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

REPORT OF THE PANEL

*Addendum*

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS484/R.

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**LIST OF ANNEXES****ANNEX A****WORKING PROCEDURES FOR THE PANEL**

<b>Contents</b>		<b>Page</b>
Annex A-1	Working Procedures for the Panel	A-2

**ANNEX B****ARGUMENTS OF THE PARTIES**

<b>Contents</b>		<b>Page</b>
Annex B-1	Integrated executive summary of the arguments of Brazil	B-2
Annex B-2	Integrated executive summary of the arguments of Indonesia	B-27

**ANNEX C****ARGUMENTS OF THE THIRD PARTIES**

<b>Contents</b>		
Annex C-1	Executive summary of the arguments of Argentina	C-2
Annex C-2	Executive summary of the arguments of Australia	C-8
Annex C-3	Executive summary of the arguments of Canada	C-11
Annex C-4	Executive summary of the arguments of the European Union	C-15
Annex C-5	Executive summary of the arguments of Japan	C-17
Annex C-6	Executive summary of the arguments of New Zealand	C-20
Annex C-7	Executive summary of the arguments of Norway	C-25
Annex C-8	Executive summary of the arguments of Paraguay	C-27
Annex C-9	Executive summary of the arguments of Qatar	C-28
Annex C-10	Executive summary of the arguments of the United States	C-30

**ANNEX A**

WORKING PROCEDURES FOR THE PANEL

<b>Contents</b>		<b>Page</b>
Annex A-1	Working Procedures for the Panel	A-2

## **ANNEX A-1**

### **WORKING PROCEDURES FOR THE PANEL**

**Adopted on 16 March 2016**

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**

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential except as communicated in the Panel report. 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.

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.

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.

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**

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it 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.

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 Brazil requests such a ruling, Indonesia shall submit its response to the request in its first written submission. If Indonesia requests such a ruling, Brazil 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.

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

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. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Thereafter, the Panel will rule as promptly as possible on any objection to the accuracy of a translation.

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.

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 Brazil could be numbered BRA-1, BRA-2, etc. If the last exhibit in connection with the first submission was numbered BRA-5, the first exhibit of the next submission thus would be numbered BRA-6.

#### **Questions**

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.

#### **Expert consultation**

13. Consistent with Article 13 of the DSU, Article 14.2 of the TBT Agreement and Article 11.2 of the SPS Agreement, the Panel may seek expert advice from experts and from international organizations, as appropriate. In the course of the proceedings, and at the latest two weeks after the first written submission is received, the Parties should inform the Panel whether they consider that the Panel should consult with scientific or technical experts. Should the Panel decide to consult experts, it shall adopt additional working procedures.

#### **Substantive meetings**

14. 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.

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

- a. The Panel shall invite Brazil to make an opening statement to present its case 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 to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, 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 have an opportunity to orally answer these questions. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's 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 Brazil presenting its statement first.
- e. The Panel may, after consultation with the parties, set time limits for the opening statements; such time limits would be informed to the parties before the first substantive meeting.

16. 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 Brazil. If Indonesia chooses not to avail itself of that right, the Panel shall invite Brazil to present its opening statement 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 to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, 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 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 party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's 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**

17. 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.

18. 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.

19. 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. In the event that interpretation is needed, each third party shall provide additional copies to the interpreters. 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. Each third party shall be invited to respond in writing to these questions within a deadline to be determined by the Panel.
- 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**

20. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of the 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.

21. Each party shall submit an integrated executive summary 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. This summary may also include a summary of responses to questions. The integrated executive summary shall not exceed 30 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

22. 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**

23. 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.

24. 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 party's written request for review.

25. 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**

26. 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 4 paper copies of all documents it submits to the Panel. Exhibits may be filed in 4 copies on CD-ROM, DVD, or USB stick and 3 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 CD-ROM, a DVD, a USB stick or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to [DSRegistry@wto.org](mailto:DSRegistry@wto.org), with a copy to \*\*\*\*.\*\*\*\*@wto.org, \*\*\*\*.\*\*\*\*@wto.org, \*\*\*\*.\*\*\*\*@wto.org, \*\*\*\*.\*\*\*\*@wto.org, and \*\*\*\*.\*\*\*\*@wto.org. If a CD-ROM, DVD, or USB stick 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 party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party may submit its documents to another party in electronic format only. With respect to third parties, a party or third party may submit its documents in electronic format only, unless a third party requests in writing to receive paper copies.
- 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.

27. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties. The Panel will annex to its report these procedures.

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**ANNEX B**

ARGUMENTS OF THE PARTIES

<b>Contents</b>		<b>Page</b>
Annex B-1	Integrated executive summary of the arguments of Brazil	B-2
Annex B-2	Integrated executive summary of the arguments of Indonesia	B-27

**ANNEX B-1****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL****I. INTRODUCTION AND FACTUAL BACKGROUND**

1. For the past years Indonesia has implemented layer-upon-layer of a complex and intricate trade regulation that imposes several restrictions on the importation of Brazilian chicken meat and chicken products. First of all, not all types of chicken meat and chicken products are allowed to be imported into the country. Secondly, Indonesia prioritizes domestic food production and national food reserve over imports, as well as restricts imports to cases in which there are "shortages" in the domestic production. Thirdly, no imports are authorized for other uses than those previously allowed by the Indonesian legislation (hotels, restaurants, catering, industries, and other particular purposes), what means that imported products are not allowed in "wet markets" (traditional markets), which are estimated to correspond to 70% of the poultry market in Indonesia. Fourthly, Indonesia adopts a complex, non-transparent and arbitrary import licensing regime, which unduly restricts imports. Fifthly, Indonesia never presented any explanation for the ongoing delay of 7 years to undertake and complete the sanitary procedures required to import chicken meat and chicken products into Indonesia. As a matter of fact, the combined effects of these different trade, sanitary, and import licensing measures impose a general ban on Brazilian exports of chicken meat and chicken products.

2. The products at issue in this dispute are referred by the following HS codes of the Gallus Domesticus species, as follows: 02.07. Meat and edible offal, of the poultry of heading 01.05, fresh, chilled or frozen - Of fowls of the species Gallus domesticus: 0207.11 (Not cut in pieces, fresh or chilled); 0207.12 (Not cut in pieces, frozen); 0207.13 (Cuts and offal, fresh or chilled); 0207.14 (Cuts and offal, frozen) and 16.02 Other prepared or preserved meat, meat offal or blood - Of poultry of heading 01.05: 1602.32 (Of fowls of the species Gallus domesticus).

3. Since 2009, Brazil has attempted through different channels to obtain access to the Indonesian market without success. Between 2009 and 2011, the private sectors of both countries tried to negotiate the sale of mechanically deboned chicken meat, but the required authorizations were never granted by the Indonesian authorities. In parallel, Brazil and Indonesia discussed the market access of Brazilian exports in several meetings of the Consultative Committee of Agriculture (CCA). In the Third Meeting of the CCA, on 4-5 May 2009, Brazil officially presented a proposal of health certificate for fresh poultry meat and for turkey and duck based on the guidelines of the OIE Terrestrial Code, but no official answer was ever received from the Indonesian Government. Also, during the Fourth Meeting of the CCA, on 15-16 September 2010, the Indonesian authorities indicated that they would evaluate the "possibility of opening" the chicken market. However, they pointed out that Indonesia was "self-sufficient" in these products (chicken), and therefore they would "prioritize" the imports of turkey and duck meat, which were never allowed as well. On the occasion, Brazilian authorities were informed that a sanitary inspection mission would be sent to the country, but it never happened nor any justification was given as to the reason the mission was not sent.

4. Brazil raised several Specific Trade Concerns (STCs) in the WTO SPS Committee over the past years regarding the Indonesian restrictive legislation and failure to grant access to Brazilian exports of chicken meat and chicken products. Indonesia has never provided a satisfactory and WTO-consistent answer to Brazil's concerns. In light of this, in July 2014, Brazil presented a formal request for information based on Article 5.8 of the SPS Agreement. Indonesia limited itself to point out to several Indonesian legislations that would apply to imports of animal products. It did not present any sanitary reasons not to approve the health Certificates and not to send an inspection mission to Brazil. It also confirmed that no risk assessment for the Brazilian chicken meat and chicken products had ever been made. According to Indonesia, the "delay" (actually an absence of response) for the approval of the Veterinary Health Certificate was due to an allegedly Brazilian failure "to comply with the existing procedures and technical regulations" related to halal information.

5. Indonesia's import regime for chicken meat and chicken products is established by the application of several laws, decrees and regulations, which are grounded on the basic premise that imports of chicken meat and chicken products shall only take place when the domestic supply is not sufficient. For the purpose of this Executive Summary, and considering that the pieces of legislation will be analyzed below, Brazil will not list them here.

6. Brazil calls the Panel's attention, however, to Indonesia's continuous changes and amendments to its legislation in a manner that suggests a strategy to turn this litigation into a pursuit of a moving target. This poses particular problems. First, it may compromise the Member's ability to challenge the measures as the respondent could try to evade its obligations by simply modifying the pertaining legislation. Second, it may affect what the Panel understands as its terms of reference. In this regard, Brazil submits that the matter before the Panel refers to "measures" and not to the legislation itself. The matter before the Panel covers the legal situation (i.e. the measures and its legal basis) identified by Brazil at its panel's request. The Panel is thus required to take into account the legal framework prevailing on the date of the establishment of the Panel, as well as any amendment introduced afterwards that affect this legal situation. This is particularly important in this case, because the changes have not served to correct the inconsistencies of Indonesian measures but rather to maintain the very same measures under a different guise, adding new layers of restrictiveness to this already extremely restrictive trade regime. It is to avoid this threat of legal insecurity when dealing with the so-called moving target that panels are required to primarily decide on the matter contained in the panel request, and, in light of the prospective relevance of its report in terms of implementation, to also evaluate the modifications occurred thereafter.

## II. PRELIMINARY RULING REQUEST

7. With regard to Indonesia's preliminary ruling request, Brazil has demonstrated that its Panel request observed the obligations under Article 6.2 of the DSU. On the issue of the Panel's terms of reference, Brazil demonstrated that the general prohibition described in Brazil's FWS preserves the same prohibitive nature and essence as the one identified in the panel request and is clearly within the scope of the Panel's terms of reference. Likewise, it was clearly established that all the products at issue in the dispute were properly identified in the panel request. The HS code used in both the panel request and in the FWS is exactly the same and corresponds in the official website of the World Customs Organization to "other prepared or preserved meat, meat offal or blood (of fowls of the species *Gallus domesticus*)".

8. Regarding Indonesia import licensing regime Brazil contended that in its panel request, it had addressed the restrictions and prohibitions laid out by the Indonesian import licensing regime, and identified that, as such, the regime is not consistent with Indonesia's commitments under the WTO. Finally, Brazil confirmed that it did not make any claim under Article 1 of the Agreement on Import Licensing. Brazil only addresses Article 1 in its FWS for the purpose of contextualization, as Article 1 informs both automatic import licensing (Article 2) and non-automatic import licensing (Article 3).

## III. MEASURES AT ISSUE

### (1) The general prohibition on the importation of chicken meat and chicken products

9. Brazil considers that the combined interaction of several different individual measures challenged in the present dispute constitute an overarching measure that is, on its own, a violation of the Covered Agreements, regardless of the specific impact of each of its constitutive elements. As such, it should be scrutinized by the Panel independently of and in addition to the analysis of claims regarding individual measures as "part of a holistic analysis", as indicated by the Appellate Body in *Argentina – Import Measures*. Even if one of the specific measures could be justified under WTO law, which could hardly be the case, the combined effects of the individual measures would still result in restrictive policies inconsistent with the Covered Agreements.

10. Brazil highlighted that all the individual measures at stake in the current dispute were conceived to implement an official trade policy based on the overriding objective of restricting imports to protect domestic production. As the Appellate Body has recognized in *Argentina - Import Measures*, when different measures are framed for the fulfillment of a single overriding

objective, the combined operation of these measures can be considered a single, self-standing measure whose consistency with the WTO agreements must be carefully scrutinized in order to effectively solve the dispute.

11. Indonesia has put in place a set of measures which resulted in a *de jure* and a *de facto* prohibition on the importation of chicken meat and chicken products from Brazil. These measures are founded on the premise that the importation of animal products should be made only if domestic production was insufficient to fulfill the needs for the people's consumption. This restrictive overarching framework operates through the combined effect of several measures, as follows:

- Prohibition on the importation of types of chicken meat and chicken products which are not included in Indonesia's positive list of permitted imports, as explained below;
- Requirement related to the "insufficiency of local production", to be defined under the discretion of the Indonesian authorities: According to Law 18/2009 (Article 36(4)), "import of animal or livestock and animal product from overseas shall be made if domestic animal products and supply of livestock is insufficient to fulfill the need for the people consumption". Also Law 18/2012 (Article 36) clearly indicates that in the case of "staple food", which encompasses chicken meat and chicken products, Indonesia's Government should always prioritize domestic food production over food imports that should only be authorized as an exception. Thus, the lack of "sufficiency" of local production is currently a "requirement" for the importation of animal or livestock and animal products to Indonesia;
- Additional restrictions regarding the importation of essential and strategic goods, which include chicken meat and chicken products. According to Article 25(1) of Law 7/2014, Indonesia shall control the availability of essential goods in adequate quantities, of good quality, and at affordable prices. The control of prices and quantities is also implemented in accordance with Article 26(3) of Law 7/2014, should Indonesian authorities understand that imports may affect the national production of strategic goods. The large margin of discretion of Indonesian authorities to confer a different treatment to imported chicken meat and chicken products, including prohibitions and/or restrictions to their importation in order to prioritize domestic products, is one of the major concerns of Brazil. This measure not only causes a high degree of unpredictability to international trade flows, but it also virtually allows Indonesian authorities to impede importation at any time, and for no specific reason;
- Restrictions on the use of imported chicken meat and chicken products, restricting the commercial opportunities for exporters to Indonesia, as explained below;
- Intricate and restrictive procedures for import licensing in Indonesia, which create unnecessary obstacles to trade, prohibiting the importation of chicken meat and chicken products, as explained below;
- Undue delay in the undertaking of the sanitary procedures required to allow Brazilian exports of chicken meat and chicken products into Indonesia, as explained below.

12. The combined effects of the different Indonesian trade, licensing and sanitary measures impose a general ban on Brazilian exports of chicken meat and chicken products and have impeded Brazilian exports of the products at issue over the past seven years in a manner inconsistent with Indonesia's obligations. This general ban derives from and is implemented through the combined operation of several written regulations and procedures (and one omission, relating to the undue delay in examining and approving Brazil's proposal for a health certificate) conceived for the fulfillment of a single overriding objective – to protect Indonesia's domestic poultry industry – that is enshrined in Indonesia's legislation itself. Of particular relevance in this regard is Law 18/2009 ("Law on Husbandry and Animal Health"), whose Article 36(4) provides that imports of animal or animal products should only be authorized if domestic animal products and "supply or livestock are insufficient to fulfil the needs for the people's consumption".

13. There is no doubt that the self-sufficiency policy is the overriding objective of Indonesia's unwritten ban on the importation of chicken meat and chicken products. Indeed, it is clear that

this policy is the "glue", to use an expression coined by a third party that binds together all the individual components of the general ban and informs its implementation. Furthermore, in its current formulation, self-sufficiency is also an important component of the general measure, as it consists of a mandatory requirement that has to be applied by Indonesian authorities before imports are authorized. For instance, Law 18/2009 specifically provides in Article 36(4) that "import of animal or livestock and animal product from overseas shall be made if domestic animal products and supply or livestock is insufficient to fulfil the need for the people consumption".

14. During the panel's proceedings, Indonesia argued that Brazil has not met the threshold to demonstrate a causal link between the lack of chicken imports from Brazil and the import ban. It also argued that self-sufficiency is only a general principle governing its laws and regulations which has not had any practical effect on the importation of chicken into Indonesia. Based on these arguments, Indonesia insisted that Brazil has not demonstrated the existence of the general measure.

15. Yet contrary to what Indonesia argues self-sufficiency is not simply a general objective within its legal framework with no practical effect. It is reflected in multiple Indonesian laws and regulations, permeates the formulation of all Indonesia's agricultural policies and has banned any kind of imports, not only from Brazil but from any other Member, at least since the enactment of Law 18/2009. The same policy is reinforced in other relevant legislation related to chicken imports, like Law 18/2012 (Article 36). Although the mentioned legal texts are sufficient to confirm that self-sufficiency should not be viewed solely as a "general principle", Brazil has submitted other pieces of evidence that shows that the self-sufficiency is indeed operative and has very noticeable trade effects. Finally, self-sufficiency has nothing to do with food security. In reality, the effects arising from this policy are quite the opposite: reduced access to food (chicken, in this case) and higher prices.

16. More importantly, Brazil has clearly demonstrated that most of the constitutive elements of the General ban are described in written legal acts adopted by Indonesia, including the self-sufficiency policy objective of the import ban. This substantially reduces the evidentiary threshold borne by the complainant to demonstrate the existence of the challenged measure. In the current dispute, these legal acts, in conjunction with the undue delay, provide enough evidence of the existence of the measure. Brazil also clarified how these different elements operate together and, combined, result in an unwritten import ban. This ban operates either to decrease the market opportunities for imported chicken or to increase the costs and risks for exporters that intend to access the market, forming a thick, virtually impenetrable barrier to imports of any amount of chicken meat and chicken products from any source in the world.

17. Brazil asks the Panel to make specific findings on the overarching measure in addition to those related to the individual restrictions. Each individual measure identified by Brazil remains a matter of concern and Brazil expects the Panel to make specific findings on them. However, although a finding of inconsistency on the individual measures may solve specific trade concerns, it would not dismantle the import ban system as whole, which is the main issue in this dispute. In terms of implementation, Indonesia could simply change the instruments through which the import ban is made effective. The fact that Indonesia's legislation is frequently modified suggests that this outcome is likely to happen.

## **(2) Prohibition on imports of chicken cuts and other prepared or preserved chicken meat ("positive list")**

18. MoA Regulation 58/2015 establishes in Articles 7 and 8 that "the types of non-cattle carcass and the processed product thereof ... that can be imported are included in Appendix II ...", which only contemplates HS codes for chicken "not cut in pieces, fresh or chilled and frozen". This is also the case for MoT 05/2016, whose Article 7(2) establishes that the "types of animals and animal products that can be imported are listed in Annex II, III and IV which is an integral part of this regulation". Annex IV makes references to HS codes for chicken "not cut in pieces, fresh or chilled and frozen". Thus, as the HS codes for the other products at issue are not described in those appendices, they cannot be imported into Indonesia.

19. Although Indonesia had argued the positive list no longer exists, as changes were introduced in this requirement by MoA Regulation 34/2016, MoT Regulation 05/2016 and MoT Regulation

37/2016, MoA Regulation 34/2016 and MoT Regulation 37/2016 still contain a list of animals and animal products that can be imported into Indonesia. HS Codes for chicken cuts and other prepared or preserved chicken meat are still not in the Annexes of both regulations. If the positive list requirement had been in fact terminated, there would be no need to have a list of products in the annexes of both Regulations in the first place. The fact that this list remains in force and that the relevant HS codes for the products at issue in this dispute are not included therein is in itself reliable evidence that the positive list requirement is still in place. Moreover, the fact that the importation of those products "may" be authorized under conditions which are not clear – that is, safe, healthy, wholesome, and halal – makes importation even more cumbersome and unpredictable. This uncertainty in itself is a restriction.

### **(3) Restrictions on the use of imported products ("intended use")**

20. The intended use requirement was provided for in Article 32(2) of MoA Regulation 139/2014 and consisted of "a limitation of the importation of chicken meat and chicken products to certain intended uses to meet the needs of "hotel, restaurant, catering, manufacturing, other special needs, and modern market" and maintained in subsequent legislation enacted by Indonesia (MoA Regulation 58/2015). After the first meeting with the Panel, Brazil learned that MoA Regulation 58/2015 was no longer in force and that the restriction on the intended uses was now contained in MoA Regulation 34/2016 and MoT Regulation 05/2016 (as amended by MoT Regulation 37/2016). In August, Indonesia enacted MoT Regulation 59/2016, replacing the previously amended MoT Regulation 05/2016.

21. After all the aforementioned legislative changes, Indonesia now claims that the intended use requirement no longer exists because, under the current regime, frozen or chilled chicken meat and chicken products can be sold in any Indonesian market, provided it has a cold storage facility.

22. Yet, the introduction of the expression "markets with cold chain facility" among the intended uses does not alter the prohibition in place. Instead of an outright prohibition as in the previous legislation, Indonesia enacted a tailor-made legislation with minor effects on the improvement of the competitive opportunities available for imported products. The market for imported chicken remains as niche markets, and the most relevant part of the marketplace continues to be allocated only for local producers.

23. Moreover, MoA Regulation 34/2016 introduced additional features, which reinforces the restriction caused by the intended uses. For instance, it now requires importers, when applying for an Import Recommendation, to submit a distribution plan for the imported meat, which shall include in advance information on the type of meat, the quantity, the name and address of the establishments/buyers and the product's price. As expected, the list of buyers included in the distribution plan shall only be among those of the allowed intended uses. To reinforce compliance, the same Regulation requires importers to submit weekly distribution reports ("every Thursday") to confirm that the products were not redirected to other purposes. Importers appear to be now tied to the terms of the distribution plan and any deviation to it may subject to sanctions, including a one-year import suspension.

### **(4) Indonesia's restrictive import licensing procedures**

24. The complex and burdensome Indonesian import licensing regime requires the importer to obtain various approvals, authorizations and recommendations, largely granted on the discretion of different authorities. Firstly, an importer has to obtain an Importer Identification Number (API-U, for chicken), which has a period of validity of 5 years, after which it has to be renewed. For that, the importer must submit a re-registration to the issuing agency at the latest 30 (thirty) business days after the period of 5 years. The business operator that holds an API-U is constrained to report about the import realization once every 3 months to the Head of Provincial Agency and to the Head of District/Municipal Agency having jurisdiction over the company's domicile. If a company fails to do so then the API-U shall be suspended. The API-U shall be revoked if it is suspended twice or if the company fails to perform the obligation to report the import realization (every 3 months) not later than 30 days as of the suspension date, submits untrue information or data in the document of application, breaches the provisions in the prevailing legislation in import sector, and abuses the document of import and the letters related to import. These possibilities of suspension and/or revocation of the API-U reinforce the control of the Indonesian authorities over

the importation, what directly affects the importation of chicken meat and chicken products, increasing the lack of predictability of the regime and causing restrictions on market access.

25. Secondly, after obtaining an API-U, an importer of chicken products must obtain a MoF Registration before the Director General of Customs and Excise. MoF Decree 454/2002 determines the need to hold a customs registration (SRP) valid in Indonesia's customs areas as a requirement for undertaking customs activities in the importation. Thirdly, once the registration procedures are completed, the importer must apply for a MoA Import Recommendation, but only for products included in the list of authorized products to be imported. All the products not listed in these Appendices are therefore automatically banned from the Indonesian market, as they cannot be imported without this Recommendation. Fourthly, For the products that can obtain a MoA Import Recommendation, several requirements have to be fulfilled by the importer. Some of them, such as the Veterinary Control Number and the Livestock and Animal Health Registration Certificate or Business License require previous and complex *démarches*. Moreover, in order to obtain a MoA Import Recommendation, an importer must demonstrate, through a "statement letter with stamp duty affixed, accompanied with supporting document of the ownership of cold storage and refrigerated vehicle", and also prove – through an assignment letter or work contract – that it employs a veterinarian with competency to supervise the imported products. Besides that, importers of chicken meat and chicken products must also submit a letter of recommendation from the provincial livestock services office, which amounts to a certification that the importer has been supervised by the competent veterinarian. The provincial livestock services office has discretionary power to issue or not the letter of recommendation.

26. Another requirement is the report of import realization from the previous period. The importer shall demonstrate that the transactions carried out during this period met the fixed terms established by previous MoA Import Recommendations related to business units, port of discharge, and type and origin of the goods covered by them.

27. Indonesia's regulation establish also that in order to obtain a Recommendation the importer must necessarily indicate the "intended use" for the products to be imported, which by itself is a requirement that imposes an important restriction on trade.

28. The issuance of a MoA Import Recommendation "for meat and processed meat products" is under additional requirements, as supervision on the compliance of veterinary public health requirements shall be performed. It is not clear whether the authority responsible for issuing the MoA Import Recommendation is required to base the decision on the conclusions of the report of the veterinary public health supervisor.

29. The requirements to obtain a MoA Import Recommendation are far from being the only problem. After the MoA Import Recommendation is issued, no changes or amendments related to the country of origin, business unit of origin, port of discharge, type/category of product are allowed. If the importers, for any reason, modify any of these "fixed license terms", Indonesia regulations establishes that they shall be sanctioned by the "revocation of [his] recommendation" and the "denial of [his] next recommendation application".

30. Moreover, the time window for imports is drastically reduced in Indonesia since they can only take place during the validity period of both the MoT Import Approval and the MoA Import Recommendation, which now is 6 months each at maximum. During this short period, the importer must complete the entire import transaction authorized by both documents by loading, shipping, transporting, delivering, and clearing at the customs the imported goods.

31. As it is the case for the MoA Import Recommendation, once the MoT Import Approval is issued, it cannot be modified. The importer who fails to comply with the "fixed license terms" is subject to several sanctions, including the revocation of the Approval and the impossibility of submitting new requests. If an Approval is revoked, the importer may only re-submit the application after 1 year.

32. Even under the current regime established by MoA Regulation 34/2016 and MoT Regulation, 59/2016, these restrictive features of Indonesia's import licensing regime – that were existent under MoA Regulation 139/2014; MoT Regulation 46/2013, MoA Regulation 58/2015 Regulation MoT 05/2016, recently modified have not been fundamentally altered. Although the

seemly elimination of the application, windows could be considered a positive development, the validity period of Import Recommendation and of the Import Approval are still short (6 months), the positive list and the intended use, albeit in a different form are still in place and the fixed license terms have not experienced any change. Moreover, as import approvals can only be obtained after the issuance of an import recommendation and the application must be submitted within three months after the issuance of the corresponding Import Recommendation, an Import Approval cannot be obtained at "any time". These elements are part and parcel of the same import licensing regime, which means that their trade restrictiveness need to be assessed as if they were one single measure.

#### **(5) Undue delay with regard to the approval of sanitary requirements**

33. According to the Indonesian legislation (Articles 35 and 36 of MoA Regulation 58/2015), it is not possible to import chicken meat and chicken products into Indonesia without a health certificate approved by the country. As mentioned above, since 2009 Brazil has been striving to negotiate with Indonesia the terms of a veterinary certificate for poultry, in order to allow Brazilian exports of those products to enter the Indonesian market. The proposal was based on the international standards applicable and encompassed the sanitary requirements established by Indonesia's legislation. Indonesia has not provided a satisfactory clarification on the sanitary reasons why the Brazilian products were not allowed into Indonesia.

#### **(6) Restrictions on the transportation of imported products**

34. According to Article 20(a) of MoA Regulation 58/2015 (now replaced by Article 19(a) of MoA Regulation 34/2016), the transportation of carcass, meat and/or processed products shall be "conducted directly from the country of origin to the port of discharge within the territory of Indonesia". If the transportation is not direct, or, by any reason, a stop in a third country or port during the transportation is necessary before the arrival at the port of destination, the products will not be allowed to be imported into Indonesia. Products will be refused even in the case of *force majeure* that may deviate the shipment to a third-country port for transit.

#### **(7) Discriminatory implementation of halal labelling requirements**

35. Indonesia requires that all products that enter, circulate and are traded in the country must be certified halal. To that end all food products must be adequately labelled halal on the product's packaging. This legal requirement applies indistinctively to both imported and like domestic products. However, the implementation of this requirement is clearly discriminatory. While imported products have to comply with the labelling requirements before importing is authorized, domestic products are not subject to this strict requirement. According to a local expert, domestic producers, particularly in the wet market, do not generally attach any label or food packaging (i.e. do not follow the requirements stipulated by the relevant laws and regulations). In addition, only rarely does the Indonesian supervision authority check compliance with the halal labelling requirement in wet markets and non-official slaughterhouses. Brazil takes no issue with halal certification and labelling. It is concerned with the fact that Indonesia accords treatment less favorable to imported products.

### **IV. LEGAL CLAIMS**

#### **1. Claims related to border measures which create trade restrictions**

36. Indonesia adopts several measures which prohibit and/or restrict the importation of the products at issue. These measures, combined and individually, impose a general ban on the Brazilian products in violation of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture (AoA). Indonesia's import licensing procedures also amount to a non-automatic licensing regime whose application and administration causes trade-restrictive effects on imports in violation of Article 3.2 of the Agreement on Import Licensing Procedures (ILA).

## 1.1. Relevant legal standard

### (a) Article XI:1 of the GATT 1994

37. Article XI:1 encompasses "prohibitions" or "restrictions" which are made effective through "quotas", "import or export licenses" or any "other measures". The Panel in *India – Quantitative Restrictions* (para. 5.129) said that "the text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'" and "the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'".

38. In light of this broad scope, the fact that a measure does not totally prevent the imports or does not encompass the application of prohibited additional duties does not mean *per se* that there is no violation of that provision. The Appellate Body has indicated that the scope of Article XI:1 includes measures through which a prohibition or restriction is produced or becomes operative. Likewise, a violation of Article XI:1 may occur even when there is no specific threshold established limiting imports or exports. Actually, Article XI:1 does not require a showing of the measure's effects on trade volumes. A Member's regulation establishing, directly or indirectly, a "positive list" or certain binding "intended uses" would, in this sense, qualify as a quantitative restriction.

39. A number of panels have considered the reference to "other measures" in Article XI:1 as a "broad residual category" which encompasses different types of measures instituted or maintained by a WTO Member with the ability to prohibit or restrict the importation of products. This broad category would encompass unwritten measures as well. In *Argentina – Import Measures* (para 6.248), the Panel found that the Trade-Related Requirements (TRRs measure), imposed by Argentina through the combined effect of different measures, fell within the meaning of "other measures", as provided for in Article XI:1 of the GATT 1994.

### (b) Article 4.2 of the Agreement on Agriculture

40. Article 4.2 of the AoA establishes that Members "must not continue to apply measures covered by Article 4.2 from the date of entry into force of the WTO Agreement" ("maintain"), "must not introduce new measures 'of the kind' that it has not had in place in the past" ("resort to"), and "may not, at some later stage after the entry into force of the WTO, re-enact measures prohibited by Article 4.2 ("revert to"). The footnote 1 of Article 4.2 provides examples of these measures: quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints and similar border measures other than ordinary customs duties. Brazil finds relevant the guidance of previous jurisprudence on the scope of the following terms: "quantitative import restrictions", "discretionary import licensing", and "similar border measures other than ordinary customs duties".

41. With regard to the meaning of "quantitative import restrictions", the Panel in *Turkey – Rice* (para 7.120) considered that measures that affect the quantities of product that can be imported undoubtedly qualify as a quantitative import restriction, even when this effect is caused by the "lack of transparency and lack of predictability" of a Member's measure. The Panel in *Turkey – Rice* (para 7.133) also interpreted the expression "discretionary import licensing" as encompassing "the discretionary use by authorities in an importing country of the concession, or refusal to grant, a particular document which is necessary for the importation of a good, as an instrument to administer trade." As for the meaning of "similar border measures other than ordinary customs duties", the Appellate Body in *Chile – Price Band System* (para. 227) explained that an inconsistency with Article 4.2 can be established when it is possible to identify border measures similar to the measures explicitly identified in footnote 1. The border measures listed in footnote 1 all "have in common the object and effect of restricting the volumes, and distorting the prices of imports of agricultural products in ways different from the ways that ordinary customs duties do". As the function of Article 4.2 and footnote 1 is "to enhance market access for agricultural products",<sup>1</sup> any measure which has the object and effect of restricting market access, limiting import volumes and distorting the prices of imports would be inconsistent with Article 4.2 of the AoA.

<sup>1</sup> Appellate Body Report, *Chile – Price Band System* (21.5), para. 215.

**(c) Article 3.2 of the Agreement on Import Licensing Procedures**

42. Article 1.1 of the ILA defines import licensing as the administrative procedures through which a business operator submits an import application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation. Article 1.2 provides the general principle that should inform any licensing procedure: "Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 ... with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures". This principle is also confirmed by Article 1.3 of ILA, which establishes a requirement that the rules for import licensing shall be neutral in "application and administered in a fair and equitable manner".

43. The ILA also regulates two types of licensing procedures: automatic and non-automatic. Automatic import licensing is a procedure where approval of the application is granted in all cases, which means that the administrative authorities have no discretion to decide whether to grant or not the license. A non-automatic licensing regime is defined by exclusion, which means that in this case the importing country has the discretion to grant or not the import license. Normally, non-automatic licensing procedures are used when there is a restrictive condition in place on the imports, such as tariff rate quotas (TRQs), which gives rise to imports controls.

44. Besides complying with the general principles established in Articles 1.2 and 1.3, Article 3.2 of the ILA provides, in relation to non-automatic licensing, that Members shall not establish licensing procedures that impose additional restrictions to those already caused by the underlying measure it implements. In order to assess a violation of Article 3.2, it is necessary to show a "decline in market share" and "a causal relationship between the licensing procedures and the trade distortion"<sup>2</sup> Moreover, Article 3.2 of ILA requires that the non-automatic licensing procedures shall not be more administratively burdensome than absolutely necessary to administer the measure they are used to implement. Thus, the determination of this "measure" is crucial for the assessment of whether it is more burdensome or not than necessary in the context of this provision.

**1.2 Legal analysis****(a) The general prohibition is a border restriction inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture**

45. Brazil submits that the combined effect of several different individual measures adopted by Indonesia in relation to chicken meat and chicken products amounts to a general prohibition on the importation of these products from Brazil. Combined, these measures constitute "prohibitions or restrictions other than duties, taxes or other charges made effective through quotas, import or export licenses or other measures" within the meaning of Article XI:1 of the GATT 1994. Indonesia has relentlessly created several obstacles to impede the importation of the products at issue through a comprehensive assortment of combined measures which established an institutional and procedural "wall" that has totally banned the importation of Brazilian chicken meat and chicken products. These measures reflect Indonesia's general policy objective of protecting the local production of chicken meat and chicken products in order to achieve self-sufficiency.

46. In *Argentina – Import Measures*, the Panel and the Appellate Body dealt with a similar situation. The Panel established a framework of analysis in order to assess whether Argentina's unwritten measure had a limiting effect on imports and were affecting the competitive opportunities protected by Article XI:1. Firstly, it established that the measure at issue restricted market access. Secondly, that it created uncertainty as to an applicant's ability to import. Thirdly, the Panel concluded that the measure prevented companies to import as much as they desired or needed without regard to their export performance. Finally, it imposed a significant burden on importers that was unrelated to their normal importing activity.

47. The Indonesian general prohibition on Brazilian imports of chicken meat and chicken products meets all these criteria. Indonesia only authorizes the importation of products specifically referred to in a "positive list" that does not include all the products at issue. And, even so, this

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<sup>2</sup> Appellate Body Report, *EC – Poultry*, paras. 126-127.

importation shall only take place in case of insufficiency of local production and for very specific intended uses, which clearly restrict market access conditions. Market access is also limited by the fact that Indonesia has unduly delayed the approval of a health certificate that would allow Brazilian exports. Additionally, imports of chicken meat and chicken products are subject to a set of restrictive import licensing procedures that have created uncertainty to importers and imposed on them a significant burden which is unrelated to other importing controls, making importations extremely difficult. For all these reasons, the general prohibition on imports is inconsistent with Article XI:1 of the GATT 1994.

