no reference indicating that such protection is specifically against food safety risks. We also observe that MOT 16/2013, as amended, mandates that "technical enquiries" be carried out by Surveyors on all horticultural product imports at the port of origin.[2111] In this respect, Article 22(1) of MOT 16/2013, as amended, provides that the Surveyor conducting the technical inquiry must examine and verify the country of origin, port of origin, type and volume of product, shipping time, port of destination, phytosanitary certificate for fresh horticultural products; certificate of origin, and packaging and labelling requirements. These health and phytosanitary certificates are not regulated through MOT 16/2013. We thus fail to see how any of these legal instruments confirm that Measure 6 was formulated to protect food safety.

7.740. Having examined the design of Measure 6, we fail to see any connection with human, animal or plant life or health that could lead us to conclude that Measure 6 is "not incapable"[2112] of protecting human, animal or plant life or health. Indonesia maintains that Measure 6 ensures that imported horticultural products are moved through channels of distribution that are highly traceable, as opposed to through the ephemeral network of open air markets, and that the Measure is vital to protect the public from the consequences of food-borne health risks.[2113] We do not think that the design, architecture and revealing structure of this Measure is intended to achieve such a goal. This measure does not protect consumers from unsafe food but rather relates to the limitations imposed by Indonesia on to whom imported horticultural products can be sold directly by importers. In this sense, the final destination of the products is not controlled by Measure 6. This means that imported products can be, and are, sold through open air markets, provided they are first sold to a distributor. In that sense, we concur with the co-complainants[2114]

[2104] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, paras. 106-109; United States' first written submission, paras. 70-72.

[2105] Article 15 of MOT 16/2013, as amended by MOT 47/2013, provides: "Businesses that have received Confirmation as a RI-Horticultural Products: a. Only can trade and/or transfer imported Horticultural Products to a Distributor; and b. Are forbidden from trading and/or transferring imported Horticultural Products directly to consumers or retailers", Exhibit JE-10.

[2106] Articles 26(e) and 26(f) of MOT 16/2013, as amended, Exhibit JE-10.

[2107] United States' second written submission, para. 208 (referring to MOA 86/2013, Exhibit JE-15; MOT 16/2013, as amended by MOT 47/2013, Exhibit JE-10).

[2108] Exhibit JE-10.

[2109] Exhibit JE-10.

[2110] Consideration (a) of MOT 16/2013, as amended by MOT 47/2013, Exhibit JE-10.

[2111] Articles 21-23 and 25 of MOT 16/2013, as amended by MOT 47/2013, JE-10.

[2112] Appellate Body Report, *Colombia – Textiles*, para. 5.68.

[2113] Indonesia's first written submission, para. 160; opening statement at the first substantive meeting of the Panel, para. 34.

[2114] New Zealand's second written submission, para. 260; United States' second written submission, para. 183.

that Measure 6 actually lengthens the supply chain, likely making traceability of harmful bacteria and foodborne pathogens more difficult. In addition, such a justification would not be valid in the case of PIs since the imported products that have not been used in the production process cannot be transferred or sold to retailers and consumers.

7.741. We note that, when arguing that MOT 71/2015 - a measure not at issue in this dispute - and MOA 86/2013 as a whole were enacted to protect food safety for human consumption with respect to horticultural products[2115], Indonesia provides an example to justify that this is the goal of its end-use requirements. However, Indonesia's example relates to preventing frozen meats from being sold in traditional markets because of the dangers that arise from freezing, thawing and refreezing meats.[2116]

7.742. We therefore conclude that Indonesia has not demonstrated that there is a relationship between Measure 6 and the protection of human, animal or plant life or health. Accordingly, we find that Indonesia has not demonstrated that Measure 6 is provisionally justified under subparagraph (b) of Article XX of the GATT 1994.

7.3.13.2.4 Conclusion

7.743. In the light of the foregoing, we find that Indonesia has failed to demonstrate that Measure 6 is justified under Article XX(b) of the GATT 1994.

7.3.14 Whether Measure 6 (Use, sale and distribution requirements for horticultural products) is justified under Article XX(d) of the GATT 1994

7.3.14.1 Arguments of the Parties

7.3.14.1.1 Whether Measure 6 is provisionally justified under subparagraph (d) of Article XX of the GATT 1994

7.3.14.1.1.1 Indonesia

7.744. Indonesia argues that its end use limitations are necessary to protect human, animal or plant life or health, and to secure compliance with Indonesia's food safety requirements in accordance with Article XX subparagraphs (b) and (d). Indonesia argues that, by limiting the distribution channels available to certain imports, Indonesian officials with limited resources are better able to track the origin of products that contain pathogenic bacteria and therefore reduce the spread of such bacteria into the food supply of the general public. In its view, these measures ensure that imported horticultural products are moved through channels of distribution that are highly traceable, as opposed to through the ephemeral network of open air markets, and are vital to protect the public from the consequences of food-borne pathogens.[2117]

7.3.14.1.1.2 New Zealand

7.745. New Zealand submits that Indonesia conflates its defences under Article XX(b) and Article XX(d), arguing that its measure "is necessary to protect human, animal or plant life or health, and to secure compliance with Indonesia's food safety requirements in accordance with Article XX subparagraphs (b) and (d)".[2118] According to New Zealand, 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 specifically identified either the laws and regulations with which this measure is designed to ensure compliance, or the relevant provisions within those laws and regulations. New Zealand contends that Indonesia's argument is

[2115] Indonesia's second written submission, para. 110.
[2116] Indonesia's second written submission, para. 110 (referring to Corina Gambuteanu, Daniela Borda and Petru Alexe, The Effect of Freezing and Thawing on Technological Properties of Meat: Review, p. 89 available at http://www.journal-of-agroalimentary.ro/admin/articole/48037L15_Vol_19_1_2013_88-92.pdf, Exhibit IDN-57).
[2117] Indonesia's second written submission, para. 245.
[2118] New Zealand's second written submission, para. 256 (referring to Indonesia's first written submission, para. 160; opening statement at the first meeting of the Panel, para. 34).

based on a mere assertion of a long list of food safety laws and regulations, without any explanation[2119], and thus the Panel should not be bound by Indonesia's vague assertions.[2120]

7.746. Responding to the argument that "the measure distinguishes the use, sale and transfer of imports from Producer Importers and Registered Importers" and "that this information is specifically used to calculate the national supply and demand for specific horticultural goods"[2121], New Zealand contends that it is unclear how this justification relates to either customs enforcement, or to the challenged measure, and that Indonesia has not explained which laws or regulations the measure is "necessary to secure compliance with" let alone why it is "necessary".[2122] In New Zealand's view, even if the first element of Article XX(d) were met, Indonesia does not explain how imposing an additional distribution layer for imported fresh horticultural products would contribute to ensuring compliance with food safety laws, thus demonstrating that the measure is "necessary". New Zealand submits that an extra distribution layer would rather seem to add to the difficulty of tracing the origin of products.[2123] In this light, New Zealand considers that Indonesia has failed to establish that its end-use restrictions for horticultural products are "necessary" to secure compliance with any WTO-consistent laws and regulations. New Zealand argues that, weighed against its significant trade-restrictiveness, the measure is not "necessary" and that it is therefore not required to elaborate on an alternative measure.[2124] However, New Zealand suggested that a less trade-restrictive alternative measure might involve public education programs on the importance of safe food handling.[2125]

7.3.14.1.1.3 United States

7.747. The United States contends that, since no WTO-consistent law or regulation is identified with which the measure is supposedly necessary to secure compliance, and since no evidence is presented showing that the challenged measure is designed to secure compliance with such a law or regulation, Indonesia's Article XX(d) defence must fail. Furthermore, according to the United States, the measure would not meet the "necessary" legal standard.[2126] The United States argues that Indonesia has not explained how requiring horticultural products imported for consumption to be sold only through a distributor would allow importers to better track bacteria in the food supply. In the United States' view, the challenged measure does not limit the retail outlets where imported horticultural products can be sold ultimately.[2127] Rather, the measure includes an additional intermediary in the supply chain for imported horticultural products sold for consumption, thereby artificially extending it and imposing additional, unnecessary costs on importation.[2128] According to the United States, lengthening the supply chain will likely make tracking products more difficult.[2129]

7.748. Further, to the extent that Indonesia is advancing a defence of the whole challenged measure, the United States considers that Indonesia has not explained why PIs are prohibited from transferring or selling products not used in their own production process. Therefore, even if Indonesia could sustain a defence of the requirement that importers sell directly to distributors only – which it cannot – according to the United States, Indonesia would still not have established a defence of the measure as challenged by the co-complainants.[2130] According to the United States, Indonesia's argument also ignores the fact that Indonesia has health and SPS requirements that apply to covered horticultural products. Specifically, it argues, importers of fresh horticultural products must obtain a health certificate and a phytosanitary certificate prior to importation.[2131] The United States argues that, because the use, sale, and transfer requirements make no demonstrated contribution to tracking bacteria in the food supply, a less trade-restrictive alternative measure that preserves Indonesia's chosen level of protection with respect to bacteria

[2119] New Zealand's second written submission, para. 257 (referring to Indonesia's responses to Panel question No. 20.
[2120] Appellate Body Report, *EC – Seal Products*, para. 5.144.
[2121] Indonesia's second written submission, para. 245.
[2122] New Zealand's opening statement at the second substantive meeting, para. 73.
[2123] New Zealand's second written submission, para. 258.
[2124] New Zealand's second written submission, paras. 259-261.
[2125] New Zealand's second written submission, paras. 261.
[2126] United States' second written submission, paras. 157-158 (referring to Indonesia's response to Panel question No. 71).
[2127] United States' first Written submission, para. 193.
[2128] United States' first written submission, paras. 194-195.
[2129] United States' second written submission, para. 159.
[2130] United States' second written submission, para. 160.
[2131] United States' second written submission, para. 161 (referring to Article 22(1) MOT 16/2013, as amended by MOT 47/2013, Exhibit JE-10).

in the food supply would be to eliminate the requirement and continue to rely instead on these other requirements, which relate specifically to Indonesia's stated objective, i.e. food safety.

7.3.14.1.2 Whether Measure 6 is applied in a manner consistent with the *chapeau* of Article XX

7.749. Concerning the parties' arguments about the *chapeau* of Article XX of the GATT 1994, see Section 7.3.5.1.2 above.

7.3.14.2 Analysis by the Panel

7.750. We have found in Section 7.3.5.2.3 above that Indonesia has failed to identify specific rules, obligations, or requirements contained in WTO-consistent laws or regulations for the purpose of its defence under Article XX(d) of the GATT 1994. Given that Indonesia's arguments concerning the identification of WTO-consistent laws or regulations for the purpose of its defence under Article XX(d) of the GATT 1994 were submitted with respect to all the relevant measures at issue, including Measure 6, we find that Indonesia has not demonstrated that Measure 6 is provisionally justified under subparagraph (d) of Article XX of the GATT 1994.

7.751. We therefore find that Indonesia has failed to demonstrate that Measure 6 is justified under Article XX(d) of the GATT 1994.

7.3.15 Whether Measure 7 (Reference prices for chillies and shallots for consumption) is justified under Article XX(b) of the GATT 1994

7.3.15.1 Arguments of the Parties

7.3.15.1.1 Whether Measure 7 is provisionally justified under subparagraph (b) of Article XX of the GATT 1994

7.3.15.1.1.1 Indonesia

7.752. Indonesia submits that the reference price system is justified under Article XX(b) of the GATT 1994 because it is necessary for food safety and food security.[2132] For Indonesia, the reference price system is an integral part of its food safety and security plan, and is necessary to protect human, plant, or animal life or health[2133], particularly against the harmful oversupply of perishable food items in equatorial heat and the consequences of extreme price volatility on the domestic availability of a continuous supply of chillies and shallots.[2134] Indonesia's Food Security Council determines the national food safety and security goals and objectives, which are then implemented through a multi-agency taskforce that includes the Ministry of Agriculture's Agency for Food Security and the Ministry of Trade.[2135] In Indonesia's view, the reference price system is a limited tool used to avert immediate threats to the Indonesian food supply.[2136]

7.753. According to Indonesia, this measure reflects the importance of chillies and fresh shallots to the Indonesian food supply given their ubiquity in local cuisine. Indonesia adduces that many Indonesians in poorer rural communities tend to store these products for far too long. The resulting spoilage and nutritional depletion is considered a public health issue by Indonesia. Food insecurity and under-nutrition are persistent threats in poorer communities, as demonstrated by the alarmingly high rate of stunting, or chronic malnutrition that results in under-development.[2137] Further, Indonesia holds that the risk of consuming decayed chilli and shallots intensifies with oversupply, creating a health risk for human consumption.[2138] Indonesia also observes that reference prices are established by taking into account certain elements, including supply and

[2132] Indonesia's second written submission, para. 207(b).
[2133] Indonesia's first written submission, para. 154; second written submission, para. 238.
[2134] Indonesia's second written submission, para. 197.
[2135] Indonesia's response to Panel question No. 18.
[2136] Indonesia's response to Panel question No. 18.
[2137] Indonesia's response to Panel question No. 18 (referring to Exhibit IDN-26, showing that in 2007, an estimated 7.7 million children under 5 years of age (36.8%) were stunted).
[2138] Indonesia's second written submission, para. 110 (referring to Exhibits IDN-59 and IDN-60); oral statement at the second substantive meeting, para. 33.

demand in the local market. Accordingly, Indonesia considers that market prices falling below reference prices are an indicator of oversupply.[2139]

7.3.15.1.1.2 New Zealand

7.754. New Zealand submits that Indonesia's argument does not meet the standard of Article XX(b).[2140] In its view, Indonesia has not demonstrated that the protection of human health is the objective of its reference price for chilli and shallots and has not provided the details of its "food safety and security plan". New Zealand considered that Indonesia conflates the concepts of "food safety" and "food security" and questioned whether the latter objective, as used by Indonesia, would fall under the Article XX(b) exception.[2141] In its view, Indonesia seems to be equating "food security" to protecting local producers rather than ensuring people have safe food.[2142] It further contended that Indonesia has not explained how the measures at issue contribute to the objectives of food security, even if it were relevant.[2143] New Zealand submitted that, to the contrary, the import-limiting measures appear to have had the effect of exacerbating food shortages, driving up prices and causing consequent flow-on effects on nutrition.[2144]

7.755. New Zealand argues that, since the government decree stipulating the reference price for chilli and shallots states that the reference price "is used as instrument [sic] for consumption, taking into account harvest season and availability of domestic supply"[2145], contrary to Indonesia's claim, the evidence shows that the purpose of the measure is in fact "to protect domestic horticultural farmers".[2146] New Zealand further contends that Indonesia relies on a general article for consumers on spoilage of fruit and vegetables that does not specifically demonstrate the existence of any "risk of consuming decayed chilli or shallots", and hence fails to demonstrate that the reference price measure for chilli and shallots is intended to protect food safety. [2147]

7.756. New Zealand submits that, even if the first element of Article XX(b) were satisfied, Indonesia has not explained how the measure contributes to the protection of human health. In particular, New Zealand points out that Indonesia has supplied no credible evidence of occurrences of "harmful oversupply" (whether chillies and shallots, or beef), nor of any prospect of "immediate crisis" or "immediate threats to the Indonesia food supply"[2148], in order to demonstrate that its reference price requirements contribute to the protection of human, animal or plant life or health under Article XX(b). Further, New Zealand maintains that Indonesia has not described how this measure, which operates to prevent the importation of chilli and shallots when the market price for such products falls below the reference price, could in any way improve the situation of "food insecurity", "under-nutrition in Indonesia's poorer communities", "stunting" or "chronic malnutrition that results in underdevelopment".[2149] In New Zealand's view, there is no genuine relationship of ends and means between the objective pursued and the measure at issue and no evidence of a contribution of that measure to the objective.[2150] In its view, the design and structure of this measure do not indicate that it is necessary to protect Indonesian citizens from public health threats.[2151] New Zealand further contends that, to the contrary, the information supplied by Indonesia points to chronic undersupply of food, persistent threats of food insecurity

[2139] Indonesia's second written submission, paras. 239-240.
[2140] New Zealand's second written submission, para. 270.
[2141] New Zealand's opening statement at the second substantive meeting, para. 37 (New Zealand refers to, for example, Indonesia's second written submission, paras. 123, 207(b), section III.D.2).
[2142] New Zealand's opening statement at the second substantive meeting, para. 37, with reference to Exhibit IDN-64. New Zealand underlines that, while acknowledging the political appeal of trade barriers to promote domestic production, the paper notes that these policies tend to fail on three counts: they lead to higher domestic prices which increases poverty, they stifle economic growth and, "ironically, they fail to recognize the crucial role of international trade … in Indonesia's own food security", p.7.
[2143] New Zealand's opening statement at the second substantive meeting, para. 38.
[2144] New Zealand's opening statement at the second substantive meeting, para. 38 (referring to Exhibits NZL-25, NZL-41, NZL-64, NZL-66; Exhibits USA-100, USA-101 and USA-103; Exhibit IDN-5, at p. 27, referring to domestic production of beef not meeting demand).
[2145] Third stipulation of Reference Price Government Decree (Exhibit NZL-58).
[2146] New Zealand's second written submission, para. 271 (referring to Exhibit NZL-59, para. 3).
[2147] New Zealand's response to Panel question No. 123 (referring to Exhibit IDN-59).
[2148] New Zealand's opening statement at the second substantive meeting, para. 81 (referring to Indonesia's response to Panel questiond No. 17, 18 and 27; and Indonesia's "food security plan", Exhibit IDN-25).
[2149] Indonesia's response to the Panel Question no. 18, paras. 19-20.
[2150] New Zealand's second written submission, para. 272.
[2151] New Zealand's opening statement at the second substantive meeting, paras. 79-80 (referring to Indonesia's second written submission, para. 240).

and chronic malnutrition in poorer communities.[2152] From New Zealand's perspective, 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.[2153]

7.757. Accordingly, New Zealand holds that Indonesia has failed to establish that the reference price for chilli and shallots is "necessary" for the purposes of protecting human health. The measure is trade-restrictive, preventing the importation of chilli and shallots.[2154] Such trade-restrictiveness, in New Zealand's view, outweighs any contribution the measure might make to the protection of human health. Although New Zealand does not consider that it is necessary to elaborate on a less trade-restrictive alternative measure, New Zealand suggests that undertaking a public education programme on the safe storage of food might address the immediate concern identified by Indonesia. Also, allowing market forces to operate would be a more effective (and less trade-restrictive) way to ensure Indonesia has a continuous supply of fresh chilli and shallots.[2155]

7.3.15.1.1.3 United States

7.758. The United States argues that Indonesia's defence under Article XX(b) of the GATT 1994 must fail on several grounds. First, Indonesia has not shown that the objective of its reference price requirements is to protect human health. The United States agreed with New Zealand that Indonesia conflates the food security and food safety concepts.[2156] As the party invoking Article XX(b), Indonesia bears the burden of explaining its objective of "food security" and demonstrating the connection between "food security" and the protection of human, animal or plant life or health.[2157] For the United States, Indonesia has given no explanation on the relationship between "food security and the protection of human health".[2158] In its view, just as Indonesia has failed to demonstrate that any of its measures are necessary to the achievement of a food safety objective, it has not provided any evidence demonstrating that any of the challenged measures are necessary to the achievement of a food security objective.