48. The Panels in *India – Quantitative Restrictions* (paras. 5.241 – 5.242) and *Korea – Various Measures on Beef* (para 762) established that a measure that had been found to violate Article XI:1 was also to be considered in violation of Article 4.2 of the AoA, to the extent it applies to agricultural products. All the products at issue are undoubtedly covered by the AoA. Therefore Brazil submits that Indonesia's general prohibition on the importation of chicken meat and chicken products is also inconsistent with Article 4.2 of the AoA.

49. Should the Panel opt to carry an independent analysis of Article 4.2, Brazil contends that the general prohibition clearly imposes a "quantitative import restriction" within the meaning of that provision. Combined, the individual measures adopted by Indonesia have the object and effect of restricting the volumes and distorting the prices of imports of agricultural products in ways different from the ways that ordinary customs duties do in the sense of the Appellate Body's understanding in *Chile – Price Band System*. Due to this general prohibition, Brazil has not been able to export chicken to Indonesia since 2009.

50. In the case Indonesia's general prohibition is not found by the Panel to constitute a "quantitative import restriction", it still constitute a "similar border measure other than ordinary customs duties" within the meaning of footnote 1 of Article 4.2, as it has "characteristics in common with a quantitative import restriction" and limit opportunities for importation of the products at issue.

51. Indonesia argued that to demonstrate a violation of Article 4.2 of the AoA, the complainant has the burden of establishing that the measure is not justified under Article XX of the GATT 1994 ("or other general, non-agriculture-specific provisions of the GATT").

52. Brazil is puzzled by Indonesia's reasoning. The Appellate Body jurisprudence confirms exactly the opposite, i.e. that the burden to establish an affirmative defense under Article XX belongs to the respondent. Brazil fails to see how the nature of Article XX would be transformed from an affirmative defense (the burden of which lies with the respondent) into something else (whose inexistence the complainant should prove). Brazil is not aware of a single instance, in more than 20 years of WTO litigation and almost 70 years of dispute settlement including the GATT years, where the burden of proof under Article XX has been reversed from the responding party to the complainant. More broadly, Brazil ignores examples of panels or the Appellate Body requiring from a party – either party – to prove a negative, as Indonesia suggests Brazil is required to do. The reason is simple: it is a general principle of law that the party arguing the affirmative of a proposition has the burden to prove the basis and content of such proposition.

53. Article 4.2 of the AoA requires the complainant to establish that the respondent maintains a measure of the kind which has been required to be converted into ordinary customs duties, such as, inter alia, quantitative import restrictions. It would be then to the respondent to demonstrate that the relevant measure is not maintained under any GATT exception. In the present dispute, Brazil has established that Indonesia maintains restrictions on imports of chicken meat and chicken products covered by Article 4.2. Indonesia has never argued, much less demonstrated, that this measure is justified under Article XX of the GATT 1994 or any other general, non-agriculture-specific provisions of the GATT 1994, and Brazil has no information to the effect that this might be the case.

**(b) The individual measures are each a border restriction inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture**

**(i) Positive list**

54. Article XI:1 covers any measures which institute or maintain a "prohibition or restriction other than duties, taxes or other charges on the importation of any product". The impossibility of importation of the products not listed amounts to an import ban. Through the positive list, Indonesia maintains a prohibition other than "duties, taxes or other charges" equivalent to a zero quota which is incompatible with Article XI:1 of the GATT 1994.

55. The positive list also amounts to a "quantitative import restriction" or a "similar border measure other than ordinary customs duties" and is inconsistent with Article 4.2 of the AoA. This measure undoubtedly contributes to restrict the volume of imports, to limit the quantities of the product that can be imported. Actually, it has prevented all imports of Brazilian chicken cuts and other prepared or preserved chicken meat, which constitutes the extreme type of "quantitative import restriction" prohibited by Article 4.2.

56. The Panels in *India – Quantitative Restrictions* and *Korea – Various Measures on Beef* established that a measure that had been found to violate Article XI:1 was also to be considered in violation of Article 4.2 of the AoA to the extent it applies to agricultural products. Therefore, the positive list is inconsistent with Article 4.2 of the AoA.

57. Should the Panel opt to carry out an independent analysis of Article 4.2, Brazil contends that this measure clearly imposes a "quantitative import restriction" within the meaning of that provision, as it has the object and effect of restricting the volumes, and distorting the prices of imports of agricultural products in ways different from the ways that ordinary customs duties do. In the case the positive list is not found to constitute a "quantitative import restriction", it constitutes a "similar border measure other than ordinary customs duties" within the meaning of footnote 1 of Article 4.2, as it has characteristics in common with a quantitative import restriction and limits the opportunities for importation.

58. During the Panel's proceedings, Indonesia argued that the positive list requirement no longer exists. Brazil submits that the amendments introduced simply allow Indonesian authorities the discretionary power to determine which chicken products could receive a MoA Recommendation and a MoT Import Approval. They do not ensure access to all types of chicken meat and chicken products, as required by Article XI:1 of the GATT 1994 and Article 4.2. In addition, the new pieces of legislation do not provide any guidance for importers in relation to what is to be regarded as "the requirements of safe, healthy, wholesome and halal". These changes not only kept in place the positive list, but also introduced new discretionary elements in the issuance of the import license.

**(ii) Intended use**

59. According to Indonesia's legislation, the chicken meat and chicken products that can be imported into Indonesia can only be destined to very specific uses. This measure has an important "limiting effect" on imports that falls squarely in the ambit of Article XI:1. As recognized by the Panel in *Colombia – Ports of Entry* (para. 7.240) any measures that have "implications on the competitive situation of an importer", creating uncertainties, affecting investment plans or restricting market access for imports is under the scope of this provision.

60. As the Panel in *China – Raw Materials* (para 7.1081) established, to be considered a restriction it is not even necessary that the measure has an actual impact on trade flows. The very potential to limit trade is sufficient to constitute a restriction within the meaning of Article XI:1. Moreover, since this restriction is not applied for domestic products, by its very design and structure, this measure prevents "whole chicken, fresh or frozen" to have the same competitive opportunities than those granted to the domestic like products.

61. The limitation on the intended uses, as well as the sanctions imposed for breaches of the original uses registered in the Recommendation, impose a limiting condition which adversely affects the market access to imported products in violation of Article XI:1.

62. This restriction also amounts to a "quantitative import restriction" and is inconsistent with Article 4.2 of the AoA, as it contributes "to restrict the volume of imports" by limiting the quantities of product that can be imported, which is in contradiction of the very purposes of Article 4.2 of improving market access to agriculture products.

63. In the case Indonesia's restriction on the intended use is not found to be a "quantitative import restriction", it still constitutes a "similar border measure other than ordinary customs duties" within the meaning of footnote 1 of Article 4.2 of the AoA, as it has "characteristics in common with a quantitative import restriction" and limits the opportunities for imports.

**(iii) Indonesia's restrictive import licensing procedures**

64. Several elements of the Indonesian import licensing regime impose undue restrictions on the importation of chicken meat and chicken products. The positive list and the intended use requirements have already been demonstrated above to violate Article XI:1 of the GATT 1994 and Article 4.2 of the AoA. Brazil addresses below the negative effects of the limited application windows, the short validity periods and the fixed license terms of the MoA Import Recommendation and the MoT Import Approval on the competitive opportunities for imports.

65. Indonesia imposes limited (and short) application windows for importers to obtain authorization to import. Since the validity period itself of the Recommendations is also very limited (only 4 months), the importer has to apply for new Recommendations 3 times per year, at every new application window.

66. Even with less than abundant factual evidence on how this system operates in practice, due to the *de facto* import ban on Brazilian products, there is no doubt that the limited application windows and validity periods have restricting effects on imports. Firstly, importers are not allowed to submit an application whenever a business opportunity occurs. Secondly, the system prevents, in practice, exports during the beginning of each validity period, as import transactions can only be carried out after the issuance of the MoA Import Recommendation and the MoT Import Approval. Considering also that shipments have to reflect exactly the terms of both authorizations, shipping operations can only be made after the commencement of the short 4-month validity period. For Brazil, this has a particular limiting effect, as the whole export procedures from Brazil to Indonesia are estimated to take on average 100 days, limiting the access to the Indonesian market to basically 20 days. In sum, there is a "dead zone" comprising most of the 4-month validity period during which no product can enter the Indonesian market. This implies also that exporters will not be able to dispatch more than one shipment of the products at each validity period.

67. This limiting effect is aggravated by the fact that both authorizations have fixed terms. Once those documents are issued, no changes or amendments are allowed. By the time the importers apply for these authorizations, all information related to the covered transactions has to be precisely defined in advance, what is not in accordance with market practices. The importer who fails to comply with these "fixed license terms" is subject to several sanctions and its exports will be refused at the entry port. As no adjustments in the terms of the licensing can be made to respond to new business opportunities during the validity period, this requirement also impedes the importers to have the necessary flexibility to respond to changes in market conditions, thereby imposing a severe limitation on imports.

68. Based on the findings in *Argentina – Import Measures*, Brazil submits that these aspects of the import licensing regime (limited application windows and validity periods, and fixed license terms) violate Article XI:1 because they (a) unduly restrict market access for Brazilian products; (b) create uncertainty as to an applicant's ability to import, which depends on the issuance of the import licenses to take all other necessary steps related to importation and also carry them out within the short 4-month validity period; and (c) impose a significant burden on importers that is unrelated to their normal importing activity.

69. These elements of Indonesia's import licensing regime, together with the positive list, the intended use and the discretionary aspect of the import licensing regime also operate as a quantitative import restriction in the sense of footnote 1 of Article 4.2, as they represent a severe restriction on the volume of Brazilian exports, in blatant contradiction with the main objective of that agreement which is to enhance market access for agricultural products.

70. In the case these aspects of Indonesia's license regime are not found to constitute a "quantitative import restriction", they still constitute a "similar border measure other than ordinary customs duties" within the meaning of footnote 1, as they are similar to a quantitative import restriction in a manner inconsistent with Article 4.2.

71. Moreover, some requirements of Indonesia's import licensing regime, by their very design, encompass "the discretionary use by authorities of the concession or refusal to grant the documents required" for importation, such as those related to: (i) a letter of recommendation from provincial livestock services office; (ii) supervision on the compliance of veterinary requirements; and (iii) the stipulation of the "amount" to be imported per Business Player. As interpreted by the Panel in *Turkey-Rice*, these requirements fall squarely into the definition of "discretionary import licensing" of footnote 1 of Article 4.2.

72. If the Panel does not consider these requirements as a "discretionary import licensing" under footnote 1, they still constitute a "similar border measure other than ordinary customs duties", as they are similar to discretionary import licensing within the meaning of footnote 1. For all the reasons above, Brazil submits that the aspects mentioned above of Indonesia's import licensing regime are inconsistent with Article 4.2 of the Agreement on Agriculture.

#### **(iv) Restrictions on the transportation of imported products**

73. As mentioned above, the transportation of carcass, meat and/or processed products shall be "conducted directly from the country of origin to the port of discharge within the territory of Indonesia". If the transportation is not straight to Indonesia or, by any reason (including *force majeure* events), it is necessary to stop in a third country or port before it arrives at the Indonesian port, then the products will not be allowed to be imported.

74. This restriction has a clear "limiting effect" on the importation of the products at issue. Due to the long distance between Brazil and Indonesia, the vessels need at least one stop in a third country or port before going to the indicated port of entry in Indonesia. Since there are no direct vessel lines from Brazil to Indonesia, this requirement amounts to a virtual ban to Brazilian products. Even if it were possible to export from Brazil directly to Indonesia, this direct transportation requirement would largely increase the transportation costs of the Brazilian product and thus "discourage importation" which, according to the findings of the Panel in *Argentina – Import Measures*, is inconsistent with Article XI:1 of GATT 1994.

75. This measure also clearly operates as a "quantitative import restriction" within the meaning of Article 4.2, as the costs and logistics involved in this direct transportation requirement discourages exports from distant countries, contributing, thus, to restrict the volume of imports. As Brazilian exports to Indonesia would take at least 100 days and would necessarily pass through third country ports, this requirement could not be fulfilled by Brazilian exporters, amounting to a complete ban of imports of Brazilian products in the Indonesian market, which cannot be justified under the Agreement on Agriculture.

76. In the case Indonesia's direct transportation requirement is not found to be a "quantitative import restriction", it still constitutes a "similar border measure other than ordinary customs duties" within the meaning of footnote 1 of Article 4.2, as it has "characteristics in common with a quantitative import restriction" and limits opportunities for importation of chicken meat and chicken products. The Indonesian direct transportation requirement is inconsistent with the agricultural market access obligation of Article 4.2.

77. During the Panel's proceedings, Indonesia has suggested that "direct" does not have its ordinary meaning, but may be used in the same manner as it is used in the airline industry. A direct flight is one that may make stops and pick up additional passengers but the original passengers do not leave the plane. Also, this requirement should be read in the context of the other provisions in the same Article, which would suggest that transit is, in fact, allowed.

78. Firstly, the plain reading of Article 19(a) of MoA Regulation 34/2016 does not support the conclusion that transit would be allowed by the Indonesian authorities. There is not a logical connection (or any connection at all) identified in the specified provision that infers that the direct transportation requirement must be interpreted together with the provisions that regulate

quarantine. This generates uncertainty to exporters and economic operators, as they may not have a legal remedy should their exports be prevented from entering Indonesia because they did not travel a direct route. Secondly, the way Indonesia has described its direct transportation requirement, as a flight that "makes stops and pick up additional passengers but the original passengers do not leave the plane", seems to imply that transshipment is not included in Indonesia's definition of transit. If this is the case, then the restrictions to transshipment is also a quantitative restriction inconsistent with Article XI:1 and 4.2 of the AoA. Finally, even if transit (and transshipment) is allowed in practice, the legal uncertainties generated by the murky language of Regulation Article 19(a) of MoA Regulation 34/2016 also amount to a quantitative restriction inconsistent with those Articles.

**(c) Indonesia's import licensing procedures impose a border restriction inconsistent with the obligations under the Agreement on Import Licensing Procedures**

79. Brazil takes issue with the following measures that restrict/prohibit imports of chicken meat and chicken products: (i) positive list of products allowed to be imported; (ii) intended uses; (iii) limited (and short) application periods and validity periods of the MoA Import Recommendation and MoT Import Approvals; (iv) fixed license terms; and (v) discretionary import licensing. In addition of breaching Article XI:1 of the GATT 1994 and Article 4.2 of the AoA, these measures are also inconsistent with Article 3.2 of the ILA.

80. The Panel in *EC – Bananas III* defined the two requirements that must be met in order to determine whether import licensing procedures are within the scope of Article 1.1 of the ILA: (i) the procedures should require the submission of an application or other documentation to the relevant administrative body; and (ii) the submission of an application or other documentation shall be a prior condition for importation.

81. The Indonesian procedures meet the two criteria. Firstly, in order to obtain a MoA Import Recommendation and a MoT Import Approval, the importer must, among other steps, submit applications to different administrative bodies. Secondly, the submission of the application and the other required documents for the MoA Import Recommendation and MoT Import Approval are clearly a condition for the importation of the products at issue into Indonesia. Both applications are a prior condition for importation.

82. The ILA allows for two types of licensing procedures: (i) automatic import licensing and (ii) non-automatic import licensing. Any licensing procedure that is not granted automatically or is subject to different limitations to apply and obtain a license should be considered a non-automatic licensing regime falling under the purview of Article 3.2 of ILA.

83. The specific features of Indonesia's import licensing procedures, such as the limited application windows, short validity periods, fixed license terms, the positive list, the intended use requirements, are sufficient to demonstrate that import recommendations and approvals cannot qualify as an automatic procedure, as they are not "granted in all cases". Indonesia itself recognizes that its licensing procedures are aimed at addressing policy concerns (halal and sanitary requirements) what would suggest that such procedures are non-automatic. Also some aspects of this regime for chicken meat and chicken products are discretionary. Therefore, Indonesia's import licensing requirements are not automatic.

84. In this context, and according to Article 3.2 of the ILA, to be consistent with WTO Agreements, the non-automatic procedures should be related to the implementation of a permissible trade restrictive measure; should not have trade restrictive effects additional to those caused by the imposition of the restrictive measure; should also correspond in scope and duration to the measure they are used to implement and should be no more administratively burdensome than absolutely necessary to administer the measure.

85. This is not the case in Indonesia. Indonesia's import licensing procedures are not connected to a permissible restrictive measure. There is no persuasive connection between halal and sanitary concerns with the positive list requirement, the intended use requirement, the limited and short application periods and validity periods, the fixed license terms and the discretionary import licensing procedures. Moreover, as Indonesia itself recognized there is a range of pre-market procedures in place to ensure that sanitary and halal requirements are fulfilled, such as: desk

review to establish the sanitary conditions of the country of origin, import risk analysis, on-site visit inspections on business units and implementation of a halal assurance system, among others. Once these appropriate measures are implemented there are no grounds in WTO rules to submit the importation to the challenged measures.

86. Even if Indonesia's procedures were applied to administer legitimate restrictions on imports, by its design, structure and operation the regime imposes restrictions on the importation far additional than those that would be required to implement the relevant restriction in violation of Article 3.2 of the ILA. Besides preventing importers from applying for licenses to products not included in the positive list and restricting applications for very limited intended uses, Indonesia prevents importers from obtaining licenses during most part of the year. These restrictions combined with the short validity period and the fixed license terms, imposes an unduly additional restriction on trade that severely affects Brazil's exports. Overall, there is a clear "causal relationship" between the licensing procedures and the fact that Brazil (or any other country in the world) has not exported chicken to Indonesia since 2009. Also, as there is no underlying permissible measure, the procedures do not correspond "in scope and duration" to any "measure" they are supposed to implement as required by the second sentence of Article 3.2. Finally, the lack of transparency and predictability of Indonesia's multi-layered import licensing procedures are more administratively burdensome than necessary to administer import procedures. Even assuming *in arguendo* that the controls were justified, the operation of the procedures is far from being simple, neutral in application and administered in a fair and equitable manner as required by Article 1 and 3.2 of the ILA.

87. In respect to the standard of "no more administratively burdensome than absolutely necessary" in Article 3.2 of the ILA, Brazil understands that it is more stringent than that contained in Article XX of the GATT 1994. Firstly, different from the necessity test under the chapeau of Article XX, the second sentence of Article 3.2 of the ILA refers to burden ("no more burdensome"), and not to trade-restrictive. The trade-restrictiveness of the licensing procedures is examined under the first sentence of Article 3.2, which means that the second sentence must add to the obligations already contained under the first sentence. Secondly, the second part of the second sentence of Article 3.2 of the ILA contains the word "absolutely", which further limits the imposition of any burden on WTO Members in connection with the implementation of non-automatic licensing procedures.

88. Similarly, the standard under Article 3.2 of the ILA is also not analogous to Article 2.2 of the TBT Agreement, which provides that "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective taking account of the risks non-fulfilment would create". Under Article 2.2 of the TBT Agreement, the focus is on the proportionality between the trade-restrictiveness of the technical regulation (the measure) and the risks it seeks to mitigate. By contrast, Article 3.2 of the ILA focuses on the burden of the implementation of the measure, not on its trade-restrictiveness. Therefore, even in situations where trade-restrictive or distortive effects cannot be substantiated, a non-automatic licensing regime can still violate Article 3.2 of the ILA if it is more burdensome than necessary.

89. Indonesia also argued that of the five elements of its import licensing regime challenged by Brazil under Article 3.2 of the ILA, only the limited application and validy periods would fall under this agreement. The positive list and intended use do not fall under the ILA because they are substantive, rather than procedural import licensing requirements.

90. Although the ILA distinguishes between administrative procedures (import licensing) and the substantive rules (the measures) these procedures are meant to administer, Brazil considers that this distinction does not apply in the present case. The dividing line between substantive and procedural requirements is somewhat blurred in relation to the challenged elements of Indonesia's import licensing regime. For instance, the positive list requirement establishes a quantitative restriction on the importation and could be considered a "substantive measure", though not permissible under WTO rules. Yet, it also obliges, as a prior condition for importation, the importer to submit documentation attesting that the products are included in positive list. In other words, there is also an administrative procedure attached to the implementation of the positive list requirement that falls squarely under the scope of the ILA.

91. What makes it difficult to distinguish between procedural and substantive requirements is the fact that there is no clear permissible measure Indonesia's import licensing regime is meant to

implement. Even if one considers the positive list requirement as the measure the administrative procedures are meant to implement, the question then becomes whether this requirement is permissible: as the positive list is in violation of Article XI:1 and Article 4.2, it cannot constitute a measure within the meaning of Article 3.2 of the ILA.

92. Due to this specific feature of Indonesia's import licensing regime, there are several instances of grey zones where the requirements could be characterized both as substantive and procedural, and, in this sense, not only do they violate the substantive provisions of WTO Agreements, but also pertain to procedural provisions regulated by the ILA.

## 2. Claims related to discriminatory treatment

### 2.1. Relevant legal standard

93. Article III:4 of the GATT 1994 enshrines the basic national treatment obligation which states that internal measures must not be applied so as to afford protection to domestic production. Viewed as a cornerstone of the WTO multilateral trading system, it encompasses the obligation to provide equality of competitive opportunities for both imported and like domestic products.

94. The Appellate Body in *Korea – Various Measures on Beef* provided a reliable guidance to determine the existence of a violation of Article III:4. It ruled that three elements must be satisfied: (i) the imported and domestic products at issue must be "like products"; (ii) the measure at issue must be a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution or use"; and (iii) the imported products are accorded "less favourable" treatment than that accorded to like domestic products.

95. In what regards the first element, there is a reiterated understanding in WTO jurisprudence that if origin is the only factor distinguishing between imported and domestic products, there is no need to conduct a full likeness analysis using the traditional criteria set out in the GATT panel report in *Border Tax Measures*. In these cases, in which the foreign origin of the imported product is the sole distinctive element, the imported and domestic products are considered to be "like" for purposes of Article III:4, and the Panel need not go over the details of the competitive relationship between them.

96. As for the second element, it must be established whether the measure could be viewed as a "law, regulation or requirement". Panels have agreed on the definition of "regulation" as any provision which is mandatory and applies across the board.<sup>3</sup> However, the core of the analysis is on the laws which "affect" the specific transactions, activities and uses mentioned in the provision. Thus, the word "affecting" is central to the analysis because it makes the link between the type of government action and the transactions, activities and uses relating to the like imported and domestic products in the marketplace.

97. The Appellate Body has ruled that the word "affecting" has a broad scope of application and interpreted it as a measure which has "an effect on" something.<sup>4</sup> This understanding indicates that any law, regulation etc. that has "an effect on" the internal sale, offering for sale, purchase, transportation, distribution or use of the like products falls within the scope of Article III:4. Additionally, the word "affecting" has also been interpreted to cover not only measures which *directly* regulate the specific activities listed in Article III:4 but also any laws or regulations which might adversely modify the conditions of competition or create incentives or disincentives between the domestic and imported products.<sup>5</sup>

98. With regard to the third element, the Appellate Body decided that to determine whether or not imported products are treated "less favourably" than like domestic products, it would be

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<sup>3</sup> Panel Report, *China – Publications Audiovisual Products*, para. 7.1513. Panel Reports, *China – Auto Parts*, para. 7.239 (citing: GATT Panel Report on *Canada – FIRA*, para. 5.5; Panel Report, *India – Autos*, para. 7.181).

<sup>4</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 209-210.

<sup>5</sup> Panel Reports, *China – Auto Parts*, para. 7.251; Panel Report, *China – Publications and Audiovisual Products*, para. 7.1450.

necessary to assess whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.<sup>6</sup>

## 2.2. Legal Analysis

### (a) The restrictions on the intended uses violates Article III:4

99. As previously detailed, MoA Regulation 58/2015 imposes restrictions on the possible uses of imported chicken meat and chicken products, while no such restrictions are imposed on domestic like products. Considering that the origin of products is the only distinguishing element for the imposition of this restriction, imported and domestic chicken meat and chicken products are "like" for the purposes of Article III:4 and that the Panel do not need to analyze the details of the competitive relationship between them.

100. Indonesia insists that imported frozen or chilled chicken and domestic fresh chicken are not like products and could not have the same treatment. Domestic products are offered for sale fresh while products imported from Brazil would necessarily be frozen. Brazilian chicken could not be offered for sale in markets not equipped with cold-chain systems, as Indonesia would not be able to ensure compliance with its sanitary and halal requirements.

101. Indonesia's arguments are groundless. Article 31(1) of MoA Regulation 58/2015 makes no reference whatsoever to "fresh", "frozen" or "chilled" products. This provision is applicable to all imported carcass and meat products, and the only distinctive criterion to restrict products to certain intended uses is the foreign origin of the product. Based on this understanding, no further analysis should be required to establish the likeness between imported and domestic chicken meat and chicken products, and there is a clear discrimination in the conditions of competition of imported and domestic like products in place in Indonesia.

102. However, if the Panel considers that a specific likeness analysis is deemed necessary, the determination of likeness under Article III:4 of the GATT is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products. The application of the traditional four criteria of the GATT's *Border Tax Adjustments* is also not mandatory but simply a useful framework.

103. Indonesia has not provided any evidence to refute the assumption that the imported and domestic products would compete in the marketplace. As a matter of fact, Indonesia appears to agree with this argument when it affirmed that frozen-thawed chicken meat is similar to fresh meat once thawed and could be thus offered for sale as fresh meat after being thawed. Although limiting the discussion to fresh and thawed chicken meat, Indonesia concedes that the consumer would not, in practice, distinguish them.

104. First of all, the difference between the imported and domestic products at issue would depend only on the temperature conditions to which each one was subjected, something that does not change the relevant properties of the product. Secondly, even products that may present certain differences in physical characteristics, they may still be considered 'like' if the nature and extent of their competitive relationship justifies such a determination. Thirdly, freezing is a process capable of retaining the characteristics of chicken meat and chicken products, guaranteeing their quality and sanity and cannot be used to disqualify the likeness of the products at issue.

105. If Indonesia considers the restrictions as sanitary measures, Brazil understands that Indonesia would have to indicate what is its appropriate level of protection and whether a risk assessment was carried out to establish that the consumption of frozen or chilled products poses a higher risk to human health than fresh chicken. It has clearly not done so, limiting itself to assert, without scientific basis, that the freezing process may affect the basic characteristics of the product and therefore the analysis of likeness.

106. Finally, imported and domestic chicken are capable of serving the same or similar end-uses. Indonesia's arguments that its consumers would not perceive imported and domestic product as the same product because they could not be sure of the halalness of frozen or chilled product or of

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<sup>6</sup> Appellate Body Report, *Korea - Various Measures on Beef*, para. 137; Appellate Body Report, *US - Tuna II (Mexico)*, para. 214.

the quality of the products is simply self-serving and devoid of any credibility. Halal-consuming countries are amongst the major importers of halal frozen chicken. This discussion of whether or not there would be a risk of deceptive practices for the Indonesian consumer does not appear to square with the established analysis of likeness. This is a question of consumer information that could be easily solved, among other measures, by a label that would indicate that the imported chicken had been "previously frozen".

107. To determine whether the measure at issue falls within the scope of Article III:4, it is also necessary to establish whether it corresponds to "laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use". MoA Regulation 58/2015 is a legislation issued by Indonesia's Ministry of Agriculture, which is mandatory and applies across the board to all importers of chicken meat and chicken products. Also this restriction have "an effect on" the internal sale, offering for sale, distribution and use of the Brazilian chicken meat and chicken products in Indonesia and adversely modify the conditions of competition, favoring like domestic products. Firstly, it affects the uses available for the imported products. Secondly, it affects the internal sale and offering for sale of Brazilian chicken meat and chicken products. The restriction impedes direct access of consumers to Brazilian products through relevant distribution and retail channels, such as "wet markets", severely restricting the size of the Indonesian market and adversely shifting the balance of commercial opportunities towards like domestic products.

108. This restriction also results in less favourable treatment to imported product as it modifies the conditions of competition and accords like domestic products a *competitive advantage* in the market over like imported products. In *Korea – Various Measures on Beef* the Appellate Body confirmed the Panel's finding that the dual retail system for imported and domestic beef was inconsistent with Article III:4 because it modified the conditions of competition in the Korean food market to the detriment of imported products. The creation of a dual system, which required retailers to choose between the sale of imported or domestic beef, resulted in the sudden cutting off of access to normal distribution outlets, virtually excluding imported beef from the retail distribution channels through which domestic beef had normal access to Korean consumers. The main consequence of these restrictions was the imposition of a drastic reduction of commercial opportunity to reach, and hence to generate sales to, the same consumers served by traditional retail channels for domestic beef.

109. Brazil considers that the "less favourable treatment" under the present dispute is even more serious. Due to the restriction imposed by MoA Regulation 58/2015, even if imports from Brazil were allowed to enter into Indonesia, they could not reach the most important distribution channels in that country, where a the vast majority of food purchase occurs. The huge majority of consumers would not have access to Brazilian products. Thus, Indonesia's restrictions on the intended uses is inconsistent with Article III:4 of the GATT.

**(b) The halal labelling requirements violates Article III:4 of the GATT 1994**

110. Brazil has demonstrated that imported and domestic chicken meat and chicken products are "like" because origin is the only distinguishing feature between these products. Brazil also demonstrated, and Indonesia has recognized, that Law 33/2014 and MoA Regulation 58/2015 are a "law, regulation or requirement" within the meaning of Article III:4.

111. Law 33/2014 provides for a five-year grace period for the full compliance with the labelling requirement. Even though this requirement is applicable for both imported and domestic halal products, Indonesian authorities do not conduct consistent surveillance concerning the implementation of halal labelling by domestic suppliers. It is very common for Indonesian consumers to find locally produced chicken meat and chicken products for sale without the halal label. This lack of surveillance is more evident in "wet markets", although it also occurs in other retail distribution channels such as modern markets. Therefore, while domestic products are not subject to strict control procedures, imports of chicken meat and chicken products must comply with the labeling requirements before importing is authorized. Without a halal label, Brazilian chicken meat and chicken products would not be able to access the Indonesian marketplace, even if the production process in Brazil strictly complies with the halal requirements imposed by Indonesia. This discriminatory treatment modifies the conditions of competition in the Indonesian marketplace. Not requiring that domestic like products comply with halal labelling tilts the balance in favour of local suppliers.

### **3. A measure can violate different WTO provisions simultaneously**

#### **Article XI:1 of the GATT and 4.2 of the AoA**

112. Indonesia claims that a measure can violate only one WTO provision at a time. It insists that Article XI:1 of the GATT and Article 4.2 of the AoA are mutually exclusive provisions and that only Article 4.2 should apply to the measures at issue, since it is *lex specialis*. It also argues that in the case of Article 4.2 the complainant would have the burden to demonstrate not only that the measure is a restriction but also that it is not justified under any of the exceptions in the GATT.

113. It is beyond any reasonable doubt that a measure can be inconsistent with more than one covered agreement simultaneously and that a Member is entitled to request for a panel to make findings on each one of these inconsistencies. The Panel's reasoning in *EC – Bananas III* can provide guidance to the understanding of what "conflict" means, based on the text of the General Interpretative Note to Annex I of the Agreement establishing the WTO. A legal conflict would occur in two situations: (i) first, clashes between obligations in the GATT and in the Annex 1A Agreements, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and, second, (ii) when a rule in one agreement prohibits what a rule in another agreement explicitly permits. None of these situations relate to any of the alleged legal conflicts indicated by Indonesia.

114. There is no conflict between these Article XI:1 and 4.2. Actually, a violation of Article XI:1 would also entail a violation of Article 4.2. A measure that has a limiting effect on imports can entail a violation of both Articles. Indonesia attempt to convince the Panel that, differently from Article XI:1, the legal standard of Article 4.2 would require the complainant to bear the burden of showing that the challenged measure is not maintained under any of "other general, non-agriculture-specific provisions of GATT-1994", including its exceptions, such as Article XX, in order to make its *prima facie* case. Indonesia's construed legal standard not only makes no sense but is also contrary to all previous WTO jurisprudence which has determined that, in the case of affirmative defenses, the burden of proof remains with the party asserting the defense, not the opposite. To understand it otherwise would require the complainant not only to prove that there is a restriction prohibited under Article 4.2 but also that none of the multiple exceptions available in the GATT could justify the inconsistency of the measure at issue. This is simply unreasonable and would mean to prove a negative.

#### **Article XI:1 of the GATT 1994, 4.2 of the AoA and 3.2 of the ILA**

115. Indonesia also argues that the general prohibition cannot be, at the same time, incompatible with Article XI:1, Article 4.2 and Article 3.2 of the ILA. In Brazil's view, an import licensing formality or procedure can constitute a violation of Article XI:1 if it has a limiting effect on imports, what would also entail a violation of Article 4.2, and can also violate Article 3.2 of the ILA. Members are required to administer non-automatic licensing in a manner which does not have additional trade-restrictive or trade-distortive effects on imports than those already caused by the imposition of the restriction itself. Indonesia's import licensing procedures are exactly the kind of measures that violate the first sentence of Article 3.2, as they reinforce the restrictions imposed by the country on the importation of chicken.

116. The same argument is used by Indonesia in respect to the substantive requirements pertaining to the challenged import licensing regime. However, there are no grounds to consider that a licensing procedure cannot violate at the same time all those three Articles. As a third party has correctly reminded, if a Member imposes a consistent "restriction" through non-automatic licensing procedures, the ILA, including Article 3.2, applies to ensure that the permissible measure is not implemented through an overly restrictive or burdensome licensing procedure. Nevertheless, licensing requirements that in themselves impose a limitation or limiting condition on importation or have a limiting effect on trade also would fail within the scope of Article XI:1 of the GATT. The limiting effect on trade of Indonesia's import licensing regime cannot be disputed as not a single chicken has been able to enter the Indonesian market since 2009.

117. More specifically, the positive list requirement has an important limiting effect on imports, in violation of both Article XI:1 and Article 4.2. Procedurally, requiring that the importer demonstrate that previous imports have complied with its declared intended use as a prior condition to obtain a

new license is a violation of Article 3.2 of the ILA. As there is no permissible measure this requirement implements, any administrative procedure attached to the positive list is necessarily an additional restriction in the sense of Article 3.2 of the ILA. The same is true for the intended use requirement.

118. As for the limited application windows, the short validity periods and the fixed license terms, Indonesia has not provided any defense to Brazil's claims regarding Article 3.2. It limited itself to say that Brazilian exporters have not obtained the Import Recommendation and Import Approval because they have not satisfied halal requirements. Yet, Indonesia has not explained how the limited application windows, the short validity periods and the fixed license terms are related to the observance of halal requirements. If there is no permissible measure non-automatic import licensing procedures are meant to implement, they are in violation of Article 3.2 of the ILA.

#### **Article XI:1 and Article III:4 of the GATT 1994**

119. Finally, with regard to the intended used requirement, Indonesia argues that this requirement cannot be challenged under both Article III:4 and Article XI:1 of the GATT and that it should be viewed only as an internal measure, not a border measure, due to the alleged application of the Ad Note to Article III. According to Indonesia, although enforced at the border, this requirement applies also to domestic chicken. First, the intended use requirement has different effects. It affects the process of importation itself: the importer will not have an import license if the imports do not contemplate one of the permitted intended uses. It also affects the conditions of competition once the product has entered the market. After customs clearance, the importer is not allowed to offer for sale the imported products to other distribution and retail channels than those listed in the import license. Therefore, the intended use requirement has different effects and violates both Article XI:1 and III:4. Second, the intended use requirement is not applicable in the same way to the domestic products. A shipment from Brazil to be used in a restaurant in Jakarta could not be directed to a traditional market (or even to another intended use, such as a hotel). However, if the same restaurant denies receiving chicken locally produced, the distributor can redirect it to another buyer, such as a hotel, restaurant or the traditional market. So, even the cold-chain requirement is not applicable in the same way to both imported and domestic products. Since there is not an "equivalent internal requirement", Ad Note to Article III is not applicable to the case. This is further demonstrated by Article 22(1) of MoA Regulation 34/2016 as it now requires importers, when applying for an Import Recommendation, to submit a distribution plan for the imported chicken, which, according to the template annexed to the legislation, shall include in advance information on the type of meat, the quantity, the name and address of the establishments/buyers and the product's price. Brazil considers that the importer is not only limited to the end-uses listed in the legislation but also to a pre-defined distribution plan within the allowed uses, preventing the importer from actually distributing the imported chicken meat and chicken product after the import operation occurs according to the best business offers it may be able to get.

120. Regardless of the Panel's decision concerning the order of analysis and the exercise of judicial economy, nothing in the WTO rules prevents the Panel from making findings on each one of these inconsistencies challenged by Brazil. This would be particularly important in this case because of the shifting nature of Indonesia's legislation regarding the intended use requirement. In the absence of findings regarding the inconsistency of this measure both as a border measure and as an internal measure, Indonesia could continue to evade its obligations by simply reinforcing in new legislation the particular aspect of the intended used requirement that was not addressed by the Panel.

### **3. Claims related to sanitary barriers**

#### **3.1. Relevant legal standard: Article 8 and Annex C(1)(a) of the SPS Agreement**

121. Article 8 of the SPS Agreement provides that Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures regarding sanitary and phytosanitary measures. Annex C gives shape and content to Article 8 and a violation of the rules of Annex C necessarily entails a violation of Article 8.

122. The most relevant provision of Annex C in the present dispute is Annex C(1)(a), which determines that "Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that" [...] "such procedures are undertaken and completed without undue delay".

123. The relevant aspects in the interpretation of Annex C (1)(a) to be taken into account in the present dispute are (i) the identification of which are the "procedures designed to check and ensure" a sanitary measure; and (ii) the understanding that the term undue delay does not refer exclusively to a "delay", but also to an absence of formal response from the authorities when certain sanitary procedure was initiated before them.

124. Concerning the first aspect, the term "procedure" is defined in the SPS Agreement in a manner as broad as possible. This interpretation has been upheld in several WTO cases.<sup>7</sup> The main feature to be established when ascertaining whether a certain procedure falls under the purview of Article 8 and Annex C(1)(a) is to determine that it "is aimed at 'checking and ensuring the fulfilment of sanitary or phytosanitary measures', and is undertaken in the context of 'control, inspection, or approval'". While Article 8 and Annex C list certain types of procedures as expressly falling within their ambit, the terms "including" in Article 8, and "include, inter alia", in footnote 7 to Annex C, clarify that the lists are illustrative.

125. Previous WTO jurisprudence, in analyzing the term "procedures" as used in Annex A(1), upheld the understanding that "procedure" has to be interpreted in a wide sense. The panel report in *US-Animals* (para 7.40), stated that "the reference to 'procedures' in the second sentence of Annex A(1) is broad enough to encompass both procedures of general application as well as the specific implementation of a procedure in a particular instance."

126. On the basis of these elements, the term "approval procedures" in both Article 8 and Annex C encompass "procedures applied to check and ensure the fulfilment of one or more substantive SPS requirements the satisfaction of which is a prerequisite for the approval to place a product on the market". The negotiation of an "International Veterinary Certificate" clearly constitutes a pre-marketing approval requirement.

127. Concerning the second aspect, the term "undue delay" does not only refer to a "delay" *stricto sensu*, but also refers to occasions where there is no response at all from a Member's competent authority. This interpretation was clarified by the Panel in *EC – Biotech* (para 4.167), which found that the ordinary meaning of the term "delay" is "(a period of) time lost by inaction or inability to proceed". The requirement in Annex C(1)(b) of the SPS also provides context for this interpretation, particularly regarding the necessity for the competent authorities to "promptly examine the completeness of the documentation" and to "inform the applicant in a precise and complete manner of all deficiencies". Moreover, in *EC–Biotech*, the Panel interpreted that "without undue delay" could adequately mean "without an unjustified loss of time". The Panel also stated that "[a]lthough Members are in principle allowed to take the time that is reasonably needed to determine with adequate confidence whether their relevant SPS requirements are fulfilled, they are also required to proceed with their SPS approval procedures as promptly as possible. Therefore, a Member is not allowed to freely decide when it will finish the undertaking and completion of the approval procedures. In cases in which there is a delay, the Member should ensure that it is not excessive or unwarranted and its causes are rightfully justified". Therefore, although possible in practice, a delay must be reasonable and cannot be unjustified and disproportionate. The absence of response naturally represents an unjustified and disproportioned delay in the sense of Article C(1)(a).

### **3.2 Legal Analysis: The undue delay of Indonesia to negotiate an "International Veterinary Certificate" with Brazil violates Article 8 and Annex C(1)(a)**

128. The negotiation of an International Health Certificate is the first step undertaken by countries interested in the trade of animal products, including chicken. It is clear that the negotiation of a valid International Health Certificate is encompassed by the term "approval procedures" referred to by Article 8 and Annex C as it is a procedure "applied to check and ensure

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<sup>7</sup> Panel Report, *US – Poultry (China)*, para. 7.363; Appellate Body Report *Australia – Apples*, para. 438; Panel Report, *US – Animals*, para. 7.68

the fulfillment of one or more substantive SPS requirements the satisfaction of which is a prerequisite for the approval to place a product on the market".

129. The rule in Annex C(1)(a) determines that the competent sanitary authority must take the necessary steps to ensure that a sanitary procedure initiated before it is concluded. There is no defined deadline in Annex C(1)(a) and that the assessment of "undue delay" should be made on a case-by-case basis. In the present dispute, the complete lack of response after seven years of the first proposal is a clear evidence that Indonesian authorities have unjustifiably delayed the procedures to check and ensure the fulfillment of the sanitary requirements that would allow for the exportation of Brazilian products. By not answering, the Indonesian authorities violated Annex C(1)(a) of the SPS Agreement. Even where a proposal is inaccurate or does not contemplate all the necessary elements required by the Indonesian legislation, Indonesia must give a proper response in order to allow for the corrections and additions necessary. Annex C stems logically from Article 8 of the SPS Agreement. As the two provisions are intertwined, a breach of Annex C(1)(a) entails a breach of Article 8.

130. Indonesia attempted to justify its inaction by arguing that the lack of response is Brazil's own fault: Brazil did not present the appropriate documents and information related to the halal requirements related to two different business units. First, compliance with halal requirements has never been an issue for Brazil, which has had for several years its two main certification bodies duly approved by Indonesia. Second, halal certification guards no connection with the conclusion of the sanitary procedures required by Indonesia. Halal certification is not a SPS procedure and should not be confounded with a sanitary requirement nor considered in a government-to-government sanitary approval process of an International Health Certificate. Indonesia does not dispute that halal certification is not covered by the scope of the SPS Agreement.

## **V. INDONESIA'S DEFENSES UNDER ARTICLE XX OF THE GATT**

### **The intended use is not justified under Articles XX (b) and (d) of the GATT**

131. Indonesia seeks to justify the intended use requirement under Article XX(b) of the GATT 1994, as it contributes to the protection of human life or health by eliminating the risk of freezing and thawing products for sale to consumers. It sustains that frequent thawing and freezing would increase microbial growth and facilitate product deterioration as this process would "mechanically damage the cell membranes and reduce water-holding capacity". However, there is no meaningful connection between limiting the sale of frozen chicken to places with cold chain facilities and the alleged objective pursued. First of all, if traditional markets have no cold storage, how is it possible that the chicken will be refrozen? Secondly, the freezing process is capable of ensuring that the meat will remain fresh for a longer period, as compared to the meat that has never been frozen. Indonesia would have more reasons to prohibit the sale of fresh chicken in markets without cold storage than prohibiting the sale of frozen chicken. Finally, Indonesia has offered no evidence to support its claims that food safety is the objective of the intended use requirement.

132. In any event, the intended use requirement is clearly not "necessary". There are less trade-restrictive measures which could satisfy Indonesia's appropriate level of protection, such as rules regulating the thawing of frozen chicken to be offered for sale and/or restricting the possibility of refreezing previously thawed chicken for sale in traditional markets. An outright prohibition of the sale of frozen chicken in those venues is in excess of the aim of protecting human life or health due to the alleged "risk of freezing and thawing products". Indonesia's assertions on this subject contradict the actual practice of its government. 9,000 tons of imported frozen meat from the United States was recently offered for sale in Indonesian traditional markets. Indonesia confirmed that the imported meat was sold frozen but did not inform whether it ensured that the products were exclusively kept in cold-chain systems at the points of sale. Given that these systems are normally not available in wet markets, it is improbable that the intended use requirement was duly enforced.

133. Indonesia also alleges that the intended use requirement is provisionally justified under the Article XX (d) because it is designed to secure compliance with Indonesia's laws and regulations on public health (namely, those setting out sanitary requirements), deceptive practices and customs enforcement. Indonesia has failed to provide any evidence that the measure contributes to the enforcement of any particular law related to food safety. As noted by one of the third parties, there is no basis in the text, structure, or the legislative history of Law 18/2009 and Law 8/1999 to

support the claim that this measure was designed to secure compliance with the food safety and consumer protection provisions cited by Indonesia. The recent decision to authorize the sale of imported frozen beef during Ramada at traditional markets demonstrates that the intended use requirement is only a protectionist tool. Similarly, Indonesia has not indicated whether there would not be any less trade-restrictive alternative measures to secure compliance with its laws and regulations. In any event, Indonesia has not demonstrated that the intended use respects the chapeau of Article XX of the GATT 1994.

#### **The positive list is not justified under Article XX (d) of the GATT 1994**

134. Indonesia does not dispute the existence of a prohibition on the importation of chicken cuts. However, it tried to justify this prohibition on the basis of Article XX(d) of the GATT 1994, claiming that it "was necessary to secure compliance with Indonesia's laws and regulations dealing with halal food. According to Indonesia, its main concern has been that certain exporters may try to circumvent Indonesia's halal requirements by sourcing chicken parts from slaughterhouses that do not produce halal chicken, and passing them off as halal.

135. Indonesia failed to demonstrate that this measure is necessary to secure compliance with its halal requirements. In reality, MoA Regulation 58/2015 (revoked by MoA Regulation 34/2016) and MoT Regulation 05/2016 (as altered by MoT 37/2016) do not impose the same restriction, for instance, in relation to the importation of cuts of lamb and goat, which should also comply with halal requirements. This exception demonstrates that Indonesia itself does not consider it necessary in all cases to restrict imports of cuts of animal products in order to ensure compliance with halal requirements. Moreover, there are less trade-restrictive alternative measures to guarantee the halalness of the products, for example, to implement certification procedures with foreign slaughterhouses seeking to export to Indonesia. Continuous certification procedures – which are a common feature of international trade of food products – would ensure the halalness of the products leaving the slaughterhouses and would also prevent deceptive practices with regard to the compliance with halal requirements. The positive list requirement cannot be justified under paragraph (d) of Article XX.

#### **The limited application and validity periods are not justified under Article XX(d)**

136. Indonesia frailly attempts to justify the limited application and validity period under Article XX(d) of the GATT 1994 as a measure "designed to secure compliance with Indonesia's laws and regulations addressing halal, public health, as well as deceptive practices (consumer protection) and customs enforcement relating to halal and safety". It is difficult to see any connection between the limited application and validity periods with the observance of halal requirements. Moreover, compliance with halal and animal health requirements can be obtained through much less trade-restrictive measures, such as proper certification procedures and verification, and information on trade flows can easily be obtained through other means.

#### **The fixed license terms are not justified under Article XX (d) of the GATT 1994**

137. According to Indonesia, the fixed license terms "were designed to secure compliance with Indonesia's laws on halal and public health, as well as deceptive practices and customs enforcement relating to halal and food safety". Indonesia based its reasoning on the consideration that, allegedly, the fixed license terms "enable[s] the Government to monitor foreign trade and to facilitate customs enforcement. They provide an estimate of the volume of imports that would enter Indonesia at a particular port and at a given time so that the Government can best allocate its limited resources in order to expedite customs clearance". However, Indonesia had not explained how the fixed license terms bear any relation to the observance of halal or sanitary requirements. Secondly, according to Indonesia, "many of these terms are not as stringent", as "importers may identify more ports than they ultimately use, or higher quantities of import than they ultimately import". If this statement is accurate, one must wonder what actually the purpose of fixing the license terms is. The only purpose they can have is to serve as yet another trade restrictive tool to close the Indonesian market.

**The halal labelling is not justified under Article XX of the GATT 1994**

138. Indonesia seeks to justify the implementation of its halal labelling certification procedures under subparagraphs (a) and (d) of Article XX of the GATT 1994. Under Article XX (a), Indonesia argues that "the halal requirements are necessary to protect public morals".

139. Brazil does not challenge Indonesia's right to establish the halal requirements nor questions the fact that these requirements are necessary to protect its religious beliefs and public morals. As the world's leading exporter of halal chicken, Brazil is fully aware of the importance of respecting the different halal standards adopted by different Muslim countries. As required by Indonesia, halal slaughtering in Brazil is performed by the country's poultry slaughterhouses through manual slaughtering.

140. Brazil contends that Indonesia did not provide any evidence to justify the "necessity" of the discrimination between domestic and imported chicken meat and chicken products to protect its public morals, as required by Article XX or how this discriminatory treatment contributes to further the public morals of the country. Also, even if it was possible to justify the discriminatory 5-year grace period halal certification and labeling requirements under subparagraph (a) of Article XX, this measure would not pass the test of the chapeau. Indeed, to the extent that the measure is only applicable to imported products, it is on its face a violation of Article III:4 of the GATT 1994.

141. Furthermore, Indonesia tries to explain that halal labelling would be applicable only to packaged products and, therefore, because domestic chicken meat and chicken products are mainly sold in the traditional markets and are not necessarily packaged like imported products, then the halal label would not be mandatory for the domestic products. However, Indonesia's explanation forgets that Law 33/204 (article 38) does not make any reference with regard to the necessity to attach the halal label only to packaged products. Instead, it provides for three different possibilities to the attachment of the label: (i) in the package of the product; (ii) in a specific part of the product; and/or (iii) in a specific place of the product. That is, according to Indonesia legislation, packaging is not a reason to justify the discriminatory treatment.

142. The same applies to the defense under paragraph (d) of Article XX. Indonesia has not provided any evidence that the challenged measures contribute to the enforcement of any particular law or regulation. It is not sufficient to simply assert that "the implementation of halal requirements is 'necessary' to secure compliance with these domestic legal provisions" without providing any evidence or further clarification that would justify the discriminatory treatment against imported products.

**VI. CONCLUSION**

143. Brazil respectfully requests that the Panel find that:

(i) Indonesia's general prohibition on the importation of chicken meat and chicken products is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture;

(ii) Indonesia's prohibition on the importation of chicken cuts and other prepared or preserved chicken meat is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture;

(iii) Indonesia's restrictions on the use of imported chicken meat and chicken products is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture;

(iv) Indonesia's restrictive import licensing procedures is inconsistent with Article XI:1 of the GATT 1994, Article 4.2 of the Agreement on Agriculture, and Article 3.2 of the Agreement on Import Licensing Procedures;

(v) Indonesia's restrictive transportation requirements for imported chicken meat and chicken products is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture;

(vi) Indonesia's restrictions on the use of imported chicken meat and chicken products is inconsistent with Article III:4 of the GATT 1994;

(vii) Indonesia's implementation of halal labelling requirements is inconsistent with Article III:4 of the GATT 1994; and

(viii) Indonesia's undue delay with regard to the approval of sanitary requirements is inconsistent with Article 8 and Annex C of the SPS Agreement.

**ANNEX B-2****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA****I. INTRODUCTION**

1. This dispute raises fundamental issues as to how a WTO Member may properly structure its laws and regulations to promote food safety and ensure compliance with its religious requirements. Indonesia is home to the fourth largest population in the world with over 255 million citizens. It is home to the largest Muslim population in the world. Many devout Muslims in Indonesia consume only halal food, which means they are prohibited from consuming pork and other meat not slaughtered according to the Islamic Shar'ia, and from consuming products that have been in contact with non-halal foods. The burden falls heavily on the Indonesian Government to ensure that the food available to Muslim Indonesians conforms to halal requirements as well as to ensure that Indonesia's food supply is adequate and safe. Indonesia believes that these societal values are of the utmost importance. Indonesia also believes that it has struck the proper balance between protecting the religious principles of its citizens and respecting its WTO obligations.

2. Brazil challenged Indonesia's laws and regulations relating to the importation of chicken meat and chicken products as a general prohibition (or overarching measure) on the importation of chicken meat and chicken products, as well as individual measures. The individual measures challenged by Brazil are: certain aspects of Indonesia's import licensing regime, including the positive list and intended use requirements; the alleged discriminatory implementation of halal labelling requirements; the alleged restrictions on the transportation of imported chicken products; and the so-called delays in the approval of sanitary requirements for the importation of chicken. Brazil appears to regard this dispute as an "open-and-shut case". It is not.

3. Indonesia has no intention to ban, restrict or limit imports of chicken meat or chicken products from any country, including Brazil. Indonesia only wishes to ensure that chicken meat and chicken products are safe, healthy, wholesome and halal. Moreover, Indonesia is committed to further liberalize its trade by enacting measures that are fully consistent with Indonesia's legitimate interests in ensuring halal compliance, food safety and security, and safe and efficient customs and quarantine administration. In fact, Indonesia's efforts at further liberalization have resulted in the termination of some measures challenged by Brazil in these proceedings. Indonesia will address these issues in detail in this integrated executive summary.

4. It is well known that complaining WTO Members engaging in WTO dispute settlement proceedings must meet high standards. These high standards are reflected in the stringent requirements for a panel request, which must plainly connect the challenged measures with the provisions of the covered agreements claimed to have been infringed, so that the respondent is aware of the basis for the claims. In addition, the Appellate Body has noted that the requirement to make a *prima facie* case – made in the course of submissions to the panel – demands the same high standards. It stated that "the evidence and arguments underlying a *prima facie* case therefore must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision".<sup>1</sup> Furthermore, each factual assertion must be proven.<sup>2</sup>

5. With all due respect, Indonesia is of the view that Brazil has not met these high standards in the course of these proceedings. As explained in greater detail below, Brazil has submitted many Indonesian laws and regulations to the Panel but has not properly identified the WTO-inconsistencies therein; it has cited several provisions in WTO agreements but has not explained the basis for the claimed inconsistency of the measure with those provisions. Brazil has also not

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<sup>1</sup> Appellate Body Report, *US – Gambling*, para. 141.

<sup>2</sup> Panel Report, *Argentina – Textiles and Apparel*, para. 6.35.

always been clear as to whether it is challenging current or expired aspects of Indonesia's import licensing regime.<sup>3</sup>

6. Moreover, throughout these panel proceedings (even at very late stages), Brazil made changes to the scope of its claim on the general prohibition/overarching measure, the import licensing regime and the halal labelling requirement. These constant changes result in a lack of clarity as to what Brazil is actually challenging in these proceedings and deprive Indonesia of the ability to defend itself properly. Furthermore, Brazil has challenged certain Indonesian measures under the incorrect WTO covered agreement and has also challenged the same aspects of the same measures under different WTO covered agreements, which have different obligations. Indonesia therefore considers that Brazil has not met its burden of proof to demonstrate that the measures it is challenging in these proceedings are inconsistent with Indonesia's WTO obligations. In addition, Brazil has not convincingly responded to Indonesia's arguments and evidence submitted with respect to each of these claims and it has not convincingly rebutted Indonesia's defences under Article XX of the GATT 1994, where applicable. Importantly, Brazil has not provided any relevant less-trade restrictive alternatives for the challenged measures.

7. There are many weaknesses in Brazil's arguments and evidence with respect to each of the challenged measures. Indonesia submits that when a complainant fails to support its claims with adequate arguments and evidence, these claims must necessarily fail. A panel, in this situation, must find that the complainant failed to make its *prima facie* case of violation. Indeed, it is a well-settled principle of international law that a sovereign State's measure will be treated as consistent with that State's international obligations until proven otherwise.<sup>4</sup>

8. Indonesia has submitted detailed legal arguments and comprehensive factual explanations with respect to its import licensing regime, including the intended use, positive list and transportation requirements; halal labelling and certification requirements. Indonesia has submitted charts detailing every step of the import licensing procedures, has explained fully the roles of the main government authorities involved in these procedures, and has clarified the scope and coverage of its own laws and regulations. Brazil has not fully engaged with, or properly responded to, any of these detailed legal arguments and factual explanations.

9. Like many other active WTO Members, Indonesia is currently involved in several dispute settlement proceedings both as complainant and as respondent. Indonesia wishes to stress that the outcome of those disputes is not relevant for the conduct of this dispute. The outcome of this dispute must be determined on the strengths and weaknesses of the legal arguments and evidence put forward by both Brazil and Indonesia in this dispute.<sup>5</sup>

## II. INDONESIA'S REQUEST FOR A PRELIMINARY RULING

10. Indonesia submitted its request for a preliminary ruling as an attachment to its first written submission. Indonesia considered that Brazil's panel request is problematic in several respects. With respect to the alleged general prohibition/overarching measure, Indonesia submitted that Brazil failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly as required by Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), as it listed several elements of this measure, several Indonesia's legal instruments and several WTO provisions without making a connection between them.<sup>6</sup>

11. Moreover, Indonesia noted that the alleged general prohibition/overarching measure described in Brazil's panel request does not correspond to the description of the alleged general prohibition/overarching measure in Brazil's first written submission. In its panel request, Brazil described this measure as a combined operation of *seven* individual measures resulting in the general prohibition on the imports of chicken. In its first written submission, Brazil decided to remove one such individual measure (halal labelling requirement) changing the scope of the

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<sup>3</sup> See, for example, Indonesia's opening statement at the second meeting, paras. 5-6 and Brazil's rebuttal submission, para. 155.

<sup>4</sup> See, *inter alia*, Appellate Body Report, *US – Carbon Steel*, para. 157.

<sup>5</sup> The information in this section is based on, *inter alia*, Indonesia's opening statement at the first meeting, paras. 3-4; and Indonesia's opening statement at the second meeting, paras. 2-8.

<sup>6</sup> Indonesia's Request for a Preliminary Ruling under Article 6.2 of the DSU, paras. 1.14-1.28.

general prohibition/overarching measure. It then referred to this measure for the first time as an unwritten measure.<sup>7</sup> Similarly, Brazil failed to describe the objective of the alleged general prohibition/overarching measure in its panel request, but only referred to it in its first written submission. However, the objective of an alleged unwritten overarching measure plays a pivotal role in defining the measure at issue and, by not referring to it in the panel request, Brazil has not complied with the specificity requirements in Article 6.2 of the DSU.<sup>8</sup>

12. Furthermore, Indonesia noted that Brazil's challenge to Indonesia's import licensing regime "as a whole" was not identified in its panel request, and was thus, outside the terms of reference of the Panel.<sup>9</sup> Along similar lines, Indonesia claimed that Brazil's challenge to an alleged import prohibition on other prepared or preserved chicken meat was not identified in Brazil's panel request and was therefore outside the terms of reference of the Panel.<sup>10</sup>

13. Finally, Indonesia argued that, to the extent that Brazil was challenging Indonesia's measures under Article 1 of the Agreement on Import Licensing Procedures (Import Licensing Agreement), the Panel should refrain from entertaining such claims, as Article 1 was not mentioned in Brazil's panel request, and was thus outside the terms of reference of the Panel.<sup>11</sup>

### III. SYSTEMIC ISSUES ARISING IN THIS DISPUTE

#### A. BRAZIL'S CLAIM ON THE ALLEGED GENERAL PROHIBITION/OVERARCHING MEASURE IS A "MOVING TARGET" FOR INDONESIA AND IS NOT SUPPORTED BY RELEVANT EVIDENCE

14. Brazil submitted that Indonesia maintains "several prohibitions or restrictions on the importation of chicken meat and chicken products, which, combined, have the effect of a general prohibition on the importation of these products".<sup>12</sup> Brazil described this measure as an overarching measure/general prohibition comprising the following elements: the prohibition of the importation of non-listed products; prioritization of "national food" over "food import"; prohibitions or restrictions on imports of essential and strategic goods; limitations on chicken meat and chicken products to certain intended uses; alleged undue refusal to approve the health certificates for poultry products; alleged prohibitions and/or restrictions to importation through Indonesia's import licensing regime; and alleged import prohibition imposed through the halal labelling requirements for imported chicken meat and chicken products.<sup>13</sup> In its first written submission, Brazil dropped the halal labelling requirement so that the description of the overarching measure/general prohibition then only included six elements.<sup>14</sup>

15. Indonesia raised systemic concerns with respect to the manner in which Brazil described the alleged general prohibition/overarching measure and its challenge throughout these proceedings, as well as the inadequate nature and amount of evidence Brazil submitted to prove the existence of this measure. In *Russia – Tariff Treatment*, the panel acknowledged that if neither the respondent nor the panel were able to pin down the measure whose consistency with the covered agreements is contested, "[t]his could raise issues of due process".<sup>15</sup> Moreover, it is well-established in WTO jurisprudence that "the complaining party must 'present relevant arguments and evidence during the panel proceedings showing the existence of the measures, for example, in the case of challenges brought against unwritten measures'".<sup>16</sup> It is also generally acknowledged that a panel cannot lightly accept the complainant's assertion that the challenged unwritten

<sup>7</sup> Brazil's first written submission, paras. 136-139.

<sup>8</sup> Indonesia's Request for a Preliminary Ruling under Article 6.2 of the DSU, paras. 1.29-1.41. See also Indonesia's response to Panel Question No. 68.

<sup>9</sup> Indonesia's Request for a Preliminary Ruling under Article 6.2 of the DSU, paras. 5.1-5.6.

<sup>10</sup> Indonesia's Request for a Preliminary Ruling under Article 6.2 of the DSU, paras. 1.43-1.48.

<sup>11</sup> Indonesia's Request for a Preliminary Ruling under Article 6.2 of the DSU, paras. 1.49-1.52.

<sup>12</sup> See, Request for the Establishment of a Panel by Brazil, *Indonesia – Measures concerning the Importation of Chicken Meat and Chicken Products*, WT/DS484/8, 21 October 2015 (Brazil's panel request), pp. 1-2.

<sup>13</sup> Brazil's panel request, p. 2.

<sup>14</sup> Brazil's first written submission, para. 74.

<sup>15</sup> Panel Report, *Russia – Tariff Treatment*, paras. 7.291, 7.302.

<sup>16</sup> See Panel Report, *Russia – Tariff Treatment*, para. 7.338 (citing Appellate Body Report, *US – Continued Zeroing*, para. 169).

measure exists.<sup>17</sup> This means that the evidentiary burden for a complainant challenging an unwritten measure must necessarily be higher than that arising from challenges to written measures, whose existence is not disputed.<sup>18</sup> Brazil has itself recognised this heightened burden.<sup>19</sup>

16. With respect to the manner in which Brazil described the alleged general prohibition/overarching measure and its challenge, until the end of the Panel's proceedings, Brazil did not explain clearly what exactly it was challenging and on what basis. Brazil referred to the measure at issue as: "a general prohibition on the importations" of chicken meat and chicken products, "*de jure*" and "*de facto*" inconsistent with Indonesia's obligations; "a general proposition, concerted action or practice", an unwritten, overarching measure, distinct from its elements; and "on-going conduct" of "general and systematic application". In its panel request, Brazil stated that the measure at issue consists of *seven* prohibitions or restrictions, which are "combined" (i.e. interact and work in concert). In its first written submission, Brazil argued that the measure at issue consists of only *six* elements. In its other submissions, Brazil argued that the alleged general prohibition/overarching measure could consist of "six, seven or eight (or more, or fewer)" WTO-inconsistent measures. And then, in its response to Panel Question No. 5.a.v, Brazil suggested that other measures, in particular the direct transportation requirement, "could also be part of the general prohibition".<sup>20</sup>

17. In its first written submission, Brazil specified the alleged objective of the general prohibition/overarching measure for the first time, and then expanded upon its argument in its opening statement at the first meeting of the Panel with the parties. In particular, Brazil clarified that "the combined interaction of different individual WTO-inconsistent measures constitutes an unwritten overarching measure and was conceived to implement an official trade policy based on the overriding objective of restricting imports to protect domestic production". Brazil referred to this policy as the requirement of "self-sufficiency". Brazil described the alleged requirement of "self-sufficiency" as the "overriding objective" and one of the elements of the measure at issue, as well as a "guiding principle". However, Indonesia explained that a measure and its objective are different concepts.<sup>21</sup>

18. Indonesia acknowledges that a complainant has certain discretion to describe the measure it is challenging in the way it considers necessary. Nevertheless, Indonesia submits that once the complainant described the measure in one way, it is not free to stretch and squeeze its content throughout the panel proceedings. Doing so would compromise the ability of the respondent to prepare its defence, as in the present case. Moreover, given that the challenge to a rule or norm of "general and systematic application" is different from the challenge to a measure as applied, or as on-going conduct, or as an overarching measure, a complainant that has changed the description of the challenged measure, or the essence of its challenge to that measure, would have to start to make its *prima facie* case anew, possibly submitting additional evidence. Brazil has itself acknowledged that the description/characterization of the measure at issue by the complainant informs the evidence and arguments that are required to prove that the measure exists.<sup>22</sup>

19. A clear and consistent description of the content of the challenged measure is especially important in circumstances where the measure is unwritten, as in the present dispute. By definition, the alleged general prohibition/overarching measure is not a measure set out in any laws, regulations or official policy documents. It is rather a construction that Brazil has devised in

<sup>17</sup> See Panel Report, *Russia – Tariff Treatment*, paras. 7.348, 7.380. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 792.

<sup>18</sup> See Panel Report, *Argentina – Import Measures*, para. 6.323.

<sup>19</sup> Brazil's rebuttal submission, para. 12. See these issues discussed in Indonesia's first written submission, paras. 96-109; Indonesia's opening statement at the first meeting, paras. 49-58; Indonesia's rebuttal submission, paras. 65-75; Indonesia's opening statement at the second meeting, paras. 10-21; Indonesia's responses to Panel Questions No. 5.c, 6-8, 68, 70; Indonesia's comments on Brazil's responses to Panel Questions No. 68, 70, and 71.

<sup>20</sup> See Indonesia's response to Panel Question No. 6; Indonesia's rebuttal submission, para. 66 (citing *inter alia*, Brazil's first written submission, paras. 76, 173; Brazil's response to Indonesia's request for a preliminary ruling, para. 32).

<sup>21</sup> Indonesia's rebuttal submission, para. 66; and Indonesia's comment on Brazil's response to Panel Question No. 68 (citing Brazil's first written submission, paras. 75 and 174; Brazil's opening statement at the first meeting, para. 11; and Brazil's responses to Panel Questions No. 5.b and 68).

<sup>22</sup> Brazil's response to Panel Question No. 8.b (citing Appellate Body Report, *Argentina – Import Measures*, para. 5.107). See Indonesia's rebuttal submission, paras. 67-68; Indonesia's opening statement at the second meeting, paras. 10 and 11.

order to cluster various otherwise distinct measures together to suggest that they supposedly advance a common objective. The very existence and the precise contours of the alleged overarching, unwritten measure are, therefore, uncertain, and should have been clearly established by Brazil.<sup>23</sup>

20. With respect to the evidence that Brazil presented to prove that the measure at issue exists, the only pieces of evidence Brazil relied upon were: trade statistics showing the absence of imports of chicken into Indonesia from Brazil, and certain legal instruments in which some individual elements of the alleged general prohibition/overarching measure are established. Brazil did not provide any evidence showing *how* the alleged elements of the measure at issue *operate together*, as opposed to being merely individual unrelated "trade restrictions". Furthermore, Brazil did not prove its assertion that each of these elements was indeed established *with a view to achieving Indonesia's alleged objective of "self-sufficiency"*. Finally, Brazil failed to substantiate its assertion that the alleged general prohibition/overarching measure is applied in a "*general and systematic*" manner.<sup>24</sup>

21. To be clear, Indonesia does not argue that the above elements must be demonstrated in each and every dispute involving unwritten measures. Brazil's evidentiary burden stems from its own characterization/description of the measure at issue in its panel request and its subsequent clarifications in the course of the Panel proceedings.<sup>25</sup>

22. At the very end of these proceedings, in its response to a Panel's question following the second substantive meeting of the Panel with the parties, Brazil attempted to introduce additional pieces of evidence, such as a letter signed by Indonesia's Director General of Livestock, Ministry of Agriculture, and four news articles allegedly quoting Indonesian government officials. Indonesia requested the Panel to disregard these documents, as they constitute evidence-in-chief and, pursuant to paragraph 8 of the Working Procedures for this dispute, had to be submitted "no later than during the first substantive meeting". Most of the documents submitted were dated well before the deadline for submitting factual evidence, and were in Brazil's possession. Brazil did not even try to show good cause as to why it should be allowed to submit evidence-in-chief at that late stage. Instead, it argued that it was entitled to submit evidence-in-chief in response to a Panel's question.<sup>26</sup>

23. But even if those pieces of evidence were properly before the Panel, they do not provide any meaningful support for Brazil's allegation that the general prohibition/overarching measure exists. Brazil's evidence is contradictory and does not prove that the lack of imports of chicken meat and chicken products from Brazil into Indonesia is caused by the alleged requirement of self-sufficiency. On the contrary, as Indonesia demonstrated throughout these proceedings, the real reason for the lack of imports is Brazil's own failure to comply with Indonesia's import procedures. With respect to the news articles, they appear to contain "quotes" of Indonesian authorities taken out of context, and do not portray the accurate picture of the Indonesian market for chicken.<sup>27</sup>

24. Based on these considerations, the fact that, even at the very end of the Panel proceedings, Brazil had not provided a clear description of the measure at issue and the nature of its challenge, and had not submitted adequate evidence demonstrating that this measure exists means that Brazil failed to make its *prima facie* case. Indeed, when various factual assertions of Brazil regarding the alleged content of the measure are assessed in a holistic manner, it becomes clear that the measure in the way it is described by Brazil in its different submissions does not even exist.<sup>28</sup>

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<sup>23</sup> Indonesia's rebuttal submission, para. 69 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 792).

<sup>24</sup> Indonesia's rebuttal submission, paras. 100-109; Indonesia's opening statement at the second meeting, para. 13.

<sup>25</sup> See Indonesia's opening statement at the second meeting, para. 14 (citing Appellate Body Report, *Argentina – Import Measures*, para. 5.108; and Panel Report, *Russia – Tariff Treatment*, para. 7.296, footnote 448).

<sup>26</sup> See Indonesia's comment on Brazil's response to Panel Question No. 70; and Brazil's comment on Indonesia's response to Panel Question No. 70.

<sup>27</sup> Indonesia's comment on Brazil's response to Panel Question No. 70.

<sup>28</sup> Indonesia's rebuttal submission, paras. 75 and 109.

**B. BRAZIL REQUESTS THE PANEL TO MAKE RECOMMENDATIONS ON MEASURES THAT HAVE EXPIRED**

25. In the course of the proceedings, Indonesia explained that some of the measures challenged by Brazil, namely, the intended use requirement, the positive list requirements, and certain aspects of Indonesia's import licensing regime, had expired. These new measures significantly liberalised the procedures and conditions to import chicken into Indonesia.

26. Brazil claimed that the intended use requirement in MoA Regulation No. 139/2014 limited the importation and distribution of imported chicken to certain uses only, i.e. hotels, restaurants, catering, manufacturing, other special needs and modern markets).<sup>29</sup> Indonesia notes that this Regulation was modified by MoA Regulation No. 34/2016,<sup>30</sup> which terminated the intended use requirement. Article 31(1) of MoA Regulation No. 34/2016 now permits the sale of frozen chilled and chicken in any market where these products can be sold, i.e. any market with cold-chain facilities, including traditional markets.