7.759. The United States argues that Indonesia has not referred to anything in the text, structure, or legislative history of the reference price requirements (respectively for chillies and fresh shallots for consumption, and for cattle and bovine products) suggesting that the "objective pursued by" the reference price requirements is the protection of human health. The United States considers that Indonesia's argument rests entirely on its assertion that this is the case. The United States observes that Indonesia's own description of its food security plan[2159] makes no mention of the reference price requirements, oversupply problems, or Indonesia's import licensing regimes more generally.[2160] The United States further argues that, even if protection of human health were the objective of the challenged measure, Indonesia has not presented any evidence that the reference price requirements make any contribution to the protection of human health. Also, despite Indonesia's assertion that oversupply of horticultural product food items is a health threat, there is no evidence that an oversupply problem exists. In its view, Indonesia presents evidence acknowledging that food scarcity and under-nutrition are prevalent in Indonesia.[2161] In fact, supply shortages of chilli and shallots are both prevalent and harmful.[2162]

[2152] Indonesia's responses to Panel question No. 18; Exhibit IDN-78; Exhibit IDN-51; Exhibit IDN-4.
[2153] New Zealand's opening statement at the second substantive meeting, para. 81 (referring to Exhibit NZL-12).
[2154] New Zealand's second written submission, para. 273 (referring to its first written submission, paras. 259-262).
[2155] New Zealand's second written submission, para. 274.
[2156] United States' response to Panel question No. 122 (referring to New Zealand's oral statement at the first substantive meeting, para. 37).
[2157] United States' response to Panel question No. 122 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 144–145; *see also EC – Seal Products*, para. 5.169).
[2158] Indonesia's second written submission, paras. 123 and 207.
[2159] United States' second written submission, para. 191; Indonesia's response to Advanced Panel questions No. 18 and 27.
[2160] United States' second written submission, para. 191 (referring to Exhibit IDN-25).
[2161] United States' second written submission, para. 192 (referring to Indonesia's first written submission, paras. 18-19; and Exhibits US-99 and US-72).
[2162] Exhibits US-100 to US-103.

7.760. On the health risks from consuming decayed chilli and shallots, and the two both blog posts cited by Indonesia in support of this assertion[2163], the United States contends that neither exhibit mentions Indonesia at all, let alone suggests a connection between its import licensing regime or any of the individual challenged measures and food safety.[2164] The United States argues that, even if the requirement made a contribution to the protection of human health, it would have to be "necessary" in light of the significant trade-restrictiveness of the measure, in order to satisfy Article XX(b). The United States alleges that Indonesia attempts to downplay the trade-restrictiveness of the reference price systems by noting that the prohibition "is not continuously in effect".[2165] The United States observes that the reference price requirement conditions all importation of the covered products on the Indonesian market prices of chillies, shallots, and secondary cuts of beef remaining above their respective reference prices, imposing a complete ban on these products if domestic market prices fall below this level.[2166] Additionally, the United States argues that the reference price has a limiting effect on importation at all times because the threat of such a broad ban reduces incentives for importation.[2167] In the United States' view, a measure would have to make a significant contribution to the objective of human health in order to justify such a level of trade-restrictiveness.

7.3.15.1.2 Whether Measure 7 is applied in a manner consistent with the *chapeau* of Article XX

7.761. Concerning the parties' arguments about the *chapeau* of Article XX of the GATT 1994, see Section 7.3.5.1.2 above.

7.3.15.2 Analysis by the Panel

7.3.15.2.1 Introduction

7.762. The task before the Panel is to determine whether Measure 7 (Reference prices for chillies and shallots) is justified under Article XX(b) of the GATT 1994. We commence with the text of the relevant provision and the ensuing legal standard.

7.3.15.2.2 The relevant legal provision

7.763. Article XX of the GATT 1994 reads, in relevant part, as follows:

> Article XX
>
> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (*a*) ...
>
> (*b*) necessary to protect human, animal or plant life or health;
>
> ...

[2163] Indonesia's second written submission, para. 110 (referring to Exhibits IDN-59 (explaining to consumers the causes behind vegetable spoilage and encouraging them to select produce carefully, store it properly, and purchase frozen items as alternatives to fresh ones) and IDN-60 (encouraging consumers to eat more vegetables and to store them correctly, wash them in uncontaminated water, and avoid pre-packaged salads if they were stored in unsanitary conditions)).

[2164] United States' response to Panel question No. 123.

[2165] Indonesia's Response to Advanced Panel question No. 18; Indonesia's Response to Advanced Panel question No. 27.

[2166] United States' second written submission, para. 193 (referring to its first written submission paras. 199-200, 310-313).

[2167] United States' first written submission, paras. 314-315.

7.764. Concerning the legal standard under this provision, we refer to Section 7.3.8.2.2 above. The task before the Panel is therefore to determine whether Measure 7 (Reference price for chillies and shallots) is justified under Article XX(b) of the GATT 1994. We commence by examining whether Indonesia has demonstrated that Measure 7 is provisionally justified under subparagraph (b) of Article XX of the GATT 1994.

7.3.15.2.3 Whether Indonesia has demonstrated that Measure 7 is provisionally justified under Article XX(b) of the GATT 1994

7.765. Under this tier of our analysis, the task before the Panel is to establish whether, as claimed by Indonesia, Measure 7 is provisionally justified by subparagraph (b). As explained before, we shall examine whether Indonesia has demonstrated that Measure 7 is designed to protect human, animal or plant life or health and, if so, whether it is necessary for such protection.

7.766. Concerning the first element, i.e. whether Measure 7 is designed to protect human, animal or plant life or health, we note that Indonesia has argued that the reference price system is an integral part of Indonesia's food safety and security plan, and is necessary to protect human, plant, or animal life or health[2168], particularly against the harmful oversupply of perishable food items in equatorial heat and the consequences of extreme price volatility on the domestic availability of a continuous supply of chillies and shallots.[2169] Indonesia held that the risk of consuming decayed chilli and shallots intensifies with oversupply, creating a health risk for human consumption.[2170] Furthermore, the resulting spoilage and nutritional depletion is considered a public health issue by Indonesia.[2171]

7.767. The co-complainants responded that Indonesia's argument does not meet the standard of Article XX(b) because Indonesia has not demonstrated that the protection of human health is the objective of its reference price for chilli and shallots.[2172]

7.768. We recall that this first step in the analysis calls for an initial, threshold examination in order to determine whether there is a relationship between an otherwise WTO-inconsistent measure and the protection of human, animal or plant life or health.[2173] We note that Indonesia has identified food safety and food security[2174] as the objectives being addressed by this Measure. The co-complainants do not question that food safety falls under the purview of the protection of human, animal or plant life or health under subparagraph (b) of Article XX. They have however contested that "food security" is covered under subparagraph (b).

7.769. New Zealand has thus argued that Indonesia is conflating the concepts of "food safety" and "food security" and questioned whether the latter objective, as used by Indonesia, would fall under the Article XX(b) exception.[2175] In its view, Indonesia seems to be equating "food security"

[2168] Indonesia's first written submission, para. 154; second written submission, para. 238.

[2169] Indonesia's Executive Summary, para. 18; second written submission, para. 197.

[2170] Indonesia's second written submission, para. 110 (referring to Exhibits IDN-59 and IDN-60); and oral statement at the second substantive meeting, para. 33.

[2171] Indonesia's responses to Panel question No. 18 (referring to Exhibit IDN–26).

[2172] New Zealand's second written submission, para. 270; United States' second written submission, para. 191.

[2173] *See* Appellate Body Report, *Colombia – Textiles*, para. 5.67, in the context of Article XX(a) and *Argentina – Financial Services*, para. 6.203, in the context of Article XIV(c) of the GATS, which mirrors Article XX(d) of the GATT 1994.

[2174] In its second written submission, Indonesia maintained that a number of measures, including Measure 7, were necessary for, *inter alia*, food security. Indonesia indicated as follows:

> ...
> (b) the requirement that imports of fresh horticultural products not be harvested more than six months from the date of importation, the domestic harvest period limitations, restrictions on end-use, the harvest time period, limitations for animal products, the storage capacity requirement, the positive list, and the reference price are justified under Article XX (b) of the GATT because these measures are necessary for food safety and food security.
> Indonesia's second written submission, para. 207(b).

The Panel observes that, although Indonesia has indicated a food security objective for measures other than Measure 7, this is the first instance that the Panel finds specific argumentation from Indonesia defending a measure as having a food security objective. We have therefore decided to examine this issue within our analysis of Indonesia's defence of Measure 7 under Article XX(b).

[2175] New Zealand's opening statement at the second substantive meeting, para. 37; New Zealand refers to, for example, Indonesia's second written submission, paras. 123, 207(b), section III.D.2.

to protecting local producers rather than ensuring people have safe food.[2176] The United States agreed with New Zealand[2177] and submitted that, as the party invoking Article XX(b), Indonesia bears the burden to explain its objective of "food security" and demonstrate the connection between "food security" and the protection of human, animal or plant life or health.[2178] For the United States, Indonesia has given no explanation on the relationship between "food security and the protection of human health".[2179]

7.770. Indonesia however maintained that the concepts of food safety and food security are inextricably linked.[2180] According to Indonesia, food insecurity and under-nutrition are persistent threats in poorer communities, as demonstrated by the alarmingly high rate of stunting, or chronic malnutrition that results in under-development.[2181] For Indonesia, securing food supply presumes access to not only enough food to meet caloric intake needs, but also food that is safe for human consumption. Indonesia considered that the co-complainants' arguments seek to detract from Indonesia's legitimate objectives of protecting, simultaneously, the safety and security of its food supply through a suite of measures, including measures relating to imported food products, consistent with Indonesia's obligations to both its trading partners and its citizens.[2182]

7.771. We observe that Indonesia has not provided us with any persuasive argumentation on whether its food security concerns would fall within subparagraph (b). Nonetheless, as we explain below, if we were to examine whether there is a relationship between Indonesia's food security policy objective, as defined above, and Measure 7, our conclusion would be that there is none.

7.772. We thus proceed to examine the evidence regarding the design of the measure at issue, including its content, structure, and expected operation to establish whether a relationship exists between Measure 7 and the policy objectives put forward by Indonesia.[2183] We understand that a measure that does not expressly refer to a human, animal or plant life or health objective may still be found to have such a relationship with human, animal or plant life or health following an assessment of the design of the measure at issue, including its content, structure, and expected operation.[2184] In this respect, as described in Section 2.3.2.7 above, Measure 7 consists of the implementation of a reference price system by the Ministry of Trade on imports of chilli and fresh shallots for consumption.[2185] Indonesia implements this Measure by means of Article 5(4) of MOA 86/2013 and by Article 14B of MOT 16/2013, as amended by MOT 47/2013. Pursuant to these provisions, importation is suspended when the domestic market price falls below the pre-established reference price. Whenever the reference price system is activated, imports are temporarily suspended, independently of whether an importer holds an RIPH and/or an Import Approval. Already authorized import volumes do not "carry over" to the next validity period.[2186] Imports are resumed when the market price again reaches the reference price. We recall that, in Section 7.2.11.3 above, we concluded that Measure 7 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation.

7.773. We observe that nothing in the text of the regulations implementing this measure and, in particular, Article 5(4) of MOA 86/2013 and by Article 14B of MOT 16/2013, as amended, refers to food safety or food security as policy objectives. We note that in its initial section, MOT 16/2013,

[2176] New Zealand's opening statement at the second substantive meeting, para. 37 (referrint to Exhibit IDN-64). New Zealand underlines that, while acknowledging the political appeal of trade barriers to promote domestic production, the paper notes that these policies tend to fail on three counts: they lead to higher domestic prices which increases poverty, they stifle economic growth and, "ironically, they fail to recognize the crucial role of international trade … in Indonesia's own food security", p.7.

[2177] United States' response to Panel question No. 122 (referring to paragraph 37 of New Zealand's oral statement at the first substantive meeting).

[2178] United States' response to Panel question No. 122 (referring to Appellate Body Report, *Brazil – Retreaded Tyres* , paras. 144–145; Appellate Body Report, *EC – Seal Products*, para. 5.169).

[2179] United States' second written submission, paras. 123 and 207.

[2180] Indonesia's response to Panel question No. 121.

[2181] Indonesia's response to Panel question No. 18 (referring to Exhibit IDN-26, showing that in 2007, an estimated 7.7 million children under 5 years of age (36.8%) were stunted).

[2182] Indonesia's responses to Panel question No. 121 (referring to New Zealand's oral statement, para. 37).

[2183] See Appellate Body Reports, *US – Shrimp*, paras. 135-142; *EC – Seal Products*, para. 5.144; *Colombia – Textiles*, para. 5.68.

[2184] Appellate Body Report, *Colombia – Textiles*, para. 5.69, in the context of Article XX(a).

[2185] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 109; United States' first written submission, paras. 75-76.

[2186] *See* Indonesia's response to Panel question No. 13.

as amended, mentions the "protect[ion of] consumers, promot[ion] [of] business certainty and transparency, and [the] simplif[ication] [of] the licensing process and the administration of imports"[2187] as the basis of this regulation. Although it could be argued that the protection of consumers may fall under the scope of the protection of human, animal or plant life or health, an argument that we note Indonesia has not put forward[2188], we see no other basis allowing us to conclude that Measure 7 was designed to protect food safety or food security.

7.774. We observe that the text of these regulations rather points to objectives that are not related to those policies. For instance, MOA 86/2013 refers generally to the simplification of the "import process of horticulture products" and to "providing certainty in the servicing of Import Recommendation of Horticulture Products" as its rationale.[2189] What is more, Article 2 of MOA 86/2013 expressly confirms the underlying rationale by stating that "[t]his Regulation is intended to be the legal basis for issuing RIPH as a requirement for the issuance of import approval" and, similarly, Article 3 of MOA 86/2013 provides that "this Regulation is intended to … increase the effectiveness and efficiency of horticulture product import management; and … provide certainty in RIPH issuing service".[2190] In its initial part, MOA 86/2013 also refers to several domestic regulations and laws concerning a wide array of subjects, including quarantine measures for the importation of fresh fruits and vegetables, the Horticulture Law and the Food law, and even the law regarding the ratification of the WTO Agreement. We fail to see, however, how any of these legal instruments constitutes relevant evidence that the reference price system for chillies and shallots was instituted to protect food safety in the sense of addressing Indonesia's alleged concerns on the harmful oversupply of perishable food items in equatorial heat and the consequences of extreme price volatility on the domestic availability of a continuous supply of chillies and shallots.[2191] The same applies to food security in the sense of securing access to enough safe and nutritious food.[2192]

7.775. Having examined the design of Measure 7, we fail to see any connection with food safety or food security that could lead us to conclude that Measure 7 is "not incapable"[2193] of protecting human, animal or plant life or health. We concur with the co-complainants that Indonesia has not referred to anything in the text, structure, or legislative history of the Measure 7 suggesting that the objective pursued by this Measure is the protection of food safety or food security. We note that, in paragraph 154 of its first written submission, Indonesia mentions that the reference price system for chillies and shallots "is an integral part of Indonesia's food safety and security plan." We have examined the evidence provided by Indonesia by means of Exhibit IDN-25. This is a brochure entitled "Agency for Food Security, at a glance". We have examined this brochure and we have not located any mention of Measure 7; the sole allusion to reference prices relates to a domestic corn reference price applied in Indonesia in order to support the local community food distribution institution. We understand that this allusion has no relation to the reference prices for chillies and shallot at issue in this dispute, which are applied as a border measure to control imports.

7.776. We therefore conclude that Indonesia has not demonstrated that there is a relationship between Measure 7 and the protection of human, animal or plant life or health. Accordingly, we find that Indonesia has not demonstrated that Measure 7 is provisionally justified under subparagraph (b) of Article XX of the GATT 1994.

7.3.15.2.4 Conclusion

7.777. In the light of the foregoing, we find that Indonesia has failed to demonstrate that Measure 7 is justified under Article XX(b) of the GATT 1994.

[2187] Exhibit JE-15.
[2188] Indonesia speaks of harmful oversupply of perishable food items in equatorial heat and the consequences of extreme price volatility on the domestic availability of a continuous supply of chillies and shallots. Indonesia's second written submission, para. 197.
[2189] Exhibit JE-15.
[2190] Article 2 and 3, Exhibit JE-15.
[2191] Indonesia's second written submission, para. 197.
[2192] Indonesia's responses to Panel question No. 121 (referring to New Zealand's oral statement, para. 37).
[2193] Appellate Body Report, *Colombia – Textiles*, para. 5.68.

7.3.16 Whether Measure 8 (Six-month harvest requirement) is justified under Article XX(b) of the GATT 1994

7.3.16.1 Arguments of the Parties

7.3.16.1.1 Whether Measure 8 is provisionally justified under subparagraph (b) of Article XX of the GATT 1994.

7.3.16.1.1.1 Indonesia

7.778. Indonesia explains that in addition to requiring importers to obtain adequate storage capacity to stock the import quantities anticipated for each validity period, Measure 8 is necessary to ensure food safety[2194], namely to ensure that consumers have access to fresh, nutritious, chemical- and preservative-free horticultural products.[2195] According to Indonesia, the requirement has no bearing on whether horticultural products can be stored for longer than six months.[2196] Indonesia explains that, in order to facilitate inspection procedures, health authorities prefer that horticultural products are stored domestically, instead of at the origin country, within six months of harvest time. Accordingly, Indonesia argues that allowing imports at a later date would render the verification of compliance with proper storage procedures impossible, particularly given the prevailing equatorial climate.[2197] Indonesia explains that, as it requires importers to obtain adequate storage capacity to house anticipated imports as a consequence of Measure 5, storage capacity is already available in Indonesia for importers who wish to store horticultural products for longer than six months.[2198] For Indonesia, it is not difficult to understand why its health authorities would prefer such produce to be stored locally as opposed to entering the market at a much later date when it is impossible to verify that proper storage procedures have been followed. Indonesia sustains that in its equatorial climate, proper food storage is of utmost importance.[2199]

7.779. Indonesia contends that not all fresh fruits can be stored for longer than six months without any degradation in quality and nutritional value.[2200] Indonesia argues that the application of hazardous chemical substances may be used to preserve horticultural products for longer periods.[2201] However, it argues, research suggests that fresh fruits stored for several months can be unsafe, with tropical fruits having a post-harvest life of a few weeks at most[2202], and recourse to controlled atmosphere may modify flavour, composition, nutritional value, and quality.[2203]

7.3.16.1.1.2 New Zealand

7.780. In New Zealand's view, Indonesia fails to demonstrate that the objective of the measure is protecting human health[2204], and only barely asserts this objective without any supporting evidence. New Zealand argues that the design and structure of the regulations do not demonstrate that the policy objective of the six-month harvest requirement is protecting human health. New Zealand observes that the actual purpose of the regulations in which the six-month harvest requirement is contained as a prerequisite for obtaining an RIPH is stated as being to "increase the effectiveness and efficiency of horticulture product import management" and "provide certainty in RIPH issuing service".[2205] In this respect, New Zealand contends that the underlying rationale of the requirements is rather to promote domestic production at the expense of imports.[2206]

[2194] Indonesia's second written submission, para. 201.
[2195] Indonesia's second written submission, para. 218; opening statement at the second substantive meeting, para. 33.
[2196] Indonesia's first written submission, para. 151.
[2197] Indonesia's first written submission, para. 151.
[2198] Indonesia's first written submission, paras. 88 and 150.
[2199] Indonesia's first written submission, paras. 88 and 150.
[2200] Indonesia's second written submission, paras. 110 and 219 (referring to Exhibit IDN-73). According to Indonesia, avocados and grapes last eight weeks at most; mangoes three weeks; oranges 12 weeks; and carrots six weeks; opening statement at the second substantive meeting, para. 33.
[2201] Indonesia's second written submission, para. 219 (referring to Exhibits IDN-55,IDN-56; and IDN-73); Indonesia's opening statement at the second substantive meeting, para. 33).
[2202] Indonesia's second written submission, para. 220 (referring to Exhibit IDN-74).
[2203] Indonesia's second written submission, para. 220 (referring to Exhibit IDN-75).
[2204] New Zealand's second written submission, paras. 278-279.
[2205] New Zealand's second written submission, para. 279 (referring to Article 3 of MOA 86/2013, Exhibit JE-15).
[2206] New Zealand's first written submission, paras. 70-71.