27. Brazil also challenged the positive list requirements, which prohibited the importation of chicken cuts that were not listed in the relevant annexes to MoA Regulation No. 139/2014 and MoT Regulation No. 46/2013.<sup>31</sup> MoA Regulation No. 139/2014 was modified by MoA Regulation No. 34/2016, and MoT Regulation No. 46/2013 was modified by MoT Regulation No. 59/2016, which terminated the positive list requirements. Pursuant to Article 7(3) of MoA Regulation No. 34/2016, importers can import all chicken products as long as they apply for an Import Recommendation and the imported products comply with the ASUH requirements (i.e. products are safe, healthy, wholesome and halal).

28. Brazil also claimed that Indonesia's previous import licensing regime restricted the importation of chicken as importers had to apply for an Import Recommendation during a specific period (application period) that were valid for four months (validity period). Importers also had to specify the price, quantity, country of origin, port of entry and intended use of imported products without the ability to modify this information during the pertinent validity period (fixed-license terms).<sup>32</sup> As stated above, MoA Regulation No. 139/2014 was modified by MoA Regulation No. 34/2016, which further liberalised Indonesia's import regime. Article 21 of this Regulation terminated the application period and Article 30 extended the validity period of Import Recommendations from four to six months.

29. During the second substantive meeting of the Panel with the parties, Brazil requested the Panel to review the WTO-consistency of these expired measures.<sup>33</sup>

30. Indonesia notes that a panel can make only findings, but not recommendations with respect to measures that have expired.<sup>34</sup> Furthermore, even though Brazil's panel request covers "any amendments, replacements, related measures, or implementing measures", to the extent that the measure at issue was terminated by an amendment, the amendment necessarily changes the essence of the measure and, therefore, cannot be ruled upon. This approach finds support in WTO jurisprudence.<sup>35</sup> Thus, Indonesia submits that the provisions that terminate the positive list requirements, the intended use requirement and the application periods fall outside the Panel's terms of reference.

31. That said, Indonesia submits that MoA Regulation No. 34/2016 and MoT Regulation No. 59/2016 can be used as evidence to confirm that the positive list requirements, the intended use requirement and the limited application periods expired.<sup>36</sup>

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<sup>29</sup> Brazil's panel request, pp. 4 and 6.

<sup>30</sup> Ministry of Agriculture Regulation No. 34/2016 Concerning Importation of Carcass, Meat, Offal and/or their Processed Products into the territory of the Republic of Indonesia (MoA Regulation No. 34/2016), Exhibit IDN-93.

<sup>31</sup> Brazil's panel request, p. 4.

<sup>32</sup> Brazil's panel request, p. 4.

<sup>33</sup> See Brazil's response to Panel Question No. 66 and Brazil's comments on Indonesia's responses to the Panel Questions after the second meeting, paras. 1-5.

<sup>34</sup> See Indonesia's response to Panel Question No. 149.

<sup>35</sup> See Appellate Body Report, *Chile – Price Band System*, paras. 136-137; Panel Report, *China – Raw Materials*, para. 7.17; Panel Report, *India – Additional Import Duties*, paras. 7.62-7.63.

<sup>36</sup> See a similar approach in Panel Report, *China – Raw Materials*, paras. 7.31, 7.33(b).

32. Indonesia notes that the validity period requirement has not been terminated, but it was rather modified in Article 30 of MoA Regulation No. 34/2016. This provision, therefore, did not change the essence of the original measure. Indonesia submits that the Panel has jurisdiction to rule on the WTO-consistency of the validity period requirement in Article 30 of MoA Regulation No. 34/2016.<sup>37</sup>

33. In the alternative, if the Panel were to find that it has jurisdiction over the expired measures, Indonesia submits that the current regime is WTO-consistent for the reasons explained in detail in its submissions.<sup>38</sup> Indonesia's defences under Article XX(b) and (d) of the GATT 1994 would apply, *mutatis mutandis*, to these measures.

**C. BRAZIL HAS CHALLENGED THE SAME ASPECTS OF THE SAME MEASURES UNDER DIFFERENT AGREEMENTS**

**1. Relationship between Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994**

34. Brazil challenged all measures at issue in this dispute, except Indonesia's halal labelling requirements and Indonesia's alleged failure to approve sanitary requirements, under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. In Indonesia's view, however, Article 4.2 of the Agreement on Agriculture applies to the exclusion of Article XI:1 of the GATT 1994. Both provisions regulate quantitative import restrictions. The products at issue (i.e. chicken meat and chicken products) are goods falling within the HS Codes listed in Annex 1 to the Agreement on Agriculture (i.e. HS0207 and HS 1602). Article 4.2 of the Agreement on Agriculture is, therefore, *lex specialis* vis-à-vis Article XI:1 of the GATT 1994.<sup>39</sup>

35. Indonesia explained that, when read together, Article 4.2 and footnote 1 of the Agreement on Agriculture suggest that a complainant would not be able to make its *prima facie* case of inconsistency with Article 4.2 unless it establishes two elements: first, that the challenged measure is a "quantitative import restriction" or another type of restrictions listed, and, second, that this restriction is not "maintained under ... other general, non-agriculture-specific provisions of GATT 1994 [such as Article XX]". This is a threshold issue in order to determine whether the challenged measure is "of the kind which have been required to be converted into ordinary customs duties", and, therefore, "shall not [be] maintain[ed], resort[ed] to, or revert[ed] to" within the meaning of Article 4.2. In Indonesia's view, the difference between how the burden of proof is allocated between the complainant and respondent under Article 4.2 of the Agreement on Agriculture and Articles XI:1 and XX (General Exceptions) of the GATT 1994, respectively, gives rise to a conflict.<sup>40</sup>

36. Pursuant to Article 21.1 of the Agreement on Agriculture and the General Interpretative Note to Annex 1A to the WTO Agreement, when a conflict exists, Article 4.2 prevails and applies to the exclusion of Article XI:1. Although the Appellate Body is yet to clarify the relationship between Article XI:1 and Article 4.2 and the allocation of the burden of proof under different elements of the latter provision, it has accepted in general, in a number of its decisions, that a conflict is possible.<sup>41</sup> The Appellate Body has understood the notion of "conflict" as covering situations in which rules and procedures under WTO covered agreements cannot be read as complementing each other.<sup>42</sup> Certainly, rules in different agreements that differ on such a fundamental issue as

<sup>37</sup> See Indonesia's rebuttal submission, paras. 19-22. See also Indonesia's justification of the validity period and the fixed license terms in its response to Panel Questions No. 113, 114, 119, and 122 (covering the new regime as well).

<sup>38</sup> See e.g., Indonesia's response to Panel Question No. 77, 88-91 and 113. See also Indonesia's comments on Brazil's responses to Panel Questions No. 77(d), 85, 86(b), 87, 90, 96, 99, 101 and 103.

<sup>39</sup> See, *inter alia*, Indonesia's first written submission, paras. 66, 74; Indonesia's rebuttal submission, paras. 80, 84-85.

<sup>40</sup> Indonesia's first written submission, paras. 69-73; Indonesia's opening statement at the first meeting, paras. 23-24, 36; Indonesia's rebuttal submission, para. 81.

<sup>41</sup> See, *inter alia*, Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 221.

<sup>42</sup> See Appellate Body Report, *Guatemala – Cement I*, para. 65.

the allocation of the burden of proof cannot be considered as "complementing each other" – rather, they are "mutually exclusive".<sup>43</sup>

37. The Appellate Body has explicitly confirmed this hierarchy between the Agreement on Agriculture and the GATT 1994, in particular between Article 4.2 and Article II:1(b) respectively, in *Chile – Price Band System*.<sup>44</sup> In *Turkey – Rice*, the panel expressed the same view with respect to the relationship between Article 4.2 and Article XI:1 by stating that "[t]he Agreement on Agriculture deals *more specifically* than the GATT 1994 with the prohibition on maintaining quantitative restrictions or quotas".<sup>45</sup>

38. Brazil and a number of third parties in this dispute, in particular the European Union, New Zealand and the United States, argued that the burden of showing that the challenged import restriction meets the second element of the test in footnote 1 to Article 4.2 of the Agreement on Agriculture rests on the respondent.<sup>46</sup> The United States asserted that "[a]dopting Indonesia's interpretation would render a successful Article 4.2 claim nearly impossible".<sup>47</sup>

39. Indonesia is not convinced by these arguments. If the drafters intended to create a general rule-exception relationship between the two elements of footnote 1 whereby the burden of satisfying the second element would be on the *respondent*, they would have used different, more explicit wording. For example, Article 3 of the TRIMS Agreement (titled "Exceptions") states explicitly that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement". Similar wording is used in Article 24.7 of the Agreement on Trade Facilitation. Furthermore, there are many examples of provisions in the covered agreements that convert exceptions under Article XX of the GATT 1994 into positive obligations, thereby shifting the burden of proof to the complainant, for example, Article 2.2 of the TBT Agreement. There are also many provisions in the covered agreements that require the complainant to demonstrate that certain exceptions do not apply, and, therefore, do not remove the inconsistency of the measure with the relevant positive obligation, for example, Article 2.4 of the TBT Agreement.<sup>48</sup>

40. Indonesia further notes that, in an effort to avoid any conflict between Article 4.2 and Article XI:1, Brazil, Australia, the European Union and Canada suggested that both Articles apply "harmoniously" to the same type of quantitative import restrictions and that the "scope of measures prohibited could in principle be the same".<sup>49</sup> If the rules under Article 4.2 and Article XI:1 were the same, then one of them would be superfluous. This would go against the well-established principle of the effective treaty interpretation, pursuant to which "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".<sup>50</sup>

41. Finally, the United States and New Zealand suggested that the Panel begin its analysis with Article XI:1, and, in this way, it would not have to address the issue of conflict between Article XI:1 and Article 4.2.<sup>51</sup> Indonesia considers that the order of analysis suggested by these third parties would distort the fundamental due process rights of Indonesia, as it would bear the burden of proof in a situation where this burden is not envisaged by the applicable law. It is a well-established principle that panels are free to determine the order of analysis only to the extent that

<sup>43</sup> See Indonesia's first written submission, paras. 67 and 68; Indonesia's opening statement at the first meeting, paras. 28 and 29; Indonesia's response to Panel Question No. 49.

<sup>44</sup> Appellate Body Report, *Chile – Price Band System*, para. 186 (see also paras. 187 and 190). See also Panel Report, *Peru – Agricultural Products*, paras. 7.19 and 7.20.

<sup>45</sup> Panel Report, *Turkey – Rice*, para. 7.48, emphasis added. The EC expressed the same view in that dispute in *ibid*, para. 7.47. See Indonesia's opening statement at the first meeting, para. 28.

<sup>46</sup> Brazil's rebuttal submission, paras. 18-21; European Union's third party submission, paras. 23-24; New Zealand's third party submission, paras. 67-70; and United States' third party submission, paras. 57-58.

<sup>47</sup> United States' third party submission, para. 58.

<sup>48</sup> Indonesia's opening statement at the first meeting, paras. 32-36.

<sup>49</sup> See European Union's third party submission, para. 27. See also Brazil's rebuttal submission, para. 16; Australia's third party submission, para. 30; and Canada's third party submission, para. 58.

<sup>50</sup> See Appellate Body Report, *US – Gasoline*, p. 20. See Indonesia's opening statement at the first meeting, paras. 37-38.

<sup>51</sup> United States' third party submission, paras. 59-60; New Zealand's third party submission, para. 71.

this determination would not "amount to an error of law", or "have repercussions for the substance of the analysis itself".<sup>52</sup>

## 2. Relationship between the Agreement on Import Licensing, Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994

42. Brazil challenges the same aspects of Indonesia's import licensing regime under Article 3.2 of the Licensing Agreement and Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994. These aspects are: (i) positive list requirements, (ii) intended use requirement, and (iii) limited application and validity periods.<sup>53</sup> Furthermore, in Question No. 128, the Panel asked Brazil to clarify whether Brazil is also challenging the fixed licence terms under Article 3.2 of the Licensing Agreement and "[i]f so, ... where this claim was developed in Brazil's submissions". In Indonesia's view, this claim, albeit included in Brazil's panel request, was not developed in Brazil's submissions, which means that Brazil failed to make its *prima facie* case with respect to this claim. This was confirmed by Brazil's response to this Question, in which it could not point to any passages in its first written submission and other submissions where it provided legal arguments and evidence in support for this claim.<sup>54</sup>

43. Indonesia explained that the respective scopes of the application of the Import Licensing Agreement, on the one hand, and Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994, on the other hand, *are not the same*. Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture establish certain *substantive rights and duties*, in particular the prohibition of quantitative import restrictions, whereas, according to Article 1.1 of the Licensing Agreement, the latter agreement regulates "administrative *procedures* used for the operation of import licensing regimes".<sup>55</sup> Indonesia explained that, among the measures challenged by Brazil under the Licensing Agreement, the only measure that actually falls within the scope of this agreement is the limited application and validity periods. This measure consists of *procedural requirements* that prescribe steps for obtaining the right to import chicken meat and chicken products into Indonesia. This view was shared by the European Union. Brazil, therefore, could not challenge the same measures under the Agreement on Import Licensing, and Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994.<sup>56</sup>

44. In any event, in its submissions, Brazil failed to explain why the measures it challenged under Article 3.2 of the Licensing Agreement in fact constitute import licensing *procedures* that are *non-automatic*, and, therefore fall under Articles 1.1 and 3.2 of the Licensing Agreement. Furthermore, Brazil did not demonstrate how these measures are inconsistent with the specific legal obligations under Article 3.2.<sup>57</sup>

## 3. Relationship between Article 4.2 of the Agreement on Agriculture, Article XI:1 and Article III:4 of the GATT 1994

45. Another systemic issue arises from Brazil's approach of challenging the same aspects of the intended use requirement under both Article III:4 of the GATT 1994 (covering internal measures affecting competitive opportunities in the domestic market), and Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994 (covering border measures affecting competitive opportunities of imports).<sup>58</sup> The Panel's determination of whether the intended use requirement is

<sup>52</sup> Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109. See Indonesia's opening statement at the first meeting, para. 39; Indonesia's response to Panel Question No. 49.

<sup>53</sup> Brazil's first written submission, paras. 200, 228, 251. See Indonesia's rebuttal submission, para. 96.

<sup>54</sup> Indonesia's comment on Brazil's response to Panel Question No. 128.

<sup>55</sup> Footnote omitted, emphasis added.

<sup>56</sup> See EU's response to Panel Question No. 7 addressed to third parties. See Indonesia's first written submission, paras. 75-80; Indonesia's responses to Panel Questions No. 48 and 49; Indonesia's rebuttal submission, para. 96.

<sup>57</sup> Indonesia's responses to Panel Questions No. 48, 58-61; Indonesia's rebuttal submission, paras. 114-117; Indonesia's opening statement at the second meeting, paras. 24-36; Indonesia's comments on Brazil's responses to Panel Questions No. 124, 127.

<sup>58</sup> Indonesia's first written submission, paras. 81-89; Indonesia's opening statement at the first meeting, paras. 41-47; and Indonesia's responses to Panel Questions No. 50-53 and 55.

an internal measure or a border measure is a threshold issue as the challenged aspect of the same measure cannot be a border measure and an internal measure at the same time.<sup>59</sup>

46. Indonesia recalls that Note *Ad Article III* draws a clear distinction between internal and border measures. It provides that "any law, regulation or requirement of the kind referred to in paragraph 1 which applies *to an imported product and to the like domestic product* and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as ... a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III" (emphasis added). This distinction was also clarified by the panel in *India – Autos*, which stated that what is targeted in Article XI:1 is exclusively restrictions which relate to the importation itself, and not to already imported products.<sup>60</sup>

47. *Ad Note to Article III* presupposes an equivalent measure that applies to imported and like domestic products.<sup>61</sup> Article 22 and 23 of Minister of Agriculture Decree 306/1994 provide that frozen and chilled poultry meat is offered for sale in meat shops and supermarkets "equipped with cooler facilities (refrigerator and/or freezer)".<sup>62</sup> Thus, Minister of Agriculture Decree No. 306/1994 is a measure equivalent to the intended use requirement challenged by Brazil that applies to both imported and like domestic products, namely chilled and frozen products. This brings the intended use requirement clearly within the scope of Article III:4 of the GATT 1994. It thus, does not fall under the scope of Article 4.2 of the Agreement on Agriculture or Article XI:1 of the GATT 1994.

#### **IV. BRAZIL FAILS TO PROVE THAT THE CHALLENGED MEASURES ARE INCONSISTENT WITH INDONESIA'S WTO OBLIGATIONS**

##### **A. ALLEGED GENERAL PROHIBITION/OVERARCHING MEASURE**

48. Indonesia recalls that Brazil challenged the so-called overarching measure/general prohibition as a "quantitative import restriction" inconsistent with Article XI:1 of the GATT 1994, and a "quantitative import restriction" or a "similar border measure" inconsistent with Article 4.2 of the Agreement on Agriculture.<sup>63</sup> As explained in Indonesia's submissions, Brazil failed to prove that the measure at issue exists in the way it is described by Brazil.<sup>64</sup>

49. Moreover, even if the Panel were to find otherwise, for the reasons already explained, Indonesia considers that, in the present dispute, Article 4.2 of the Agreement on Agriculture applies to the exclusion of Article XI:1 of the GATT 1994. In the context of its claim under Article 4.2, Brazil did not substantiate its assertions that a causal relationship exists between the alleged measure and the claimed trade distortion (i.e. the measure has a limiting effect), that the measure at issue constitutes a similar border measure, and that it is not "maintained under ... general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement". In light of these deficiencies, Brazil failed to prove that the general prohibition/overarching measure – to the extent that Brazil established its existence (*quod non*) – is inconsistent with Article 4.2 of the Agreement on Agriculture.<sup>65</sup>

50. If, despite Indonesia's arguments, the Panel were nevertheless to address Brazil's claim under Article XI:1 of the GATT 1994, Brazil failed to prove that this measure is a quantitative

<sup>59</sup> See Appellate Body Report, *China – Auto Parts*, para. 139 (referring to Panel Report, *China – Auto Parts*, para. 7.105). See also GATT Panel Reports, *EEC – Parts and Components*, para. 5.4; *Greece – Import Taxes*, para. 5; *Canada – Gold Coins*, para. 49 and Panel Report, *Argentina – Hides and Leather*, para. 11.139.

<sup>60</sup> The panel also explained that only in the very specific circumstance of state-trading enterprises involving a monopoly over both importation and distribution of goods, such as in the case of *Korea – Various Measures on Beef*, the traditional distinction between measures affecting imported products and measures affecting importation may be blurred. Panel Report, *India – Autos*, para. 7.221 and footnote 410 (citing Panel Report, *Korea – Various Measures on Beef*, para. 766).

<sup>61</sup> See Panel Report, *EC – Asbestos*, paras. 8.91-8.95 (referring to GATT Panel Report, *US – Section 337 of the Tariff Act of 1930*); and Panel Report, *Argentina – Hides and Leather*, paras. 11.150 and 11.154.

<sup>62</sup> Article 22(c) and Article 23 of the Minister of Agriculture Decree 306/1994 concerning slaughtering of poultry and handling of poultry meat and its by-products, Exhibit IDN-83.

<sup>63</sup> Indonesia's first written submission, para. 94.

<sup>64</sup> Indonesia's first written submission, para. 109; Indonesia's rebuttal submission, paras. 98-109.

<sup>65</sup> Indonesia's first written submission, paras. 118-124.

import restriction inconsistent with this provision. This is because, as explained, Brazil failed to demonstrate that the general prohibition/overarching measure has a limiting effect.<sup>66</sup>

51. Thus, due to the highly abstract nature of Brazil's claim on the general prohibition/overarching measure, Indonesia submits that Brazil failed to make its *prima facie* case that this measure was inconsistent with both Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994.<sup>67</sup>

## **B. HALAL LABELLING REQUIREMENTS**

### **1. Brazil has not demonstrated that the halal labelling requirements are inconsistent with Indonesia's obligations under Article III:4 of the GATT 1994**

52. Brazil challenged Indonesia's halal "labelling" requirements imposed through, *inter alia*, Law No. 33/2014 (Halal Law).<sup>68</sup>

53. Brazil claimed that Indonesia's halal "labelling" requirements violate Article III:4 of the GATT 1994. First, Brazil argued that Indonesia discriminated against Brazilian producers by granting a five-year grace period from the halal "labelling" requirement only to domestic products, but not to imported products. Brazil considered the certification requirements fell under labelling. Indonesia explained that what Brazil referred to as "labelling" was actually "certification".<sup>69</sup>

54. Indonesia enacted Law No. 33/2014 (Halal Law) to unify the halal assurance requirements under one instrument and to create new government bodies to guarantee halal product assurance, in coordination with the Indonesian Ulama Council (MUI). Article 4 of Law No. 33/2014 (Halal Law) provides that "products that enter, circulate and [are] traded in the territory of Indonesia must be certified halal". The Halal Product Assurance Organizing Agency (BPJPH) was the new agency formed by the Government to certify products as halal.<sup>70</sup> Article 67(1) provides that the "obligation of halal certification that circulate and [are] traded in the territory of Indonesia as intended in Article 4 comes into effect 5 (five) years from the [enactment] of this Law." Moreover, Article 64 provides that "the formation of the BPJPH .... must be formed no later than three years commencing from the [enactment] of this Law." Thus, it was expected that it would take three years to set up the BPJPH and another two years for the BPJPH to establish procedures before which its Halal Certification procedures would be mandatory.

55. However, the obligation for establishments to obtain halal certification was still required until the BPJPH was formed. Article 60 provides that "MUI still conducts its task in Halal Certification until BPJPH is formed." The requirement to obtain halal certification through the MUI, therefore, applied to both domestic and imported products throughout this grace period. It is only the BPJPH, as a body, that received the grace period. Indonesia submits that Brazil has not established a *prima facie* case that the grace period constitutes discrimination with respect to the halal certification requirement.<sup>71</sup>

56. Second, Brazil argued that the implementation of the halal labelling is discriminatory because Indonesian producers can sell chicken meat and chicken products without the halal label, whereas foreign products had to have a halal label. Indonesia recalls that for a violation of Article III:4 to be established, three elements must be satisfied: (i) the imported and domestic products at issue are "like products"; (ii) the measure at issue is a "law, regulation, or requirement affecting the products' internal sale, offering for sale, purchase, transportation, distribution, or use", and (iii) the imported products are accorded "less favourable treatment" than that accorded to like domestic products.<sup>72</sup> Brazil has not satisfied these elements.

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<sup>66</sup> Indonesia's first written submission, paras. 125-127; Indonesia's opening statement at the first meeting, paras. 54-58.

<sup>67</sup> Indonesia's first written submission, para. 128.

<sup>68</sup> Brazil's panel request, p. 6.

<sup>69</sup> Indonesia's opening statement at the first meeting, paras. 113-115. Indonesia's opening statement at the second meeting, para 47.

<sup>70</sup> See Articles 1(5) to 1(11) of Law 33/2014 (Halal Law), Exhibit IDN-5.

<sup>71</sup> See Indonesia's opening statement at the second meeting, paras. 46 and 47.

<sup>72</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.

57. Brazil argued that imported chicken meat and products were like domestic chicken meat and products.<sup>73</sup> Indonesia disagreed. Indonesia recalls that the determination of "likeness" under Article III:4 of the GATT 1994 is "...fundamentally, a determination about the nature and extent of a competitive relationship between and among products."<sup>74</sup> As the determination of likeness relates to the competitive relationship between domestic and imported products in the relevant *marketplace*,<sup>75</sup> a panel should base its analysis on the products that *actually* compete in the relevant market. For example, in Indonesia, *domestic fresh* chicken meat does not compete with *imported fresh* chicken meat because it would be virtually impossible for Brazil to import fresh chicken into Indonesia. Fresh chicken has a storage life of less than one day. A consignment from Brazil to Indonesia that is transported via marine cargo would take around 30 days, while transportation by air from São Paulo to Jakarta takes more than 45 hours and would be prohibitively expensive. Thus, in all likelihood, considering the distance, the transport time and the prohibitive transportation cost (if by air), Brazil would only import frozen chicken meat and products into Indonesia.<sup>76</sup> In contrast, domestic chicken meat is usually sold fresh in traditional markets.<sup>77</sup>

58. Indonesia further explained that although, the end-uses of fresh and frozen products are similar for the ultimate consumer, the products at issue are not classified under the same HS-six-digit code and they have different products characteristics that affect heavily consumer tastes and habits in the Indonesian market.<sup>78</sup> Indonesia did not dispute that the halal labelling requirements are domestic regulations falling under Article III:4.

59. Brazil argued that imported chicken meat and products were accorded "less favourable treatment" than that accorded to like domestic products. Brazil relied on the text of Article 38 of Law No. 33/2014 (Halal Law), which provides that "halal labels must be affixed on (a) product's packaging; (b) specific part of the products, and/or (c) specific place of the product".<sup>79</sup> Indonesia explained although the Halal Law applies to a wide range of products including cosmetics, chemical products and consumer goods,<sup>80</sup> Government Regulation No. 69/1999 is the more specific regulation providing that halal labels do not need to be affixed to "food directly sold and packed before buyers". For example, it is common practice to sell *fresh* chicken without a halal label affixed directly on the product, but have the halal certificates for the products and for the slaughterman displayed at the point of sale in the traditional markets.<sup>81</sup> Thus, Indonesia requires halal compliance (albeit through different methods) for both frozen/chilled chicken sold in packages and for fresh chicken sold unpackaged. Therefore, there is no "less favourable treatment" accorded to imported chicken meat and products. In any event, at a late stage of the proceedings, Brazil stated that it "accepts Indonesia's contention that because Government Regulation 69/1999 is more specific it should prevail over Law 33/2014".<sup>82</sup> This means that Brazil's original arguments that Article 38 of Law No. 33/2014 requiring halal labels be placed on specific parts of fresh products prevailed over the exception in Government Regulation 69/1999 on "food directly sold and packed before buyers in a small number" are no longer valid.<sup>83</sup>

60. Third, Brazil claimed that previously-frozen (thawed) chicken meat must be allowed to be sold as fresh chicken, i.e. unpackaged and unlabelled when sold before consumers in small quantities.<sup>84</sup> Indonesia argued that fresh, chilled and frozen chicken are not like products.<sup>85</sup> Moreover, there are legitimate grounds for distinguishing between the places where sellers can sell

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<sup>73</sup> Brazil's first written submission, para. 285.

<sup>74</sup> Appellate Body Report, *EC – Asbestos*, para. 99.

<sup>75</sup> Appellate Body Report, *EC – Asbestos*, para. 103 (emphasis added).

<sup>76</sup> Indonesia's first written submission, para. 149 and footnote 188.

<sup>77</sup> Indonesia's first written submission, para.159.

<sup>78</sup> Indonesia's first written submission, paras. 316-328.

<sup>79</sup> See Brazil's response to Panel Question No. 46.

<sup>80</sup> See Article 1(1) of Law No. 33/2014 (Halal law).

<sup>81</sup> See Indonesia's first written submission, paras. 316-328; Indonesia's response to Panel Question No. 43. See also Exhibit IDN-118.

<sup>82</sup> See Brazil's response to Panel Question No.143.

<sup>83</sup> See Indonesia's comment on Brazil's responses to Panel Question No. 143.

<sup>84</sup> See Brazil's response to Panel Question No. 144.

<sup>85</sup> Indonesia's comments on Brazil's responses to Panel Questions after the second meeting, paras. 62-66 and 120.

fresh chicken as compared to chilled/frozen products. These legitimate grounds are also reflected in the laws and regulations of other countries, notably Brazil itself and the Philippines.<sup>86</sup>

61. In the light of the foregoing, Indonesia submits that Brazil has not made a *prima facie* case that the implementation of halal labelling requirements is inconsistent with Indonesia's obligations under Article III:4 of the GATT 1994. Brazil has not met its burden of proof and its claim should therefore be dismissed.

**2. If the Panel were to find that the halal labelling requirements are inconsistent with Article III:4, this measure is justified under Article XX(a) and Article XX(d) of the GATT 1994**

62. If, however, the Panel were to find otherwise, Indonesia submits that the halal labelling requirements are justified under Article XX(a) and (d) of the GATT 1994. For a measure to be provisionally justified under Article XX(a) or Article XX(d) of the GATT 1994, a panel must conduct a two-step analysis. First, a panel must address whether the measure is designed and necessary "to protect public morals" or "to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement", respectively. Then, a panel must address whether the application of the measure does not unjustifiably or arbitrarily discriminate among countries where the same conditions prevail or otherwise lead to a disguised restriction on international trade (the *chapeau*).

63. With respect to the provisional justification under Article XX(a), Indonesia notes that the halal labelling requirements are "designed to protect public morals".<sup>87</sup> Indonesia recalls that the examination of whether a measure is designed to protect public morals is not "particularly demanding".<sup>88</sup> A measure will be designed to protect public morals if it is "not incapable of" protecting public morals.<sup>89</sup> The preamble of Law No. 33/2014 (Halal Law) makes clear that the halal requirements are designed to protect the religious principles of the majority Muslim population by guaranteeing that the products they are consuming are halal. The halal requirements are also "necessary to protect public morals" as they make a meaningful contribution to ensure that consumers are not misled as to what they are eating. In addition, the halal requirements are not trade-restrictive as they apply to all packaged products, whether domestic or imported. Indonesia submits that the relatively slight impact on packaged products is more than outweighed by the importance of the religious values Indonesia is attempting to protect through its halal labelling laws and regulations.

64. With respect to the provisional justification under Article XX(d), Indonesia notes that the halal labelling requirements are "designed to secure compliance with laws and regulations" that are not inconsistent with the GATT 1994.<sup>90</sup> This is demonstrated by many textual linkages between the halal labelling requirements and the laws and regulations they seek to implement. In addition, the halal labelling requirements are "necessary to secure compliance with laws and regulations" that are not inconsistent with the GATT 1994 as they provide information to the consumer about the product he or she is consuming so that consumers are not misled as to what they are eating. In addition, they are not trade-restrictive as they apply to all packaged products, whether domestic or imported. If the Panel were nevertheless to consider these requirements as trade restrictive, Indonesia submits that the "relatively slight impact on imported products" is more than outweighed by the importance of the religious values Indonesia is attempting to protect through its halal labelling laws and regulations.

65. Once a panel has weighed and balanced these different factors, it must then compare the challenged measure with possible alternative measures that achieve the same level of protection while being less trade-restrictive. The burden of submitting reasonably available alternatives lies

<sup>86</sup> Indonesia's comments on Brazil's response to Panel Question No. 10..

<sup>87</sup> See Indonesia's first written submission, paras. 342-356; and Indonesia's opening statement at the first meeting, paras. 110-132.

<sup>88</sup> Indonesia's opening statement at the first meeting, para. 117.

<sup>89</sup> See Indonesia's opening statement at the first meeting, paras. 116-119. See also Appellate Body Report, *Colombia – Textiles*, para. 5.68.

<sup>90</sup> See Indonesia's first written submission, paras.342-356 and Indonesia's opening statement at the first meeting, paras. 110-132.

with the complainant, Brazil. Brazil has never provided a less trade restrictive alternative to the halal labelling requirement.

66. Turning to the *chapeau* of Article XX, it is well established that this provision is concerned with the manner in which the measure is applied. In undertaking an analysis under the *chapeau*, a panel must examine the design, architecture, and revealing structure of a measure.<sup>91</sup>

67. Indonesia submits that the halal labelling requirements are not discriminatory as they apply to all packaged products, whether domestic or imported. If the Panel nevertheless were to find that discrimination exists because the halal labelling requirements apply only to packaged foods, Indonesia submits that there is a rational connection between the policy objective of protecting the religious beliefs of Indonesian Muslims not to eat non-halal products and informing them as to whether they are purchasing legitimate halal products. To be clear, the halal labelling requirements are not applied differently to countries in which the same conditions prevail. They are applied to all packaged products from all countries (including Indonesia) in a consistent manner.

68. Finally, under the *chapeau* of Article XX, a measure must not constitute a disguised restriction on international trade, e.g., "concealed or unannounced restriction or discrimination in international trade".<sup>92</sup> The halal labelling requirements do not amount to a disguised restriction on international trade because the measures are transparent. The halal labelling requirements are published in, *inter alia*, Law 33/2014 (Halal Law) and Article 97 of the Law 18/2012 (Food Law).<sup>93</sup>

69. In sum, Indonesia submits that the halal labelling requirements are not inconsistent with Article III:4 of the GATT 1994. If the Panel were to consider otherwise, Indonesia submits that this measure is justified under Article XX(a) and Article XX(d) of the GATT 1994.

### C. INTENDED USE REQUIREMENT

#### 1. Brazil has not demonstrated that the intended use requirement is inconsistent with Indonesia's obligations under Article III:4 of the GATT 1994

70. Brazil claimed that Indonesia's intended use requirement violated Article III:4 of the GATT. Indonesia recalls that for a violation of Article III:4 to be established, three elements must be satisfied: (i) the imported and domestic products at issue are "like products"; (ii) the measure at issue is a "law, regulation, or requirement affecting the products' internal sale, offering for sale, purchase, transportation, distribution, or use, and (iii) the imported products are accorded "less favourable treatment" than that accorded to like domestic products.<sup>94</sup> Brazil has not satisfied these elements.

71. As discussed above, Indonesia explained that fresh, and frozen and chilled chicken are not "like products".<sup>95</sup> In addition, Indonesia noted that the intended use requirement was an internal measure imposed with respect to imported products at the moment of importation.<sup>96</sup>

##### (a) Previous regime

72. Before the enactment of MoA Regulation No. 34/2016, Indonesia required that frozen and chilled chicken meat and chicken products to be sold in industries, hotels, restaurants, catering, or be used for other specific purposes.<sup>97</sup> Article 22 and 23 of Minister of Agriculture Decree 306/1994 provide that domestic frozen and chilled poultry meat must be offered for sale in meat shops and supermarkets "equipped with cooler facilities (refrigerator and/or freezer)".<sup>98</sup> Such facilities had not been available in traditional markets. This intended use requirement aimed at

<sup>91</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29, DSR 1996:I, p. 120.

<sup>92</sup> Appellate Body Report, *US – Gasoline*, p. 25.

<sup>93</sup> See Indonesia's opening statement at the first meeting, para. 131.

<sup>94</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.

<sup>95</sup> See also Indonesia's first written submission, paras. 147-164.

<sup>96</sup> Indonesia's first written submission, paras. 81-89; Indonesia's opening statement at the first meeting, paras. 41-47; and Indonesia's responses to Panel Questions No. 50-53 and 55.

<sup>97</sup> See Section II.B.3 of Indonesia's rebuttal submission.

<sup>98</sup> Article 22(c) and Article 23 of the Minister of Agriculture Decree No. 306/1994, Exhibit IDN-83.

ensuring that "frozen" or "chilled" chicken meat and products were not sold in markets that did not have proper cold-chain systems. It is generally recommended that frozen meat should ideally be thawed inside refrigerated facilities.<sup>99</sup> Indonesia must also ensure that previously frozen products were not thawed and refrozen.<sup>100</sup> It is noteworthy that Brazil shares these same food safety concerns. In fact, Brazil requires thawing to be carried out in a refrigerated facility and prohibits the refreezing of thawed products.<sup>101</sup>

73. Brazil argued that the intended use requirement meant that imports "could not reach the most important distribution channels" while domestic products "had open and free access to the 'wet markets'" "which represent around 70% of the Indonesian consumer market".<sup>102</sup> Indonesia explained that Articles 22 and 23 of Minister of Agriculture Decree 306/1994 provide that all frozen and chilled poultry meat must be offered for sale in meat shops and supermarkets "equipped with cooler facilities (refrigerator and/or freezer)". As a result, neither domestic nor imported frozen products had "open and free access to the 'wet markets'".

74. Brazil argued that chicken products that had been imported for one intended use e.g. hotels, could not be redirected to another intended use, e.g. restaurants.<sup>103</sup> There is no basis for this assertion. Indonesia recalls that Article 31 of MoA Regulation No. 58/2015 provides that "intended use ... is for hotels, restaurants, caterings, industries, and other particular purposes". Article 38 (e) of the same Regulation provides that there would be sanctions for a breach of the intended use requirement. These sanctions apply when an importer directs the chicken products to a place other than those listed in Article 31. They do not apply when an importer redirects the products to another place listed in Article 31.<sup>104</sup>

(b) Current regime

75. Under the current regime, MoA Regulation No. 34/2016 terminated the intended use requirement by providing that frozen and chilled chicken meat can be sold in *any* market with cold-chain facilities, including traditional markets with cold chain facilities. This regulation also requires importers to provide a distribution plan and a distribution report. The distribution plan requires the importer to indicate an estimate of the products it intends to import and information with respect to potential buyers that must have cold-chain facilities available. The distribution report requires importers to submit information with respect to the actual imports and the actual buyers that are required to have cold-chain facilities available.

76. Brazil argued that Indonesia simply replaced the term "modern markets" used in MoA Regulation No. 39/2014 with "markets with cold chain facilities" in MoA Regulation No. 34/2016. Brazil stated that "this seemingly more flexible formulation was, however, made more restrictive by the requirement [to] submit a "distribution plan" [and] "distribution reports" (every Thursday) so as to confirm that importers did not evade the previous plan". Indonesia explained that the term "markets with cold chain facilities" is a broader term, which includes, but is not limited to, "modern markets". Modern markets are characterized by offering a wide variety of products with a longer shelf life including pre-packaged and/or processed products, such as minimarkets, supermarkets, and hypermarkets. In contrast, "market with cold chain facilities" can be *any* market, including traditional markets, to the extent they have refrigerators, freezers or any other cold-chain facility. The difference between these two types of markets is critical. While MoA Regulation No. 34/2016 allows the sale of frozen/chilled products in traditional markets with cold chain facilities, the previous MoA Regulation No. 39/2014 did not.

77. Brazil also argued that importers are now tied to the terms of the distribution plan submitted in the application process and any deviation may subject the importer to harsh sanctions.<sup>105</sup> Indonesia explained that importers are not tied to the terms of the distribution plan because they do not need to match the distribution report. Sanctions only apply when the importer fails to

<sup>99</sup> See, *inter alia*, Exhibit IDN-85.

<sup>100</sup> Indonesia's first written submission, para. 134.

<sup>101</sup> See Article 1.1 of Brazil's Resolution No. 216/2004 on good practices for food services, Exhibit IDN-150 and Brazil's Normative Instruction DIVISA/SVS No. 4/2014 on good practices for commercial food establishments and food services, Exhibit IDN-151.

<sup>102</sup> Brazil's first written submission, paras. 278-283 and 289.

<sup>103</sup> Brazil's rebuttal submission, para. 55.

<sup>104</sup> Indonesia's rebuttal submission, para. 141.

<sup>105</sup> Brazil's opening statement at the second meeting, para. 20.

submit the required documents in the first place.<sup>106</sup> In addition, an equivalent requirement is applied to domestic producers when they apply for their meat distributor license.<sup>107</sup> This license requires that applicants disclose the delivery, type, area of the products, the report of sales for the last three months, as well as the meat distributor permit history.<sup>108</sup>

78. Brazil argued that the distribution report served to confirm that chicken products that had been imported for one intended use, e.g. hotels, were not redirected to another intended use, e.g. restaurants, and any deviation would be subject to sanctions.<sup>109</sup> Indonesia notes that although there are enforcement provisions in Article 38 of MoA Regulation No. 34/2016, they apply only if the importer deviates from the terms listed in the Import Recommendation, i.e. if he sells at a market *without* a cold chain facility. Moreover, there is no sanction if the distribution plan does not match the distribution report. These sanctions only apply when the importer fails to submit the required documents in the first place.<sup>110</sup>

79. In light of the above, Indonesia submits that the intended use requirement is not inconsistent with Article III:4 of the GATT 1994.

**2. If the Panel were to find that the intended use requirement is inconsistent with Article III:4, this measure is justified under Article XX(b) and Article XX(d) of the GATT 1994**

80. Should the Panel nevertheless consider otherwise, Indonesia demonstrated that this measure was justified under Article XX(b) and Article XX(d) of the GATT 1994.<sup>111</sup>

81. To recall, for a measure to be provisionally justified under Article XX(b) or Article XX(d) of the GATT 1994, a panel must determine whether the measure is designed and necessary "to protect human health" or "to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement", respectively. Following this determination, a panel must address whether the application of the measure complies with the requirement of the *chapeau* of Article XX.

82. With respect to the provisional justification under Article XX(b), Indonesia noted that the intended use requirement is designed to, and necessary to, protect public health.<sup>112</sup> The intended use requirement is designed to protect public health, a value of the highest degree of importance,<sup>113</sup> as it prohibits the sale of frozen or chilled chicken in markets without cold-chain facilities. By doing so, the intended use requirement contributes to ensure that only safe chicken is sold in Indonesia. Indonesia has submitted several scientific articles<sup>114</sup> and regulations establishing food safety requirements from WTO Members<sup>115</sup> on the risks of (i) thawing frozen chicken meat at open-air temperatures, and (ii) refreezing products that had previously been frozen and then thawed at open-air temperatures. In addition, the intended use requirement is not trade-restrictive as it applied in an equivalent manner to both imported and domestic products.

83. With respect to the provisional justification under Article XX(d), Indonesia notes that the intended use requirement is designed to, and necessary to, secure compliance with laws and regulations that are not inconsistent with the GATT 1994.<sup>116</sup> The intended use requirement is designed to ensure compliance with consumer protection laws and regulations. This is demonstrated by the textual linkages between the intended use requirement and the laws and

<sup>106</sup> See Indonesia's response to Panel Question No. 88(a).

<sup>107</sup> See Requirements to obtain a Meat Distributor License, retrieved from: <http://pelayanan.jakarta.go.id/site/detailperizinan/472>, Exhibit IDN-131.

<sup>108</sup> Ibid.

<sup>109</sup> Brazil's opening statement at second meeting, para. 20.

<sup>110</sup> Indonesia's response to Panel Question 88(a).

<sup>111</sup> Indonesia's first written submission, paras. 179-216; Indonesia's opening statement at the first meeting, paras. 62-79.

<sup>112</sup> See Indonesia's first written submission, paras.342-356 and Indonesia's opening statement at the first meeting, paras. 110-132.

<sup>113</sup> Appellate Body Report, *EC – Asbestos*, para. 172.

<sup>114</sup> Exhibits IDN-54, IDN-55 and IDN-56.

<sup>115</sup> Exhibits IDN-84 and IDN-85.

<sup>116</sup> See Indonesia's first written submission, paras.342-356 and Indonesia's opening statement at the first meeting, paras. 110-132.

regulations it seeks to implement. Indonesia notes that thawed chicken meat is deceptively similar to fresh chicken meat. The sanctions imposed in case of violation of the intended use requirement on sellers of imported products (that is, the revocation of the Import Recommendation)<sup>117</sup> contribute to the prevention of deceptive practices against consumers, as sellers will be reluctant to thaw frozen products and present them as fresh, in the light of the possible sanctions they may face. Indonesia submitted that the intended use requirement is not trade-restrictive as it applied in an equivalent manner to both imported and domestic products.

84. Once a panel has weighed and balanced these different factors, it must then compare the challenged measure with possible alternative measures that achieve the same level of protection sought by the concerned Member, while being less trade-restrictive. Brazil provided "alternatives" that would not have achieved the specific objective and level of protection Indonesia sought with respect to the (now expired) intended use requirement, namely, to protect the public health of consumers by preventing frozen products from being thawed at tropical temperatures in open-air markets and to prevent consumers from being misled into buying thawed products believing they were fresh products. For example, Brazil's alternative of introducing a mandatory good hygienic practice (GHP) plan for establishments selling chicken meat is not a valid alternative as the Minister of Agriculture Decree No. 306/1994 already provides for good hygienic and sanitary practices. In addition, some of Brazil's alternatives became moot with the introduction of cold-chain facilities at the traditional markets. Nowadays, a consumer can buy a frozen product in a traditional market, keep it in a cold storage thermal bag, go home and put it safely in his freezer.

85. Turning to the *chapeau* of Article XX, it is well established that discrimination under the *chapeau* is only possible "among countries where the same conditions prevail". In Indonesian traditional markets, chicken meat and products are mostly sold fresh and unpackaged. In contrast, imported products are frozen and packaged. Indonesia submitted that there is a different risk posed by frozen meat being thawed in open-air spaces compared to fresh meat that has been slaughtered a few hours before. Even if both products are exposed to tropical open-air conditions, fresh chicken meat does not have the excessive moisture conducive to bacteria growth as does frozen chicken. Therefore, there is no discrimination vis-à-vis imported products. Indonesia treats all frozen products in the same way, regardless of their origin, by preventing their sale in markets without proper cold-chain facilities.

86. If the Panel were nevertheless to find that discrimination exists, Indonesia submits that there is a rational connection with the policy objective of protecting public health and ensuring compliance with food safety and consumer protection regulations. In addition, the intended use requirement does not constitute a disguised restriction on international trade as it is a transparent measure published in MoA Regulation No. 34/2016.<sup>118</sup>

87. In sum, Indonesia submits that the intended use requirement is not inconsistent with Article III:4 of the GATT 1994. If the Panel were to consider otherwise, Indonesia submits its measure is justified under Article XX(b) and Article XX(d) of the GATT 1994.

#### **D. POSITIVE LIST REQUIREMENTS**

88. Brazil claims that the positive list requirements constitute a "prohibition or restriction" inconsistent with Article XI:1 of the GATT 1994. Brazil argues that this measure prohibits or restricts the importation into Indonesia of chicken meat and chicken products not included in the positive lists.<sup>119</sup>

89. Under the previous regime, the positive list was introduced in response to an incident in 1999, where Tyson Foods of the United States sent a shipment of chicken cuts that was part *halal*

<sup>117</sup> Article 38(e) of the MoA Regulation No. 58/2015, Exhibit IDN-24.

<sup>118</sup> Indonesia's first written submission, paras. 213-216; and Indonesia's opening statement at the first meeting, paras. 76-79.

<sup>119</sup> Brazil's first written submission, paras. 192-194. In addition, Brazil claimed that the positive list requirements constituted a "quantitative import restriction" or a "border measure similar to quantitative import restrictions" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture; and that this measure was also inconsistent with Article 3.2 of the Import Licensing Agreement. Brazil's first written submission, paras. 219-223, 251. Indonesia addressed the relationship between Article 4.2 of the Agreement on Agriculture, Article 3.2 of the Import Licensing Agreement and Article XI:1 of the GATT in other parts of this summary. Therefore, Indonesia addresses only Brazil's claim under Article XI:1.

and part non-halal. The Tyson incident was not an isolated incident. Rather, there were other instances that caused unrest among the majority Muslim community in Indonesia (87 per cent of the population) and led the Indonesian Government to take steps to ensure the integrity and halalness of all imported products.<sup>120</sup>

90. Under the current regime, the Ministry of Trade and the Ministry of Agriculture have further liberalized Indonesia's trade policies with respect to the importation of chicken meat and chicken products. Under the current regime, neither the MoA nor the MoT Regulations provide for positive list requirements. Article 7(3) of MoA Regulation No. 34/2016 provides that chicken meat and chicken products that are not included in the relevant attachments to these Regulations may be imported in Indonesia as long as they meet the requirements of being safe, healthy, wholesome and halal (ASUH requirements).

91. With respect to the current regime, Brazil argued that compliance with the ASUH requirements only provided an "abstract possibility of importation" and that the assessment of compliance with these requirements was "discretionary". Indonesia noted that the expression "may still be granted recommendation" is not used to express an "abstract possibility of importation", but rather the concrete conditions precedent that must be met prior to the granting of the Import Recommendation, i.e. that the importer: (i) applies for the Import Recommendation,<sup>121</sup> and (ii) complies with the ASUH requirements. Moreover, Indonesia explained that there are objective criteria for the assessment of compliance with the ASUH requirements.<sup>122</sup> For example, compliance with Indonesia's halal requirements is assessed by customs officials through the inspection of the Halal Certificate.<sup>123</sup>

92. Moreover, Brazil's concern that both "listed" and "non-listed" chicken meat and chicken products have to comply with ASUH requirements, but only "listed" chicken products enjoy certainty of being granted approval is without merit. The Annexes to MoA Regulation No. 34/2016 and MoT Regulation No. 59/2016 do not serve any purpose at this point in time. Indonesia has explained that pursuant to Article 2(b) of MoA Regulation No. 34/2016, the ASUH requirements apply to *all imported products*. In addition, ASUH as a comprehensive principle has existed since Animal Law No. 18/2009 was enacted. In addition, halal requirements date back to Law No. 6/1967 (previous Animal Law).<sup>124</sup> Safety requirements have applied ever since importation first took place. These safety and halal requirements continue to apply in accordance with, *inter alia*, MoA Regulation No. 34/2016.<sup>125</sup>

93. To sum up, if an importer applies for an Import Recommendation and the imported products comply with the ASUH requirements (regardless of whether they are listed or not listed in the annexes to MoA Regulation No. 34/2016), the Import Recommendation will be granted.

94. If the Panel were nevertheless to find that the positive list requirements are inconsistent with Article XI:1 of the GATT 1994, Indonesia justified this measure under Article XX(d) of the GATT 1994.<sup>126</sup>

95. In its submissions, Indonesia identified specific laws with which the measure was designed to secure compliance. Furthermore, Indonesia showed that the positive list requirements were "designed to secure compliance with the relevant laws and regulations" by pointing to the textual linkages between the positive list requirements and the laws and regulations it seeks to secure compliance with. In addition, Indonesia submitted that the positive list requirements were "necessary to secure compliance with the relevant laws and regulations" as they prevented the circumvention of Indonesia's halal requirements.<sup>127</sup> Indonesia also considers that the importance of its objective and the existence of the contribution of the measure to the objective outweighed the relatively insignificant trade-restrictiveness of the measure. Nothing prevented Brazilian

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<sup>120</sup> Opening statement of Indonesia at the first meeting, para. 89. See Letter by Indonesia's Minister of Agriculture, Exhibit IDN-82; Letter by the US Secretary of Agriculture, Exhibit IDN-81.

<sup>121</sup> See Article 4(3) of MoA Regulation No. 34/2016.

<sup>122</sup> See Indonesia's response to Panel Question No. 77(a).

<sup>123</sup> Exhibit IDN-92(c).

<sup>124</sup> See Law of the Republic of Indonesia No. 6/1967 Concerning Basic Provisions on the Husbandry and Animal Health (previous Animal Law), Exhibit IDN-129.

<sup>125</sup> See Indonesia's response to Panel Question No. 77(a).

<sup>126</sup> Indonesia's first written submission, paras. 230-231.

<sup>127</sup> Indonesia's first written submission, para. 232.

exporters from exporting to Indonesia whole carcasses of chicken, provided that Indonesia's halal requirements were fulfilled. Thus, in Indonesia's view, the measure is not highly trade restrictive.

96. Indonesia further submitted that the positive list requirements were justified under the *chapeau* of Article XX. The *chapeau* of Article XX requires the measure not to 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".<sup>128</sup> Indonesia applied the positive list requirements in a non-discriminatory manner to chicken meat and chicken products imported from all Members.<sup>129</sup> However, even if the Panel were to find that the positive list requirements accorded discriminatory treatment to imported chicken from Brazil, Indonesia submits that the discriminatory application of the measure is not unjustifiable or arbitrary. On the contrary, it is justifiable when considered in the light of the objective of the measure to secure compliance with Indonesia's halal requirements.<sup>130</sup> Put differently, the discrimination, to the extent that it existed, was necessary to achieve the measure's objective. Furthermore, again, the fact that there are important differences between the conditions that prevail in Indonesia and Brazil, namely that Indonesia is the country with the world's largest Muslim population, resolves any doubts as to whether the discriminatory treatment was arbitrary or unjustifiable. It was not.

97. Finally, Indonesia submits that the question of whether the measure was a disguised restriction on international trade cannot be addressed in isolation from the analysis of the other elements of the *chapeau*.<sup>131</sup> The fact that the measure meets the requirements of the first two elements confirms that it is not a disguised restriction. In any event, the positive list requirements are a transparent regulation published in MoA Regulation No. 39/2014 and MoT Regulation No. 46/2013.

## E. IMPORT LICENSING REGIME

### 1. Most of Brazil's claims with respect to Indonesia's import licensing regime are repetitive, not supported by adequate evidence and arguments, or outside the Panel's terms of reference

98. Brazil challenges almost identical elements of Indonesia's import licensing regime under Article XI:1 of the GATT 1994, Article 4.2 of the Agreement on Agriculture, and Article 3.2 of the Licensing Agreement. In particular, Brazil claims that the following elements of the import licensing regime "constitute restrictions on the importation of chicken meat and chicken products" that are inconsistent with both Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994: (i) the positive list requirements; (ii) the intended use requirement; (iii) the limited application and validity periods; and (iv) the fixed license terms. The first two elements were also challenged as individual measures. With respect to these elements, Brazil simply incorporated by reference its arguments made in the context of its other claims.<sup>132</sup>

99. In addition, in the course of these proceedings, Brazil raised a number of additional claims that were either unsubstantiated, or outside the Panel's terms of references. For example, Brazil claimed in the alternative, without providing adequate evidence and arguments, that the elements of Indonesia's import licensing regime at issue constitute "similar border measures other than ordinary customs duties" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture. Brazil did not make its *prima facie* case with respect to these claims.<sup>133</sup>

100. Along the same lines, Brazil challenged the first, second and third elements of Indonesia's import licensing regime as inconsistent with Article 3.2 of the Licensing Agreement. However, Brazil did not explain adequately why these measures constitute "*non-automatic*" "import licensing procedures" within the meaning of Articles 1.1 and 3.1 of the Licensing Agreement, which is a threshold issue that must be addressed before analysing the consistency of a measure with Article

<sup>128</sup> Indonesia's first written submission, paras. 209-212.

<sup>129</sup> Indonesia's first written submission, para. 233.

<sup>130</sup> See Indonesia's first written submission, para. 210.

<sup>131</sup> Appellate Body Report, *US – Gasoline*, p. 25.

<sup>132</sup> See Indonesia's first written submission, paras. 235-247; Indonesia's rebuttal submission, paras. 120-123 (citing Brazil's first written submission, paras. 200-201, 212, 228-231).

<sup>133</sup> Indonesia's rebuttal submission, para. 123.

3.2. Furthermore, Brazil did not provide any arguments or evidence proving that the relevant aspects of Indonesia's import licensing regime are inconsistent Article 3.2, in particular they are "more administratively burdensome than absolutely necessary". Brazil's interpretation of Article 3.2 is based on an erroneous premise that, according to this provision, "a non-automatic procedure must be related to the implementation of a permissible 'trade restrictive measure', that is, a measure consistent with the relevant provisions of the WTO Agreement".<sup>134</sup> Brazil introduces this requirement into the legal tests under the first and second sentences of Article 3.2, and alleges that the challenged measures failed to satisfy this requirement.<sup>135</sup> However, Brazil did not explain from where it derived this additional requirement. Indeed, Indonesia demonstrated that Brazil's interpretation lacks any support in the text of Article 3.2, its context (in particular Article 1.1), negotiating history, and makes little sense from both a legal and a practical perspective. As stated clearly in Article 1.1, the Licensing Agreement disciplines administrative *procedures*, that is, import licensing, and is not concerned with a broader question of the WTO-consistency of the underlying measures those procedures seek to implement.<sup>136</sup>

101. Furthermore, as explained, in Question No. 128, the Panel asked Brazil to clarify whether Brazil is also challenging the fixed licence terms under Article 3.2 of the Licensing Agreement and, "[i]f so, ... where this claim was developed in Brazil's submissions". In its response, Brazil could not point to any passages in its first written submission, as well as other submissions, where it provided adequate legal arguments and evidence to develop this claim. Indonesia trusts that the Panel will find that Brazil failed to make its *prima facie* case with respect to the alleged inconsistency of the aforementioned measures with Article 3.2 of the Licensing Agreement.<sup>137</sup>

102. In its response to Panel Question No. 15.b, Brazil stated generally that "[t]o the ... extent that MoT Regulation 87/2015 and MoT 05/2016 introduce additional requirements and procedures to obtain an import license whenever a product is considered a 'certain product', in the first case, or is a processed product coming from a country having a risk of spread of zoonosis, in the second, Brazil submits that these additional restrictions are also at issue in the present dispute". Brazil, however, failed to explain which specific measures it is challenging, under which specific provisions of the WTO covered agreements, and on what legal basis.<sup>138</sup>

103. A number of Brazil's claims with respect to Indonesia's import licensing regime are not properly identified in Brazil's panel request and are, therefore, outside the Panel's terms of reference. In addition to Brazil's challenge to the regime "as a whole" already rejected by the Panel in its preliminary ruling, Brazil also challenged: (i) a letter of recommendation from provincial livestock services office; (ii) supervision on the compliance of veterinary public health requirements; and (iii) the alleged discretionary powers in determining "the amount in Recommendation per Business Player" under Article 27 of MoA Regulation No. 58/2015. Brazil claimed, *inter alia*, that these measures constitute "discretionary import licensing" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture.<sup>139</sup>

104. However, even if the Panel were to find that it has jurisdiction over these claims, Indonesia demonstrated that Brazil's claims are without merit. The first two requirements do not constitute "licensing", and the second requirement does not even address the issue of importation. These measures cannot, therefore, be characterised as "import licensing". Furthermore, Brazil failed to demonstrate that the alleged licensing elements bestow any discretion on Indonesia's authorities, as these measures are set out clearly in Indonesia's legislation and are based on transparent criteria.<sup>140</sup>

105. Indonesia addresses below Brazil's claims that the limited application and validity periods and the fixed license terms are "quantitative import restrictions" within the meaning of Article 4.2

<sup>134</sup> See Brazil's rebuttal submission, para. 117.

<sup>135</sup> Brazil's rebuttal submission, paras. 128 and 129.

<sup>136</sup> See Brazil's claim under Article 3.2 discussed in Indonesia's first written submission, paras. 76-80, 279-290; Indonesia's responses to Panel Questions No. 48, 57, 58, 59, 60; Indonesia's rebuttal submission, paras. 114-117; Indonesia's opening statement at the second meeting, paras. 22-36; Indonesia's comments on Brazil's responses to Panel Questions No. 124, 127.

<sup>137</sup> Indonesia's comment on Brazil's response to Panel Question No. 128.

<sup>138</sup> Indonesia's rebuttal submission, paras. 77-79, 118.

<sup>139</sup> Indonesia's responses to Panel Questions No. 105.

<sup>140</sup> See, *inter alia*, Indonesia's first written submission, paras. 267-275; Indonesia's responses to Panel Questions No. 12, 18 and 105; Indonesia's comment on Brazil's response to Panel Question No. 108.

of the Agreement on Agriculture and Article XI:1 of the GATT 1994. The other claims with respect to Indonesia's import licensing regime are repetitive, not supported by adequate evidence and arguments, or outside the Panel's terms of reference.

**2. Brazil has not demonstrated that the limited application and validity periods and the fixed license terms are inconsistent with Indonesia's obligations under Article 4.2 of the Agreement on Agriculture**

106. As explained, Indonesia considers that, in the present dispute, Article 4.2 of the Agreement on Agriculture applies to the exclusion of Article XI:1 of the GATT 1994. In the context of its claim under Article 4.2, Brazil did not substantiate its assertion that the limited application and validity periods and the fixed license terms constitute a quantitative import restriction as these measures: "(a) unduly restrict market access for Brazilian products; (b) create uncertainty as to an applicant's ability to import...; and (c) impose a significant burden on importers that is unrelated to their normal importing activity". Brazil further argued that these measures create what Brazil calls a "dead zone", i.e. a period during which products cannot be imported into Indonesia. In its submissions, Indonesia has, however, demonstrated that, under both previous and current regimes, its import licensing procedures are fast and simple. Indeed, despite these measures, an importer could import the products at issue to Indonesia without interruption on terms it determined itself in its application for the Import Recommendation. For example, under the current regime, producers and importers can make their application for an Import Recommendation and an Import Approval at any time of the year to import within a six-month validity period. The flexibility is that an importer can apply for an infinite number of Import Recommendations and Import Approvals, at whichever point in time he wishes throughout the year. Brazil has not rebutted these arguments, or provided adequate evidence that Indonesia's import licensing regime indeed creates a "dead zone". To the extent that the alleged "dead zone" results from the way how Brazilian exporters operate, as Brazil's own evidence suggests, this dead zone cannot be attributed to any action or omission of Indonesia.<sup>141</sup>

107. Moreover, Brazil did not provide any arguments or evidence showing that the above measures are not "maintained under ... general, non-agriculture-specific provisions of GATT 1994" within the meaning of footnote 1 of the Agreement on Agriculture.<sup>142</sup>

108. In light of the foregoing, Brazil failed to prove that the limited application and validity periods and the fixed license terms are one of the measures listed in footnote 1 of the Agreement on Agriculture, and are not "maintained under ... general, non-agriculture-specific provisions of GATT 1994". Brazil thus failed to make its *prima facie* case that these measures are inconsistent with Article 4.2 of the Agreement on Agriculture.<sup>143</sup>

**3. Brazil has not demonstrated that the limited application and validity periods and the fixed license terms are inconsistent with Indonesia's obligations under Article XI:1 of the GATT 1994**

109. Should the Panel find that Article XI:1 of the GATT 1994 applies to the limited application and validity periods and the fixed license terms (*quod non*), as explained, these measures, under both previous and current regimes, do not have a limiting effect on imports. Brazil, therefore, failed to make its *prima facie* case of inconsistency with Article XI:1 of the GATT 1994.<sup>144</sup>

110. Nevertheless, even if the Panel were to find otherwise, these measures are justified under Article XX(d) of the GATT 1994.<sup>145</sup>

<sup>141</sup> See, inter alia, Indonesia's first written submission, paras. 250-259, 261-265 (citing Brazil's first written submission, paras. 202, 212, 228-231); Indonesia's rebuttal submission, paras. 9-22; Indonesia's comment on Brazil's response to Panel Question No. 103.

<sup>142</sup> Indonesia's first written submission, para. 277.

<sup>143</sup> Indonesia's first written submission, para. 278.

<sup>144</sup> See Indonesia's rebuttal submission, paras. 9-22, 126-127. See also Indonesia's first written submission, paras. 292-294.

<sup>145</sup> Indonesia's rebuttal submission, para. 128.

**4. If the Panel were to find that the limited application and validity periods and the fixed license terms are inconsistent with Article XI:1, these measures are justified under Article XX(d) of the GATT 1994**

111. As explained, Article XX(d) of the GATT 1994 allows Members to apply measures that are "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, ... and the prevention of deceptive practices". Indonesia demonstrated that the limited application and validity periods and the fixed license terms are justified under Article XX(d), as these measures were designed to secure compliance with Indonesia's laws and regulations addressing halal requirements, public health, as well as deceptive practices (consumer protection) and customs enforcement relating to the halal requirements and food safety.<sup>146</sup>

112. In particular, Indonesia identified certain laws with which the measures at issue ensure compliance, such as Law No. 18/2009 (Animal Law) as amended by Law No. 41/2014; Law No. 33/2014 (Halal Law); and Law No. 8/1999 (Consumer Protection Law). In this respect, Indonesia referred the Panel to the relevant provisions of these laws on food safety, halal requirements, and consumer deceptive practices. Furthermore, these laws are "not inconsistent with the provisions of [the GATT 1994]". It is a general principle that a Member's law is recognized to be WTO-consistent until proven otherwise. Brazil has not provided this proof.<sup>147</sup>

113. Indonesia further explained how the application and validity periods and the fixed license terms contribute to securing compliance with these laws. At the outset, Indonesia noted that even though these measures are challenged as individual measures, they are the interrelated elements of Indonesia's import licensing regime for chicken. These measures are integral parts of Indonesia's comprehensive package of measures that aim at fulfilling the same objective. Although these measures *operating together* contribute to Indonesia's objective, it is difficult to segregate the *individual* contributions they make to Indonesia's objective.<sup>148</sup>

114. With respect to the issue of contribution, Indonesia explained that it is a developing archipelagic country with vast territory, which imposes additional constraints on its ability to conduct expedient customs clearance operations, in particular for products that pose halal and safety risks, such as animal products. The application and validity periods and the fixed license terms seek compliance with Indonesia's relevant laws by facilitating the supervision by Indonesia's customs and quarantine officials over the importers' compliance with these laws at the time of importation. In other words, *the facilitation of supervision* is the immediate objective of these measures through which Indonesia seeks to achieve its ultimate objective of ensuring that animal products are safe, healthy, wholesome and halal; and that consumers are not deceived about these issues. For example, absent the limited validity period, one would not be able to estimate how many products of which particular type will be imported through which particular ports. Conversely, if Indonesia were to impose the validity period requirement without applying the fixed license terms requirement, it would have received information on the period of importation. However, it would not know, at least approximately, what quantity of which particular products would be imported and through which particular ports. In addition, importers submit arrival plans for imports on a monthly basis, which provide further information as to the quantity and the timing of the imports that will arrive at the specified ports. Thus, without these requirements, Indonesia would not be able to allocate a sufficient number of quarantine and customs officials to a particular port of entry to supervise an importer's compliance with halal and food safety requirements, as well as consumer protection. These measures, therefore, contribute to Indonesia's objective.<sup>149</sup>

115. In light of the foregoing, Indonesia considers that it has satisfied its burden of proof under Article XX(d) of the GATT 1994.<sup>150</sup>

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<sup>146</sup> See, inter alia, Indonesia's first written submission, paras. 295-300; Indonesia's opening statement at the first meeting, paras. 97-109; Indonesia's responses to Panel Questions No. 24, 27, 113-119, 121-122; Indonesia's comments on Brazil's responses to Panel Questions No. 120-123.

<sup>147</sup> See, inter alia, Indonesia's first written submission, paras. 297-298 (citing Appellate Body Report, *US – Carbon Steel*, para. 157); Indonesia's response to Panel Question No. 113.

<sup>148</sup> Indonesia's response to Panel Question No. 113.

<sup>149</sup> See, inter alia, Indonesia's responses to Panel Questions No. 113, 115, 119.

<sup>150</sup> Indonesia's response to Panel Question No. 113.

116. Indonesia notes that Brazil did not propose any concrete alternative measures that are less-trade restrictive and make an equivalent contribution to Indonesia's objective. Brazil's so-called "alternatives" are vague and imprecise, and do not address the issue of supervision by Indonesia's customs and quarantine officials over the importer's compliance with Indonesia's relevant laws at the time of importation. Moreover, Indonesia already applies these measures. Brazil, therefore, failed to rebut Indonesia's defence under Article XX(d).<sup>151</sup>

117. Finally, Indonesia demonstrated that the limited application and validity periods and the fixed license terms are justified under the *chapeau* of Article XX. Indonesia applies these measures in a non-discriminatory manner to chicken meat and chicken products imported from all Members. In addition, there is no discrimination between imported and domestic like products, as Indonesian producers of the products at issue must comply with Indonesia's safety and halal requirements. Furthermore, even if these measures were found to accord discriminatory treatment to imports, Indonesia submits that this treatment is not unjustifiable or arbitrary. On the contrary, it is justifiable when considered in the light of the importance of Indonesia's objective to secure compliance with Indonesia's laws that address halal and public health, as well as the conditions that prevail in Indonesia. Finally, the fact that the measures at issue are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination confirms that they are not a disguised restriction, as all elements of the test under the *chapeau* "may ... be read side-by-side [and] ... impart meaning to one another". In any event, these measures are published, and are, therefore, not "disguised".<sup>152</sup>

118. In light of the foregoing, even if the Panel were to find that the limited application and validity periods and the fixed license terms fall under Article XI:1 of the GATT 1994 (which they do not), these measures are, nevertheless, justified under both sub-paragraph (d) and the *chapeau* of Article XX of the GATT 1994.<sup>153</sup>

#### F. ALLEGED DELAYS IN APPROVING BRAZIL'S VETERINARY CERTIFICATE

119. Brazil claims that "Indonesia has consistently failed to undertake and complete the procedures to check and ensure the fulfillment of sanitary requirements necessary to authorize Brazilian exports of chicken meat and chicken products" thereby violating the requirements of Article 8 and Annex C(1)(a) of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).<sup>154</sup> Brazil states it "has submitted in 2009 to Indonesia's authorities a proposal of an International [Veterinary] Certificate, which followed every single guideline from the World Organization for Animal Health".<sup>155</sup>

120. Indonesia submits that Brazil has not obtained the "International Veterinary Certificate" because it has not submitted all the appropriate documentation. A letter from the Ministry of Agriculture, Directorate-General of Livestock and Animal Health Services dated 22 January 2013 indicates that the Director-General acknowledged the questionnaire of MFG-MARFRIG FRIGORIFICOS BRASIL S/A and COOPERATIVE CENTRAL AURORA ALIMENTOS, two Brazilian companies wishing to export beef, chicken meat and products to Indonesia.<sup>156</sup> The Indonesian government then informed Brazil that the application documents presented by the two Brazilian companies were at the stage of desk review. However, the submitted questionnaire only covered the food safety assurance system, and did not include information on halal practices in the exporting poultry slaughter house.<sup>157</sup> Therefore any delays experienced by Brazil are because they have not submitted the proper documentation, and should not be attributed to the Government of Indonesia.

<sup>151</sup> Indonesia's responses to Panel Questions No. 121, 122; Indonesia's comments on Brazil's responses to Panel Questions No. 121, 123.

<sup>152</sup> Indonesia's opening statement at the first meeting, paras. 107-109 (citing, *inter alia*, Appellate Body Report, *US – Gasoline*, p. 25).

<sup>153</sup> Indonesia's first written submission, para. 302.

<sup>154</sup> See Brazil's opening statement at the first meeting, para. 96. See also *ibid.*, paras. 96-105; and Brazil's first written submission, paras. 294-315. Indonesia provided its interpretation of Article 8 and Annex C(1)(a) in, *inter alia*, its response to Panel Question No. 65.

<sup>155</sup> Brazil's opening statement at the first meeting, para. 97. See also Brazil's first written submission, para. 35.

<sup>156</sup> Letter from the Ministry of Agriculture to the Embassy of Brazil in Jakarta, 22 January 2013. Exhibit IDN-40.

<sup>157</sup> *Ibid.*

121. Indonesia does not dispute that negotiation of a Veterinary Certificate, which certifies that the country of origin is free of diseases or that exporters comply with safety requirements, may fall within the scope of Article 8 and Annex C of the SPS Agreement.<sup>158</sup> In Indonesia's view, the real question is whether Brazil has established that there was indeed a "delay" in the approval of the veterinary certificate for chicken meat and chicken products within the meaning of Article 8 and Annex C, and the delay, if were found to exist (*quod non*), is "undue". Indonesia understands the phrase "undue delay" as indicating that a delay in the approval procedure (i.e. "time lost by inaction" or "something [that] is late or postponed")<sup>159</sup> can only result from a properly submitted application, which was not submitted in the case at hand. Furthermore, even if one were to interpret the term "delay" broadly as encompassing delays that were caused by applicants themselves (for example, applicants that failed to attach all required documents to their application), Indonesia submits that delays "attributable to action, or inaction, of an applicant" cannot properly be considered as "undue" (i.e. "[u]nwarranted or inappropriate"), as was confirmed by the panel in *EC – Approval and Marketing of Biotech Products*.<sup>160</sup> Such delays are, therefore, not inconsistent with Article 8 and Annex C of the SPS Agreement.