7.781. New Zealand asserts that, even if the first element of Article XX(b) were satisfied, Indonesia has not explained why the measure is necessary to protect human health, or how it contributes to food safety. New Zealand finds two of Indonesia's arguments contradictory. First, Indonesia argues that its equatorial climate affects food safety, yet claims that it is better to store products in Indonesia.[2207] Second, Indonesia argues that it has "limited capacity" to store imported horticultural products[2208], yet claims that "storage capacity is already available in Indonesia for importers who wish to store horticultural products for longer than [six] months".[2209] New Zealand contends that no evidence has been produced by Indonesia to support either proposition.[2210] New Zealand observes that, in its second written submission, Indonesia claims that the purpose of the measure is to ensure that horticultural products are fresh, nutritious, chemical and preservative-free, safe and of good quality, and argues that not all fresh fruit can be stored for longer than six months, and may be exposed to hazardous chemicals in order to last longer.[2211] In New Zealand's view, the measure is arbitrary as it makes no distinction based on factors such as storage life: some horticultural products have a storage life that is longer than six months[2212], as previously acknowledged by Indonesia.[2213] Moreover, New Zealand does not accept that the purpose of the six-month harvest requirement is to protect against "hazardous chemicals": food safety control and the six-month harvest requirement are separately regulated through Indonesian laws that are not at issue in this dispute.[2214] New Zealand observes that none of the exhibits cited by Indonesia support its assertions.[2215] For the sake of argument, New Zealand holds that, even if the measure did contribute to the protection of human health by enhancing food safety, its trade-restrictiveness (i.e., import prohibition on horticultural products harvested more than six months previously) outweighs any possible contribution towards such objective.[2216] In New Zealand's view, after weighing and balancing the relevant factors, it follows that Indonesia has not established that a six-month harvest requirement is "necessary" for the purposes of protecting human health.[2217] For these reasons, New Zealand does not consider it is necessary to elaborate on a less trade-restrictive alternative measure. New Zealand notes, however, that Indonesia already requires a health certificate and a phytosanitary certificate for fresh horticultural products. Indonesia has not explained why these requirements, which seem to be designed precisely to achieve the objective Indonesia claims for its six-month harvest requirement, would not be adequate to ensure that imported horticultural products are safe. Accordingly, New Zealand suggests these existing requirements should be considered as less trade-restrictive alternative measures.[2218]

7.3.16.1.1.3 United States

7.782. The United States argues that Indonesia has not established that the six-month requirement has any connection to the protection of human health – either as an objective or in terms of an actual contribution.[2219] With regards to the objective pursued by the measure, the United States contends that Indonesia has not presented any evidence suggesting that the six-

[2207] New Zealand's second written submission, para. 280 (referring to Indonesia's first written submission, paras. 88 and 151).
[2208] New Zealand's second written submission, para. 280 (referring to Indonesia's first written submission, para. 148).
[2209] New Zealand's second written submission, para. 280 (referring to Indonesia's first written submission, paras. 88 and 151).
[2210] New Zealand's second written submission, para. 280.
[2211] New Zealand's opening statement at the second substantive meeting, paras. 82-83 (referring to Indonesia's second written submission, paras. 110 and 218).
[2212] Exhibit IDN-73, showing, *inter alia,* that onions have a storage life greater than six months.
[2213] New Zealand's opening statement at the second substantive meeting, paras. 82-83 (referring to Indonesia's first written submission, para. 150); response to Panel question No. 123 (referring to Exhibit IDN-54, showing that apples and pears can be stored up to 12 months under controlled atmosphere conditions that use low oxygen and high carbon dioxide levels to slow down respiration).
[2214] New Zealand's opening statement at the second substantive meeting, para. 84 (referring to MOA 88/2011 concerning Food Safety Control over the Import and Export of Fresh Food of Plant Origin).
[2215] New Zealand's response to Panel question No. 123 (referring to Exhibit IDN-55, a Jakarta Post article from 2012, which refers to Indonesia's import licensing regime but focuses on labelling requirements and a (former) measure reducing the number of entry gateways, neither of which are being challenged in this dispute; and IDN-56, a photograph of "China-imported oranges", with a caption stating that *"every kilogram of imported fruits contained 9.5-21.1 milligrams of formalin. The WHO stipulates that the level of formalin must not higher than 60 milligrams."*, which, in New Zealand's view does not support Indonesia's assertion that *"In certain cases, fruits are exposed to hazardous chemicals in order to last longer"* and does not show that the six-month harvest requirement has a food safety objective).
[2216] New Zealand's first written submission, paras. 268-270.
[2217] New Zealand's second written submission, para. 281.
[2218] New Zealand's second written submission, para. 282.
[2219] United States' second written submission, paras. 185 and 189.

month harvest requirement aims at ensuring food safety. Further, Indonesia has not rebutted the evidence submitted by the co-complainants that the actual purpose of all of Indonesia's import licensing requirements, including the six-month harvest requirement, is the protection of domestic producers from competition from imports.[2220] The United States contends that, even if the objective of the measure were, in part, the protection of human health, the second element of Article XX(b) would not be satisfied because Indonesia has not shown how the measure would contribute to food safety, let alone make a contribution rising to the level of being "necessary".[2221] The United States observes that Indonesia has not even asserted that the requirement is "necessary" for food safety purposes, merely stating that health authorities "prefer" products to be stored locally. The United States also notes that there is no evidence in the text of the measure to suggest that the Ministries of Agriculture or Trade inspect horticultural products while they are stored in Indonesia, which is the crux of Indonesia's argument. Moreover, Indonesia's reference to its "equatorial climate" undermines rather than supports its argument that, for food safety purposes, it is better for importers to store products in Indonesia.[2222]

7.783. According to the United States, the evidence shows that certain horticultural products could be safely stored for more than six months[2223], thus confirming that the measure is not "necessary" for the protection of human health.[2224] Indonesia has already acknowledged that this requirement "has no bearing" on whether products can be sold to consumers more than six months after harvest, and that some products "can be stored for more than six months . . . when properly refrigerated".[2225] Indonesia's exhibits also confirm the safety and widespread use of controlled atmosphere storage.[2226] Likewise, Indonesia presents evidence on formaline content in imported oranges without even suggesting that its measure is related to such concerns.[2227] As the World Health Organization recommends maximum residue limits for formalin above those reported, the food safety argument that the exhibit was intended to support remains unclear. Moreover, the exhibit does not suggest any connection between the six-month requirement and freshness.[2228] The United States observes that one exhibit mentions Indonesia's import licensing regulations, focusing primarily on aspects of the regulation that are not relevant to this dispute.[2229] Thus, none of Indonesia's exhibits support its defence concerning the six-month harvest requirement.

7.784. The United States holds that Indonesia's argument ignores the fact that Indonesia already has health and SPS requirements in place that apply to horticultural products, including requirements that all imported horticultural products be accompanied by a Health Certificate and an SPS Certificate, which, along with the products to be imported, must be inspected in the country of origin before shipment.[2230] Hence, the United States suggests that a less trade-restrictive and reasonably available alternative measure would be to continue to rely on such requirements and not impose, in addition, the six-month requirement, which is highly trade-restrictive and makes no apparent contribution to food safety.[2231]

7.3.16.1.2 Whether Measure 8 is applied in a manner consistent with the *chapeau* of Article XX

7.785. The parties' arguments about the *chapeau* of Article XX of the GATT 1994 are explained in Section 7.3.5.1.2 above.

[2220] United States' second written submission, para. 186.
[2221] United States' second written submission, para. 187.
[2222] United States' second written submission, para. 187.
[2223] According to the United States, Exhibits IDN-54 and IDN-73 confirm that apples, potatoes, pears, and carrots, *inter alia*, can be stored safely for longer than six months.
[2224] United States' oral statement at the second substantive meeting, para. 50; response to Panel question No. 123.
[2225] United States' oral statement at the second substantive meeting, para. 50 (referring to Indonesia's first written submission, paras. 150-151).
[2226] United States' oral statement at the second substantive meeting, para. 50 (referring to Exhibit IDN-75, stating that controlled atmosphere storage is "used worldwide on a variety of fresh fruits and vegetables" and its benefits "have been amply demonstrated").
[2227] United States' response to Panel question No. 123, referring to Indonesia's second written submission, para. 110; and Exhibit IDN−56.
[2228] United States' response to Panel question No. 123.
[2229] United States' response to Panel question No. 123 (referring to Exhibit IDN-55, mentioning labelling and a now-expired requirement restricting imports to certain ports of entry).
[2230] United States' second written submission, para. 187 (referring to Articles 21-22(g)-(h) of MOT 16/2013, as amended, Exhibit JE-21).
[2231] United States' second written submission, para. 188.

7.3.16.2 Analysis by the Panel

7.3.16.2.1 Introduction

7.786. The task before the Panel is to determine whether Measure 8 (Six-month harvest requirement) is justified under Article XX(b) of the GATT 1994. We commence with the text of the relevant provision and the relevant legal standard.

7.3.16.2.2 The relevant legal provision

7.787. Article XX of the GATT 1994 reads, in relevant part, as follows:

> Article XX
>
> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (*a*) ...
>
> (*b*) necessary to protect human, animal or plant life or health;
>
> ...

7.788. The legal standard under this provision is explained in Section 7.3.8.2.2 above. We commence by examining whether Indonesia has demonstrated that Measure 8 is provisionally justified by subparagraph (b) of Article XX of the GATT 1994.

7.3.16.2.3 Whether Indonesia has demonstrated that Measure 8 is provisionally justified under Article XX(b) of the GATT 1994

7.789. We begin our analysis of Measure 8 by considering whether, as claimed by Indonesia, Measure 8 is provisionally justified by subparagraph (b) of Article XX of the GATT 1994. Thus we shall examine whether Indonesia has demonstrated that Measure 8 is designed to protect human, animal or plant life or health and, if so, whether it is necessary in order to achieve such protection.

7.790. As to whether Measure 8 is designed to protect human, animal or plant life or health[2232], we note that Indonesia argued that this measure is necessary to ensure food safety, which it explains as consumers having access to fresh, nutritious, chemical- and preservative-free horticultural products.[2233] Indonesia explained that, in order to facilitate inspection procedures, Indonesian health authorities prefer that horticultural products are stored domestically instead of at the origin country within six months of harvest time. According to Indonesia, allowing imports after six months from harvest would render the verification of compliance with proper storage procedures impossible, particularly given the prevailing equatorial climate in Indonesia.[2234] Indonesia also contended that not all fresh fruits can be stored for longer than six months without

[2232] In its second written submission, Indonesia indicated as follows:

> ...
> (b) the requirement that imports of fresh horticultural products not be harvested more than six months from the date of importation, the domestic harvest period limitations, restrictions on end-use, the harvest time period, limitations for animal products, the storage capacity requirement, the positive list, and the reference price are justified under Article XX (b) of the GATT because these measures are necessary for food safety and food security.

Indonesia's second written submission, para. 207(b). The Panel observes that, although Indonesia has indicated a food security objective for Measure 8, the specific argumentation put forward by Indonesia with respect to Measure 8 does not appear to include food security concerns.

[2233] Indonesia's second written submission, para. 218; opening statement at the second substantive meeting, para. 33.

[2234] Indonesia's first written submission, para. 151.

any degradation in quality and nutritional value[2235], and that the application of hazardous chemical substances may be used to preserve horticultural products for longer periods.[2236] In this respect, Indonesia submitted that research suggests that fresh fruits stored for several months can be unsafe, with tropical fruits having a post-harvest life of a few weeks at most[2237], and recourse to controlled atmosphere may modify flavour, composition, nutritional value and quality.[2238]

7.791. The co-complainants submitted that Indonesia failed to demonstrate that the objective of the measure is protecting human health and argued that the design and structure of the regulations do not demonstrate a policy objective of protecting human health.[2239] New Zealand observed that the actual purpose of the regulations in which the six-month harvest requirement is contained as a prerequisite for obtaining an RIPH is stated as being to "increase the effectiveness and efficiency of horticulture product import management" and "provide certainty in RIPH issuing service".[2240] New Zealand contended that the underlying rationale of the requirements is to promote domestic production at the expense of imports.[2241] The United States agreed and contended that Indonesia has not rebutted the evidence submitted by the co-complainants that the actual purpose of all of Indonesia's import licensing requirements, including the six-month harvest requirement, is the protection of domestic producers from import competition. In its view, Indonesia did not present any evidence suggesting that the six-month harvest requirement aims at ensuring food safety.[2242]

7.792. As mentioned above, this first step in the analysis calls for an initial, threshold examination in order to determine whether there is a relationship between an otherwise WTO-inconsistent measure and the protection of human, animal or plant life or health.[2243] Indonesia identified food safety[2244] as the objective being pursued by this Measure. The co-complainants did not question that food safety falls under the purview of the protection of human, animal or plant life or health under subparagraph (b) of Article XX. However, they did question the existence of a relationship between Measure 8 and the protection of human health, and in particular, food safety.[2245] We proceed to examine the evidence regarding the design of the measure at issue, including its content, structure, and expected operation, to establish whether such a relationship exists.[2246]

7.793. As described in Section 2.3.2.8 above, Measure 8 consists of the requirement that all imported fresh horticultural products have been harvested less than six months prior to importation.[2247] Indonesia implements this measure by means of Article 8(1)(a) of MOA 86/2013. Pursuant to this provision, in order to obtain an RIPH for fresh horticultural products, an RI must produce a statement committing not to import horticultural products harvested over six months prior to importation. We recall that, in Section 7.2.12.3 above, we concluded that Measure 8 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a prohibition on importation.

7.794. As we mentioned in paragraph 7.631 above, we observe that nothing in the text of the regulations implementing this measure and, in particular, Article 8 of MOA 86/2013, refers to the

[2235] Indonesia's second written submission, paras. 110 and 219 (referring to Exhibit IDN-73). According to Indonesia, avocados and grapes last eight weeks at most; mangoes three weeks; oranges 12 weeks; and carrots six weeks; opening statement at the second substantive meeting, para. 33.

[2236] Indonesia's second written submission, para. 219 (referring to Exhibits IDN-55, IDN-56; Exhibit IDN-73); opening statement at the second substantive meeting, para. 33.

[2237] Indonesia's second written submission, para. 220 (referring to Exhibit IDN-74).

[2238] Indonesia's second written submission, para. 220 (referring to Exhibit IDN-75).

[2239] New Zealand's second written submission, paras. 278-279. United States' second written submission, para. 186.

[2240] New Zealand's second written submission, para. 279 (referring to Article 3 of MOA 86/2013, Exhibit JE−15).

[2241] New Zealand's first written submission, paras. 70-71.

[2242] United States' second written submission, para. 186.

[2243] *See* Appellate Body Report, *Colombia − Textiles*, para. 5.67, in the context of Article XX(a) of the GATT 1994 and *Argentina − Financial Services*, para. 6.203, in the context of Article XIV(c) of the GATS, which mirrors Article XX(d) of the GATT 1994.

[2244] Indonesia's first executive summary, para. 17; second written submission, para. 201. As explained in footnote 2174 above, Indonesia also argued that the objective of this measure is food security. We address this issue in Section 7.3.15.2.3 above.

[2245] New Zealand's second written submission, paras. 278-279; United States' second written submission, paras. 186-187.

[2246] See Appellate Body Reports, *US − Shrimp*, paras. 135−142; *EC − Seal Products*, para. 5.144; *Colombia − Textiles*, para. 5.68.

[2247] New Zealand's Panel Request, pp. 1-4; United States' Panel Request, pp. 1-4; New Zealand's first written submission, para. 111; United States' first written submission, paras. 80 and 204.

protection of human, animal or plant life or health as the policy objective of this measure. On the contrary, we note that MOA 86/2013 refers generally to simplification of the "import process of horticulture products" and to "providing certainty in the servicing of Import Recommendation of Horticulture Products" as its rationale.[2248] We fail to see how the text of MOA 86/2013 could support Indonesia's contention that Measure 8 was formulated to address food safety concerns.

7.795. We nevertheless acknowledge, as we have observed before, that a measure that does not expressly refer to protecting human, animal or plant life or health may be found to have a relationship with protecting human, animal or plant life or health following an assessment of the design of the measure at issue, including its content, structure, and expected operation.[2249] In this vein, we observe that Measure 8 imposes a ban on horticultural products that have been harvested more than six months prior to their importation and that Indonesia linked this measure to food safety arguing that, in order to facilitate inspection procedures, health authorities prefer that horticultural products are stored domestically, instead of at the origin country, within six months of harvest time. Indonesia justified the need for such inspections and the length of the period by alleging that some horticultural products cannot be stored for longer than six months without any degradation in quality and nutritional value[2250], that research suggests that fresh fruits stored for several months can be unsafe[2251], and that recourse to controlled atmosphere may modify flavour, composition, nutritional value and quality.[2252]

7.796. The evidence submitted to the Panel shows that certain horticultural products can be safely stored for more than six months. For instance, Exhibits US-34 and IDN-54 explain that in the case of apples and pears, controlled atmosphere storage using low oxygen concentration content permits this product to be stored for up to 12 months.[2253] However, Exhibit IDN-73, including information from the FAO regarding storage of horticultural crops, indicates that some horticultural products have a short storage life.[2254] We note that, in Exhibit IDN-54, in an academic article entitled "Maximizing the Nutritional Value of Fruits & Vegetables", Dr Diane M. Barrett mentions that "[m]ost perishable commodities, however, are stored under refrigerated conditions, and storage life may range from 8–10 days for highly perishable fruits like berries to 8–10 weeks for less-perishable commodities like squash, pumpkin, apples, grapes, and pears." Dr Barrett also explains that "loss of nutrients during fresh storage may be more substantial than consumers realize, so consumers should be educated about proper storage. Fruits and vegetables should be consumed soon after harvest, or postharvest handling conditions must be controlled such that nutrient degradation does not occur".[2255]

7.797. Given the evidence before us, we agree that food safety, in the sense of consumers' access to fresh, nutritious, chemical- and preservative-free horticultural products, is associated with the storage of certain horticultural products for more than six months after harvest. Thus, in prohibiting the importation of horticultural products harvested more than six months before importation, Indonesia may be said to be pursuing, at least in the sense that Indonesia describes food safety, a food safety objective in connection with some products.[2256] In our view, Measure 8 is not incapable of protecting food safety by prohibiting imports of horticultural goods that may be unsafe for human consumption, and this would therefore indicate the existence of a relationship between this measure and the protection of human, animal or plant life or health.[2257] Although not all horticultural products harvested more than six months prior to their importation pose a threat to food safety, the existence of a number of horticultural products that do is sufficient for us to conclude that there is a relationship between Measure 8 and the objective of food safety, and that this Measure can be said to have been designed, at least in part, to protect human health.

[2248] Exhibit JE-15.

[2249] Appellate Body Report, *Colombia – Textiles*, para. 5.69, in the context of Article XX(a).

[2250] Indonesia's second written submission, paras. 110 and 219 (referring to Exhibit IDN-73. According to Indonesia, avocados and grapes last eight weeks at most; mangoes three weeks; oranges 12 weeks; and carrots six weeks; Indonesia's opening statement at the second substantive meeting, para. 33.

[2251] Indonesia's second written submission, para. 220 (referring to Exhibit IDN-74).

[2252] Indonesia's second written submission, para. 220 (referring to Exhibit IDN-75).