122. Indonesia submits that Brazil's claim is based on its erroneous interpretation of Article 8 and Annex C(1)(a) of the SPS Agreement, its total misunderstanding of Indonesia's import licensing regime, and the misleading presentation of facts underlying this claim. First, Brazil's argument that, under the SPS Agreement, sanitary procedures must be isolated from other procedures is legally incorrect. Indonesia submits that the determination of whether the delay in question is "undue" is not dependent upon the nature of the document that the applicant failed to submit as long as the document/requirement relates to the approval procedure. The Appellate Body and previous panels have confirmed that a wide range of measures, including those that are not themselves sanitary procedures, may fall within the scope of Article 8 and Annex C.<sup>161</sup>

123. The Appellate Body's statement that measures other than the sanitary procedures may infringe the requirements of Article 8 and Annex C must necessarily mean that the failure of an applicant to comply with additional legitimate requirements (e.g. to pay fees, or, *in casu*, to fill out the halal questionnaire) is relevant for the assessment of whether the alleged "undue delay" exists. For example, in the event of an applicant's failure to comply with these requirements, the delay cannot be attributed to governmental authorities conducting the approval procedure. Brazil has itself acknowledged that the term "procedures" in Article 8 and Annex C "is defined in the SPS Agreement *in a manner as broad as possible*".<sup>162</sup>

124. In addition, Brazil's argument has far-reaching practical implications. There may be legitimate reasons why a Member may wish to conduct a holistic assessment of the compliance by a particular establishment with sanitary requirements as well as other requirements. In its response to Panel Question No. 29, Indonesia explained that it would be inefficient to start the Document Desk Review process of the food safety assurance system of the business unit in Brazil and proceed to the field on-site inspection for food safety, if it is not known whether the business unit has a halal assurance system. To make separate trips to assess food safety and halal requirements separately would entail unnecessary costs for Indonesia, which is a developing country. This is why Indonesia treats the assessment of the food safety and halal requirements on a holistic basis.

125. Furthermore, in its responses to Panel Questions No. 30, 32 and 37, Indonesia provided a detailed description of a four-step process for obtaining the approval of country of origin and business units. This process starts with the Desk Document Review, during which Indonesian authorities assess certain documents provided by Brazil and its business units, including: the questionnaire covering food safety and assurance system,<sup>163</sup> the halal questionnaire,<sup>164</sup> and the

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<sup>158</sup> Indonesia's response to Panel Question No. 65.

<sup>159</sup> See Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495. See definition of "delay" in Oxford Dictionaries, Exhibit IDN-106.

<sup>160</sup> See Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1497.

<sup>161</sup> Appellate Body Report, *Australia – Apples*, para. 438. The broad scope of Article 8 and Annex C was also confirmed in Panel Report, *US – Poultry (China)*, para. 7.363; and Panel Report, *US – Animals*, paras. 7.67-7.68.

<sup>162</sup> Brazil's first written submission, para. 299, emphasis added.

<sup>163</sup> See Questionnaire for Country of Origin on Food Safety, Exhibit IDN-101.

<sup>164</sup> See Questionnaire for Business Unit on Food Safety and Halal Assurance System, Exhibit IDN-102.

halal certificate approved by MUI or an Islamic body in Brazil recognized by the MUI.<sup>165</sup> Based on the results of the Desk Document Review, a field inspection will be undertaken to the proposed establishment (i.e. On-site Field Inspection in Country of Origin). At the following stage of Risk Analysis in Jakarta, Indonesia then analyses the reports to determine whether to approve or reject the application. The four-step process culminates with the conclusion of a bilateral agreement between the country of origin and Indonesia (Protocol)<sup>166</sup> which specifies the body in the country of origin responsible for the issuance of Veterinary Certificates at the regional or local level, certifying that meat exports will meet all veterinary and specific requirements determined by Indonesia. A model certificate is attached to the completed and signed Protocol between the country of origin and Indonesia.<sup>167</sup>

126. Indonesia trusts that it has become clear that Brazil's proposal of an International Health Certificate was very premature and failed to meet the requirements under Indonesia's import licensing regime. A Veterinary Certificate can only be agreed upon at the very end of the four-step country of origin and business unit approval process, during the negotiations on the Protocol. It is in the Protocol that the approval of the permanent official veterinaries by a body in the country of origin can be established. However, Brazil has not reached this final stage of the approval process. In fact, Brazil's application is incomplete, and did not even trigger the Desk Document Review (i.e. the first step). The only document that Brazil has so far provided is the questionnaire covering food safety and assurance system. There are other documents that are still to be submitted, including those establishing compliance with Indonesia's halal requirements. In its response to Question 4, Indonesia made clear that "[t]he delay of the approval for Brazil and its business units of slaughterhouse was due to failure in the application to comply with the existing procedures and technical regulations, stipulated by the Indonesian law", and "[t]he process of desk review was discontinued *because the Brazilian applications [were] not equipped with halal questionnaire*".<sup>168</sup>

127. In the light of the above, Indonesia submits that Brazil's claim must be rejected in its entirety, as Brazil did not prove that there is any "delay" in the country of origin and business unit approval process, attributable to Indonesia within the meaning of Article 8 and Annex C(1)(a) of the SPS Agreement. Alternatively, should the Panel find otherwise, Brazil failed to prove that the delay is "undue".<sup>169</sup>

#### **G. TRANSPORTATION REQUIREMENTS**

128. Brazil alleges that Indonesia imposes restrictions on the transportation of imported products by requiring that the transportation of carcass, meat and/or processed products shall be "conducted directly from the country of origin to the port of discharge within the territory of [the Republic of] Indonesia".<sup>170</sup> It claims that the measure "clearly operates as a 'quantitative import restriction' within the meaning of Article 4.2 [of the Agreement on Agriculture] and Article XI:1 of the GATT 1994, and alleges that the measure restricts the volume of imports."<sup>171</sup>

129. Indonesia submits that Brazil incorrectly understands the legal requirements related to the transportation of carcass, meat and/or processed products to Indonesia.

<sup>165</sup> See Form 2 to Questionnaire for Business Unit on Food Safety and Halal Assurance System, Exhibit IDN-102. See also Indonesia's response to Panel Question No. 30(a).

<sup>166</sup> See Sample Protocol between the Directorate General of Livestock and Animal Health Services of the Ministry of Agriculture of the Republic of Indonesia and the Directorate General of XXX Concerning Establishment, Approval, and Inspection for Export of Meat, Meat Products and Milk Products from XXX to Indonesia, Exhibit IDN-115.

<sup>167</sup> See Sample Health Certificate for Export of Beef from XXX to the Republic of Indonesia, Exhibit IDN-114.

<sup>168</sup> Indonesia's responses to Brazil's information request under Article 5.8 of the SPS Agreement, Exhibit BRA-20, emphasis added.

<sup>169</sup> These issues are discussed in Indonesia's rebuttal submission, paras. 159-174; Indonesia's response to Panel Question No. 65.

<sup>170</sup> Brazil's first written submission, para. 239, citing Article 20(a) of MoA Regulation 58/2015, Exhibit IDN-24.

<sup>171</sup> Brazil's first written submission, paras. 214-217 and paras. 239-243.

130. Indonesia acknowledges that Article 20(a) of MoA 58/2015 refers to a direct transportation requirement from the country of origin to Indonesia.<sup>172</sup> However, this provision must be read in the context of the other provisions in the same Article, which provide for the application of animal quarantine measures. Article 20(b) requires that animal quarantine measures must be carried out at the country of origin, before the products are loaded on the conveyance. Article 20(c) of the same regulation provides that the "*transit* during importation shall be carried out pursuant to the animal quarantine laws and regulations". Thus, this provision acknowledges that transit during importation can take place as long as animal quarantine laws are respected. Article 20(e) requires that upon arrival at the port of discharge, further animal quarantine measures shall be performed or applied to the carcass, meat and/or processed products.

131. Animal quarantine requirements are regulated under Law 16/1992 on Animal, Fish and Plant Quarantine.<sup>173</sup> Recital (c) of the Considerations notes that "most of the pests and diseases of animals, fish and plants that are particularly injurious to [Indonesia's] biotic natural resources are not yet found in the Indonesian archipelago whereas a number of those that are already present are confined to certain islands".<sup>174</sup> Thus, Indonesia has concerns about pests and other organisms invading its territory, as do other countries that do not share contiguous borders. Article 5 of Law 16/1992 and Government Regulation 82/2000 on Animal Quarantine provides for animal quarantine requirements. Article 2 provides that all carrier media (or animal or non-animal products) must be equipped with health certificates issued by the authorized officials in the country of origin and the transit country. The definitions section provides that "transit is a temporary stop of [the means of transportation] in a harbour during a journey that brings in animals, material derived from animals, animal products and other things before arriving in the designated harbour." Part Three of Government Regulation 82/2000 is entitled "Transit" and provides, *inter alia*, in Article 34 that "in order to prevent quarantine animal pests entering [Indonesia] from a foreign country, transit shall only be approved at a designated place" and in Article 35 that the designated places for transit must have appropriate facilities.

132. Indonesia explained that imported products do not have to make the journey on a *non-stop* basis but on a *direct* basis.<sup>175</sup> It further explained that a breach of the "direct" transportation requirement would only occur if the vessel transporting the goods in question broke journey en route to Indonesia and the goods were imported and then re-exported from the transit country.<sup>176</sup>

133. In the light of the foregoing, it is factually incorrect for Brazil to argue that transit is not permitted during the transportation of chicken meat and chicken products from Brazil to Indonesia. As can be noted from the various laws and regulations discussed above, transit is permitted as long as it complies with Indonesia's animal quarantine regulations. Indeed, Format-1 for the Import Recommendation attached to MoA Regulation No. 58/2015 contains the following fields to be completed for importation: (a) tariff position, type/products category, country of origin and port of discharge; (b) name of business unit and establishment number; (c) *transit*, (d) intended use and (e) term of validity.<sup>177</sup>

134. The European Union has noted that the existence of a prohibition to pass through third parties is factually disputed between Brazil and Indonesia.<sup>178</sup> Indonesia has submitted exhibits demonstrating that transit during importation has, in fact, occurred. Indonesia submitted an Import Declaration indicating that frozen, boneless beef was transited through Singapore before arriving at Tanjung Priok in Indonesia to demonstrate that transit was allowed by Indonesian

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<sup>172</sup> In this context, the term "direct" may be used in the same manner as it is used in the airline industry. A direct flight is one that may make stops and pick up additional passengers but the original passengers do not leave the plane. A "non-stop" flight does not make any stops at all. See: <http://www.programmerinterview.com/index.php/assortment/whats-the-difference-between-a-nonstop-and-direct-flight/>

<sup>173</sup> Law No. 16/1992 on Animal, Fish and Plants Quarantine, Exhibit IDN-72.

<sup>174</sup> Recital (c) of Law No. 16/1992 on Animal, Fish and Plant Quarantine, Exhibit IDN-72.

<sup>175</sup> Indonesia's first written submission, para. 310.

<sup>176</sup> Indonesia's response to Panel question No. 39 after the first meeting.

<sup>177</sup> MoA Regulation No. 58/2015, "Import Recommendation by Directorate General of Livestock and Animal Health", p. 27, Exhibit IDN-24.

<sup>178</sup> European Union's third party submission, para. 52.

authorities.<sup>179</sup> Indonesia also submitted a bill of lading and Import Declaration for another shipment that stopped in transit in a third country, namely Singapore, in September 2015.<sup>180</sup>

135. In response to Indonesia's clarification of the so-called direct transportation requirement, Brazil merely stated "...if this is indeed the case, it is far from clear on the basis of Indonesia's trade regulations. It is actually a challenge to understand the notion of legal certainty argued by the Indonesian Government".<sup>181</sup> In Indonesia's view, this does not constitute a proper rebuttal.

136. Brazil admits that it is unclear how transportation requirements operate in practice.<sup>182</sup> In *US – Carbon Steel*, the Appellate Body stated that "a party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion".<sup>183</sup> Brazil has not met this burden as it has not introduced any such evidence. Indonesia has explained the legal and administrative requirements for transportation of imports to Indonesia. The Appellate Body has endorsed the principle that a Member is normally well-placed to explain the meaning of its own law.<sup>184</sup>

137. Brazil argues that Indonesia's description of its transportation requirements "seems to imply" that transshipment is not included in Indonesia's description of its transit requirements, and thus, in violation of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.<sup>185</sup> Indonesia submits that Brazil's assertion is incorrect. Transshipment is the "transfer of a shipment from one carrier, or more commonly, from one vessel to another."<sup>186</sup> Article 19(c) of Regulation 34/2016 explicitly allows for importation by way of transit or, in other words, a change in the vessel used to transport the goods.

138. In its rebuttal submission, Brazil in essence acknowledges that the requirement of direct transportation may in fact not exist, and that "transit (transshipment) is allowed in practice". It made a new claim, however, that restrictions on the transportation are caused by "the legal uncertainties generated by the murky language of Regulation Article 19(a) of MoA Regulation 34/2016".<sup>187</sup> Indonesia submits that this claim falls outside the Panel's terms of reference. In section II(ii) (third and tenth bullets) of its panel request, Brazil challenged "[r]estrictions on the transportation of imported products by ... requiring direct transportation from the country of origin to the entry points in Indonesia", as inconsistent, *inter alia*, with Article XI:1 of the GATT 1994. The preposition "by" indicates that the requirement of direct transportation was the only relevant cause of the alleged restrictions on the transportation of imported products.<sup>188</sup>

139. In the light of the foregoing, Indonesia submits that Brazil has not made a *prima facie* case to support its claim that the so-called direct transportation requirement violates Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.<sup>189</sup>

<sup>179</sup> Import Declaration from Australia, Exhibit IDN-79.

<sup>180</sup> See Indonesia's responses to Panel Questions No. 39 and 40; Bill of Lading and Import Declaration in Exhibit IDN-88.

<sup>181</sup> Brazil's opening statement at the first substantive meeting, para. 107.

<sup>182</sup> Brazil's rebuttal submission, para. 216.

<sup>183</sup> Appellate Body Report, *US-Carbon Steel*, para. 157.

<sup>184</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, footnote 253 endorsing para. 7.684 of the Panel Report, and referring to Panel Report, *China – Intellectual Property Rights*, para. 7.28. See also Panel Report, *EC – Trademarks and Geographical Indications*, para. 7.55.

<sup>185</sup> Brazil's rebuttal submission, para. 219 (emphasis added).

<sup>186</sup> See definition of transshipment in <http://www.businessdictionary.com/definition/transshipment.html>, last accessed on 03.10.2016 (emphasis added).

<sup>187</sup> Brazil's rebuttal submission, para. 222.

<sup>188</sup> Indonesia's response to Panel Question No. 139.

<sup>189</sup> See Indonesia's first written submission, paras. 303-311; Indonesia's response to Panel Question No.

**V. CONCLUSION**

140. In the light of the foregoing, Indonesia requests the Panel to find that all of Brazil's claims are without merit and should be rejected

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**ANNEX C****ARGUMENTS OF THE THIRD PARTIES**

<b>Contents</b>		<b>Page</b>
Annex C-1	Executive summary of the arguments of Argentina	C-2
Annex C-2	Executive summary of the arguments of Australia	C-8
Annex C-3	Executive summary of the arguments of Canada	C-11
Annex C-4	Executive summary of the arguments of the European Union	C-15
Annex C-5	Executive summary of the arguments of Japan	C-17
Annex C-6	Executive summary of the arguments of New Zealand	C-20
Annex C-7	Executive summary of the arguments of Norway	C-25
Annex C-8	Executive summary of the arguments of Paraguay	C-27
Annex C-9	Executive summary of the arguments of Qatar	C-28
Annex C-10	Executive summary of the arguments of the United States	C-30

## ANNEX C-1

### EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA

1. Argentina takes part in this case due to its systemic interest in the correct and consistent interpretation and application of the covered agreements. This executive summary includes comments made by Argentina in its written submission, during the third party session and in its reply to the written questions by the Panel.

#### **Brazil's claim of undue delay under article 8 and annex C(1)(a) of the SPS Agreement**

2. In Argentina's view, Article 8 of the SPS Agreement establishes an obligation to comply with the provisions contained in Annex C with regard to the operation of "control, inspection and approval procedures."

3. Annex C(1) provides a general obligation to ensure that *any* procedure aimed to "*check and ensure the fulfillment of sanitary and phytosanitary measures*" complies with the specific obligations in paragraphs (a) to (i). The use of the word *any* in this provision does not seem to limit the scope Article 8 and Annex C.

4. The use of the term *inter alia* and *including* does not restrict the possibility of other procedures falling within their scope. All in all, article 8 and Annex C have a wide scope of application.

5. In this context, Argentina considers that Brazil is correct in affirming that "the negotiation of the International Veterinary Certificate is a procedure designed to check and ensure the fulfillment of sanitary requirements" under Article 8 and Annex C(1) of the SPS Agreement, since the successful completion of this procedure is a prerequisite to allow the importation of Brazilian chicken meat and chicken products, and therefore it is subject to the obligations set forth in Article 8 and Annex C(1)(a).

6. The negotiation of the International Veterinary Certificate is the only way available to obtain access to the Indonesian market and successful completion of this procedure is a prerequisite to allow the importation of chicken meat and chicken products.

7. Argentina notes that there is uncontested evidence on the record that shows that both Brazil and Indonesia started and maintained periodical bilateral negotiations regarding the approval of the "Health Certificate" by the competent authorities of both countries for the importation of chicken meat and chicken products. Unlike the halal certificate, the "Veterinary" or "Health" Certificate serves mainly to check the compliance with several SPS requirements. In this regard, Argentina understands that the negotiation of the Veterinary Certificate is an approval procedure applied to comply with several of the objectives listed in Annex A(1) of the SPS Agreement and therefore falls within the definition of an SPS measure.

8. Therefore, in making a determination under this procedure, Indonesia must comply with the pertinent obligations on "approval procedures" under Annex C(1) of the SPS Agreement.

9. Second, Argentina believes that "the analysis of a claim under Article 8 and Annex C(1)(a) requires two steps. When intending to identify an undue delay under Article 8 and Annex C(1)(a), the complainant must establish first that there has been a "delay". Second, the complainant must establish that the delay was "undue."

10. The first step for establishing that there has been a delay is to determine its existence. In this regard, "a determination of whether a delay exists should be made in light of the nature and complexity of the procedure to be undertaken and completed."

11. A period of time lost because of the lack of response from a Member's competent authority in the negotiation of an International Veterinary Certificate, especially when there are available

guidelines from the relevant international organization, can be considered as a "delay" incurred by that Member in the procedure.

12. Argentina recognizes that the seven years delay alleged by Brazil could not be, in and of itself, conclusive as to whether Indonesia incurred in a delay. However, in light of the aforesaid and considering Brazil's evidence submitted for this claim, Argentina considers that in the present case there is a presumption of inactivity by Indonesia with regard to the negotiation of an International Veterinary Certificate, which acts as a strong indication that in such circumstances Indonesia may have incurred in a "delay".

13. Regarding the second step, *i.e.* establishing that the existing delay is "undue", the Appellate Body defined "undue" as something "that ought not to be or to be done, inappropriate, unsuitable, improper, unrightful, unjustifiable" or "going beyond what is warranted or natural; excessive, disproportionate." It also explained that Annex C(1)(a) requires that relevant procedures are undertaken and completed with appropriate dispatch.

14. Argentina considers that the term "undue delay" suggests that both the reason for the "delay" and its duration are relevant considerations for determining whether the delay is "undue" and therefore they must be analyzed taking special account on the proportionality between them. The proportionality between the reason and the duration of the delay has a central role in defining whether the delay is "undue". Such proportionality must be addressed always on a case-by-case basis, and in the context of the circumstances of each individual case.

15. In the present case, according to the evidence submitted by Brazil, it can be inferred that Indonesia has not provided an adequate explanation that could justify its delay in the negotiation of the International Veterinary Certificate. Therefore, absent a proper justification by Indonesia, it can be considered that such delay was "undue".

16. Argentina would like to highlight as well that Brazil is not challenging certain provisions of the Indonesian Regulations *as such*. According to Argentina's understanding, Brazil is challenging the undue delay of the Indonesian authorities to undertake and complete the sanitary procedures required to allow Brazilian imports of chicken meat and chicken products into Indonesia. Therefore, the measure at issue under this claim is Indonesia's undue delay and not the legal provision. As Indonesia explains in its submission, "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings." Hence, in the present dispute Brazil is challenging Indonesia's omission to undertake and complete the approval procedures, and not a particular provision of certain Regulation.

17. Even assuming, *arguendo*, that Brazil could be challenging certain provisions of the Indonesian legislation *as such* for the undue delay claim, Argentina notes that the defense presented by Indonesia is not clear or could have been exposed with a greater level of precision. At the beginning of its argument, Indonesia seems to be suggesting that Brazil's claim is incorrect because it addressed provisions of a wrong chapter of MoA Regulation 58/2015 (*i.e.* "Supervision" instead of "Import Procedures"). Argentina does not agree. While the title of the chapter of a Regulation does not always confine the scope of its provisions, Argentina considers that Article 33(1) provides that the performance of the "supervision" and/or "control" is precisely on the veterinary public health requirements. In turn, Article 36(4) details that these "requirements [...] are the veterinary certificate and halal certificate for the required product." Hence, in light of the findings of the Panel in *EC – Approval and Marketing of Biotech Products*, the application of these provisions ensure "the fulfillment of one or more SPS substantive requirements."

18. Indonesia seems to suggest that Brazil's claim is incorrect because it addressed the wrong legislation (*i.e.* "MoA Regulation 58/2015" instead of "Government Regulation 95/2012"). However, Argentina notes that, according to the evidence in the record, in 2014 – when Regulation 95/2012 was already in force - Indonesia informed Brazil that "the importation of poultry meat into Indonesia's territory is allowed as long as they meet the requirements stipulated in the Minister of Agriculture Regulation No. 84/2013" and when asked about the approval procedures for the Health Certificate for Brazilian poultry, Indonesia informed that "based on Minister of Agriculture Regulation No. 84/2013, the approval step for country and business unit will only be granted after desk review and on site review are completed." Argentina also notes that MoA Regulation 84/2013,

which replaced MoA Regulation 50/2011, has been replaced by MoA Regulation 139/2014 which, in turn, has been replaced by MoA Regulation 58/2015, which is the regulation referred to by Brazil.

19. All these regulations are similar in their design, structure and even content. Therefore, despite the subsequent modifications of the legislation, the Sanitary Certificate requirement seems to be a permanent requirement which existed before Government Regulation 95/2012 went into force.

20. Argentina considers that the evidence in the record, including Indonesia's reply to Brazil questions pursuant to Article 5.8 of the SPS Agreement, does not establish that the importation requirements are addressed in Government Regulation 95/2012 and not in MoA Regulation 58/2015.

21. Furthermore, Indonesia provides an explanation of the stages of the approval procedure to import chicken meat and chicken products and affirms that any delays experienced by Brazil [in the approval procedure] are of its own doing. Argentina is puzzled with Indonesia's argument. Argentina notes that Indonesia does not contend the existence of a delay in the procedure for approval to import chicken meat and chicken products. Rather, Indonesia tries to justify the existence of any delay in its approval procedure by attributing it to Brazil's failure to submit certain documentation regarding the halal requirements.

22. Argentina agrees that delays attributable to action or inaction of an applicant cannot be held against the Member carrying out the procedure and that delays which "are justified in their entirety" by the Members' need "to determine with adequate confidence whether their relevant SPS requirements are fulfilled" should not be considered undue. However, this is not the case. Argentina considers that a "procedure applied to check and ensure the fulfillment of one or more substantive SPS requirements" should not be delayed by non SPS requirements. As Indonesia recognizes, "[t]he halal requirements are enforced for religious reasons, rather than to protect human health."

23. In fact, the Panel in *EC – Approval and Marketing of Biotech Products* made exactly the same finding. According to the Panel, delays caused by measures which are not based on scientific evidence may be considered "undue". The Panel went further on by explicitly stating that "[t]his could be the case, for example, if a delay is caused by a request for additional information which has nothing to do with the issue of whether the relevant product meets the SPS requirements concerned". This seems to be exactly what Indonesia did, according to its own statements. The delay in the approval of the veterinary certificate was caused by an alleged failure to submit documentation regarding halal requirements, *i.e.*, information which "has nothing to do" with the issue of whether Brazilian chicken meat and products met the SPS requirements concerned.

24. Indonesia asserts that the halal certificate requirement falls outside the scope of the SPS Agreement because "the information required for complying with halal requirements are completely different from sanitary or phytosanitary information provided by the business units to obtain the International Veterinary Certificate."

25. Argentina believes that this argument does not help Indonesia's position. Argentina agrees that the halal requirement is not a sanitary or phytosanitary requirement. As a matter of fact, the parties in this dispute are also in agreement on this point. Argentina considers that this only reinforces the fact that, as mentioned before, Indonesia incurred in an undue delay by requiring a non SPS requirement to justify a delay in an SPS approval procedure.

#### **Brazil's claim under Article 4.2 of the Agreement on Agriculture**

26. According to Indonesia, when presenting a claim of inconsistency of a given measure with Article 4.2, together with bearing the burden of showing that the measure falls within the scope of this provision, the complainant must show a "second element", *i.e.* that the measure at issue is not "maintained under [inter alia] ... other general, non-agriculture-specific provisions of GATT 1994 [such as Article XX]". Without providing at least some evidence or argumentation addressing both of those elements, Indonesia believes that the complainant cannot make its *prima facie* case of inconsistency with Article 4.2.

27. As many of the third parties in this dispute, Argentina disagrees with Indonesia's interpretation of the burden of proof under Article 4.2. Indonesia's arguments run counter not only with long standing WTO jurisprudence but also, if adopted, would result in an unreasonable burden for the complaining party.

28. First, as it was made clear by the Panel in *India - Quantitative Restrictions*, the phrase "measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement" in footnote 1 constitutes an exception or an affirmative defense. Furthermore, the Panel in *Chile - Price Band System* explained that footnote 1 must be read "...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...". Indonesia recognizes such phrase as an exception. In its First Written Submission Indonesia states that "[a] number of panels have interpreted the latter phrase as excluding from the scope of Article 4.2 measures maintained under various exceptions set out in the GATT 1994...".

29. As it is clear since *US - Wool Shirts and Blouses*, it is the burden of the defending party to invoke an exception or an affirmative defense. In fact, quoting *US - Wool Shirts and Blouses*, Indonesia itself recognizes that in the case of a provision which "...is in the nature of affirmative defense, [...] 'the burden of establishing such a defense should rest on the party asserting it', namely the respondent".

30. Therefore according to well established WTO jurisprudence and Indonesia's own statements, it is clear that it is for the responding party to invoke the second phrase in footnote 1 as an affirmative defense or exception and submit evidence that a measure which falls under that footnote is not maintained under a general, non-agriculture-specific provision of the GATT.

31. Furthermore, according to Indonesia, a party claiming a violation to Article 4.2 of the Agreement on Agriculture should show first that the measure falls within the category of measures specified in footnote 1. Then, for example, it should demonstrate that it is not maintained under *inter-alia*, article XII, article XIX, any of the sub-paragraphs a) to j) in article XX or the chapeau and even article XXI of the GATT. And this is only for the GATT. Not only the argumentative exercise would be almost endless for the complainant, but also such party would be required to submit arguments without knowing in advance which of the exceptions or affirmative defenses will be invoked by the responding party, if any.

32. As the United States and the European Union stated in their written submissions, adopting Indonesia's interpretation would render a successful Article 4.2 claim either difficult or nearly impossible. In Argentina's opinion, Indonesia's interpretation is unreasonable and could, in effect, deter complaining parties from pursuing claims under Article 4.2 due to the excessive burden they would face, depriving such provision of its role as one of the fundamental obligations in the Agreement on Agriculture.

#### **The restrictions on intended use under Articles III:4 and XI:1 of the GATT 1994**

33. MoA Regulation 58/2015 is a mandatory legislation within the scope of Article XI:1. Within the import procedures set forth in Chapter III of the Regulation, Article 29(j) provides that all the recommendations issued for accepted applications shall at least contain the intended use, among other requirements. Hence, detailing the intended use is a condition for the issuance of the recommendation of importation.

34. Furthermore, when defining the scope of the term "intended uses" for carcass and meat and processed products, Article 31 expressly limits these products to be used in hotels, restaurants, caterings, industries, particular purposes, and modern markets for processed products only. Therefore, there is a presumption that these restrictions may impose a condition for the importation of chicken meat and chicken products that is limiting, i.e. that has a limiting effect, in a manner inconsistent with the obligations under Article XI:1 of the GATT 1994.

35. Also, in Argentina's view, the three elements as described in paragraph 263 of Brazil's First Written Submission could be the basis for a violation of GATT Article III:4. In the first place, the "intended use" that must be declared in the recommendation of importation following an online application is a condition that, according to the plain text of Regulation 58/2015 and its application by Indonesia, is not based in any other factor different from the origin of the product, *i.e.*, whether it is imported or domestic.

36. Secondly, as above mentioned, the MoA Regulation is a mandatory legislation. Argentina considers that certain provisions of this Regulation have "an effect on" the use, internal sale and offering for sale of imported products. While Argentina is conscious of the fact that a broad interpretation of the term "to affect" does not necessarily imply that any measure can fall within the scope of Article III:4 of the GATT 1994, it also believes that Brazil has identified the link of the MoA Regulation with the imported products so that it could be established that it affects the conditions of competition of the imported products on the Indonesian market in such a way that the domestic products are protected.

37. Thirdly, regarding the less favourable treatment analysis, Argentina notes that this restriction does not seem to apply to domestic products. In this sense, Argentina considers that if certain requirements are imposed only on imported products, such as the "intended use" requirement, the mere existence of this requirement, applied only to imported products, may provide an indication that such products are treated less favourably.

38. Argentina agrees with the EU in that Articles XI:1 and III:4 of the GATT 1994 contain different obligations and have each their own legal standard. Article III is relevant for goods after that have cleared customs already, whereas Article XI:1 is relevant to assess measures that affect the actual importation of products. Without making reference to Article XI, Ad Note to Article III sheds some further light with respect to the application of Article III. According to this provision, a measure "enforced or collected in the case of an imported product at the time or point of importation" can be regarded as an internal measure. In that sense, for internal regulations applying to imported and like domestic products and enforced at the time of importation for the imported product, an analysis under Article III is prioritized.

39. As the EU recalls, the condition for Article III to apply is that the imported product and the domestic product face the same (although not necessarily identical) requirement. Such a requirement is then an internal regulation, although enforced upon importation. As the Panel in *EC – Asbestos* explained, "... the word ... "and" in the English text ... [of Ad Note to Article III] implies in the first place that the measure applies to the imported product and to the like domestic product."

40. However, Ad Note to Article III does not imply that when a measure is subject to Article III then Article XI cannot apply. In this regard, it must be recalled that in *India – Autos* the Panel considered that in certain circumstances a measure may have an impact (or effect) upon both the importation of products (Article XI) and the competitive conditions of imported products on the internal market (Article III).

41. The Panel in *India – Autos* implied that, in the context of a specific measure and in the particular circumstances of a case, different effects of such measure may come under the purview of Article III and Article XI. That finding seemed to reflect in a later dispute in *Argentina – Import Measures*. In that case the Panel addressed a measure by which, among other requirements, companies were not allowed to import unless they increased the level of local content of domestic production through import substitution. 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 imports, because economic operators were required to replace a specified amount of imports with domestic products in order to continue importing. The Panel found that this requirement, together with others, constituted a restriction on the importation of goods and thus rendered the measure inconsistent with Article XI:1 of the GATT 1994.

42. Interestingly, in that case the Panel found that the same measure, with respect to the same local content requirement, modified the conditions of competition in the market to the detriment of imported products. Therefore, imported products were granted less favorable treatment than like domestic products within the meaning of Article III:4 of the GATT 1994. Accordingly, the measure, with respect to the local content requirement, was found to be inconsistent also with Article III:4 of the GATT 1994.

**ANNEX C-2****EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA****AUSTRALIA'S VIEWS ON INDONESIA'S IMPORT LICENCING REGIMES**

1. Under various Indonesian laws identified by Brazil,<sup>1</sup> and by ourselves and other third parties in written submissions, Indonesia has in place the following measures to restrict imports of animal products:

- (a) prohibition of chicken meat and chicken products not listed in its regulations.<sup>2</sup> This is in effect a positive list prohibition;
- (b) restriction of importation other than for certain limited uses.<sup>3</sup> This includes rules preventing the sale of imported meat products in modern and traditional markets, which reduce the commercial opportunities for imported goods;
- (c) limited licence validity periods and application windows. These prevent long term planning and contractual arrangements, impose additional costs on importers and exporters when the issuance of licences is delayed, and effectively prevent imports at the beginning and end of each import period;<sup>4</sup>
- (d) fixed licence terms. These prevent importers from responding to any changes in the importing or exporting market during an import period;<sup>5</sup>
- (e) restrictions on the transportation of imported animal products;<sup>6</sup> and
- (f) strict enforcement of halal labelling requirements<sup>7</sup> when these same requirements are rarely enforced with regard to equivalent domestic products.

Australia considers that these measures constitute prohibitions and restrictions on importation inconsistent with Article XI:1 of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) and Article 4.2 of the *Agreement on Agriculture*. To the extent that this Panel finds that the use, sale and distribution restrictions are internal measures, Australia considers that they are contrary to Article III:4 of the GATT 1994.<sup>8</sup>

2. Australia agrees with Brazil that, to the extent the Panel considers that Indonesia's measures 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, the trade-restrictive effects of these procedures, including their effect on long-term business planning and the flow of goods at the beginning and end of each import period, must be considered "additional". Furthermore, the procedures are clearly "more administratively burdensome than absolutely necessary" as there is no permissible measure that they administer.

**INDONESIA'S CLAIMS REGARDING ITS MEASURES**

3. In our written submission, Australia disagreed with several claims made in Indonesia's first written submission. In Australia's view, Indonesia's assertions in regard to Article XI.1 of the GATT 1994 and Article 4.2 of the *Agreement on Agriculture*, and in regard to Article 4.2 of the *Agreement on Agriculture* and Article XX of the GATT 1994, are not supported by the text of the WTO covered agreements and are inconsistent with the findings of previous panels and Appellate Body reports.

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<sup>1</sup> Brazil's first written submission, paras. 49-56, 80-86, 172-189.

<sup>2</sup> Brazil's first written submission, paras. 191-194.

<sup>3</sup> Brazil's first written submission, paras. 195-199.

<sup>4</sup> Brazil's first written submission, paras. 200-209.

<sup>5</sup> Brazil's first written submission, paras. 210-213.

<sup>6</sup> Brazil's first written submission, paras. 214-217.

<sup>7</sup> Brazil's first written submission, paras. 136-139.

<sup>8</sup> Brazil's first written submission, paras. 268-283.

4. A number of disputes have considered claims made by Members under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. As outlined in Australia's written submission, the panels in *Korea - Beef* and *India - Quantitative Restrictions*, found that certain measures breached both Article XI:1 of the GATT 1994 and Article 4.2 of the *Agreement on Agriculture*.<sup>9</sup>

5. As Australia outlined in paragraph 24 of its written submission, Australia agrees with Brazil that Indonesia's restrictions on imports of animal products are "measures of the kind which have been required to be converted into ordinary customs duties"<sup>10</sup> that are prohibited under Article 4.2 of the *Agreement on Agriculture*. These measures are also "quantitative import restrictions ... discretionary import licensing ... and similar border measures"<sup>11</sup> 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 rendered them inconsistent with Article XI:1 of the GATT 1994. As previous panels have found, a breach of Article XI:1 of the GATT 1994 will also constitute a breach of Article 4.2 of the *Agreement on Agriculture*, where the measure is among those listed in footnote 1 to Article 4.2.<sup>12</sup>

6. Indonesia has also asserted that Article III:4 of the GATT 1994 and Article XI:1 of the GATT 1994 are mutually exclusive in their scope of application.<sup>13</sup> To date, these provisions have not been found by panels to be mutually exclusive. Given the systemic issues regarding the distinction between market access and domestic regulation, in Australia's view the Panel should carefully consider the classification of the measures at issue before reaching a conclusion. It is Australia's view that the Panel should examine the relationship between the two provisions in light of the manner in which Brazil has characterised its claims.

7. The Panel in *India - Autos* found that "there may be circumstances in which specific measures may have a range of effects".<sup>14</sup> The Panel went on to say that "[i]n appropriate circumstances [specific measures] may have an impact both in relation to the conditions of importation of a product and in respect of the competitive conditions of imported products on the internal market within the meaning of Article III:4".<sup>15</sup> For a Panel to find that a measure has "different effects" (i.e. definitive effect on importation, and then modifies the conditions of competition once the goods have entered the market), and therefore the measure may be both an internal measure and a border measure, will turn on the facts in dispute, and the scope of the measure under challenge. In *Brazil - Retreaded Tyres*, the Panel noted that "what is important in considering whether a measure falls within the types of measures covered by Art. XI:1 is the nature of the measure".<sup>16</sup> In Australia's view, the Panel should examine whether a measure can be assessed as a border measure and internal measure simultaneously in light of the manner in which Brazil has characterised its claims.

8. Australia notes that regulations that give effect to the measures at issue in this dispute have been frequently replaced. This has created continuing uncertainty and lack of transparency, without effecting any material change.<sup>17</sup> Australia considers that in order to "secure a positive solution to [a] dispute"<sup>18</sup> it is important that the Panel make rulings and recommendations on the measures at issue, irrespective of any changes to the regulations that Indonesia may have made, which do not actually effect any material change. In this regard, the Panel's characterisation of the measure will be important.

9. In its first written submission, Indonesia asserts that regardless of whether its measures are found to be WTO-inconsistent under various agreements, the measures are nevertheless justified

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<sup>9</sup> Panel Report, *Korea- Various Measures on Beef*, paras. 762 and 768. Panel Report, *India - Quantitative Restrictions*, paras. 5.238-5.242.

<sup>10</sup> Article 4.2, Agreement on Agriculture.

<sup>11</sup> Footnote 1 to Article 4.2, Agreement on Agriculture.

<sup>12</sup> Panel Reports, *Korea - Various Measures on Beef*, para. 762 and *India - Quantitative Restrictions*, paras. 5.238-5.242.

<sup>13</sup> Indonesia's first written submission, paras. 81-89.

<sup>14</sup> Panel report, *India-Autos*, para 7.296.

<sup>15</sup> Ibid.

<sup>16</sup> Panel report, *Brazil - Retreaded Tyres*, para 7.372.

<sup>17</sup> Brazil's first written submission, paras. 57-58.

<sup>18</sup> Article 3.7 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

under Article XX of the GATT 1994.<sup>19</sup> 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. Indonesia provides no convincing 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.

## **CONCLUSION**

10. In conclusion, Australia considers that Indonesia's prohibitions and restrictions on imports of animal products are clearly inconsistent with Indonesia's WTO obligations under the GATT 1994, the *Agreement on Agriculture* and the *Agreement on Import Licencing Procedures*. In respect of the GATT 1994, Australia further considers that these measures cannot be justified under any of the exceptions in Article XX of the GATT 1994. Australia is further concerned that the measures at issue have been frequently amended to cause further uncertainty for importers and exporters, in order to achieve Indonesia's broader policy of self-sufficiency.

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<sup>19</sup> Indonesia's first written submission, paras. 179-192, 209-217, 232-234, 295-302, 342-355.

**ANNEX C-3****EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA****I. INTRODUCTION**

1. Canada intervenes in this dispute because of its systemic interest, as a major exporter of agricultural products, including animals and animal products, in the correct interpretation of Article XI:1 of the GATT 1994 and Article 4.2 of the *Agreement on Agriculture (AoA)*.

**II. INDONESIA'S IMPORT CONTROL MEASURES**

2. The various laws and regulations maintained by Indonesia that make up its import control regime overlap in substance and appear to Canada to be designed to function as an integrated whole.

3. Several of the measures at issue refer in some way to "insufficiency of local production" as a prerequisite for the approval of importation. Other measures appear to impose restrictions on the end use of imported chicken meat and products. There is also a positive list of goods that may be imported that seems to prohibit unlisted products from being imported. A multi-step approval process for the importation of chicken meat and products confers broad discretionary powers on decision-makers and appears to require that importers recomplete the process if they wish to continue to import products beyond the prescribed "validity term". Shipping requirements stipulate that carcasses, meat and/or processed products must be transported directly from the country of origin to their Indonesian port of destination. Finally, one measure at issue appears to require a valid International Veterinary Certificate as a pre-condition to importation.

**III. ARTICLE XI:1 OF THE GATT 1994**

4. Article XI:1 of the GATT 1994 lays down a general obligation to eliminate quantitative restrictions. In doing so, it reflects one of the basic principles animating the GATT 1994, that is, the idea that tariff measures are preferable to border measures that restrict trade volumes and distort prices. Thus, measures that prohibit or restrict the importation, exportation, or sale for export of products, other than duties, taxes or other charges, are inconsistent with the GATT 1994.<sup>1</sup>

5. The Appellate Body has observed that the use of the word "quantitative" in the title of the provision indicates that "Article XI [...] covers those prohibitions and restrictions that have a limiting effect on the quantity of a product being imported and exported."<sup>2</sup> However, the Appellate Body has also noted that Article XI:1 does not cover "every condition or burden placed on importation or exportation".<sup>3</sup> For a measure to fall within the scope of Article XI:1, it must "limit the importation or exportation of products".<sup>4</sup>

6. The Appellate Body has also indicated that the phrase "made effective through" suggests that Article XI:1 covers, not only measures that set out prohibitions or restrictions, such as quantitative limits or quotas, but also measures "through which a prohibition or restriction is produced or becomes operative".<sup>5</sup> The Appellate Body has further stated that "in the context of import formalities or requirements, Article XI:1 requires an examination of whether those measures themselves produce a limiting effect on imports."<sup>6</sup>

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<sup>1</sup> Panel Reports, *India – Quantitative Restrictions*, paras. 5.128-5.129; *Colombia – Ports of Entry*, para. 7.233; and *Dominican Republic – Import and Sale of Cigarettes*, para. 7.248.

<sup>2</sup> Appellate Body Reports, *China – Raw Materials*, para. 320.

<sup>3</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.217.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.* para. 5.218.

<sup>6</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.245.

7. In addition, demonstrating that a measure has a limiting effect on imports does not require a complainant to produce evidence of actual trade effects. Rather, "such limiting effects can be demonstrated through the "design, architecture, and revealing structure of the measure at issue considered in its relevant context."<sup>7</sup> This is because Article XI:1 "protects competitive opportunities" rather than trade flows.<sup>8</sup>

8. The Appellate Body has observed that the term "prohibition" is defined as a "legal ban on the trade or importation of a specified commodity."<sup>9</sup> This suggests that for a measure to constitute a "prohibition" it must proscribe all trade in the commodity in question.

9. In contrast, the legal standard for determining whether a measure "restricts" imports considers: 1) the limiting effect of conditions placed on imports and 2) the negative effect on the condition of competitive opportunities of like imported goods.<sup>10</sup>

**A. The panel must properly characterize measures under Indonesia's Licensing Regime as restrictions or prohibitions**

10. In Canada's view, various measures under Indonesia's import control regime appear to be designed to protect and promote the domestic chicken industry. Canada does not take a final position on the proper characterization of the various measures cited by Brazil, but notes that most of the measures at issue appear to fit more easily into the category of import restrictions under Article XI:1. Only the alleged delay in undertaking and completing the sanitary approval required to enable Brazilian exports of chicken meat and products seems to operate as a *de facto* general prohibition. This is because the alleged failure by Indonesia to undertake and complete the approval process has precluded imports of Brazilian chicken meat and products to Indonesia since 2009.

11. The panel in *Argentina – Import Measures* reiterated the meaning of "restriction" as interpreted by previous panels and the Appellate Body:

The panel in *India – Quantitative Restrictions* also noted that the ordinary meaning of the term "restriction" is "a limitation on action, a limiting condition or regulation". The panel in *India – Autos* and the Appellate Body in *China – Raw Materials* endorsed this interpretation. The Appellate Body in *China – Raw Materials* added that the term "restriction" "refers generally to something that has a limiting effect".<sup>11</sup>

12. In *Colombia – Ports of Entry*, the panel reaffirmed the reasoning applied by the *India – Autos* panel that a "restriction" cannot mean merely "prohibitions" on imports since Article XI:1 covers both instances of restrictions and prohibitions on imports.<sup>12</sup> Likewise, a prohibition cannot mean only that restrictions on imports exist. This distinction should similarly be properly reflected in the panel's assessment of Brazil's claims since Brazil refers to both the general measure and the individual measures as operating to both limit imports of chicken meat and products *and* as a general prohibition on imports. This conflation of the terms 'prohibition' and 'restriction' has the potential to expand the meaning of the term "restriction" and the understanding of measures that constitute a restriction on imports. Such a conflation should be avoided.

13. Canada submits that the positive list maintained by Indonesia on permitted chicken meat and products appears to operate as a restriction rather than a complete prohibition under Article XI:1 as it only excludes from import certain subcategories of chicken meat and products.

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<sup>7</sup> Ibid. para. 5.217.

<sup>8</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.20.

<sup>9</sup> Appellate Body Reports, *China – Raw Materials*, para. 319.

<sup>10</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.234.

<sup>11</sup> Panel Reports *Argentina – Import Measures*, para. 6.452. See also Panel Reports, *India – Quantitative Restrictions*, para. 5.129; *India – Autos*, paras. 7.269-7.270; and Appellate Body Reports, *China – Raw Materials*, para. 319.

<sup>12</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.234.

14. Canada agrees with Brazil that the design and structure of the import licensing system creates a procedural burden on importers and creates a disincentive to import, negatively affecting the conditions of competition and limiting imports.<sup>13</sup>

15. Meanwhile, the possibility of additional restrictions being implemented pursuant to the discretion that is accorded to the Minister under Indonesia's chicken products and meat import regime can affect the business decisions of private actors to avoid imports. The panel in *Argentina – Import Measures* found that completely opaque and unfettered discretion exercised by governmental entities over import licenses creates uncertainty for importers of goods and is therefore a restriction that violates Article XI:1 of the GATT 1994.<sup>14</sup> Therefore, a measure that lacks criteria and provides overly broad discretion in determining if the required approvals will be granted, and consequently if the import licence will be issued, is likely to constitute an import restriction that is inconsistent with Article XI:1 of the GATT 1994.

**B. The panel must assess whether individual measures or the cumulative effects of measures operate as a *de facto* prohibition on imports of chicken meat and products**

16. The limiting effects on imports or the negative effects on the conditions of competition of imports under Article XI:1 of the GATT 1994 should be characterized as a "prohibition" only where the effects are so severe as to completely prevent the entry of any of the subject goods. Where an individual measure or the cumulative effect of numerous measures operates to create a *de facto* prohibition on imports, then those measures must be found inconsistent with Article XI:1 of the GATT 1994. Therefore, the Panel must consider whether the cumulative effect of the measures at issue operate as a *de facto* complete ban on chicken meat and products from Brazil.

17. Both the delays in the veterinary certification and the direct transportation requirements for chicken meat and products appear to operate as a *de facto* prohibition on chicken meat and chicken imports from Brazil, even though the measures, on their face, do not prohibit imports of such products.

18. Canada recalls that a prohibition has been defined as instituting a legal ban on a good. The legal standard applied by the Panel should maintain that threshold. Anything less than a "legal ban", whether *de facto* or *de jure*, should still be assessed as a restriction on imports.

**IV. ARTICLE 4.2 OF THE AOA: ANALYSIS OF PROHIBITED NON-TARIFF MEASURES**

**A. The legal standard to be applied**

19. Under Article 4.2 of the AoA, 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.<sup>15</sup> Footnote 1 provides examples of measures captured by Article 4.2. If a WTO Member adopts or maintains a measure of the kind listed in Footnote 1, that Member violates Article 4.2.

**B. Indonesia's Measures: Quantitative Import Restriction, Discretionary Import Licensing, or "Similar Border Measure"?**

**1. The domestic insufficiency condition**

20. Indonesia's framework legislation, as applied through its import licensing regime, only allows for the possibility of imports of chicken and chicken products when the government deems domestic production insufficient to satisfy the market. Furthermore, the laws and regulations establishing Indonesia's import licensing regime do not provide for explicit criteria by which the government is to determine domestic insufficiency. In Canada's view, this strongly suggests that Indonesia's "domestic insufficiency" condition operates as a quantitative import restriction. If, however, Indonesia's "domestic insufficiency" condition does not constitute a quantitative import

<sup>13</sup> Ministry of Trade Regulation 05/M-DAG /PER/1/2016, Exhibit BRA-03.

<sup>14</sup> Panel Reports, *Argentina – Import Measures*, para. 6.467.

<sup>15</sup> Article 4.2 of the Agreement on Agriculture, as contained in Annex 1A to the WTO Agreement (Article 4.2).

restriction, it should also be assessed against the "discretionary import licensing" category. Should Indonesia's domestic insufficiency condition not fall squarely within the meaning of a quantitative import restriction or discretionary import licensing, it should also be evaluated to determine whether it falls within the meaning of a "similar border measure other than ordinary customs duties".

## **2. Strict application windows and short licence validity periods**

21. Indonesia's one-month application window for import recommendations and approvals directly preceding the three-month validity period for import licences limit the quantity of imports of chicken and chicken products for several weeks within each quarter of a given year. Should Indonesia's strict licence application windows and short licence validity periods not constitute *per se* quantitative import restrictions, given that they have the effect of limiting the quantity of imports of chicken and chicken products, they should be considered as "similar border measures other than ordinary customs duties".

## **3. End-use restrictions**

22. Indonesia's end-use requirements for imports of chicken and chicken products prohibit their importation except for certain specific purposes, restricting access to the Indonesian market, either fully or partially. Indonesia's Schedules of Concessions under the GATT 1994 does not provide for such restrictions. Should Indonesia's end-use requirements not constitute *per se* quantitative import restrictions, given that they have the effect of restricting access to the Indonesian market, either fully or partially, they should be considered as similar border measures that are like or resemble the non-tariff measures listed in Footnote 1 to Article 4.2.

## **V. CONCLUSION**

23. Canada invites the Panel to take the foregoing observations into account when assessing whether Indonesia's measures collectively and/or individually comply with the requirements of Article XI:1 of the GATT 1994 and Article 4.2 of the AoA.

**ANNEX C-4****EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION**

1. The European Union intervenes in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, and the multilateral nature of the rights and obligations contained therein, in particular the General Agreement on Tariffs and Trade 1994 (GATT 1994), the Agreement on Agriculture, the Agreement on Import Licensing Procedures (Import Licensing Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). This executive summary integrates comments made by the European Union in the Third Party Hearing on 14 July 2016 and in its reply to the written questions by the Panel of 2 August 2016.

2. The case concerns a number of measures by Indonesia restricting the importation of chicken meat and chicken products. The European Union believes that the measures challenged by Brazil constitute quantitative restrictions within the meaning of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Their justification under Article XX of the GATT 1994 is implausible for most of them, and at least doubtful for the intended use requirement. The combined operation of various features of the Indonesian import licensing system, including applications to and documents issued by various authorities, very limited application windows and validity periods for import licences and fixed terms thereof is also problematic with regard to Article 3.2 of the Import Licensing Agreement. The main legal arguments made by the European Union in its submissions can be summarised as follows.

3. On the scope of application of the various provisions at stake: The European Union does not see a conflict between the provisions of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. For the purposes of the analysis in these proceedings, both provisions contain substantially similar obligations, especially with the same burden of proof as regards exceptions under Article XX of the GATT 1994. Hence, they apply concurrently to the measures at issue, with no mandatory order of analysis. Article 3.2 of the Import Licensing Agreement applies only to procedural restrictions (requirements of a formal, administrative nature), not to substantive restrictions (the import regime itself), which the non-automatic licensing procedure implements. Such procedural restrictions can be challenged concurrently under Article 3.2 of the Import Licensing Agreement and Article XI:1 of the GATT 1994<sup>1</sup>, without a mandatory order of analysis.

4. On the alleged overarching measure of a "general import ban" on Brazilian chicken meat and chicken products, the European Union invites the Panel to consider all measures composing the overarching measures individually before examining the alleged overarching measure composed of these measures. In the European Union's view, in principle only components which are themselves non-compliant with WTO-law should be taken into account when assessing the existence of the overarching measure. The approach to be taken might however be different where (some of) the individual measures are inseparable from each other or from the overarching measure.

5. The elements that a complainant must substantiate are attribution of the measure to the respondent, precise content and any additional features relevant to the specific type of measure at stake. What these additional features are depends on how the measure has been described or characterized by the complainant<sup>2</sup>. In the present case, following Brazil's description of the overarching measure, such additional feature consists in the fact that the individual measures, linked by virtue of the underlying policy objective of protecting domestic production, operate together so as to constitute a total import ban. It must result from the design and architecture of the overall system that it is more than the sum of the individual measures. Figuratively speaking, the overarching measure is like a "bouquet" of flowers, which by its composition and arrangement is obviously more than individual flowers lying around scattered on the floor. When considering whether individual components work together as a single measure distinct from its components,

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<sup>1</sup> See Appellate Body Report, *Argentina – Import Measures*, para. 5.244.

<sup>2</sup> Appellate Body Report, *Argentina – Import Measures*, paras. 5.108, 5.110.

the Panel needs to carry out a holistic assessment of the entire system, with particular attention to the overall effects and the underlying policy objective. The underlying objective is a central element; it can be considered as the "glue" that glues the individual measures together into the overarching measure.

6. On the question whether the intended use requirement falls under Article III:4 and XI:1 of the GATT 1994, the European Union invites the Panel to consider the design and architecture of the measure. By its design and architecture, the requirement seems to be a border measure falling under Article XI:1 of the GATT 1994 (rather than a "behind the border measure" falling under Article III:4 of the GATT 1994). The measure has a clear potential impact on trade volumes, and, in particular, the European Union has not seen evidence of equivalent domestic legislation restricting uses for domestic frozen meat in the same way as for imported frozen meat. Thus, the measure cannot be considered an internal measure pursuant to the Ad note to Article III of the GATT 1994<sup>3</sup> If Indonesia were to show that such truly equivalent internal regulation exists, the assessment would be different.

7. For the so-called "likeness test" under Article III:4, the Panel should not apply mechanically the different criteria developed by the case-law (physical properties, end-uses, consumers' tastes and habits and tariff classification). It should rather analyse which are the products that are in a competitive relationship at least in a certain segment of the market<sup>4</sup> It is crucial that the universe of products on both sides of the equation (imported and domestic) is exactly the same.

8. With regard to an alleged undue delay of the competent authorities in undertaking and completing the approval procedures within the meaning of Article 8 and Annex C(1)(a) of the SPS Agreement, the European Union is of the opinion that the inaction of the applicants can only be relevant to justify that delay if it relates to the failure to submit documents or other evidence required in order to conduct the risk assessment or other controls designed to protect human, animal or plant life or health. The fact that domestic legislation makes the completion of a procedure under the SPS Agreement dependent on the satisfaction by the applicants of other requirements unrelated to the objectives of that Agreement should not, regardless of the nature of such requirements and of their eventual consistency with WTO obligations, justify of itself the inaction of the authorities competent for administering the SPS approval procedure.

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<sup>3</sup> See Panel Report, *EC — Asbestos*, paras. 8.91-8.95.

<sup>4</sup> Appellate Body Reports, *EC-Asbestos*, paras. 101-103 (and cases cited therein); *Philippines — Distilled Spirits*, paras. 121, 220.

**ANNEX C-5****EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN****I. The Relationship of Article 4.2 of the Agreement on Agriculture With Article XI:1 of the GATT 1994**

1. Although Indonesia argues that the "difference between how the balance is struck between Members' obligations and rights" under Article 4.2 of the Agreement on Agriculture, on the one hand, and Articles XI:1 and XX of the GATT 1994, on the other, "results in a conflict within the meaning of the Article 21.1" of the Agreement on Agriculture,<sup>1</sup> Japan disagrees with Indonesia's argument. Indonesia's interpretation is not supported by previous WTO jurisprudence in *Korea – Various Measures on Beef*<sup>2</sup> and *India – Quantitative Restrictions*,<sup>3</sup> which found that certain measures breached both Article 4.2 of the Agreement on Agriculture and Articles XI:1 of the GATT 1994. Further, there is no conflict between Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994. A complainant claiming a violation of Article 4.2 does not have to demonstrate that the challenged measure is not a measure maintained under other general, non-agriculture-specific provisions of the GATT 1994 or other Multilateral Trade Agreements in Annex 1A of the WTO Agreement, if the complainant chose not to challenge the measure under any other provisions or when a respondent chooses not to invoke any other provisions in its defense.

2. In any case, in this dispute, the complainant invokes both Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994 and the Panel has the discretion to decide the order of analysis of these alleged violations.

**II. General Prohibition**

3. Brazil argues that six challenged measures, when combined, impose a general ban on imports of chicken meat and chicken products.<sup>4</sup> In its examination of this claim, the Panel should be guided by the Appellate Body's finding in *Argentina – Import Restrictions* that, in addition to attribution and precise content of the challenged measure that must be established in every WTO disputes, a complainant may be required to demonstrate "other elements, depending on the particular characteristics or nature of the measure being challenged" <sup>5</sup> in proving the existence of a measure at issue. Japan also notes that, in *Argentina – Import Restrictions*, the Appellate Body stated that "a complainant challenging a single measure composed of several different instruments will normally need to provide evidence of how the different components operate together as part of a single measure and how a single measure exists as distinct from its components."<sup>6</sup>

4. Further, Japan is of the view that, although the Panel may begin its assessment by considering the WTO-inconsistency of each element of the general prohibition, such assessment is not enough to reach a conclusion that the general prohibition is inconsistent with Indonesia's WTO obligation. This understanding is consistent with the panel's finding in *US-Export Restraints*, which stated that "[i]n considering whether any or all of the measures individually can give rise to a violation of WTO obligations, the central question that must be answered is whether each measure operates in some concrete way in its own right. By this we mean that each measure would have to constitute an instrument with a functional life of its own, i.e., that it would have to do something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations."<sup>7</sup> This finding indicates that the general prohibition should exist as

<sup>1</sup> Indonesia FWS, para. 74.

<sup>2</sup> Panel Report, *Korea – Various Measures on Beef*, WT/DS161/169/R, July 31, 2000, para. 762.

<sup>3</sup> Panel Report, *India – Quantitative Restrictions*, WT/DS90/R, April 6, 1999, paras. 5.241-5.242.

<sup>4</sup> Brazil FWS, paras. 74-76.

<sup>5</sup> Appellate Body Report, *Argentina – Import Measures*, WT/DS438/444/445/AB/R, January 15, 2015, para. 5.104

<sup>6</sup> *Id.*, para.5.108

<sup>7</sup> Panel Report, *US – Export Restraints*, WT/DS194/R, June 29, 2001, para. 8.85.

distinct from its elements, and it is such nature of the general prohibition which should be assessed in considering the WTO-consistency.

5. In any case, the Panel should carefully assess the interaction and operation of each element of the general prohibition to decide whether the general prohibition exists and whether the combination of each element leads to a finding of WTO-inconsistency because the WTO-inconsistency of the general prohibition should not be found simply by combining multiple elements into a single measure.

### III. Intended Use

6. Indonesia argues that Article III:4 of the GATT 1994, concerning internal measures, and Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, concerning border measures, are mutually exclusive and that only Article III:4 applies in this case. Japan submits that the Panel's decision to apply Article III:4 or Article XI:1 should be guided by the structure, design, and architecture of the challenged measure. While the intended use requirement imposed in this case is an import licensing requirement, which suggests the measure is subject to Article XI:1, if the Panel finds that a similar measure applies to Indonesia's domestic like products, application of Article III:4 would be appropriate.

### IV. Article XI:1 of the GATT 1994

7. Japan agrees with Brazil that any "prohibition" or "restriction" on importation may be considered a violation of Article XI:1 of the GATT 1994, if that restriction could have limiting effects on the importation of products of other Members.<sup>8</sup> Article XI:1 does not impose a high threshold with respect to the limiting effects that a measure must have to constitute a "restriction." Rather, limiting effects exist when a measure narrows opportunities for importation, thus limiting an imported product's ability to compete.<sup>910</sup>

8. With regard to the means or features that may have "limiting effect" under Article XI:1, the panel in *Colombia – Ports of Entry* explained that "a number of GATT and WTO panels have recognized the applicability of Article XI:1 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", and that "these cases were based on the design of the measure and its potential to adversely affect importation."<sup>11</sup> Likewise, in *Argentina – Import Measures*, the panel found the DJAI procedure (in which an importer must file a DJAI (Advance Sworn Import Declaration) and obtain "exit" status to import goods into Argentina) had a limiting effect because "it: (a) restrict[ed] market access for imported products to Argentina as obtaining a DJAI in exit status is *not automatic*; (b) *create[d] uncertainty* as to applicant's ability to import; (c) *d[id] not allow* companies to import *as much as they desire or need* without regard to their export performance; and (d) *impose[d] a significant burden* on importers that is unrelated to their normal importing activity."<sup>12</sup> In short, prohibitions or restrictions to imports through basically any means violate Article XI:1.<sup>13</sup>

9. 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:

<sup>8</sup> Panel Report, *Argentina – Import Measures*, WT/DS438/444/445/R, June 26, 2014, para. 6.363.

<sup>9</sup> *E.g.*, Panel Report, *Argentina – Hides and Leather*, WT/DS155/R, February 16, 2001, para. 11.20, Panel Report, *India – Autos*, WT/DS146/175/R, December 21, 2001, paras. 7.269-7.270, and Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, WT/DS/302/R, November 26, 2004, para. 7.261.

<sup>10</sup> As presented in the Responses of Japan to Panel's Questions for the Third Parties Following the First Panel Meeting, Japan considers that the EU's argument stressing a *discernible quantitative dimension* of a measure puts too much weight on the quantitative aspect required for there to be a limiting effect. The EU's argument seems to entail an additional unnecessary burden of proving "a discernible quantitative dimension of the measure, in the form of a limiting effect on the quantity or value" for demonstrating a limiting effect under Article XI:1 of the GATT 1994.

<sup>11</sup> Panel Report, *Colombia – Ports of Entry*, WT/DS366/R, April 27, 2009, para. 7.240.

<sup>12</sup> Panel Report, *Argentina – Import Measures*, para. 6.474. (emphasis added) This finding was not reversed by the Appellate Body (see Appellate Body Report, *Argentina – Import Measures*, paras. 5.287-288).

<sup>13</sup> Other examples are: the trade balancing condition as "an importer is 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" (Panel Report, *India – Autos*, paras. 7.320-7.322.); and all of (i) the granting of licenses on "unspecified merits", (ii) making only government agencies eligible for licenses to import certain products, and (iii) restricting the entities that could obtain import licenses and the purpose for which they could do so, because they operated so that "certain imports may not be permitted" due to the product or the prospective importer at issue. (Panel Report, *India – Quantitative Restrictions*, paras. 5.125, 5.129, 5.137, 5.139, 5.140 and 5.142.)

- (a) a fundamental principle of the GATT 1994 is that trade-restrictive measures other than tariffs are prohibited unless expressly permitted under Article XI:2 or justified by the explicit exceptions in Article XX of the GATT 1994;
- (b) 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, and thus all other measures with limiting effects were intended to be prohibited under Article XI:1; and
- (c) while application of a high threshold for the limiting effects could result in circumvention of GATT disciplines for measures without justifiable underlying policy objectives, it is not the case that legitimate trade-restrictions are unreasonably prohibited by a broad understanding of the concept of limiting effects because import restrictions which serve justifiable policy objectives could be justified under the general exceptions provided in Article XX of the GATT 1994 and thus properly addressed under the GATT disciplines.

**V. Article XX of the GATT 1994**

10. Finally, Japan invites the Panel to carefully assess Indonesia's claims under Article XX of the GATT 1994. In particular, Indonesia's arguments under Article XX (a), (b), and (d) should be carefully assessed as to whether the alleged objectives are specific enough, and whether the measures are designed for and are necessary to achieve these policy objectives listed in these provisions.

## ANNEX C-6

### EXECUTIVE SUMMARY OF THE ARGUMENTS OF NEW ZEALAND

#### INTRODUCTION

1. Since 2009, Indonesia has enacted a series of laws and regulations that prohibit and restrict imports of agricultural products when domestic production is deemed sufficient to satisfy domestic demand. These instruments result in 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.

2. In New Zealand's view, Indonesia's import regime is inconsistent with core WTO obligations. Specifically, as argued in *Indonesia — Importation of Horticultural Products, Animals and Animal Products* (DS477/DS478), New Zealand considers that several elements of Indonesia's import licensing regime for animal products (including chicken meat and chicken products) are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

#### I. FACTUAL BACKGROUND

3. Indonesia maintains an overarching framework of laws that underpin its import regimes for chicken and other animal products. In particular, Law 18/2009 as amended by Law 41/2014 (the Animal Law), Law 18/2012 (the Food Law), Law 7/2014 (the Trade Law) and Law 19/2013 (the Farmers Law) establish a framework through which imports of animal products are prohibited where domestic production is deemed sufficient to fulfil domestic demand. Pursuant to these laws, Indonesia has promulgated regulations through which additional prohibitions and restrictions on importation are made effective.

4. As described above, there is substantial overlap between the measures at issue in this dispute and those challenged by New Zealand and the United States in DS477/DS478.<sup>1</sup> Specifically, the disputes challenge Indonesia's:

- a. "Positive list" prohibition on unlisted animal products, which prohibits importation of animal products that are not listed in the relevant regulations;
- b. Restrictions on use, sale and distribution of imported animal products (including chicken meat and chicken products), which prohibit all imported animal products from being imported for certain uses;
- c. Limited application windows and validity periods for MOA Import Recommendations and MOT Import Approvals, which provide that authorisation to import may only be applied for during limited application windows and is only valid for limited time periods;
- d. Fixed licence terms for MOA Import Recommendations and MOT Import Approvals, which prevent importers from importing, during a validity period, products of a different type, in a greater quantity, from another country, or through a different port than those specified in an MOA Import Recommendation and MOT Import Approval;
- e. Indonesia's general prohibition on certain imports which consists of the combined interaction of several different restrictive measures that collectively prohibit or restrict imports of animal products, including chicken meat and chicken products. New Zealand also considers that the domestic insufficiency condition, which forms part of the Indonesian import regime challenged by Brazil, constitutes a standalone

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<sup>1</sup> See New Zealand's request for the establishment of a panel, WT/DS477/9, circulated 24 March 2015 and the United States request for the establishment of a panel, WT/DS478/9, circulated 24 March 2015.

restriction on importation.

5. New Zealand considers that these measures constitute prohibitions and restrictions on importation inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

6. New Zealand notes that Indonesia's import regulations have changed frequently in recent years. However, many of the core trade-restrictive elements of its import regime, including those challenged by Brazil in this dispute, have not materially changed through these various iterations of the regulations. In light of these frequent changes to the *instruments* through which the *measures* at issue are made effective, New Zealand considers that it is important for this Panel to make rulings and recommendations on the *measures at issue*, irrespective of minor changes that may have been made to the *instruments* through which these measures are made effective.

## **II. PROHIBITIONS AND RESTRICTIONS ON THE IMPORTATION OF ANIMAL PRODUCTS INCLUDING CHICKEN MEAT AND CHICKEN PRODUCTS**

### ***1. Indonesia's restrictions on the importation of animal products***

#### **(a) The positive list prohibition on unlisted animal products**

7. New Zealand agrees with Brazil's submission that animals and animal products that are not listed in the Appendices of MOA 58/2015 and MOT 5/2016 are prohibited from importation.<sup>2</sup> In addition to the specific HS Codes identified by Brazil in its first written submission, a number of other animal products are also prohibited from importation through this measure. Indonesia's regulations are clear that the carcass, meat, offal and processed products that can be imported are limited to those that are listed in the relevant appendices to MOA 58/2015 and MOT 5/2016. Products that are unlisted are ineligible to obtain MOA Import Recommendations and MOT Import Approvals, both of which are pre-requisites to importation.

8. New Zealand does not consider that the positive list prohibition challenged by Brazil has been removed by MOT 37/2016. Indeed, MOT 37/2016 expressly acknowledges that products that are not listed must still obtain both an MOT Import Approval and an MOA Import Recommendation. However, unlike *listed* products, in respect of which the process for obtaining MOT Import Approvals and MOA Import Recommendations is set out in MOT 5/2016 and MOA 58/2015, there is no process by which MOT Import Approvals and MOA Import Recommendations for *unlisted products* can be obtained. This is because, based on New Zealand's understanding, MOA Import Recommendations and MOT Import Approvals cannot be obtained for such products.

#### **(b) Restrictions on use, sale and distribution of imported animal products**

9. As detailed in Brazil's submission, Indonesia's regulations prohibit importation of animal products other than for use in "hotels, restaurants, caterings, industries, and other particular purposes". The effect of this measure is that animal products are not permitted to be imported into Indonesia for any form of domestic use, or to be sold or distributed through consumer retail outlets. Importantly, it precludes certain imported animal products from being imported for sale at modern markets such as supermarkets and hypermarkets as well as traditional retail outlets. 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 certain animal products for domestic consumption.

10. By prohibiting importation of products for certain uses, or from being sold or distributed through certain channels, the use and distribution restrictions have a limiting effect on the quantity or amount of product which can be imported and therefore constitute a "restriction" within the meaning of Article XI:1 of the GATT 1994 and a "quantitative import restriction" or "similar border measure" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture.

11. New Zealand does not agree with Indonesia that Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture "do not apply to the intended use requirement". As explained above, Indonesia's restrictions on use, sale and distribution of imports of animals and animal

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<sup>2</sup> See Brazil's first written submission, paras. 99-103.

products are imposed as a condition of importation *at the border*. Therefore, in New Zealand's view, these are the appropriate provisions for the Panel to commence its analysis of the consistency of the use, sale and distribution restriction.

12. However, to the extent that the use, sale and distribution restriction is considered by the Panel to be an internal measure, New Zealand considers that it would be contrary to Article III:4 of the GATT 1994.

**(c) Limited application windows and validity periods**

13. The limited application windows and validity periods for MOA Import Recommendations and MOT Import Approvals described by Brazil restrict imports by limiting the time periods during which exports are able to access the Indonesian market. In addition, they require importers to determine well in advance, and then "lock in", the terms of importation (including the quantity, products, country of origin and port of entry), thereby further limiting market access for imports.

14. The combination of the inability to import at the start of a validity period, along with the corresponding inability to export towards the end of a validity period means there is a "dead zone" during which products cannot be imported into Indonesia. The limited validity periods also create uncertainty and mean that importers are unable to enter into long-term contractual obligations with exporters, as importers cannot obtain the right to import product beyond the end of the upcoming validity period.

15. New Zealand considers that limited application windows and validity periods have a limiting effect on the quantity of animal products that can be imported into Indonesia. As a consequence, the measure is contrary to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. To the extent that the Panel finds that the limited application windows and validity periods are non-automatic licensing procedures, New Zealand considers that they are also inconsistent with Article 3.2 of the ILA.