[2253] Exhibit IDN-54; *See also* Exhibit USA-34 (Controlled Atmospheric Storage (CA): Washington State Apple Commission).

[2254] Exhibit IDN-73.

[2255] Exhibit IDN-54, p. 44.

[2256] Indonesia's second written submission, para. 218; opening statement at the second substantive meeting, para. 33.

[2257] Appellate Body Report, *Colombia – Textiles*, para. 5.68.

7.798. Having completed the threshold examination to determine whether there is a relationship between an otherwise WTO-inconsistent measure and the protection of human, animal or plant life or health, we proceed to determine whether Indonesia has demonstrated that Measure 8 is "necessary" to protect human health. We recall that the "necessity test" involves a process of "weighing and balancing" a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure at issue.[2258] In this respect, Indonesia argues that Measure 8 is necessary to ensure food safety[2259], namely that consumers have access to fresh, nutritious, chemical- and preservative-free horticultural products.[2260] Indonesia explains that, in order to facilitate inspection procedures, health authorities prefer that horticultural products are stored domestically, instead of in the origin country, within six months of harvest time. Accordingly, Indonesia argues that allowing imports at a later date would render the verification of compliance with proper storage procedures impossible, particularly given the prevailing equatorial climate.[2261] The co-complainants responded by asserting that Indonesia did not explain why the measure is necessary to protect human health, or how it contributes to food safety. [2262]

7.799. We recall that the Appellate Body has observed that the weighing and balancing exercise under the necessity test can be understood as "a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement."[2263] We further recall that it is incumbent upon Indonesia to demonstrate that Measure 8 is necessary to protect human health. In this context, we observe that Indonesia has not addressed each of the individual variables under this test, i.e. the importance of the objective, the contribution of the measure to that objective and the trade-restrictiveness of the measure. Indonesia has only made some general comments about this measure, such as that the health authorities prefer that horticultural products are stored domestically within six months of harvest time in order to facilitate inspection of stored imported horticultural products.

7.800. Although Indonesia did not specifically address the importance of the objectives pursued by this measure in the context of its necessity analysis, we acknowledge that food safety in the sense understood by Indonesia is an important objective and we note that the co-complainants did not contest this. We thus proceed to the second step under the necessity test, namely the alleged contribution of Measure 8 to food safety and thereby the protection of human health. Indonesia did not present arguments or evidence specifically addressing the alleged contribution of Measure 8 to this objective, although it referred to its health authorities' preference regarding storage of horticultural products domestically, and it maintained that allowing imports at a later date would render the verification of compliance with proper storage procedures impossible, particularly given the prevailing equatorial climate.[2264]

7.801. Concerning the contribution of Measure 8 to the stated policy objective of food safety, Indonesia has not provided any particular argumentation or evidence in this respect. Indonesia simply argued that the six-month harvest requirement for fresh horticultural products is to ensure that fresh horticultural products "consumed by Indonesian people" are still nutritious, safe and of good quality.[2265] Nonetheless, Measure 8 appears to be more concerned with the management of inspection procedures than with food safety issues posed by some horticultural products that have been harvested more than six months prior to importation. This is confirmed, for instance, by the fact that Indonesia allows for the storage of horticultural products in its territory for longer than six months.[2266] We concur with the co-complainants that this means that Indonesia allows for the sale

[2258] Appellate Body Report, *EC – Seal Products*, para. 5.169 (referring to Appellate Body Reports, *Korea – Various Measures on Beef*, para. 164; *US – Gambling*, para. 306; and *Brazil – Retreaded Tyres*, para. 182).

[2259] Indonesia's second written submission, para. 201.

[2260] Indonesia's second written submission, para. 218; Indonesia's opening statement at the second substantive meeting, para. 33.

[2261] Indonesia's first written submission, para. 151.

[2262] New Zealand' second written submission, paras. 278–280. United States' second written submission, para. 187.

[2263] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 182. *See also,* Appellate Body Report, *Colombia – Textiles*, para. 5.75. The Appellate Body explains that, whether a particular degree of contribution is sufficient for a measure to be considered "necessary" cannot be answered in isolation from an assessment of the degree of the measure's trade-restrictiveness and of the relative importance of the interest or value at stake. Appellate Body Report, *Colombia – Textiles*, para. 5.77

[2264] Indonesia's first written submission, para. 151.

[2265] Indonesia's second written submission, para. 218; Indonesia's opening statement at the second substantive meeting, para. 33.

[2266] Indonesia's first written submission, paras. 151.

to consumers of horticultural products that have been harvested more than six months before. This is also confirmed by Indonesia's statement that its health authorities have a preference for such products to be stored locally where they can be readily inspected to ensure quality. We thus fail to see how Measure 8 contributes to ensuring that fresh horticultural products consumed by Indonesian people are still nutritious, safe and of good quality when this Measure does not concern itself with the harvesting time of products actually sold to consumers. Indeed, Measure 8 only regulates the harvesting time of imported products for purposes of allowing their importation. This calls into question any contribution Measure 8 can be said to make to the stated policy objective of ensuring food safety and thereby protecting human health.

7.802. Moving now to the trade-restrictiveness of the measure and the existence of less trade-restrictive measures that are reasonably available, we note that Indonesia has chosen to impose an absolute ban on the importation of horticultural products that have been harvested for more than six months prior to importation. To us, this is the most trade-restrictive measure that Indonesia could have chosen to address its food safety concerns. In this connection, we note the Appellate Body's statements that "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects".[2267] We also recall that the Appellate Body has explained that an alternative measure may be found not to be "reasonably available" where "it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties".[2268] We observe that, as pointed out by the co-complainants[2269], Indonesia already has health and SPS requirements in place that apply to horticultural products, including requirements that all imported horticultural products be accompanied by a Health Certificate and a Phytosanitary Certificate, which, along with the products to be imported, must be inspected in the country of origin before shipment. Indeed, we recall that Article 21 of MOT 16/2013, as amended[2270], provides that every horticultural product imported by a PI or an RI must first undergo verification or technical inquiry at its port of origin. Article 22 further specifies the data that will be verified, including a Health Certificate and a Phytosanitary Certificate for fresh horticultural products. New Zealand submitted that Indonesia did not explain why these certification requirements, which seem to be designed precisely to achieve the objective Indonesia claims for its six-month harvest requirement, would not be adequate to ensure that imported horticultural products are safe. The United States echoed New Zealand's argument and suggested that a less trade-restrictive and reasonably available alternative measure would be to continue to rely on such certification requirements and not impose, in addition, the six-month requirement, which is highly trade-restrictive and makes no apparent contribution to food safety.[2271] We note that Indonesia did not seek to rebut these arguments.

7.803. On the basis of the evidence presented by the co-complainants and in the absence of an effective rebuttal by Indonesia, we consider the existing health and phytosanitary certificates for fresh horticultural products at the port of origin can achieve the food safety objective of ensuring consumers access to fresh, nutritious, chemical- and preservative-free horticultural products. Moreover, as the measure already exists in Indonesia, it is clear that such a measure would not suffer from being "merely theoretical in nature" because Indonesia is "not capable of taking it". Nor would the measure "impose an undue burden" on Indonesia because it is already in place.

7.804. Bearing in mind Indonesia's lack of argumentation concerning the "necessity" of Measure 8 and the absence of any evidence supporting the contribution of Measure 8 to the protection of human health and the high degree of trade-restrictiveness that this measure involves, we conclude that Indonesia has not demonstrated that Measure 8 is necessary to protect human, animal or plant life or health in the sense of Article XX(b) of the GATT 1994. Accordingly, we find that Indonesia has not demonstrated that Measure 8 is provisionally justified under subparagraph (b) of Article XX of the GATT 1994. Accordingly, the Panel does not need to proceed to make findings under the *chapeau* of Article XX of the GATT 1994. Notwithstanding this decision, given that this finding may be appealed and that the Appellate Body will need sufficient facts on the record to address any argument under the *chapeau* of Article XX of the GATT 1994, we will nevertheless

[2267] Appellate Body Report, *Colombia – Textiles*, para. 5.104 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 163).

[2268] Appellate Body Report, *US – Gambling*, para. 308. *See also,* Appellate Body Report, *Colombia – Textiles*, para. 5.74.

[2269] United States' second written submission, para. 187, referring to Articles 21-22(g)-(h) of MOT 16/2013, as amended, Exhibit JE-10. New Zealand's second written submission, para. 282.

[2270] Exhibit JE-10.

[2271] United States' second written submission, para. 188

assume *arguendo* that Measure 8 is provisionally justified under subparagraph (b) of Article XX of the GATT 1994 and will examine whether Measure 8 is applied in a manner consistent with the *chapeau* of Article XX.

7.3.16.2.4 Whether Measure 8 is applied in a manner consistent with the *chapeau* of Article XX

7.805. As explained in Section 7.3.1 above, Indonesia argued that its import licensing regimes for horticultural products and animals and animal products as a whole are applied in a manner consistent with the *chapeau* of Article XX of the GATT 1994. It did so without making any relevant distinctions between the individual measures at issue[2272] and it conflated all three defences under subparagraphs (a), (b) and (d) of Article XX of the GATT 1994. We recall that the burden of demonstrating that the inconsistent measures that are provisionally justified under one of the subparagraphs of Article XX of the GATT 1994 are consistent with the requirements of the *chapeau* rests with Indonesia.[2273] Given the manner in which Indonesia formulated its defence, the Panel will examine whether Indonesia's import licensing regimes for horticultural products and animals and animal products as a whole, including the individual measures therein, are applied in a manner consistent with the *chapeau*, with respect to all three relevant subparagraphs of Article XX of the GATT 1994.

7.806. The task before the Panel is therefore to determine whether, as argued by Indonesia[2274], Indonesia's import licensing regimes for horticultural products and animals and animal products comply with the requirements of the *chapeau* of Article XX because they are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction of international trade. We commence with the first element of the *chapeau* and proceed to examine whether Indonesia has demonstrated that its import licensing regimes do not constitute a means of arbitrary or unjustifiable discrimination. We will thus consider the design, architecture, and revealing structure of these measures in order to establish whether the import licensing regimes as a whole, in their actual or expected application, constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[2275] We recall that, in order for a measure to be applied in a manner which constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", three elements must exist: (i) the application of the measure must result in discrimination; (ii) the discrimination must be arbitrary or unjustifiable in character; and (iii) this discrimination must occur between countries where the same conditions prevail.[2276]

7.807. With reference to these three elements, Indonesia argued that there is no discrimination between imported and domestic products.[2277] Regarding subparagraph (a), Indonesia contended that pursuant to Law No 33/2014, domestic products are also required to have a Halal label[2278]; for subparagraph (b), Indonesia submitted that the distinctions existing between imported and domestic products are not in any way more onerous than necessary and provided as an example the regulation concerning quarantine of animal and plant products as applying to all imports,

[2272] Indonesia briefly addressed the compliance of the "individual elements" of its import licensing regime with the *chapeau* in paragraphs 248 through 251 of its second written submission. Indonesia argued that none of the individual measures results in discrimination because: "the same legal, technical and administrative requirements are applied on all trading partners" (para. 249); custom enforcement measures understandably do not apply to domestic products as by definition they are border measures; and, as far as halal assurance and food safety are concerned, the requirements are applied on a non-discriminatory basis. As to whether the individual measures concerned constitute disguised restrictions of international trade, Indonesia argued that, in the present case, there is no lack of transparency due to the publication of each requirement and response to applications (para. 249).

[2273] Appellate Body Report, *EC – Seal Products*, para. 5.297 (referring to Appellate Body Report, *US – Gasoline*, pp. 22-23, DSR 1996:I, p. 21).

[2274] Indonesia's second written submission, paras. 146-148.

[2275] Appellate Body Report, *EC – Seal Products*, para. 5.302 (referring to Appellate Body Report, *US – Shrimp*, para. 160).

[2276] Appellate Body Report, *US – Shrimp*, para. 150.

[2277] Indonesia refers to the Appellate Body Report on *US – Gambling*, para. 351, finding that the occurrence of discrimination must be determined by articulating the standard between domestic and foreign services. Indonesia's second written submission, para. 150; *See also* Indonesia's second written submission, para. 249.

[2278] Indonesia cites Article 4 of Law No. 33/2014 concerning Halal Product Assurance, which states: "products that enter, circulate, and traded in the territory of Indonesia must be certified halal", Exhibit IDN-47. Indonesia's second written submission, para. 150.

exports, as well as domestic transportation[2279]; concerning subparagraph (d), Indonesia contended that no discrimination exists between importing countries because its import licensing regimes are applied invariably between all importing countries and, therefore, "it would logically follow that customs enforcement, by virtue of its definition …, refers to the import or export of goods".[2280] For Indonesia, as there is no discrimination, it is unnecessary to further determine if the discrimination is unjustifiable or arbitrary, or if it takes place between countries in which like conditions prevail.[2281] Should the Panel find otherwise, Indonesia considered that the resulting discrimination would not be arbitrary or unjustifiable because the *chapeau* of Article XX does not prohibit discrimination *per se*, but rather arbitrary or unjustifiable discrimination.[2282]

7.808. The co-complainants disagreed and pointed out that Indonesia did not make any attempt to meet its burden under the *chapeau* of Article XX in its first written submission, and that its limited arguments in its second submission are insufficient to sustain its claim.[2283] With respect to the discrimination elements, New Zealand submitted that Indonesia has the burden of proving that Article XX provides a justification for each of its measures, demonstrating that each of these elements does not apply. In New Zealand's view, Indonesia did not do so, nor did Indonesia demonstrate that any of the challenged measures applies to domestic products or explain any rational basis for discriminating between domestic and foreign products. For example, it argued, Indonesia did not explain why it restricts the use, sale and distribution of imported products alone. In relation to whether discrimination occurs between countries where the same conditions prevail, New Zealand observed that Indonesia made frequent reference to its equatorial climate. According to New Zealand, this does not justify, for example, the Indonesian harvest period measure, as the same climatic conditions prevail for domestic as well as imported products once they are in Indonesia.[2284] New Zealand recalled that the Appellate Body has confirmed that one of the most important factors in an assessment of the first element of the *chapeau* 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 subparagraphs of Article XX of the GATT 1994.[2285] New Zealand considered that the text, structure and history of the import licensing regulations and the framework legislation pursuant to which Indonesia's import licensing regimes were established, show that the actual purpose of the challenged measures is to restrict imports of agricultural products when domestic production is deemed sufficient as part of Indonesia's policy to achieve self-sufficiency in food.[2286] Thus, according to New Zealand, the import licensing regimes at issue are implemented through regulations made under these overarching laws[2287], which carry into effect, through the challenged measures, the self-trade-restricting objectives. Hence, for New Zealand, Indonesia failed to show that any of its measures can be reconciled with or is rationally connected to the policy objectives in Article XX.[2288]

7.809. In the same vein, the United States submitted that the measures at issue arbitrarily or unjustifiably discriminate against imports because they impose significant restrictions on trade and bear little or no relationship to the policy objectives with respect to which Indonesia seeks to

[2279] Indonesia cites Consideration (d) of Law 16/1992 concerning Animal, Fish and Plant Quarantine, Exhibit IDN-67. Indonesia's second written submission, para. 150.

[2280] Indonesia refers to Article 1(1) of Law No. 17/2006 concerning Customs, Exhibit IDN-66. Indonesia's second written submission, para. 150.

[2281] Indonesia's second written submission, para. 151.

[2282] Indonesia's second written submission, para. 152 (referring to Appellate Body Report, *US – Gasoline*, p. 23).

[2283] New Zealand's second written submission, para. 300, where New Zealand observes that the sole reference to the chapeau in Indonesia's first written submission is at para. 124; opening statement at the second substantive meeting, para. 48; United States' oral statement at the second substantive meeting, para. 67.

[2284] New Zealand's second written submission, para. 308.

[2285] New Zealand's opening statement at the second substantive meeting, paras. 49-50 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.306).

[2286] New Zealand's second written submission, para. 303 (referring to its first written submission, paras. 2, 15-18 and 67-71).

[2287] For example, New Zealand cites: Article 36B(1) of the Animal Law Amendment (Exhibit JE-5), stating that importation of animals and animal products should only be done "if domestic production and supply of Livestock and Animal Product has not fulfill public consumption"; Articles 14-36 of the Food Law (Exhibit JE-2), providing that imports of food are only allowed to the extent of any domestic shortfall; Article 30(1) of the Farmers Law (Exhibit JE-3), prohibiting importation of agricultural commodities when the availability of domestic agricultural commodities is sufficient for consumption and/or government food reserves.

[2288] New Zealand's opening statement at the second substantive meeting, para. 50; New Zealand's second written submission, paras. 307-309.

justify them under the Article XX subparagraphs.[2289] Regarding the public morals exception under Article XX(a), the United States argued that Measures 6 and 14 (use, sale and distribution requirements), which prohibit or restrict imported products' access to retailers and consumers, result in arbitrary and unjustifiable discrimination. Such restrictions serve only to impose burdens on importation that do not exist for domestic products.[2290] In fact, domestic horticultural products are not required to be sold through distributors, and domestic animal products are not barred from traditional and other markets. Responding to Indonesia's assertion that domestic products are also required to have a halal label[2291], the United States clarifies that compliance with halal labelling or other requirements is not at issue in this dispute: the challenged measures are restrictions on the sale, use, and transfer of imported horticultural products (Measure 6); prohibition on the sale of imported beef and other animal products in traditional or modern markets (Measure 14); and limitation on the total quantities of imported horticultural products based on the importer's ownership of storage capacity (Measure 5).[2292] In its view, Indonesia offered no arguments under the *chapeau* to address the arbitrary and unjustifiable nature of these restrictions. Responding to Indonesia's contention that discrimination, if it exists, is not arbitrary because the import licensing requirements and the rationale of the Indonesian decision-makers regarding certifications are "available to all applicants"[2293], the United States recalled that, in assessing the arbitrary or unjustifiable discrimination element of the *chapeau*, one of the most important factors is whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.[2294] The United States believes that Indonesia's arguments do not explain how the discrimination arising from the measures it seeks to justify under Article XX is rationally related to protecting halal, ensuring food safety, or securing compliance with customs enforcement. Thus Indonesia failed to show that its measures do not constitute arbitrary and unjustifiable discrimination.[2295]

7.810. Regarding the protection of human health under Article XX(b), the United States submitted that restrictions based on the domestic harvest period (Measure 4), importers' storage capacity (Measure 5), the use, sale and transfer of imported products (Measure 6), and the six-month harvest requirement (Measure 8), the reference price (Measures 7 and 16) and domestic purchase requirements (Measure 15), constitute arbitrary and unjustifiable discrimination. In its view, each of these restrictions bears little, if any, relationship to the objective of protecting human, animal or plant life or health. Because the restrictions are not rationally connected to the objective, they result in burdensome costs and limitations on the importation of horticultural and animal products.[2296] Countering Indonesia's assertion that "[t]he distinctions which exist between imported and domestic products are not in any way more onerous than necessary", citing a provision of its quarantine law as an example[2297], the United States asserts that Indonesia provides no evidence or explanation of what distinctions exist between imported and domestic products under this and other laws, or how these distinctions apply to the measures Indonesia seeks to justify under Article XX(b).[2298] The United States considers that Indonesia's purpose for citing the quarantine law remains unclear, as none of the measures at issue relates to quarantine of imports.[2299]

7.811. With respect to Article XX(d), the United States contended that Indonesia showed no rational connection between the application windows and validity periods (Measures 1 and 11), fixed licence terms (Measures 2 and 12), realization requirements (Measure 3 and 13), storage capacity requirements (Measure 5), and use, sale, and transfer restrictions (Measures 6 and 14) and the stated objective of securing compliance with customs laws. Because these restrictions do not relate to the objective of securing compliance with Indonesia's customs laws, they exist solely

[2289] United States' second written submission, para. 235.
[2290] United States' second written submission, para. 236.
[2291] United States' oral statement at the second substantive meeting, para. 68 (referring toIndonesia's second written submission, para. 150 (referring to Article 4 of Law No. 33/2014 concerning Halal Product Assurance at Exhibit IDN-47, stating that "products that enter, circulate, and traded in the territory of Indonesia must be certified halal")).
[2292] United States' oral statement at the second substantive meeting, para. 68.
[2293] Indonesia's second written submission, paras. 153-154.
[2294] United States' oral statement at the second substantive meeting, para. 71 (referring to Appellate Body Report, *EC – Seals Products*, para. 5.306).
[2295] United States' oral statement at the second substantive meeting, para. 71.
[2296] United States' second written submission, para. 237.
[2297] Indonesia's second written submission, para. 150 (referring to Consideration (d) of Law 16/1992 concerning Animal, Fish and Plant Quarantine, Exhibit IDN-67).
[2298] United States' oral statement at the second substantive meeting, para. 69.
[2299] United States' oral statement at the second substantive meeting, para. 69.

to restrict imports and protect the domestic industry and, therefore, result in arbitrary and unjustifiable discrimination.[2300] Turning to Indonesia's argument that no discrimination arises from any of its measures because its import licensing regimes apply equally to all importing countries[2301], the United States considered that it does not address the fact that Indonesia's regimes do result in discrimination against imported products vis-à-vis domestic products.[2302] In any event, the United States observed that Indonesia did not submit all the relevant customs or food safety laws or regulations related to its Article XX(d) defences, or specify which aspects of these laws are relevant to the analysis under the *chapeau*.[2303] Therefore, the United States contended that the Panel and the co-complainants have no basis upon which to evaluate Indonesia's assertion.