**(d) Fixed licence terms**

16. New Zealand agrees with Brazil's submission that the "fixed licence terms" constitute a restriction on importation inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Fixed licence terms "lock in" key terms of importation, including the quantity, type, country of origin and port of entry of the products that each importer may import during the relevant validity period.

17. Fixed licence terms restrict imports by imposing quantitative limits on the amount of product that may be imported into Indonesia during each validity period. These restrictions are imposed through MOT Import Approvals, which specify the maximum quantity of products that may be imported during each validity period. By imposing a limitation on the quantity of products that are able to be imported, fixed licence terms are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

***2. Indonesia's general prohibition on the importation of animals and animal products including the domestic insufficiency requirement***

18. New Zealand agrees with Brazil's statement that the "combined interaction of several different individual measures challenged in the present dispute constitute an overarching measure that is on its own a violation of the Covered Agreements".<sup>3</sup> In New Zealand's view, each of the individual trade-restrictive components of Indonesia's import licensing regime for animals and animal products constitutes an independent restriction on imports in violation of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. However, these individual restrictions and prohibitions do not exist in a vacuum. Rather, each element of Indonesia's import licensing regime for animals and animal products also operates in conjunction to form an overarching trade-restrictive measure inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

19. New Zealand also agrees with Brazil's contention that "the individual measures at stake in the

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<sup>3</sup> Brazil's first written submission, para. 74.

current dispute were conceived to implement an official trade policy based on the overriding objective of restricting imports to protect domestic production".<sup>4</sup> This underlying objective is reflected in multiple Indonesian laws, and permeates each individual component of Indonesia's import licensing regime. Indonesia's laws are explicit that imports of a range of products are prohibited when domestic production is deemed sufficient to meet domestic demand.

### **III. Article XX of the GATT 1994**

20. Indonesia has sought to justify a number of its measures under Articles XX(a), (b) and (d) of the GATT 1994. New Zealand does not consider that any of the measures addressed in New Zealand's submissions in this dispute can be justified under these exceptions. In particular, New Zealand does not consider that Indonesia has demonstrated that the measures at issue are "necessary" to achieve the objectives specified by Indonesia in accordance with the relevant legal standards. New Zealand also considers that Indonesia has failed to demonstrate that its measures satisfy the chapeau to Article XX. New Zealand specifically comments on certain aspects of three measures in respect of which Indonesia has invoked Article XX defences.

#### ***1. The positive list is not justified under Article XX of the GATT 1994***

21. New Zealand considers that Indonesia has failed to demonstrate that the positive list is justified under Article XX(d) on the basis that it is necessary to secure compliance with "laws and regulations dealing with halal requirements ... deceptive practices ... and customs enforcement relating to halal".<sup>5</sup>

22. New Zealand respects Indonesia's commitment to protect the right of its people to consume halal food. New Zealand emphasises, however, that the positive list does not determine an animal product's eligibility for importation based on its halal status. Rather, the positive list prohibits certain products irrespective of whether they conform to Indonesia's halal requirements. Accordingly, even if a product is certified as conforming to Indonesia's halal requirements, if it is not listed in the appendices to both MOA 58/2015 and MOT 5/2016, it is prohibited from importation.<sup>6</sup>

23. New Zealand also emphasises the trade-restrictiveness of the measure - the positive list constitutes a complete prohibition on importation of certain products. There are clearly less trade restrictive measures available which would enable Indonesia's objectives to be satisfied, such as the existing requirement in Indonesia's laws for imports to have "rightful certificate" certifying that the products satisfy its halal standards.

#### ***2. The intended use requirement is not justified under Article XX of the GATT 1994***

24. In New Zealand's view, Indonesia has failed to demonstrate that the intended use requirement is justified under Articles XX(b) and (d) of the GATT 1994. New Zealand considers that the evidence before the Panel supports a conclusion that the measure is both unnecessary to achieve the objective of protecting human life or health or to secure compliance with laws and regulations regarding public health, deceptive practices and customs enforcement.

25. New Zealand notes that the intended use requirement prevents the sale of all imported meat products in traditional markets, but does not appear to impose any comparable restrictions on the sale of domestically-produced products in these markets. New Zealand also emphasises that the substantial restrictiveness of the intended use requirement must be taken into account. The intended use requirement is highly restrictive and prevents imported animal products from reaching the majority of retail consumers in Indonesia.

#### ***3. Limited application and validity periods and fixed licence terms are not justified under Article XX of the GATT 1994***

26. New Zealand considers that Indonesia has failed to demonstrate why limited application and validity periods and fixed licence terms are necessary for the objectives it specifies under Article XX(d) of the GATT 1994. New Zealand agrees that Indonesia has the right to take measures

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<sup>4</sup> Brazil's first written submission, para. 75.

<sup>5</sup> Indonesia's first written submission, paras. 229 - 234.

<sup>6</sup> See Brazil's first written submission, paras. 99 - 101.

necessary to secure compliance with halal, food safety and customs laws. New Zealand does not agree that limiting the periods during which import licences can be obtained, and limiting the validity period of such licences, contribute towards, or is necessary for, the achievement of those objectives.

#### **IV. LEGAL ISSUES RAISED IN INDONESIA'S FIRST WRITTEN SUBMISSION**

##### ***1. Relationship between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture***

27. Indonesia contends that there is a "conflict" between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture which renders Article XI:1 "not applicable law in the present dispute".<sup>7</sup> New Zealand disagrees with this proposition.

28. New Zealand notes that a number of disputes have considered claims made by Members under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. In none of those disputes have panels found a conflict between these two articles.<sup>8</sup> New Zealand considers Indonesia's suggestion of a conflict between these provisions an untenable interpretation that is not supported by the text of the provisions or extensive WTO jurisprudence.

29. Second, there is no "conflict" as New Zealand disagrees with Indonesia's contention that the legal standard under Article 4.2 of the Agreement on Agriculture places the burden on a complainant to establish that a measure is not maintained under a non-agriculture specific provision of the GATT 1994.

30. Furthermore, simply because the Agreement on Agriculture applies only to agricultural products and the GATT 1994 applies to all products (including agricultural products), this does not automatically render Article 4.2 of the Agreement on Agriculture the more specific provision in respect of import restrictions such as those at issue in the present dispute.

##### ***2. Relationship between Article 4.2 of the Agreement on Agriculture and Article XX of the GATT 1994***

31. New Zealand does not agree with Indonesia's contention that a complainant has the burden of establishing that a measure is *not* maintained under general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement. New Zealand considers that this novel argument is flawed. According to Indonesia, in order to demonstrate a violation of Article 4.2 of the Agreement on Agriculture, a complainant would not only have to demonstrate a *prima facie* violation of Article 4.2, but it would also have to posit and rebut possible defences under Article XX that a respondent might raise.

32. There is no justification for shifting the well-established principle that a respondent bears the burden of demonstrating that a measure can be justified under Article XX. It would be contradictory if the same provision were an exception to Article XI:1 of the GATT 1994 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.

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<sup>7</sup> Indonesia's first written submission, para. 74.

<sup>8</sup> See for example: Panel Report, Korea- Various Measures on Beef, paras. 762 and 768. Panel Report, India - Quantitative Restrictions, para. 5.242; Panel Report, US - Poultry (China), paras. 7.484 - 7.487.

**ANNEX C-7****EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY****I. THE APPLICABILITY OF BOTH THE GATT 1994 ARTICLE XI:1 AND ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE WITH REGARD TO THE SAME MEASURE**

1. In its first written submission, Indonesia claims that the same aspects of the same measure may not be challenged under both the GATT 1994 Article XI:1 and Article 4.2 of the Agreement on Agriculture, as these provisions have different legal standards.<sup>1</sup> According to Indonesia, "by virtue of Article 21.<sup>1</sup> of the Agreement on Agriculture, Article 4.2 applies to measures challenged by Brazil to the exclusion of Article XI:1 of the GATT 1994".<sup>2</sup>

2. Norway is puzzled by this argument. Like Australia argues in its third party submission, Norway asserts that Indonesia's claim lacks support in WTO jurisprudence, as it is clear that a measure can constitute a violation of both Article XI:1 of the GATT 1994 as well as of Article 4.2 of the Agreement on Agriculture.<sup>3</sup>

**II. WHETHER LIMITED (AND SHORT) APPLICATION PERIODS AND VALIDITY PERIODS OF THE MINISTRY OF AGRICULTURE'S IMPORT RECOMMENDATION AND MINISTRY OF TRADE'S IMPORT APPROVAL AS WELL AS FIXED LICENSE TERMS CONSTITUTE RESTRICTIONS ON IMPORTS.**

3. Brazil argues in its first written submission that Indonesia's import licencing procedures constitute a "restriction" on importation in violation of the GATT 1994 Article XI:1 as well as the Agreement on Agriculture Article 4.2. According to Brazil, this is in particular due to; (i) the prohibition of applying for licences for the importation of chicken cuts and other prepared or preserved chicken meat due to their exclusion from the "positive lists" of the products allowed to be imported; (ii) the requirements related to the intended uses of imported chicken meat and chicken products; (iii) the limited (and short) application periods and validity periods of the MoA Import Recommendation and MoT Import Approvals; and (iv) the fixed licence terms.<sup>4</sup> Norway wishes to offer its observations on the latter two elements.

4. Indonesia asserts that "[t]he mere fact that importers must reapply periodically for the new Import Recommendation and the Import Approval does not, in and of itself, mean that the measure at issue is a quantitative restriction".<sup>5</sup> Norway agrees that the covered agreements do not oblige Members to apply automatic import licencing. However, if the application windows and the validity periods are limited to the extent that they create obstacles which have a "limiting effect" on trade, they will also constitute a restriction which fall under the scope of both Article XI:1 of the GATT 1994 and Footnote 1 of Article 4.2 of the Agreement on Agriculture.

5. As regards the fixed licence terms, Indonesia holds that "importers determine their own terms of importation" according to this requirement, which in turn does not have any limiting effect on imports. Indonesia refers to the fact that "the terms of import licenses – including the type, quantity, country of origin, and port of entry – are at the complete discretion of the importers themselves". Hence, Indonesia argues that "[t]he terms of importation listed on import license applications are, therefore, not measures that are 'instituted or maintained' by Indonesia. They fall outside the scope of Article 4.2, as they are determined by private parties".<sup>6</sup> We assume that Indonesia would use the same argument with regard to scope of Article XI:1 of the GATT 1994.

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<sup>1</sup> Indonesia's First Written Submission, paras. 65-74.

<sup>2</sup> Indonesia's First Written Submission, para. 74.

<sup>3</sup> Australia's Third Party Submission, para. 30, referring to Panel Report, *Korea – Various Measures on Beef*, para. 762 and Panel Report, *India – Quantitative Restrictions*, paras. 5.241-5.242.

<sup>4</sup> Brazil's First Written Submission, para. 200.

<sup>5</sup> Indonesia's First Written Submission, para. 257.

<sup>6</sup> Indonesia's First Written Submission, para. 262.

6. 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, quantity, the country of origin of the products, and the port of entry through which the products will enter Indonesia. However, Indonesia here fails to point to the *measure at issue*, as it is the fact that the licence term, once defined by the importers, are *fixed*, and *may not be altered* during a term that constitutes the restriction.

7. 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. For instance, 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.<sup>7</sup> 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.<sup>8</sup> Hence, Norway agrees with Brazil that the fact that the importers are prevented from responding to changes in market conditions will have a limiting effect on trade. Moreover, Norway notes that importers may experience a need to respond to 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. Being prevented from doing this can restrict the volume of imports. The measure challenged is therefore not *the terms of importation as they are determined by private parties*, as put by Indonesia,<sup>9</sup> but rather the measure limiting what importers may import.

8. The importers being "free to alter their terms of importation from one license application to the next"<sup>10</sup> does not change the fact that this limitation has a limiting effect in a set term. Moreover, one must also bear in mind that import opportunities as regards availability of products etc. may change from one term to another. It is not given that what a company has the "desire and ability to export"<sup>11</sup> at one point in time would also be desired and available months later.

### III. THE TERM "RESTRICTION" IN ARTICLE XI:1 OF THE GATT 1994

9. It is clear from WTO jurisprudence that the term "restriction" in the GATT 1994 Article XI:1 should be interpreted as something that has a "*limiting effect*".<sup>12</sup> In establishing this, the Appellate Body has stated this can be "demonstrated through the design, architecture, and revealing structure of the measure at issue".<sup>13</sup> In Norway's view, the Panel in this dispute should not deviate from this test. We are not convinced that "*discernible quantitative dimension*", as suggested by the European Union, would be a correct expression of this test.

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<sup>7</sup> Panel Report, *Colombia - Ports of Entry*, para. 7.274.

<sup>8</sup> Panel Report, *India - Autos*, para. 7.320.

<sup>9</sup> Indonesia's First Written Submission, para. 262.

<sup>10</sup> Indonesia's First Written Submission, para. 263.

<sup>11</sup> Panel Report, *India - Autos*, para. 7.268.

<sup>12</sup> See, e.g. Appellate Body Reports, *China - Raw Materials*, para. 319; *Argentina - Import Measures*, para. 5.217.

<sup>13</sup> *Ibid.*

## ANNEX C-8

### EXECUTIVE SUMMARY OF THE ARGUMENTS OF PARAGUAY\*

1. Mr. Chairman and distinguished Members of the Panel, Paraguay would like to thank the Panel and the Secretariat for their work in this dispute and for the opportunity to present our views today.
2. Paraguay is a third party in these proceedings, mainly because of our systemic interest in the interpretation of the WTO Agreements. We would like to stress the importance that this matter reverts for landlocked developing countries, like ours.
3. In that context, we would like to underscore the key role that Article XI of the GATT 1994 plays for the multilateral trading system, as it establishes a general prohibition on the use of quantitative restrictions. Similar measures generate losses, and thus, have distortive effects for international trade. Often, they create systems that are not transparent and increase the trade costs for exporters and importers, especially from developing countries.
4. With regard to the interpretation and application of Article XI of the GATT, the WTO jurisprudence has set certain parameters that we would like to recall in our brief statement. First and foremost, the scope of this provision has repeatedly been understood in a wide manner. Indeed, the broad scope of the term "restriction" has been reaffirmed in the GATT and the WTO jurisprudence. It is also clear from previous cases that not only de jure, but also de facto restrictive measures are covered by this provision.
5. We would also like to stress the standard of review. Complainants are not required to demonstrate trade effects attributable to the challenged measure. Panels have repeatedly stated that GATT Article XI reflects the obligation to safeguard the competitive opportunities for imported products, and, consequently, all complainants need to show is that a measure operates as a quantitative restriction without incurring the additional obligation to also show that the measure at hand is responsible for the reduced volume of trade.
6. It follows that panels dealing with GATT Article XI must focus their work on the design, structure and architecture of the challenged measures, and inquire into whether they may affect the importation of products by restricting market access. This could be the outcome of, for example, increased trade costs, as a result of the adoption of more complicated procedures.
7. Finally, we would like to refer to the panel's letter of 3 June 2016 regarding Oman and Qatar's request to participate as third parties in this dispute. Paraguay welcomes the panel's decision, and the consideration given to the experience that these WTO Members have in dispute settlement cases.
8. As noted by the panel, the DSU allows the WTO adjudicating bodies to exercise a certain margin of discretion when dealing with issues, that have not been explicitly addressed in the body of the DSU. When doing so nevertheless, panels and the Appellate Body must always observe due process. In this specific case, we agree with the panel that that due process rights of the parties have not been affected, and we are of the opinion that this type of deliberations will help those WTO Members, that have limited experience in dispute settlement, in better understanding the rules and procedures.
9. With that, we conclude our statement and thank the panel for its attention.

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\* Paraguay has requested that its oral statement serves as executive summary.

**ANNEX C-9****EXECUTIVE SUMMARY OF THE ARGUMENTS OF QATAR\*****I. INTRODUCTION**

1. Mr. Chairman and distinguished Members of the Panel, the State of Qatar appreciates this opportunity to appear before you today as a third party to the dispute *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products* (DS484). Qatar is of the view that the Panel's resolution of the dispute should be, first and foremost, respectful of the religious and moral choices of each Member. Qatar will thus limit its intervention to the important questions relating to the halal-labelling obligations imposed by Indonesia.

2. Brazil claims that the halal-labelling requirements violate the National Treatment obligation of GATT Article III:4 because Indonesia accords to imported chicken meat and chicken products treatment less favorable with respect to the implementation and enforcement of its halal requirements as it does to like domestic products.

3. Indonesia argues that there is no violation of the National Treatment obligation because (1) imported "chilled" or "frozen" chicken products are not "like" domestic "fresh" chicken as predominantly sold in the wet markets and (2) the treatment accorded to imported products is no less favorable when compared with like domestic products, as soon as the entire regulatory regime applicable to domestic products is appropriately taken into account. In addition, Indonesia argues that the halal-labelling requirements do not and cannot apply to fresh chicken but apply only to packaged, chilled or frozen chicken, whether domestically produced or imported.

4. Furthermore, Indonesia argues that any violation is in any case justified under the General Exceptions of GATT Article XX a) and d), given that the halal requirements are necessary to protect public morals and necessary to secure the enforcement of domestic laws that are not otherwise WTO inconsistent.

5. Qatar would like to take this opportunity to address a few systemic considerations raised by Brazil's challenge in this particular case.

6. First, it should be entirely within the discretion of each Member to impose product-related requirements that are necessary to ensure respect for the religious considerations and preferences of each Member. Religious requirements are part of public morals and should not be set aside or challenged based on economic or trade-related considerations. In *EC – Seal Products*, the Appellate Body acknowledged that "Members should be given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values."<sup>1</sup> Qatar considers that this acknowledgement must be given meaning, not only in the specific context of a defense under GATT Article XX but also when examining the consistency of measures with a Member's basic WTO obligations. One must be careful not to confuse permissible measures adopted for religious reasons with impermissible measures imposed so as to afford protection to domestic products.

7. Second, Brazil confirms that it is not challenging the halal requirements as such but only their practical application by Indonesia. In particular, as noted by Indonesia, Brazil has recognized that it "takes no issue with regard to the fulfillment of the halal certification and labelling, as required by the Indonesian legislation."<sup>2</sup> However, Qatar is of the view that a panel should pay particular attention in the context of a "de facto" challenge of this kind to avoid a false positive. A "de facto" claim of violation arguably concerns only the application and implementation of the requirement in question. But the distinction between application, implementation and enforcement

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\* Qatar has requested that its oral statement serves as executive summary.

<sup>1</sup> Appellate Body Report, *EC – Seals Products*, para. 5.199.

<sup>2</sup> Indonesia's first written submission, para. 352 referring to Brazil's first written submission, para. 139.

of a requirement based on religion and public morals would be difficult and could easily become in fact a challenge of the requirement itself.

8. Third, Qatar considers that an important distinction must be made between products produced in a manner respectful of religious considerations and requirements in the country that imposes such requirements, on the one hand, and products imported from a country where these religious considerations and requirements are not applicable. For example, respect for halal-related requirements is part and parcel of Muslim countries' culture, thus justifying perhaps less need for additional inspection and verification of products produced domestically. The fact that stringent requirements relating to inspection and verification apply in particular to imported products from non-Muslim countries is thus not a protectionist measure but simply a reflection of this religious reality. Although it may not be necessary to demonstrate that the measure is driven by protectionist intentions, the complete absence of any evidence suggesting that a measure on its face is origin neutral nevertheless violates the National Treatment obligation and in Qatar's view it must play an important role in the context of the Panel's examination.

9. Fourth, and related to the above points, the mere fact that there are certain differences in the manner in which domestic and imported products are treated should not lead to the immediate conclusion that less favorable treatment is accorded. It must be demonstrated that the measure in question has adversely affected the conditions of competition for imported products. Qatar would like to suggest that the Panel closely examines the arguments and evidence cited by Brazil in support of its claim of less favorable treatment, with particular attention to the specific circumstances of the Indonesian market.

## **II. CONCLUSION**

10. This dispute raises a number of very important and systemic issues that concern the essence of the freedom to regulate for religious reasons.

11. The key question when it comes to Brazil's challenge of Indonesia's halal requirements and their application in practice, is whether it has been demonstrated that these measures were imposed and applied so as to afford protection or whether the practical differences between domestic and imported products explain any differences in the treatment of these products. It needs to be examined whether the conditions of competition have been distorted so as to afford protection to domestic products.

12. Public morals and religious requirements are not merely relevant considerations to justify a violation. In Qatar's view, they also play an important role when examining whether a violation exists in the first place. In addition, when examining whether a violation can be justified for reasons related to religion and public morals, Qatar considers that considerable deference should be given to Members. It is our view that it should be the prerogative of each member to regulate on the basis of public morals and extensive latitude should be allocated to their right to do so.

13. Thank you.

**ANNEX C-10****EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES****I. INDONESIA'S IMPORT LICENSING MEASURES ARE INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994 AND ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE**

1. Indonesia's import licensing regime for animals and animal products imposes impermissible "restrictions" and "prohibitions" within the meaning of Article XI:1 of the GATT 1994. "Restriction," as used in Article XI:1, refers to "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation," i.e., "to something that has a limiting effect." "Prohibition" refers to a "legal ban on the trade or importation of a specified commodity." Thus, Article XI:1 establishes a "general ban on import or export restrictions or prohibitions" other than duties, taxes, or other charges. Article XI:1 does not require a complaining party to demonstrate quantitatively that a measure has adversely impacted the overall volume of imports. The Appellate Body affirmed this interpretation in *Argentina – Import Measures*, finding that a measure's limitation on action or limiting condition on importation "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 at issue considered in its relevant context."

2. Indonesian regulation 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. 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). 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 importers are prohibited from importing animals and animal products not specified on a valid Recommendation and Import Approval. Indonesia's positive list of animals and animal products that can be imported, and its consequent ban on importation of any products not included on that list, thus constitutes a "prohibition" in breach of Article XI:1 of the GATT 1994.

3. Indonesia also requires, as a condition for importation, that animals and animal products be imported only for certain specific uses. This restriction varies in scope depending on the product at issue, but 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. Specifically, importers of the animal products listed in Appendix II to MOT 46/2013 and MOA 139/2014 (non-bovine animals, meat, and offal) are only eligible to obtain a Recommendation from the Ministry of Agriculture if they indicate on their application a permitted use, including sale in manufacturing, hotels, restaurants, catering, or other limited purposes, or for sale in modern markets (i.e., supermarkets and convenience stores, but not in traditional markets). Thus, Indonesia impermissibly precludes importers from importing non-bovine animals, meat, and offal for commercially important purposes. The use requirements are, therefore, a limitation on action or limiting condition on importation constituting a "restriction" in breach of Article XI:1.

4. Next, Indonesia's application window and validity period requirements create a period of several weeks at the end of one validity period and the beginning of another during which products *cannot* be exported to Indonesia. Specifically, Import Approvals are issued four times a year for a single three-month validity period and can be applied for only during the month preceding the start of a period; they cannot be submitted in advance. Further, Import Approvals are not issued until after the import period has begun, and exporters cannot ship until they receive the approval. Moreover, all animals and 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 must stop accepting orders and shipping to Indonesia up to several weeks before the end of the period, depending on the time it takes to transport products to a port, ship them to Indonesia, and clear customs. Consequently, depending on their origin, there is a window of time of up to several weeks at the end of each period when Indonesian importers seeking to import animals or animal products are *precluded* from doing so due to the structure of the application window and validity

period requirements. These requirements are a limitation on action or limiting condition on importation, and therefore constitute a "restriction" in breach of Article XI:1 of the GATT 1994.

5. Indonesia also 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. Importation of any animals and animal products without permits covering their type, quantity, country of origin, and port of entry is prohibited. But once an import period begins, importers cannot apply for new permits to import different or additional products, or for products shipping from, or into, a new location. Thus imports are strictly limited to the products specified on outstanding permits. Importers that do not comply with this requirement are subject to sanctions, including revocation of their Recommendations and ineligibility for future Recommendations and revocation of their Import Approvals, and any goods not in compliance with the requirement will be re-exported at the importer's expense. Once a period begins, therefore, importers cannot make changes based on market or other developments that may be necessary to meet current demand, whether because certain products are no longer needed, because new or additional products are needed due to the unavailability or insufficiency of the original orders, or even due to changed circumstances regarding the importer itself. The type, quantity, country of origin, and port of entry requirement imposed through Recommendations and Import Approvals is, therefore, a limitation on action or limiting condition on importation, and thus constitutes a "restriction" within the meaning of Article XI:1.

6. Finally, Indonesia's domestic insufficiency requirement explicitly places a limiting condition on imports by conditioning all importation of animals and animal products on the insufficiency of domestic products to meet Indonesian consumers' needs. The requirement thus severely limits the opportunities for importation, in that imported products are given market access only if, and to the extent that, domestic supply is deemed insufficient to satisfy domestic needs. The lack of transparency and predictability in the implementation of the domestic insufficiency requirement itself has an additional limiting effect on imports. Therefore, the requirement is a "restriction" within the meaning of Article XI:1 of the GATT 1994.

7. For the same reasons these measures breach Article XI:1 of the GATT 1994, they also breach Article 4.2 of the Agreement on Agriculture.

8. Indonesia's import licensing restrictions for animals and animal products 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 import restrictions," "minimum import prices," and "similar border measures" other than ordinary customs duties. Where a measure constitutes a "prohibition or restriction" (other than duties, taxes or other charges) in breach of Article XI:1 of the GATT 1994, that measure also would run afoul of the prohibition in Article 4.2 on Members maintaining agricultural measures of the kind listed in footnote 1. The United States considers that Indonesia's import licensing measures therefore breach Article 4.2 for the same reasons they breach Article XI:1 of the GATT 1994. When a measure concerning agricultural products has been found inconsistent with Article XI:1 of the GATT 1994, previous panels have found that the measure would also be inconsistent with Article 4.2 of the Agreement on Agriculture.

## **II. A COMPLAINANT NEED NOT SHOW THAT A MEASURE DOES NOT FALL WITHIN AN ARTICLE XX EXCEPTION TO DEMONSTRATE A BREACH UNDER ARTICLE 4.2**

9. Footnote 1 of Article 4.2 of the Agreement on Agriculture provides that the scope of Article 4.2 does not extend to measures maintained under "general, non-agriculture-specific provisions of the GATT 1994," which include Article XX. Indonesia asserts that to make a *prima facie* case that a challenged measure is inconsistent with Article 4.2, the complainant bears the burden to show that a measure does not fall within one of the exceptions of Article XX.

10. In the United States' view, adopting Indonesia's interpretation would render a successful Article 4.2 claim nearly impossible. Taking Indonesia's interpretation to its logical conclusion means that a complainant must present arguments and evidence to prove a negative; that is, none of the measures at issue are maintained under the ten sub-articles of Article XX or under other general, non-agricultural-specific provisions of the GATT 1994 or of the other WTO multilateral trade agreements. Indeed, Indonesia has not cited to any previous panel or

Appellate Body reports that found that the complainant must prove that a measure is not maintained under Article XX or any other WTO provision in its Article 4.2 *prima facie* case. In fact, the panel in *India –Quantitative Restrictions* indicated that it is the respondent who must prove that the exceptions in footnote 1 apply. Such an interpretation is also consistent with previous panel and Appellate Body findings indicating more generally that the party that invokes a justification under Article XX of the GATT 1994 bears the burden to demonstrate that the inconsistent measures come within its scope.

11. In any event, the United States notes that the Panel need not reach Indonesia's novel legal interpretations, because Brazil has raised claims under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. If the Panel begins its analysis with Article XI:1, followed by an examination of Indonesia's defenses under Article XX, and if the Panel were to find that each measure breaches Article XI:1 and that Indonesia has made out an affirmative defense for any measure, then the Panel would not need to reach the issue raised by Indonesia under footnote 1 to Article 4.2 at all because that provision would not apply.

### **III. INDONESIA'S REQUEST FOR A PRELIMINARY RULING**

12. A close examination of the panel request suggests that Brazil has presented its claim against Indonesia's "general prohibition" in a manner consistent with Article 6.2 of the DSU. In section I of its panel request, Brazil identified a single measure consisting of seven components, each described narratively in detail. Brazil went on to list the five legal instruments through which the single measure is maintained below the narrative description. Finally, Brazil listed 15 provisions of the WTO agreements with which it considered the single measure to be inconsistent, including the aspect of each of those provisions Brazil was invoking. That is, the single measure was identified and then connected with each of the WTO provisions with which Brazil claimed that measure to be WTO inconsistent. Thus, Brazil has sufficiently identified the single measure and the legal bases for its claims to bring the matter within the Panel's terms of reference.

13. Questions of whether Brazil has demonstrated that such a measure exists in Indonesia, or whether the identified measure breaches any of the 15 WTO provisions, are substantive issues to be resolved by the Panel on the merits. Identification of the objective of a measure also is not required for purposes of Article 6.2. To the extent the objective of a measure is relevant to the ultimate resolution of a substantive claim, that issue would be resolved by the panel on the merits.

### **EXECUTIVE SUMMARY OF US THIRD PARTY ORAL STATEMENT**

#### **IV. INDONESIA'S DEFENSES UNDER GATT ARTICLE XX**

14. Indonesia first seeks to justify its intended use requirement under Article XX(b) by arguing that it is necessary to protect human life or health. Setting aside the second step of showing compliance with the chapeau to Article XX, to make out preliminarily a defense under Article XX(b), Indonesia must show that two elements of its text are met: (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. In the context of an exception for a measure that would otherwise be WTO-inconsistent, a measure may be viewed as "necessary" when it is indispensable, or nearly so.

15. Indonesia specifically asserts that the intended use requirement prevents food spoilage and protects the public health by "ensur[ing] that frozen products are not sold in markets without a proper cold chain." However, Indonesia has offered no evidence – from either the text, structure, or the legislative history of the Ministry of Agriculture and the Ministry of Trade regulations – to show that food safety is, in fact, the objective (or one of the objectives) in pursuit of which the intended use requirements were imposed. Therefore, there would not appear to be an evidentiary basis for the Panel to find that the first element of the Article XX(b) defense has been met. With respect to the "necessary" element, Indonesia has also failed to show how prohibiting the importation of non-beef animal products, including poultry meat and products, for sale in traditional markets contributes to the objective of food safety. Specifically, the intended use requirement in the MOA Regulation at issue only prohibits the sale of *imported* frozen meat in traditional markets; it does not address the sale of *domestic* frozen meat at all.

16. In addition to Article XX(b), Indonesia also attempts to justify the intended use requirement under Article XX(d), arguing that it is necessary to secure compliance with Indonesia's laws on food safety and consumer protection, in particular Law 18/2009 on Animals and Law 8/1999 on Consumer Protection. Although the MOT and MOA regulations "noted" Law 18/2009 and Law 8/1999 in their preambulatory sections, there is no support in the text, structure, or the legislative history of legal instruments that shows that the intended use requirement was *designed* to secure compliance with the food safety and consumer protection provisions cited by Indonesia.

17. More importantly, Indonesia has failed to show that the intended use requirement is necessary to secure compliance with the legal provisions it identified. With respect to the food safety laws, Indonesia has not explained how barring the importation of poultry products for sale at traditional markets contributes to securing compliance with Articles 58 and 59 of Law 18/2009, which relate to the requirement on the government to regulate animal products for food safety within its authority and the requirement for importers to obtain import permits. And with respect to compliance with the consumer protection law, Indonesia argues that the intended use requirement prevents vendors in traditional markets from selling thawed frozen meat as fresh meat. However, as discussed above, the intended use requirement does not address domestic frozen meat at all, making any contribution to securing compliance with consumer deception provisions negligible.

18. Indonesia also asserts that its positive list requirement, which prohibits the importation of any product not listed in its regulations, is justified under Article XX(d), because it is designed – and necessary – to secure compliance with its laws on halal as well as consumer protection and customs enforcement laws related to halal. Again, however, Indonesia has failed to sufficiently support its defense. The entirety of its argument consists of (1) listing the provisions regarding veterinary certificates, halal certification, and the requirement to provide truthful product information, and (2) concluding that it can be "hardly disputed" that the positive list requirement is designed to secure compliance with those laws. Indonesia has offered only its own characterization of the objective, without evidence or even argumentation in support; this is insufficient to meet its burden under the first element of the Article XX(d) test.

19. With respect to the first element, Indonesia provides no evidence or explanation to show that the positive list is designed to secure compliance with halal and related laws. Even aside from Indonesia's failure to establish the first element, however, Indonesia cannot demonstrate that the positive list is necessary to secure compliance with its law on halal and consumer protection and customs enforcement laws related to halal, because the positive list simply bans the importation of any poultry meat and poultry products not listed in the import licensing regulations, regardless of whether they comply with Indonesia's halal requirements.

20. In seeking to justify the limited application window and validity periods and the fixed license term requirements under Article XX(d), Indonesia appears to have adopted the same approach it took with respect to the positive list requirement. That is, it lists a myriad of food safety, halal, and consumer protection laws, and concludes summarily that "it can hardly be disputed" that its import licensing measures are designed to secure compliance with those provisions. Again, Indonesia has not offered any evidence or explanation from the text, structure, or legislative history on *whether* or *how* these two measures are designed to secure compliance with halal and other legal requirements. Such a showing is clearly insufficient to succeed under the first element of Article XX(d).

21. Indonesia also has failed to explain sufficiently how the limited application window and validity periods and the fixed license term requirements are necessary to secure compliance with the food safety, halal, and consumer protection provisions it has identified. Instead, Indonesia asserts that these requirements "enable[] government officials to monitor foreign trade" by making the importers reapply for permits periodically. As examples, Indonesia argues that these requirements address the problems of "overstatement of anticipated import volume" and customs enforcement at the various ports of entry. None of these arguments and examples relate to the food safety, halal, and consumer protection provisions that Indonesia cited.

**V. THE LEGAL STANDARDS REGARDING BRAZIL'S "GENERAL PROHIBITION" CLAIM**

22. The United States would also like to offer initial views on Brazil's identification of a "general prohibition" in Indonesia on the importation of poultry meat and poultry products, as well as the legal standards applicable to Brazil's demonstration of the existence of such a measure.

23. First, with respect to identification, the DSU does not specify in detail the types of measures that complainants may identify in a panel request. The DSU requires that the measure be "taken by another Member" and suggests that a measure would normally be capable of "impair[ing]" "benefits accruing to it directly or indirectly under the covered agreements" and would normally be capable of being withdrawn in the absence of a mutually agreed solution. Once the complainant identifies a specific measure in the panel request, this measure forms part of the "matter" referred to the Dispute Settlement Body under Article 7.1 of the DSU and that the DSB tasks the panel with examining to assist the DSB in carrying out its responsibilities under the DSU.

24. Second, with respect to proving the existence of the challenged measure, the United States recalls that the burden is on the complainant to demonstrate the existence of a measure. This requirement on the complainant is the same whether the measure is written or unwritten. Due to the nature of an unwritten measure, however, a larger volume of evidence may be required to prove the existence of an unwritten measure while a written measure may often be identified solely by reference to its publication.

25. In *Argentina – Import Measures*, the Appellate Body found that a panel should look to "the specific measure challenged and how it is described and characterized by a complainant" to determine "the kind of evidence it is required to submit and the elements it must prove to establish the existence of the measures challenged." The Appellate Body further noted that, in a dispute in which the complainant has characterized the measure as a single, unwritten measure composed of different instruments, the complainant may need to "provide evidence of how different components operate together as part of a single measure and how a single measure exists as distinct from its components."

26. Therefore, the Panel may find that the "general prohibition" challenged by Brazil exists if Brazil brings forward evidence that such a prohibition exists "as distinct from" the individual measures constituting that prohibition, as identified by Brazil in its panel request.

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