7.812. Turning to our own analysis, we observe that Indonesia maintained that there is no discrimination between imported and domestic products in its import licensing regimes. It put forward a number of examples. For instance, with reference to subparagraph (a), Indonesia contended that pursuant to Law No 33/2014, domestic products are also required to have a Halal label.[2304] However, as pointed out by the United States, compliance with Halal labelling or other requirements is not at issue in this dispute.[2305] Indeed, from the evidence on the record, we understand that Halal requirements are regulated in instruments other than measures at issue in this dispute. Therefore, the fact that domestic products are also subject to Halal requirements is not of relevance for our analysis of discrimination in the sense of the *chapeau* of Article XX because we are to examine whether there is discrimination with respect to the relevant measures at issue in this dispute and, in particular, those aspects of the measures that we have found to be inconsistent with Article XI:1 of the GATT 1994. In this sense, we are not to examine whether Halal requirements also apply to the measures at issue but rather whether these measures result in discrimination in terms of the *chapeau* of Article XX of the GATT 1994.

7.813. We recall that Indonesia put forward defences under subparagraph (a) with respect to Measure 5 (Storage ownership and capacity requirements), Measure 6 (Use, sale and distribution requirements for horticultural products), Measure 9 (Indonesia's import licensing regime for horticultural products as a whole), Measure 14 (Use, sale and distribution of imported bovine meat and offal requirements) and Measure 17 (Import licensing regime for animals and animal products as a whole). We understand that these measures and, in particular, the restrictions that they impose, are not equally applicable to domestic products. We note that Indonesia's regulations implementing these measures specifically provide that they apply to importation. For instance, MOT 16/2013, as amended, is entitled "Provisions of the Import of Horticultural Products"; MOT 46/2013, as amended, is entitled "Provisions of the Import or Export of Animals and Animal Products"; MOA 139/2014, as amended, is entitled "Importation of carcasses, meats, and/or their processed products into the Territory of the Republic of Indonesia"; MOA 86/2013 is entitled "Import Recommendations of Horticulture Products". Although the measures at issue are mostly customs related and would therefore only apply on importation, we found in Sections 7.2.9.2, 7.2.10.2, 7.2.13.2, 7.2.18.2 and 7.2.21.2 above that these measures affect the competitive opportunities of importers and imported goods. In our view, this shows that there is discrimination between domestic and imported goods in the sense of that prohibited by the *chapeau* of Article XX. Furthermore, Indonesia did not provide the Panel with evidence showing that similar or equivalent measures are applied to domestic products. For instance, with reference to Measure 14, domestically produced goods may be sold directly in traditional markets where Indonesian consumers carry out an important proportion of their purchases. However, imported products must go through a distributor, i.e. importers cannot sell imported goods directly in traditional markets, thus affecting the competitive opportunities of imported goods and importers.

7.814. Likewise, Indonesia's reference, with respect to subparagraph (b), to the regulation concerning quarantine of animal and plant products as applying to all imports, exports, as well as domestic transportation[2306], is inapt because, as argued by the United States, none of the

[2300] United States' second written submission, para. 238.
[2301] Indonesia's second written submission, para. 150 (referring, in the context of Article XX(d), to Law No. 17/2006 concerning Customs, Article 1(1), Exhibit IDN-66).
[2302] United States' oral statement at the second substantive meeting, para. 70.
[2303] United States' oral statement at the second substantive meeting, para. 70.
[2304] In paragraph 150 of its second written submission, Indonesia cites Article 4 of Law No. 33/2014 concerning Halal Product Assurance which states: "products that enter, circulate, and traded in the territory of Indonesia must be certified halal", Exhibit IDN-47.
[2305] United States' oral statement at the second substantive meeting, para. 68.
[2306] Indonesia cites Consideration (d) of Law 16/1992 concerning Animal, Fish and Plant Quarantine, Exhibit IDN-67.

measures at issue relates to quarantine of imports.[2307] We recall that Indonesia put forward defences under this subparagraph with respect to Measure 4 (Harvest period requirement), Measure 5 (Storage ownership and capacity requirements), 6 (Use, sale and distribution requirements for horticultural products), Measure 7 (Reference prices for chilli and fresh shallots for consumption), Measure 8 (Six-month harvest requirement), Measure 9 (Indonesia's import licensing regime for horticultural products as a whole), Measure 10 (Prohibition of importation of certain beef and offal products, except in emergency circumstances), Measure 14 (Use, sale and distribution of imported bovine meat and offal requirements), Measure 15 (Domestic purchase requirement for beef), Measure 16 (Beef reference price) and Measure 17 (Import licensing regime for animals and animal products as a whole). As we explained above, these measures affect the competitive relationship between imported and local products. In addition to the example of Measure 14, another instance that shows that the measures affect the competitive opportunities of importers and imported goods is Measure 16. We understand that no domestic distributor and market participant other than importers appears to be obliged to purchase a certain amount of local beef in order to be able to conduct its business. With respect to Measure 8 (Six-month harvest requirement), we understand that no domestic distributor and market participant other than importers is subject to the requirement to only market horticultural products which have been harvested no later than six months before the sale. We thus understand that no similar restriction exists for domestic products. To us, this shows that discrimination exists between domestic and imported goods in the sense of that prohibited by the *chapeau* of Article XX.

7.815. Concerning subparagraph (d), Indonesia contended that no discrimination exists between importing countries, as the import licensing regime is applied invariably between all importing countries.[2308] However, Indonesia does not address the discrimination against imported products vis-à-vis domestic products.[2309] In fact, Measures 1 and 11 (Limited application windows and validity periods), Measures 2 and 12 (Periodic and fixed import terms), Measures 3 and 13 (80% realization requirement), Measure 5 (Storage ownership and capacity requirements), Measure 6 (Use, sale and distribution requirements for horticultural products), Measure 9 (Indonesia's import licensing regime for horticultural products as a whole), and Measure 17 (Import licensing regime for animals and animal products as a whole), and in particular, the restrictions that they impose, are not equally applicable to domestic products. For instance, in response to a question from the Panel asking whether the same storage ownership and capacity requirements (Measure 5) apply to domestic distributors and market participants[2310], Indonesia responded that the relevant legislation, Law 18/2012, does not specifically mention the storage facility requirement but that having storage for distributors and market participants is necessary for food safety reasons.[2311] We thus understand Indonesia's failure to respond to the Panel's direct question to mean that distributors and market participants other than importers in Indonesia are not required to *own* their storage facilities or to guarantee that those facilities are large enough to hold a certain amount of products.[2312]

7.816. Considering the design, structure and expected operation of these measures as well as the evidence made available to the Panel, we are therefore of the view that discrimination exists between domestic and imported goods with respect to the import licensing regimes as a whole and the individual measures therein. We thus conclude that Indonesia's import licensing regimes for horticultural products and animal and animal products, including the restrictions which have been challenged individually and which we have found to be inconsistent with Article XI:1 of the

[2307] United States' oral statement at the second substantive meeting, para. 69.
[2308] Indonesia refers to Article 1(1) of Law No. 17/2006 concerning Customs, Exhibit IDN-66.
[2309] United States' oral statement at the second substantive meeting, para. 70.
[2310] Panel Question no. 98 read as follows:
Article 8(e) of MOT 16/2013, as amended by MOT 47/2013, requires that importers applying for designation as a RI are to provide "proof of ownership of storage facilities appropriate for the product's characteristics", while Article 8(2)(c) of MOA 86/2013 requires importers to include a statement of ownership of storage as part of their RIPH applications. Are domestic distributors and market participants in the horticultural supply chain required to own storage facilities? Please cite and submit the relevant legislation to this effect.
[2311] Indonesia's response to Panel question No. 98 was as follows:
The legislation concerning storage facilities for domestic distributors and market participants is Law 18/2012 "Concerning Food" (Exhibit IDN−6). Pursuant to Article 71, all parties involved in the food supply chain are required to control food risks in order to ensure food safety. This includes storage, transport and/or distribution of food. Although the storage facility requirement is not explicitly mentioned, having storage for distributors and market participants in the food supply chain is necessary to ensure food safety. (footnotes omitted)
[2312] This is also the understanding of the United States in its comments on Indonesia's response to Panel question No. 98.

GATT 1994, result in discrimination between imported and domestic products in the sense of the *chapeau* of Article XX of the GATT 1994.

7.817. The next question is whether such discrimination is arbitrary or unjustifiable. We recall that one of the most important factors in an assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.[2313] In *Brazil – Retreaded Tyres*, the Appellate Body considered this factor particularly relevant in assessing the merits of the explanations provided by the respondent as to the cause of the discrimination.[2314]

7.818. Indonesia argued that, in contrast to the *US – Shrimp* case, information on its import licensing regime, the application procedures, as well as the rationale underpinning the granting of import licences, is readily accessible to all.[2315] For this reason, Indonesia considered that we should find that its measures do not constitute a means of "arbitrary discrimination". Furthermore, Indonesia contended that it should not be obliged to engage in negotiations with the complainants regarding a domestic law over which it has full autonomy.[2316] In our view, Indonesia appears to misunderstand the Appellate Body's reasoning in *US – Shrimp*. The fact that the application procedures and their rationales are known to importers is not a determining factor in deciding whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX. It is for Indonesia to show how the discrimination arising from the measures it seeks to justify under Article XX can be reconciled with, or is rationally related to, protecting the public moral of Halal (under Article XX(a)), ensuring food safety (under Article XX(b)), or securing compliance with customs enforcement (under Article XX(d)).

7.819. As explained in Section 7.3.4 above, we concluded that Indonesia put forward defences under Article XX(a) with respect to Measure 5 (Storage ownership and capacity requirements), Measure 6 (Use, sale and distribution requirements for horticultural products), Measure 9 (Indonesia's import licensing regime for horticultural products as a whole*),* Measure 14 (Use, sale and distribution of imported bovine meat and offal requirements) and Measure 17 (Import licensing regime for animals and animal products *as a whole*). We recall that subparagraph (a) concerns the protection of public morals. Indonesia maintained that these measures are necessary to protect the public moral of Halal but did not explain how the discrimination arising from these measures can be reconciled with, or is rationally related to, protecting the public moral of Halal. For instance, Indonesia did not explain how the discrimination arising from the requirement to own storage facilities with a certain capacity, instead of leasing or renting them, and from allowing importers to bring into Indonesia only a quantity equal to the owned storage capacity, has any connection with the protection of halal requirements or with public morals. Our understanding of the evidence before us is that relevant imported goods can only come into Indonesia if accompanied by the necessary Halal certifications, and that in the case of fresh horticultural products, there are no halal requirements. We fail to understand what the storage ownership/capacity requirements have to do with the objective of protecting halal requirements given that such protection is already ensured through a different set of regulations. We can find no rational connection between the storage measure and the protection of public morals. The same goes for the use, sale and distribution requirements for horticultural products and for imported bovine meat and offal addressed in Measures 6 and 14. We recall that these requirements prohibit or restrict imported products' access to retailers and consumers and that these limitations do not apply to domestic products. Bearing in mind that both imported and domestic products are subject to Halal regulations, we do not understand how the resulting discrimination can be reconciled with, or is rationally related to, protecting halal regulations.

7.820. Regarding the protection of human, animal or plant life or health under Article XX(b), we recall, as explained in Section 7.3.4 above, that we concluded that Indonesia put forward defences under Article XX(b) with respect to Measures 4 (Harvest period requirement), 5 (Storage ownership and capacity requirements), 6 (Use, sale and distribution requirements for horticultural products), 7 (Reference prices for chilli and fresh shallots for consumption), 8 (Six-month harvest requirement), 9 (Indonesia's import licensing regime for horticultural products as a whole), 10 (Prohibition of importation of certain beef and offal products, except in emergency

[2313] See Appellate Body Reports, *US – Shrimp*, para. 165; and *Brazil – Retreaded Tyres*, paras. 227, 228, and 232; *EC – Seal Products*, para. 5.306.
[2314] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.
[2315] Indonesia's second written submission, paras. 153–154.
[2316] Indonesia's second written submission, paras. 153–154.

circumstances), 14 (Use, sale and distribution of imported bovine meat and offal requirements), 15 (Domestic purchase requirement for beef), 16 (Beef reference price), 17 (Import licensing regime for animals and animal products as a whole) and 18 (Sufficiency of domestic production to fulfil domestic demand). Indonesia did not explain how the discrimination arising from these measures can be reconciled with, or is rationally related to, protecting human, animal or plant life or health. For instance, we fail to see how the discrimination resulting from the reference price system, which leads to an import prohibition when triggered and still has a limiting effect on importation when inactive, can be reconciled with, or is rationally related to, protecting human, animal or plant life or health. Indonesia's reference to Consideration (d) of Law 16/1992 concerning Animal, Fish and Plant Quarantine in this respect[2317] fails to persuade us that such a relationship exists because, as we explained above, none of the measures at issue relates to quarantine of imports. The same goes for the harvest period requirements, the storage ownership, capacity requirements and other measures at issue. We find no relationship to the protection of human life or health and Indonesia does not suggest one.

7.821. With respect to Article XX(d), as explained in Section 7.3.4 above, we concluded that Indonesia put forward defences under Article XX(d) with respect to Measures 1 and 11 (Limited application windows and validity periods), Measures 2 and 12 (Periodic and fixed import terms), Measures 3 and 13 (80% realization requirement), Measure 5 (Storage ownership and capacity requirements), Measure 6 (Use, sale and distribution requirements for horticultural products), Measure 9 (Indonesia's import licensing regime for horticultural products as a whole), and Measure 17 (Import licensing regime for animals and animal products as a whole). Indonesia did not explain how the discrimination arising from these measures can be reconciled with, or is rationally related to, securing compliance with its WTO-consistent laws and regulations. We recall that Indonesia referred to these laws and regulations as being those necessary to secure compliance with customs requirements. We are not persuaded that the discrimination arising from these measures can be reconciled with, or is rationally related to, the objective of securing compliance with Indonesia's customs laws. For instance, we fail to see how the discrimination resulting from the storage ownership and capacity requirements has any rational connection with customs enforcement, because enforcing customs can be achieved irrespective of the ownership or the size of the storage facilities. The same goes for the 80% realization requirement and the other measures at issue.

7.822. The co-complainants argued that the actual policy objective behind all these measures is to achieve self-sufficiency through domestic production by way of restricting and, at times, prohibiting imports. We concur with New Zealand that the text, structure and history of the import licensing regulations and the framework legislation pursuant to which Indonesia's import licensing regimes were established, show that this is the case[2318], as we explained in Section 2.2.1 above. The Animal Law, Animal Law Amendment, Horticulture Law, Food Law and Farmers Law explicitly provide that imports are made contingent on the availability of sufficient domestic supply to satisfy domestic demand. For instance, Article 36 of the Food Law establishes that imports of food "can only be done if the domestic [f]ood [p]roduction is insufficient and/or cannot be produced domestically".[2319] Similarly, Article 30 of the Farmers Law establishes a prohibition from importing agricultural commodities "when the availability of domestic Agricultural Commodities is sufficient for consumption and/or Government food reserves".[2320] In the same vein, Article 36B(1) of the Animal Law Amendment provides that the "[i]mportation of [l]ivestock and [a]nimal [p]roduct from overseas into the Territory of the Republic of Indonesia can be perform[ed] *if domestic production and supply of Livestock and Animal Product has not fulfil[ed] public consumption*" (emphasis added). Likewise, Article 88 of the Horticulture Law provides that imports of horticultural products must observe several criteria, including the availability of domestic horticultural products and the established production and consumption targets for horticultural products.[2321] We recall that these overarching laws are implemented through the regulations issued[2322] by the Ministry of Trade and the Ministry of Agriculture that regulate Indonesia's import

[2317] Consideration (d) of Law 16/1992 concerning Animal, Fish and Plant Quarantine reads as follows: "that the ever-increasing international and intra-national movement of animals, fish, and plants through trade, exchange, and distribution enhances the likelihood of the introduction and dissemination of pests and diseases of animals, fish, and plants that may do damage to these biotic natural resources".(Exhibit IDN-67). Indonesia's second written submission, para. 150.

[2318] New Zealand's second written submission, para. 303 (referring to its first written submission, paras. 2, 15-18 and 67-71).

[2319] Exhibit JE-2.

[2320] Exhibit JE-3.

[2321] Exhibit JE-1.

[2322] MOT 16/2013, as amended, and MOA 86/2013 set out Indonesia's import licensing regime for horticultural products in force at the time of the establishment of the Panel; and MOT 46/2013, as amended,

licensing regimes. These implementing regulations carry out the task of, among other things, ensuring sufficiency of domestic production by means of a series of import restrictions and prohibitions. In addition to the texts of the laws, the evidence in our record supports our understanding. For instance, as pointed out by the United States, we find correspondence by government officials charged with administering the measures at issue where they openly discuss how and why they restrict imported products. Specifically, the Ministry of Agriculture Director of Horticulture explains that Indonesia imposes these restrictions to ensure that imported horticultural products do not compete with local products during their harvest season.[2323] Similarly, the Minister of Agriculture was reported as stating that "[i]mports are only for covering domestic shortfalls" and that "meat imports will be gradually reduced and import restrictions will be tightened".[2324]

7.823. Like the Appellate Body in *Brazil – Retreaded Tyres*, we have "difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX".[2325]

7.824. In the light of the foregoing, we conclude that the measures at issue, which include Indonesia's import licensing regimes for horticultural products and animals and animal products as a whole and the individual measures therein, are applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination contrary to the requirements of the *chapeau* of Article XX of the GATT 1994, given the absence of a rational connection between the discrimination and the policy objectives protected under subparagraphs (a), (b) and (d) of Article XX of the GATT 1994.

7.825. Concerning the third element, namely the discrimination between countries where the same conditions prevail, Indonesia did not provide relevant argumentation. We recall that, in determining which "conditions" prevailing in different countries are relevant in the context of the *chapeau*, subparagraphs (a), (b) and (d) of Article XX provide pertinent context in the sense that the "conditions" relating to the particular policy objective under the applicable subparagraph are relevant for the analysis under the *chapeau*.[2326] We also recall that, subject to the particular nature of the measures and the specific circumstances of the case, the provisions of the GATT 1994 with which a measure has been found to be inconsistent may also provide useful guidance on the question of which "conditions" prevailing in different countries are relevant in the context of the analysis under the *chapeau*. In particular, the type or cause of the violation that has been found to exist may inform the determination of which countries should be compared with respect to the conditions that prevail within those countries.[2327] As with other elements of the analysis under the *chapeau*, Indonesia has not provided the Panel with relevant argumentation in support of its contention that different conditions applied in the sense of the *chapeau*. In particular, it has not developed argumentation on which countries and which conditions we are to examine. We recall that it is incumbent upon Indonesia to demonstrate that its measures are applied in a manner consistent with the *chapeau* of Article XX*.* We note that New Zealand observed that Indonesia made frequent reference to its equatorial climate in the context of its defence. According to New Zealand, this does not justify, for example, the discrimination found in the Indonesian harvest period measure, because the same climatic conditions prevail for domestic as well as imported products once they are in Indonesia.[2328] In our view, Indonesia did not suggest explicitly that its equatorial climate resulted in different prevailing conditions between itself and the co-complainants thereby justifying its discriminatory application of the import licensing regimes. Had it done so, we would agree with New Zealand that Indonesia's reliance on its climatic conditions could not justify treating New Zealand or the United States differently with respect, for example, to Measure 5 (Storage ownership and capacity requirements) or Measure 8 (Six month

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and MOA 139/2014, as amended[2322], do the same for Indonesia's import licensing regime for animals and animal products.

[2323] United States' second written submission, para. 240 (referring to its first written submission, paras. 62, 63; and Exhibit US-25. *See also* Exhibit NZL-39).

[2324] Exhibits NZL-1 and USA-10. *See also* Exhibit USA-11, where the it is reported that the Minister of Agriculture used an statement on how meat imports would be limited: "Previously, Agricultural Minister Suswono said that the Ministry of Agriculture will decrease its meat imports in 2012 by establishing that imports do not exceed 20% [of total domestic demand] or a volume of 85,000 tons – lowered from the 90,000 tons in total realized meat imports in 2011. 'Meat imports of 85,000 tons in 2012 will come from imports of 283,000 heads of live cattle, and 34,000 tons of meat,' said Suswono to Agrofarm".

[2325] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.

[2326] Appellate Body Report, *EC – Seal* Products, para. 5.300.

[2327] *See* Appellate Body Reports, *US – Gasoline*, p. 23-24, DSR 1996:I, pp. 21-22; *US – Shrimp*, para. 150; *EC – Seal Products*, para. 5.300.

[2328] New Zealand's second written submission, para. 308.

harvest requirement). This is because the climatic conditions of New Zealand and the United States are irrelevant to the application of these Measures.

7.826. In the light of our earlier conclusion that the measures at issue are applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination and in the absence of any relevant argumentation from Indonesia concerning whether different conditions apply in the sense of the *chapeau,* we conclude that Indonesia has failed to demonstrate that its Measures are applied in a manner that does not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

7.827. As discussed in Section 7.3.16.2.3 above, the Panel does not consider it necessary to make findings under the *chapeau* of Article XX of the GATT 1994 because it has found that Measure 8 is not provisionally justified under subparagraph (b) of Article XX. However, assuming *arguendo* that Measure 8 is provisionally justified under this subparagraph, the Panel considers that Indonesia has failed to demonstrate that its import licensing regimes for horticultural products and animals and animal products as a whole, and the individual measures therein, including Measure 8, are applied in a manner consistent with the *chapeau* of Article XX of the GATT 1994.

7.3.16.2.5 Conclusion

7.828. In the light of the foregoing, we find that Indonesia has failed to demonstrate that Measure 8 is justified under Article XX(b) of the GATT 1994.

7.3.17 Conclusion concerning Indonesia's defences under Articles XX(a), (b) and (d) with respect to Measures 9 through 17

7.829. We have found in Section 7.3.16.2.4 above that, assuming *arguendo* that Measure 8 is provisionally justified under subparagraph (b) of Article XX of the GATT 1994, the Panel considers that Indonesia has failed to demonstrate that its import licensing regimes for horticultural products and animals and animal products as a whole, and the individual measures therein, including Measure 8, are applied in a manner consistent with the *chapeau* of Article XX of the GATT 1994. We recall that Measure 9 consists of Indonesia's import licensing regime for horticultural products as a whole. We also recall that Measures 10 through 16 are individual components of Indonesia's import licensing regime for animals and animal products and that Measure 17 consists of Indonesia's import licensing regime for animals and animal products as a whole. Indonesia has therefore failed to demonstrate that these Measures are applied in a manner consistent with the *chapeau* of Article XX of the GATT 1994. Bearing in mind that compliance with the *chapeau* of Article XX is a necessary requirement in order for a measure to find justification under this provision, we refrain from continuing our analysis of Indonesia's defences under Article XX(a), (b) or (d) of the GATT 1994 for Measures 9 through 17.[2329]

7.830. We therefore find that Indonesia has failed to demonstrate that Measures 9 through 17 are justified under Articles XX(a), (b) or (d) of the GATT 1994, as appropriate.

7.4 Claims pursuant to Article 4.2 of the Agreement on Agriculture

7.4.1 Arguments of the Parties

7.831. Most of the arguments of the parties concerning the consideration of the 18 measures at issue as restrictions on importation pursuant to Article XI:1 of the GATT 1994 apply *mutatis mutandi* to the present claims. For all other arguments, we refer to Annexes C-1 through C-6.

7.4.2 Analysis by the Panel

7.832. We recall that, in Section 7.2 above, we found that Measures 1 through 18 are inconsistent with Article XI:1 of the GATT 1994 because they constitute prohibitions or restrictions on importation. We also found in Section 7.3 above that Measures 1 through 18 are not justified under Articles XX(a), XX(b) or XX(d) of the GATT 1994, as appropiate.

7.833. We further recall that "[a] panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so

[2329] *See* Section 7.3.4 for an account of these defences.

as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members'".[2330] The Panel considers that its findings pertaining to the inconsistency of Measures 1 through 18 with Article XI:1 of the GATT 1994 and the absence of a justification under Articles XX(a), XX(b) or XX(d) of the GATT 1994 ensures the effective resolution of this dispute. Accordingly, the Panel concludes that it is not required to continue its analysis and make specific findings on the consistency of these Measures with Article 4.2 of the Agreement on Agriculture.

7.5 Claims pursuant to Article III:4 of the GATT 1994

7.5.1 Introduction

7.834. Both New Zealand and the United States included in their panel requests claims pursuant to Article III:4 of the GATT 1994 against Measure 6 (Use, sale and distribution requirements for horticultural products), Measure 14 (Use, sale and distribution of imported bovine meat and offal requirements) and Measure 15 (Domestic purchase requirement for beef). However, only New Zealand has provided substantive arguments in support of its claims under this provision. In response to Panel question No. 4, the United States explained that it "has not presented any argumentation concerning Article III:4 of the GATT 1994 and has not asked the Panel to make findings concerning the inconsistency of the challenged measures with Article III:4. Nor has the United States at this point definitively withdrawn these claims". The United States has not presented any subsequent argumentation or request for findings by the Panel under this provision. Accordingly, in the absence of any argumentation concerning its claims pursuant to Article III:4 of the GATT 1994, we find that the United States has failed to make a *prima facie* case with respect to its claims pursuant to this provision.

7.835. Consequently, our analysis below *only* concerns New Zealand's claims pursuant to Article III:4 of the GATT 1994.

7.5.2 Whether Measure 6 (Use, sale and distribution requirements for horticultural products) is inconsistent with Article III:4 of the GATT 1994

7.5.2.1 Arguments of the Parties

7.5.2.1.1 New Zealand

7.836. New Zealand claims that Measure 6, insofar as it is considered by the Panel to be an internal measure, is contrary to Article III:4 of the GATT 1994.[2331] New Zealand submits that the restrictions inherent to Measure 6 only apply to imported products and not to domestic products.[2332] In New Zealand's view, because the only factor that determines whether Measure 6 applies is origin, the covered imported and domestic horticultural products are "like" for the purposes of Article III:4 of the GATT 1994.[2333] New Zealand further submits that MOT 16/2013 falls within the definition of "laws, regulations and requirements" in Article III:4.[2334] For New Zealand, Measure 6 affects the internal sale, distribution and use of imported horticultural products because it explicitly prescribes the use, sale and distribution channels through which imported horticultural products may be channelled, namely only through distributors or in industrial production processes.[2335] New Zealand argues that Measure 6 accords imported products less favourable treatment than "like" domestic products,[2336] formally treating imported horticultural products differently from their domestic equivalents.[2337]

7.837. New Zealand states that Indonesia does not appear to contest that Measure 6 falls within the scope of Article III:4 of the GATT 1994, but rather relies on defences under Article XX of the GATT 1994.[2338] New Zealand contends that in doing so Indonesia appears to understand

[2330] Appellate Body Report, *Australia – Salmon*, para. 223 (referring to Article 21.1 of the DSU).
[2331] New Zealand's first written submission, para. 410.
[2332] New Zealand's first written submission, para. 412 (referring to Articles 7 and 15 of MOT 16/2013, Exhibit JE-8)
[2333] New Zealand's first written submission, para. 412.
[2334] New Zealand's first written submission, para. 413.
[2335] New Zealand's first written submission, para. 414.
[2336] New Zealand's first written submission, paras. 415 and 417.
[2337] New Zealand's first written submission, para. 416 (referring to Articles 7 and 15 of MOT 16/2013, Exhibit JE-8),
[2338] New Zealand's opening statement at the second substantive meeting of the Panel, para. 67.

New Zealand's argument as challenging restrictions on the sale of fresh horticultural products in traditional, open-air markets. New Zealand understands that fresh imported horticultural products are not prohibited from sale in traditional, open-air markets. Rather, New Zealand asserts that fresh horticultural products imported by an RI must be transferred to a distributor and RIs are prohibited from trading or transferring the horticultural products directly to consumers or retailers. Similarly, New Zealand asserts that a PI may only import horticultural products as raw materials or supplementary materials for industrial production products. New Zealand claims that no such restriction is imposed on the like domestic product.[2339]

7.5.2.1.2 Indonesia

7.838. With respect to New Zealand's alleged claim that the restriction from sale in traditional, open-air Indonesian market, accords less favourable treatment than like domestic products, Indonesia responds that this requirement applies uniformly to imports and domestic products. For Indonesia, Measure 6 does not accord "less favourable treatment" to like domestic products within the meaning of Article III:4.[2340]

7.5.2.2 Analysis by the Panel

7.839. We recall that in Section 7.2.10.3 above, we found that Measure 6 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation. We also found that Indonesia has failed to demonstrate that Measure 6 is justified under Articles XX(a), (b) and (d) of the GATT 1994. We further recall that "[a] panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members'".[2341] The Panel considers that its findings pertaining to the inconsistency of Measure 6 and the absence of justification under Articles XX(a), XX(b) or XX(d) of the GATT 1994 ensures the effective resolution of this dispute. Accordingly, the Panel considered that it is not required to continue its analysis and make specific findings on the consistency of Measure 6 with Article III:4 of the GATT 1994.

7.840. Accordingly, the Panel declines to rule on the consistency of Measure 6 with Article III:4 of the GATT 1994.

7.5.3 Whether Measure 14 (Use, sale and distribution of imported bovine meat and offal requirements) is inconsistent with Article III:4 of the GATT 1994

7.5.3.1 Arguments of the Parties

7.5.3.1.1 New Zealand

7.841. New Zealand claims that Measure 14, insofar as it is considered by the Panel to be an internal measure, is contrary to Article III:4 of the GATT 1994.[2342] New Zealand submits that the restrictions inherent to Measure 14 only apply to imported bovine meat and offal and not to domestic products.[2343] For New Zealand, because the only factor that determines whether the use, sale and distribution restrictions apply is origin, imported and domestic bovine meat and offal are "like" for the purposes of Article III:4 of the GATT 1994.[2344] New Zealand also argues that MOA 139/2014 and MOT 46/2013 are "laws, regulations and requirements"[2345] and that they undoubtedly affect the internal sale and use of imported bovine meat and offal.[2346] According to New Zealand, the Indonesian regulations affect the "use" of animals and animal products by explicitly prescribing the use to which imported bovine meat and offal may be put. These uses are limited to those listed in the relevant regulations, namely use in industry, hotels, restaurant, catering and other special needs. In addition, New Zealand argues, Indonesian regulations also affect the internal sale and offering for sale of imported bovine meat and offal because imported

[2339] New Zealand's second written submission, para. 262.
[2340] Indonesia's second written submission, para. 276.
[2341] Appellate Body Report, *Australia – Salmon*, para. 223 (referring to Article 21.1 of the DSU).
[2342] New Zealand's first written submission, para. 398.
[2343] New Zealand refers to Article 32 of MOA 139/2014 (Exhibit JE-26) and Article 17 of MOT 46/2013 (Exhibit JE-18).
[2344] New Zealand's first written submission, para. 400.
[2345] New Zealand's first written submission, para. 401.
[2346] New Zealand's first written submission, para. 402.

bovine meat and offal cannot be sold directly to consumers, at either modern markets (such as supermarkets or hypermarkets) or traditional markets (such as wet markets, small shops or stalls, or street carts).[2347]

7.842. New Zealand further argues that the measures accord less favourable treatment to imported products than "like" domestic products. New Zealand recalls that an analysis of "treatment no less favourable" requires an examination of the "design, structure, and expected operation of the measure" to discern its implications on the conditions of competition between imported and like domestic products.[2348] New Zealand contends that Measure 14 formally treats imported bovine meat and offal differently from their domestic equivalents because 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.[2349] New Zealand thus argues that the Indonesian regulations drastically reduce the "commercial opportunity to reach" consumers in an analogous fashion to the dual retail system in *Korea – Various Measures on Beef*.[2350] New Zealand concludes that Indonesia's formally different treatment for like imported and domestic animals and animal products therefore affects the conditions of competition to the detriment of imported products and accords treatment that is "less favourable" to imported animals and animal products.[2351] New Zealand further submits that it is not aware of, and Indonesia has not introduced evidence of, any equivalent restrictions that are applicable to like domestic products.[2352] New Zealand contends that the treatment accorded to imported bovine meat and offal is both formally different to that accorded to Indonesian bovine meat and offal, and less favourable, as it prevents the sale of imported product in outlets where domestic beef is permitted to be sold.[2353]

7.843. New Zealand further argues that Indonesia fails to address the prohibition on imports of bovine meat and offal products for sale in "modern markets" (such as supermarkets).[2354] New Zealand submits that Indonesia only attempts to rebut its arguments regarding the prohibition on sale of meat products in traditional markets.[2355] New Zealand concludes that Indonesia has not rebutted the *prima facie* case made by New Zealand that the prohibition on the use, sale and distribution of imported bovine meat and offal is inconsistent with Article III:4 of the GATT.[2356]

7.5.3.1.2 Indonesia

7.844. With respect to New Zealand's alleged claim that the restriction from sale in traditional, open-air Indonesian market, accords less favourable treatment than like domestic products, Indonesia responds that this requirement applies uniformly to imports and domestic products. Indonesia further contends that Measure 14 does not accord less favourable treatment to imports than like domestic products within the meaning of Article III:4.[2357]

7.5.3.2 Analysis by the Panel

7.845. We recall that in Section 7.2.18.3 above, we found that Measure 14 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation. We also found that Indonesia has failed to demonstrate that Measure 14 is justified under Articles XX(a) and (b) of the GATT 1994. We further recall that "[a] panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members'".[2358] The Panel considers that its findings pertaining to the inconsistency of Measure 14 and the absence of justification under Articles XX(a) and (b) of the GATT 1994 ensures the effective resolution of this dispute.

[2347] New Zealand's first written submission, para. 403.
[2348] New Zealand's first written submission, para. 404 (referring to Appellate Body Report, *Thailand – Cigarettes (Philippines),* para. 129).
[2349] New Zealand's first written submission, para. 405 (referring to Article 17 of MOT 46/2013, Exhibit JE-18 and Article 32 of MOA 139/2014, Exhibit JE-26).
[2350] New Zealand's first written submission, paras. 404-406.
[2351] New Zealand's first written submission, para. 407.
[2352] New Zealand's second written submission, para. 129.
[2353] New Zealand's second written submission, para. 130.
[2354] New Zealand's second written submission, para. 131.
[2355] New Zealand's second written submission, para. 132.
[2356] New Zealand's second written submission, para. 133.
[2357] Indonesia's first written submission, para. 188.
[2358] Appellate Body Report, *Australia – Salmon*, para. 223 (referring to Article 21.1 of the DSU).

Accordingly, the Panel considers that it is not required to continue its analysis and make specific findings on the consistency of Measure 14 with Article III:4 of the GATT 1994.

7.846. Accordingly, the Panel declines to rule on the consistency of Measure 14 with Article III:4 of the GATT 1994.

7.5.4 Whether Measure 15 (Domestic purchase requirement for beef) is inconsistent with Article III:4 of the GATT 1994

7.5.4.1 Arguments of the Parties

7.5.4.1.1 New Zealand

7.847. New Zealand claims that Measure 15, insofar as it is considered by the Panel to be an internal measure, is contrary to Article III:4 of the GATT 1994.[2359] Because Measure 15 is based exclusively on a product's origin, as, by its design, it requires domestically produced beef to be purchased in order to obtain the right to import beef from elsewhere[2360], beef produced in Indonesia is "like" beef produced elsewhere for the purposes of Article III:4 of the GATT.[2361] New Zealand further argues that MOA 139/2014 is a "law, regulation, or requirement" in the sense of Article III:4 of the GATT 1994.[2362] In addition, New Zealand maintains that the domestic purchase requirement "affects" the "internal sale, purchase, or use" of imported products within the meaning of Article III:4[2363] because it incentivises the purchase of domestically produced beef and thereby "affects" the "internal sale, purchase, or use" of beef within Indonesia. Importers are not free to purchase imported products in line with their own commercial considerations. Instead, it explains, their purchasing decisions in respect of imported and domestically produced beef are distorted in favour of domestically produced products.[2364]

7.848. New Zealand argues that Measure 15 accords less favourable treatment to imported products than the treatment granted to like domestic products. In reference to the Appellate Body Report on *Korea – Various Measures on Beef*, New Zealand maintains that the domestic purchase requirement 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. Specifically, it explains, as a consequence of the domestic purchase requirement, the purchase of domestically produced beef provides importers with the ability to import beef products through the granting of MOA Recommendations which importers would be unable to obtain in the absence of demonstrating compliance with the domestic purchase requirement. In its view, by definition, the purchase of imported products does not confer the same advantage.[2365] In response to Indonesia's argument whereby Measure 15 is not inconsistent with Article III:4 because "it has never been used to prevent the issuance of an import licence", New Zealand contends that this is irrelevant for the purpose of Article III:4.[2366] New Zealand further submits that Measure 15 is analogous to the requirement to purchase domestically produced rice considered by the panel in *Turkey – Rice*[2367] and to the local content requirement in *Argentina – Import Measures*.[2368]

7.5.4.1.2 Indonesia

7.849. Indonesia asserts that New Zealand has failed to establish a *prima facie* case that Indonesia's import licensing procedures are inconsistent with Article III:4 of the GATT. Indonesia

[2359] New Zealand's first written submission, para. 387.
[2360] New Zealand's first written submission, para. 389 (referring to Panel Report *Argentina – Import Measures*, paras. 6.274-6.276).
[2361] New Zealand's first written submission, para. 389.
[2362] New Zealand's first written submission, para. 390.
[2363] New Zealand's first written submission, para. 391.
[2364] New Zealand's first written submission, para. 393.
[2365] New Zealand's first written submission, para. 394.
[2366] New Zealand's second written submission, paras. 152-154.
[2367] New Zealand's first written submission, para. 395 (referring to Panel Report, *Turkey – Rice*, para. 7.234).
[2368] New Zealand's first written submission, para. 395 (referring to Panel Report, *Argentina – Import Measures*, paras. 6.292 and 6.294).

argues that the record demonstrates that the domestic purchase requirement for animal products has never been used to prevent the issuance of an import licence.[2369]

7.5.4.2 Analysis by the Panel

7.850. We recall that in Section 7.2.19.3 above, we found that Measure 15 is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction having a limiting effect on importation. We also found that Indonesia has failed to demonstrate that Measure 15 is justified under Article XX(b) of the GATT 1994. We further recall that "[a] panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members'".[2370] The Panel considers that its findings pertaining to the inconsistency of Measure 15 and the absence of justification under Article XX(b) of the GATT 1994 ensures the effective resolution of this dispute. Accordingly, the Panel considers that it is not required to continue its analysis and make specific findings on the consistency of Measure 15 with Article III:4 of the GATT 1994.

7.851. Accordingly, the Panel declines to rule on the consistency of Measure 15 with Article III:4 of the GATT 1994.

7.6 Claims under the Import Licensing Agreement

7.6.1 Introduction

7.852. The co-complainants have claimed that, to the extent that the Panel finds that Measures 1 and 11 (Limited application windows and validity periods) are non-automatic licensing procedures, they are inconsistent with Article 3.2 of the Import Licensing Agreement.[2371] In their panel requests, the co-complainants have also claimed that, to the extent that Indonesia's import licensing regime falls within the scope of Article 2 of the Import Licensing Agreement, these measures are also inconsistent with Article 2.2(a) of the Import Licensing Agreement.[2372] Unlike with their claims under Article 3.2 of the Import Licensing Agreement, the co-complainants have not provided any supporting argumentation in relation to their claims under Article 2.2(a) of the Import Licensing Agreement. Accordingly, in the absence of any argumentation, we find that the United States and New Zealand have failed to make a *prima facie* case of inconsistency of Measures 1 and 11 with Article 2.2(a) of the Import Licensing Agreement.

7.853. We shall therefore only examine the co-complainants' claims under Article 3.2 of the Import Licensing Agreement. In this respect, we note that both co-complainants have presented arguments jointly for both measures. Indonesia has also followed that approach in its response. We shall therefore follow the same approach in our analysis.

7.6.2 Whether Measures 1 and 11 (Limited application windows and validity periods) are inconsistent with Article 3.2 of the Import Licensing Agreement

7.6.2.1 Arguments of the Parties

7.6.2.1.1 New Zealand

7.854. New Zealand claims that the limited application windows and validity periods are non-automatic import licensing procedures inconsistent with Article 3.2 of the Import Licensing Agreement.[2373] New Zealand submits that these Measures are non-automatic licensing procedures, because applications for MOA Recommendations and Import Approvals may only be applied for and granted during limited time periods, and thus cannot be submitted on any working day prior to customs clearance; and the administration of the licensing scheme through the imposition of

[2369] Indonesia's second written submission, para. 275.
[2370] Appellate Body Report, *Australia – Salmon*, para. 223 (referring to Article 21.1 of the DSU).
[2371] New Zealand's first written submission, para. 421; United States' first written submission, para. 384.
[2372] New Zealand's panel request, fns. 5 and 8; United States' panel request, fns. 5 and 8.
[2373] New Zealand's first written submission, para. 426; opening statement at the second substantive meeting of the Panel, para. 17.

limited application windows and validity periods has a restricting effect on imports.[2374] New Zealand further argues that Indonesia's contentions regarding the automaticity of its licensing regime are inaccurate because the Indonesian licensing regime does not satisfy the requirements of an "automatic" import licensing procedure within the meaning of Article 2.1 of the Import Licensing Agreement.[2375]

7.855. New Zealand notes that the first sentence of Article 3.2 provides that non-automatic licensing shall not have additional trade restrictive or distortive effects beyond those caused by the imposition of the restriction. For New Zealand, in order to determine whether the relevant import licensing administrative procedures have additional trade-restrictive or distortive effects, it is necessary to identify the underlying "measure" that is implemented through these procedures. New Zealand argues that there is, however, no legitimate underlying measure implemented by Indonesia through the limited application windows and validity periods. New Zealand submits that the trade-restrictive and distortive effects resulting from those requirements are additional to the underlying restriction and therefore inconsistent with Article 3.2 of the Import Licensing Agreement.[2376] New Zealand contends that importers are prevented from obtaining import licences outside the limited application windows and that this results in a decline in imports at the start of each validity period due to the delay between the issuance of Import Approvals and the processing and shipment to Indonesia. New Zealand adds that this also disrupts imports at the end of each validity period because importers do not wish shipping or other delays to result in products arriving after the end of the validity period of the licence, which could lead to sanctions being implemented against the importer.[2377] New Zealand argues that, because these import licensing procedures are not used to implement an underlying substantive measure, any trade-restrictive or distortive effect will necessarily be "additional" for the purposes of Article 3.2. New Zealand further submits that, as such, the measures are inconsistent with the first sentence of Article 3.2 of the Import Licensing Agreement.[2378]

7.856. New Zealand adds that the second sentence of Article 3.2 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". According to New Zealand, the limited application windows and validity periods for MOA Recommendations and Import Approvals are not used to implement any legitimate underlying measure, and accordingly any administrative burden imposed by these requirements is also inconsistent with the second sentence of Article 3.2.[2379] New Zealand contends that MOA Recommendations and Import Approvals must be applied for during limited time periods and are valid for three or six months. New Zealand argues that it has demonstrated that compliance with each of these requirements is extremely burdensome for importers. New Zealand asserts that such procedures do not meet the standards of being no more burdensome than "absolutely necessary" as required under Article 3.2.[2380] New Zealand concludes that the limited application windows and periods for validity of the MOA Recommendations and Import Approvals for animals, animal products and horticultural products are non-automatic licensing procedures inconsistent with Article 3.2 of the Import Licensing Agreement.[2381]

7.857. Referring to Indonesia's reliance upon Article 1.6 of the Import Licensing Agreement in support of its contention that its licensing procedures are "automatic", New Zealand submits that it understands Indonesia's argument to be that, in order to give effect to Article 1.6, Article 2.2(a)(ii) of the Import Licensing Agreement must be read in a way whereby "applications for licenses [need not] be submitted on any working day".[2382] New Zealand contends, however, that Indonesia's novel interpretation of Article 2.2(a)(ii) takes Article 1.6 out of context and is not supported by the words of Article 2.2.[2383] New Zealand asserts that Article 1.6 acknowledges only that there may be circumstances where closing periods are permissible as part of an otherwise WTO-consistent import licensing regime. New Zealand observes that for example, in order for a WTO-consistent

[2374] New Zealand's first written submission, para. 425; opening statement at the second substantive meeting of the Panel, para. 21.
[2375] New Zealand's second written submission, para. 68; response to Panel question No. 8.
[2376] New Zealand's first written submission, paras. 426-427; opening statement at the second substantive meeting of the Panel, para. 22.
[2377] New Zealand's first written submission, para. 429; second written submission, para. 69.
[2378] New Zealand's first written submission, para. 431.
[2379] New Zealand's first written submission, para. 432.
[2380] New Zealand's first written submission, para. 433.
[2381] New Zealand's first written submission, para. 434.
[2382] New Zealand's opening statement at the second substantive meeting of the Panel, para. 18.
[2383] New Zealand's opening statement at the second substantive meeting of the Panel, para. 19.

tariff rate quota (TRQ) to be administered, it may in some cases be necessary for applications to be subject to a closing date in order to allocate the TRQ between applicants. New Zealand's notes that such a requirement would fail to meet the requirements of "automatic licensing" set out in Article 2.1 (because, *inter alia*, it would not permit the submission of applications on "any working day"). However, according to New Zealand, this requirement may still be permissible under Article 3.2 as a non-automatic licensing procedure provided that it does not have trade-restrictive or distortive effects additional to those caused by the imposition of the underlying TRQ.[2384]

7.6.2.1.2 United States

7.858. The United States claims that the limited application windows and validity periods are non-automatic import licensing requirements inconsistent with Article 3.2 of the Agreement on Import Licensing.[2385] For the United States, the application for, and receipt of, MOA Recommendations and Import Approvals fall within the definition of "import licensing" set out in Article 1.1 of the Import Licensing Agreement.[2386] The United States contends that Article 3.1 defines non-automatic import licensing procedures in the negative, as "import licensing not falling within the definition contained in paragraph 1 of Article 2" and that Article 2.1 defines "automatic import licensing" as "import licensing where approval of the application is granted in all cases, and which is in accordance with the requirements of paragraph 2(a)". Paragraph 2(a), in turn, provides that automatic licensing procedures "shall not be administered in such a manner as to have restricting effects on imports", and that procedures shall be deemed to have such trade-restricting effects "unless, inter alia…(ii) applications for licences may be submitted on any working day prior to the customs clearance of the goods".[2387] The United States asserts that the application windows and validity periods fail to qualify as "automatic import licensing" and, thus, are classified as "non-automatic import licensing". The United States submits that, applications for MOA Recommendations and Import Approvals cannot be submitted on any working day prior to the customs clearance of the goods; applications may be submitted only during limited applications windows during the month prior to the start of an import validity period, i.e. in December or June for horticultural products and in December, March, June, or September, for animals and animal products.[2388] The United States adds that Indonesia's assertions that its import licensing regimes are "automatic" and "transparent" are based on an incorrect legal premise and are factually inaccurate.[2389] The United States contends that regardless of the number of applications approved, or the lack of discretion on the part of Indonesian officials in reviewing these applications, such measures cannot be considered "automatic" in any sense of the word.[2390]

7.859. The United States adds that the application windows and validity periods have "restricting" effects on imports.[2391] The United States contends that an evaluation of an import licensing procedure under the first sentence of Article 3.2 requires identification of the "restriction" being implemented by the import licensing procedures. The United States argues, however, that the legal instruments establishing the application windows and validity periods contain no description of or reference to a "restriction" separate from the licensing procedures themselves. The United States submits that, on the contrary, MOT 46/2013 suggests only that the purpose of the import licensing regime for animals and animal products is "to improve consumer protection, preserve natural resources, provide business certainty, transparency, and simplify the licensing process and the administration of imports"; and, similarly, MOT 16/2013, as amended, which regulates horticultural products, states that its purpose is to "protect consumers, promote business certainty and transparency, and simplify the licensing process and the administration of imports".[2392] The United States adds that when Indonesia notified MOT 46/2013 to the Committee on Import Licensing, the notices did not identify any measure being implemented through the import licensing procedure. The United States asserts that Indonesia's notification for MOT 16/2013 indicated no administrative purpose for the regulation, and the notification for MOT 46/2013 stated

[2384] New Zealand's opening statement at the second substantive meeting of the Panel, para. 20.
[2385] United States' first written submission, paras. 388, 394; opening statement at the second substantive meeting, para. 12; response to Panel question No. 8.
[2386] United States' first written submission, para. 385.
[2387] United States' first written submission, para. 386; United States' opening statement at the second substantive meeting, para. 9.
[2388] United States' first written submission, para. 387.
[2389] United States' response to Panel question No. 8, paras. 42-43 and 46.
[2390] United States' opening statement at the second substantive meeting, para. 12; response to Panel question No. 8.
[2391] United States' first written submission, para. 387.
[2392] United States' first written submission, paras. 388-389.

that the administrative purpose was "to establish healthy trade, conductive business environment and orderly import and administration".[2393]

7.860. The United States submits that to the extent the Panel were to consider the requirements non-automatic import licensing procedures, however, the restrictive effects of these requirements must be considered "additional" "trade-restrictive or −distortive effects" under the first sentence of Article 3.2.[2394] The United States contends that these restrictive effects are considerable: (1) importers cannot apply for additional or different import permits outside the limited application windows; (2) imports are restricted at the beginning of each validity period because exporters cannot begin conducting the necessary health inspections and shipping the product until after Import Approvals are issued for each period; and (3) imports are restricted at the end of each validity period as importers must stop shipping several weeks prior to the end of each of the periods to ensure that their goods arrive in Indonesia and clear customs before the period's last day.[2395]

7.861. The United States argues that the analysis under the second sentence of Article 3.2 also must begin with identification of the "measure" that the licensing regime is implementing. The United States asserts, however, that for the reasons outlined above, the application windows and validity periods requirements do not implement any identifiable measure.[2396] The United States adds that because the application windows and validity period requirements do not implement any underlying "measure", Article 3.2 does not reach those requirements. The United States submits that to the extent that the Panel were to consider the requirements non-automatic import licensing procedures, however, the application windows and validity periods must be considered "more administratively burdensome than absolutely necessary to administer the measure".[2397]

7.862. The United States submits that Indonesia's argument is based on the assumption that its import licensing measures are "import licensing procedures" within the meaning of the Import Licensing Agreement which the United States argues they are not. The United States argues that the Import Licensing Agreement distinguishes between "procedures" used to operate import licensing regimes, which are covered by the Import Licensing Agreement, and the substantive rules themselves.[2398] The United States asserts that Indonesia's import licensing regimes include procedures for administering the regimes, i.e. the procedures for applying for recommendations and Import Approvals, but the measures challenged by the co-complainants are much broader, encompassing substantive rules and requirements, including restrictions and prohibition on importations. The United States adds that its challenge to Indonesia's regimes is directed against these substantive restrictions and prohibitions.[2399] The United States also contends that the interpretation proposed by Indonesia would enable a country to impose any requirement either on import licensing procedures or on importation itself, no matter how trade-restrictive and mean that, as long as all applications that meet the legal requirements are ultimately granted, the regime would be considered automatic.[2400]

7.6.2.1.3 Indonesia

7.863. Indonesia argues that the complainants have failed to establish a *prima facie* case that its import licence application procedures are inconsistent with Indonesia's obligations under Article 3.2 of the Import Licensing Agreement. Indonesia argues that its import licensing regime is automatic (i.e. not "discretionary") and is therefore outside the scope of Article 3 of the Import Licensing Agreement.[2401] Indonesia submits that the complainants have failed to demonstrate that any importer that has met all of the administrative requirements of Indonesia's import licensing regime has ever been denied an import licence. Indonesia contends that, on the contrary, any importer who fulfils the clearly-defined legal requirements is automatically granted an import licence by Indonesia's authorities.[2402] Indonesia adds that there is no discretion granted to the agency under either regulation to reject an application that has met all the legal requirements.

[2393] United States' first written submission, para. 390.
[2394] United States' first written submission, para. 390.
[2395] United States' first written submission, para. 391.
[2396] United States' first written submission, para. 392.
[2397] United States' first written submission, paras. 393.
[2398] United States' opening statement at the second substantive meeting, para. 10.
[2399] United States' opening statement at the second substantive meeting, para. 11.
[2400] United States' response to Panel question No. 8, paras. 48-49.
[2401] Indonesia's first written submission, para. 175; second written submission, paras. 44-46 and 66; opening statement at the second substantive meeting, paras. 20 and 23.
[2402] Indonesia's first written submission, para. 175.

Indonesia submits that: (i) any person, firm or institution which fulfils the legal requirements of the importing Member for engaging in import operations involving products subject to automatic licensing is equally eligible to apply for and to obtain import licences; (ii) applications for licences may be submitted on any working day prior to the customs clearance of the goods; and (iii) applications for licences when submitted in appropriate and complete form are approved immediately on receipt, to the extent administratively feasible, but within a maximum of 10 working days.[2403]

7.864. Indonesia asserts that with respect to the timing of applications, Article 8(1) of MOT 71/2015 for certain horticultural products and Article 11(3) of MOT 46/2013 for certain animals and animal products, Import Approvals must be granted within 2 working days. In addition, Indonesia submits that pursuant to Article 12(1) of MOA 86/2013 for certain horticultural products and Article 25 of MOA 139/2014 for certain animals and animal products RIPH/MOA-Recommendations must be granted within 7 working days.[2404] Indonesia further argues that, in fact, during 2013-2015, no applications that fulfilled all the legal requirements were rejected by the regulating authority.[2405] Indonesia refers to the table submitted in its response to Panel Question no. 8 and argues that the table clearly shows that almost all of RIPH/MOA Recommendations or Import Approval applications were granted with the exception in 2013 when "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".[2406] Indonesia argues that MOT rejected the Import Approval applications listed as "rejected" because the importer submitted incomplete and/or incorrect applications. Indonesia asserts that in 2014, 8 RIPH applications were rejected because of incorrect applications.[2407]

7.865. Indonesia refers to Article 1(1) of the Import Licensing Agreement and argues that its import licensing for certain horticultural products and for certain animals and animal products qualifies as administrative procedures used for the operation of import licensing regimes requiring the submission of an application and other supporting documentation to MOA and MOT as well as other relevant administrative bodies as a prior condition for importation of the relevant products into the customs territory of Indonesia.[2408] Indonesia notes that without an Import Approval from the Ministry of Trade and an RIPH for certain horticultural products and MOA Recommendation for certain animals and animal products, an importer cannot import such products into Indonesia. Indonesia contends that whether Indonesia's import licensing requirements for certain horticultural products and certain animals and animal products amount to "import licensing" within the meaning of Article 1(1) has not been at issue in this case.[2409]

7.866. Indonesia contends that its import licensing regime is not trade restrictive because it is applied in a manner that does not produce trade-restrictive effects.[2410] Hence, for Indonesia, its licensing regime is expressly permitted by Article 2.2 of the Import Licensing Agreement.[2411] Indonesia submits that in the present case there is no causal link between the implementation of the import licensing regime and the declined market share of the co-complainants which would be expected in the case of a trade-restrictive measure.[2412]

[2403] Indonesia's second written submission, para. 52.

[2404] Indonesia's second written submission, para. 54; response to Panel question No. 77.

[2405] Indonesia asserts that, for example, in 2015, there were 271 applications for RIPHs. Indonesia further asserts that all applications fulfilled the legal requirements and the Ministry of Agriculture issued RIPHs for all 271 applications. According to Indonesia, in the same year, there were 161 applications for the Ministry of Trade for Import Approvals for horticultural products. Indonesia asserts that the Ministry of Trade issued 161 Import Approvals because all applications fulfilled the legal requirements provided by the relevant regulations. Regarding animals and animal products, in 2015 there were 239 applications for Import Approvals, and the Ministry of Trade issued 239 Import Approvals. In addition, Indonesia argues that in 2015 there were 1,126 applications for Import Approvals related to animal products, all 1,126 applications fulfilled all the legal requirements provided by the relevant regulations, and the Ministry of Trade accordingly issued Import Approvals for all 1,126 applications. Indonesia's first written submission, para. 176; second written submission, paras. 47, 50; opening statement at the second substantive meeting, para. 18.

[2406] Indonesia's second written submission, paras. 48-49.

[2407] Indonesia's second written submission, para. 49.

[2408] Indonesia's response to Panel question No. 30.

[2409] Indonesia's second written submission, paras. 42-43.

[2410] Indonesia's opening statement at the second substantive meeting, para. 19.

[2411] Indonesia's first written submission, para. 177.

[2412] Indonesia argues that, in fact, the complainants' market share increased. According to Indonesia, in relation to fresh horticultural products, market share of US for orange in 2012 was 11%, in 2013 it was 15% and in 2014 was 22%. Indonesia adds that for processed horticultural products, the US market share for frozen sliced potato in 2012 was 33%, in 2013 it was 48%, and in 2014 it was 49%. In addition, Indonesia asserts

7.867. Indonesia submits that the second sentence of Article 3.2 of the 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. Indonesia contends that its import licensing regime for horticultural products, animals, and animal products has a different scope and duration depending on whether the importers use the imported products for raw materials or if the importers are traders. Specifically, Indonesia adds that, for horticulture products, there are different provisions for importing fresh horticulture products, processed horticulture products, or chillies and shallot. Similarly, Indonesia asserts that for animals and animal products there are different categories with different provisions and that the duration of validity for each import licence can be different depending on the products. Indonesia concludes that its import licensing procedures correspond in scope and duration to the measure they are used to implement[2413] and thus the complainants' claim arising under Article 3.2 of the Import Licensing Agreement must fail.[2414]

7.868. Indonesia contends that the co-complainants' interpretation of Article 2(2)(a)(ii) of the Import Licensing Agreement is incorrect.[2415] Indonesia contends that the application windows to apply for Import Approvals do not apply for fresh chilli and shallot and processed horticultural products, as well as for fresh horticultural products imported to be used as raw materials for API-P holders. Indonesia asserts that the application window to apply for RIPHs and Import Approvals for importers having API-U for certain fresh horticultural products is regulated by Article 11 of MOT 71/2015 and Article 13 of MOA 86/2013. Indonesia further asserts that under Article 11 of MOT 71/2015 importers having API-U may submit their application for Import Approval of certain fresh horticultural products one month before the beginning of the period (in December of the previous year for the January-June period and in June for the July-December period). Indonesia adds that, under Article 13 of MOA 86/2013, an importer may submit an RIPH application in the beginning of November of the preceding year for the January-June period and in the beginning of May of the same year for the July-December period. Indonesia submits that accordingly, the application window is opened two months before the period starts.[2416] Indonesia further argues that, in relation to animals and animal products, pursuant to MOT 46/2013, the application window for applying for Import Approvals opens one month prior to the start of the validity periods and is only applicable for products listed under Annex I. Indonesia adds that there is no application window for products listed under Annex II.[2417] Indonesia submits that according to the complainant's interpretation of Article 2(2)(a)(ii) of the Import Licensing Agreement, an import licence application must be accepted on any working day prior to customs clearance, with indefinite time. For example, if an importer plans to import US apples in 2025, the importer must be allowed to submit his application for an RIPH and an Import Approval in 2016, and the Ministries of Agriculture and Trade must accept the applications and process them within a maximum of 10 working days in order not to violate Article 2(2)(a(ii) and (iii) of the Import Licensing Agreement.[2418] Indonesia disagrees with this interpretation which it believes is broad and incorrect.[2419]

7.869. According to Indonesia, the ordinary meaning of "prior to" based on Oxford Dictionaries is before a particular time or event. Indonesia argues that this ordinary meaning does not suggest that "prior to" can be interpreted in indefinite time before a particular time or event.[2420] Therefore, Indonesia submits that this leaves the interpretative question open. Indonesia finds support in the Appellate Body findings in *Canada – Aircraft*, *EC – Asbestos* and *Japan – Alcoholic Beverages II*[2421], where the Appellate Body suggested that the ordinary meaning of the term cannot be determined outside the context in which the term is used and without consideration of the object and purpose of the agreement at issue.[2422] Indonesia asserts that regarding the context and in line with the object and purpose of the Import Licensing Agreement, a treaty interpreter must read all

that for other grapefruit juice the US market share in 2012 was 11%, in 2013 it was 56% and in 2014 it was 85%. Indonesia's first written submission, para. 178.

[2413] Indonesia's first written submission, para. 179.

[2414] Indonesia's first written submission, para. 180.

[2415] Indonesia's second written submission, paras. 55-56.

[2416] Indonesia's second written submission, para. 57.

[2417] Indonesia's second written submission, para. 58.

[2418] Indonesia's opening statement at the second substantive meeting, para. 21.

[2419] Indonesia's second written submission, para. 59.

[2420] Indonesia's second written submission, paras. 60-61.

[2421] Indonesia's second written submission, para. 62 (referring to Appellate Body Reports, *US – Gasoline*, para. 16, *Japan – Alcoholic Beverages II*, para. 104).

[2422] Indonesia's second written submission, para. 62.

applicable provisions of a treaty in a way that gives meaning to all of them harmoniously.[2423] Indonesia submits that the reading of Article 2(2)(a)(ii) of the Import Licensing Agreement must be seen in conjunction with Article 1(6).[2424] Indonesia argues that this provision clearly acknowledges that an application window for import licensing application procedures is allowed under the Import Licensing Agreement.[2425] Indonesia adds that it allows 15 working days (21 calendar days) for the application window for RIPHs for horticultural products, a one-month application window for MOA-Recommendations for animal products, and a one-month application window for Import Approvals. Indonesia further asserts that all applications for RIPHs, MOA Recommendations or Import Approvals can be submitted online at INATRADE and REIPPT, as part of Indonesia National Single Window ("INSW"). Indonesia contends that this is already in line with Article 1(6) of the Import Licensing Agreement.[2426]

7.6.2.2 Analysis by the Panel

7.870. We recall that, in Sections 7.2.5.3 above and 7.2.15.3 above, we found that Measures 1 and 11 are inconsistent with Article XI:1 of the GATT 1994 because, by virtue of their design, architecture and revealing structure, they constitute a restriction having a limiting effect on importation. We further recall that "[a] panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members'".[2427] The Panel considers that its findings pertaining to the inconsistency of Measures 1 and 11 with Article XI:1 of the GATT 1994 ensures the effective resolution of this dispute. Accordingly, the Panel considers that it is not required to continue its analysis and make specific findings on the consistency of Measures 1 and 11 with Article 3.2 of the Import Licensing Agreement.

7.871. Accordingly, the Panel declines to rule on the consistency of Measures 1 and 11 with Article 3.2 of Import Licensing Agreement.

[2423] Indonesia's second written submission, para. 63.
[2424] Indonesia's second written submission, para. 64.
[2425] Indonesia's opening statement at the second substantive meeting, para. 22.
[2426] Indonesia's second written submission, para. 65.
[2427] Appellate Body Report, *Australia – Salmon*, para. 223 (referring to Article 21.1 of the DSU).

8 CONCLUSIONS AND RECOMMENDATION(S)

8.1. As described in greater detail above, the Panel *finds* that:

a. In respect of Indonesia's request for a preliminary ruling:

i. 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;

ii. 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";

iii. 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;

iv. 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;

v. 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 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;

vi. In the light of our finding in paragraph 8.1.a.v 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; and

vii. 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.

b. In respect of the co-complainants' claims under Article XI:1 of the GATT 1994:

i. Measures 1 through 7, 9 and 11 through 17 are inconsistent with Article XI:1 of the GATT 1994 because, by virtue of their design, architecture and revealing structure, they constitute a restriction having a limiting effect on importation;

ii. Measures 8 and 10 are inconsistent with Article XI:1 of the GATT 1994 because, by virtue of their design, architecture and revealing structure, they constitutes prohibition on importation; and

iii. Measure 18 is inconsistent *as such* with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture and revealing structure, it constitutes a restriction

having a limiting effect on importation. Accordingly, the Panel declines to rule on whether Measure 18 is also inconsistent *as applied* with Article XI:1 of the GATT 1994.

c. In respect to Indonesia's defence under Article XX of the GATT 1994:

i. Indonesia has failed to demonstrate that Measures 1, 2 and 3 are justified under Article XX(d) of the GATT 1994;

ii. Indonesia has failed to demonstrate that Measure 4 is justified under Article XX(b) of the GATT 1994;

iii. Indonesia has failed to demonstrate that Measures 5 and 6 are justified under Articles XX(a), (b) and (d) of the GATT 1994;

iv. Indonesia has failed to demonstrate that Measure 7 is justified under Article XX(b) of the GATT 1994;

v. Indonesia has failed to demonstrate that Measure 8 is justified under Article XX(b) of the GATT 1994; and

vi. Indonesia has failed to demonstrate that Measures 9 through 18 are justified under Articles XX(a), (b) or (d) of the GATT 1994, where appropriate.

8.2. Concerning the co-complainants' claims under Article 4.2 of the Agreement on Agriculture, the Panel declines to rule because its findings pertaining to the inconsistency of Measures 1 through 18 with Article XI:1 of the GATT 1994 and the absence of justification under Articles XX(a), (b) or (d) of the GATT 1994 ensure the effective resolution of this dispute.

8.3. With respect to New Zealand's claims under Article III:4 of the GATT 1994, the Panel declines to rule because its findings pertaining to the inconsistency of Measures 6, 14 and 15 with Article XI:1 of the GATT 1994 and the absence of justification under Articles XX(a), (b) or (d) of the GATT 1994 ensure the effective resolution of this dispute.

8.4. Concerning the co-complainants' claims under Article 3.2 of the Import Licensing Agreement, the Panel declines to rule because its findings pertaining to the inconsistency of Measures 1 and 11 with Article XI:1 of the GATT 1994 ensure the effective resolution of this dispute.

8.5. The Panel further declines to rule on the United States' claims under Article III:4 of the GATT 1994 because, in the absence of any argumentation, the United States has failed to make a *prima facie* case. The Panel also declines to rule on the co-complainants' claims under Article 2.2(a) of the Import Licensing Agreement because, in the absence of any argumentation, the United States and New Zealand have failed to make a *prima facie* case.

8.6. Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that Indonesia has acted inconsistently with Article XI:1 of the GATT 1994, it has nullified or impaired benefits accruing to New Zealand and the United States under that agreement.

8.7. Pursuant to Article 19.1 of the DSU, having found that Indonesia acted inconsistently with its obligations under Article XI:1 of the GATT 1994 with respect to Measures 1 through 18, we recommend that the DSB request Indonesia to bring its measures into conformity with its obligations under the GATT 1994.

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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.

[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

[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

[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.

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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.

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ANNEX C

ARGUMENTS OF THE PARTIES

NEW ZEALAND

UNITED STATES

INDONESIA

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]

[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.

[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]

[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.

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[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

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.

* 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).

[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]

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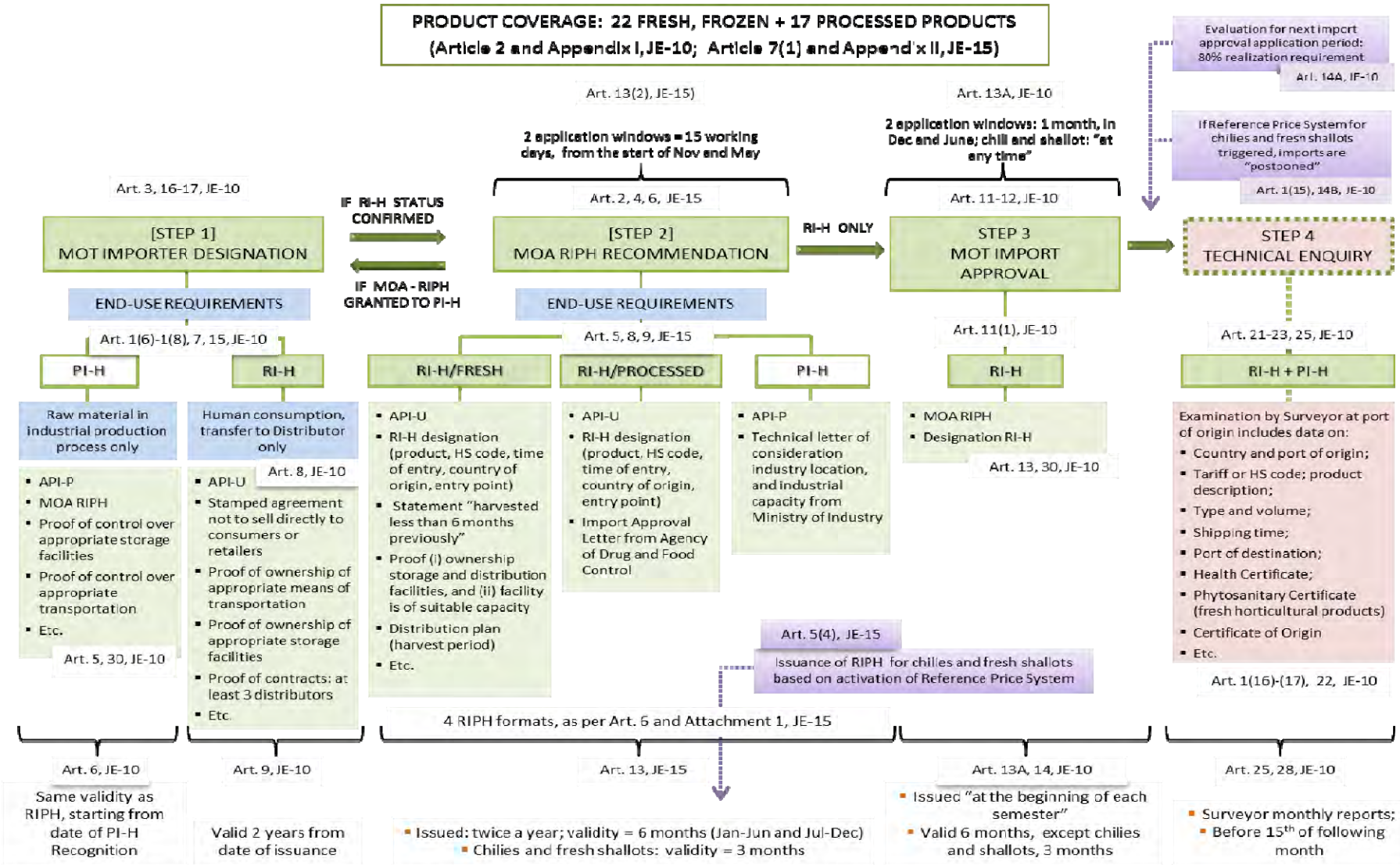
[12] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's third party submission, para 22.

ANNEX E

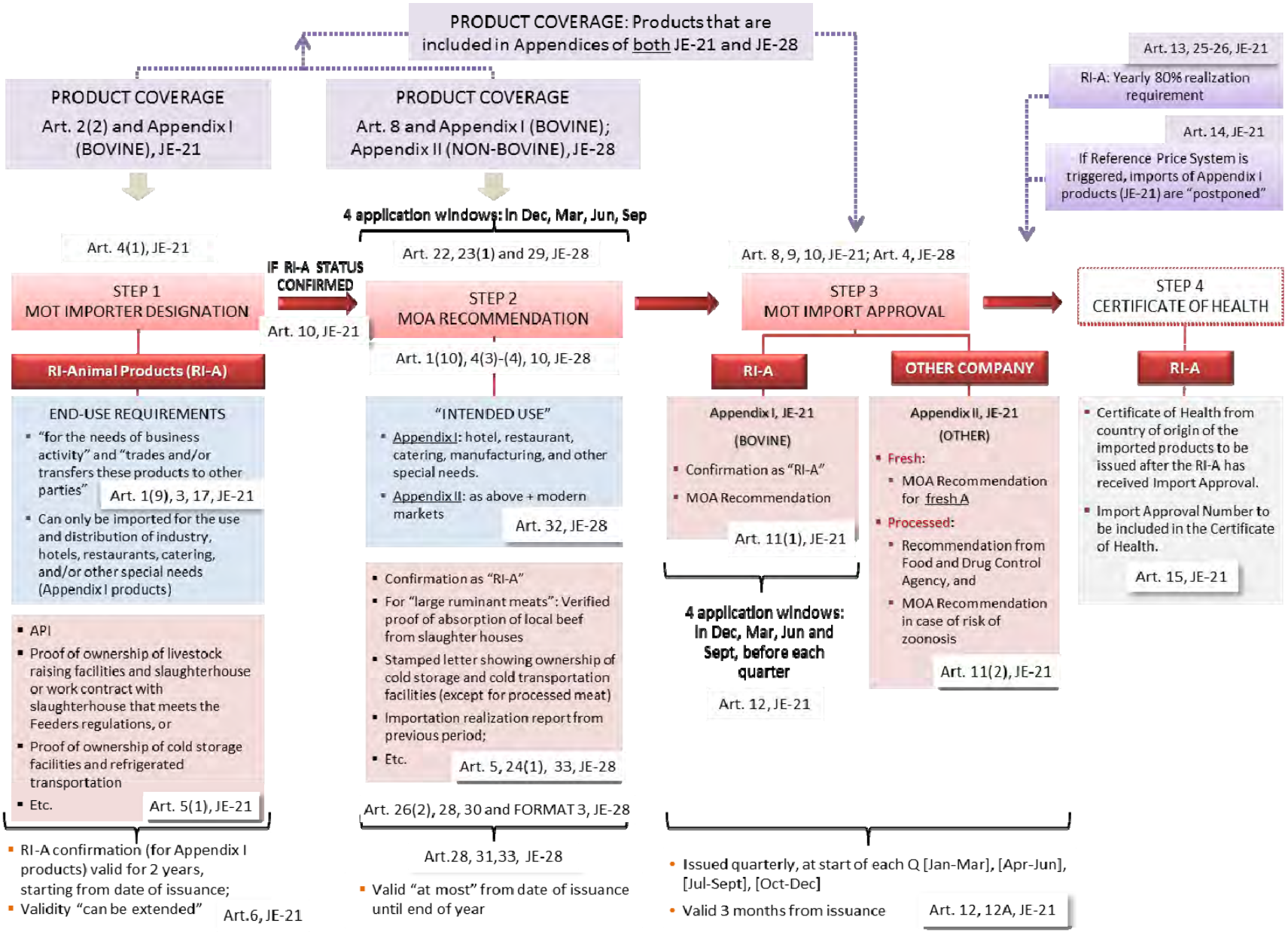
IMPORT LICENSING PROCEDURES FOR HORTICULTURAL PRODUCTS AND FOR ANIMALS AND ANIMAL PRODUCTS

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)

WORLD TRADE ORGANIZATION
ORGANISATION MONDIALE DU COMMERCE
ORGANIZACIÓN MUNDIAL DEL COMERCIO

WT/DS477/R/Corr.1
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8 February 2017

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INDONESIA - IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS

REPORT OF THE PANEL

Corrigendum

The last line in Paragraph 1.9 of the Panel Report reads that "[t]he Panel issued its Final Report to the parties on 5 July 2016". This should instead read "The Panel issued its Final Report to the parties on 16 August 2016".

INDONÉSIE - IMPORTATION DE PRODUITS HORTICOLES, D'ANIMAUX ET DE PRODUITS D'ORIGINE ANIMALE

RAPPORT DU GROUPE SPÉCIAL

Corrigendum

La dernière phrase du paragraphe 1.9 du rapport du Groupe spécial est ainsi libellée: "Il leur a remis son rapport final le 5 juillet 2016". Il convient de la remplacer par: "Il leur a remis son rapport final le 16 août 2016".

INDONESIA - IMPORTACIÓN DE PRODUCTOS HORTÍCOLAS, ANIMALES Y PRODUCTOS DEL REINO ANIMAL

INFORME DEL GRUPO ESPECIAL

Corrigendum

En la última línea del párrafo 1.9 del informe del Grupo Especial, donde dice: "El Grupo Especial trasladó su informe definitivo a las partes el 5 de julio de 2016" debe decir: "El Grupo Especial trasladó su informe definitivo a las partes el 16 de agosto de 2016".
