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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY BRAZIL

REPORT OF THE PANEL

*Addendum*

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

## LIST OF ANNEXES

### ANNEX A

WORKING PROCEDURES OF THE PANEL



### ANNEX B

ARGUMENTS OF THE PARTIES



### ANNEX C

ARGUMENTS OF THE THIRD PARTIES



### ANNEX D

PRELIMINARY RULING

## ANNEX A

WORKING PROCEDURES OF THE PANEL

## ANNEX A-1

WORKING PROCEDURES OF THE PANEL

**Adopted on 12 August 2019**

**General**

1. (1) In this proceeding, 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 apply.

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

**Confidentiality**

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If 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.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

**Submissions**

3. (1) Before the substantive meeting of the Panel with the parties, each party shall transmit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

(2) Each third party that chooses to make a written submission before the substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(3) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

**Preliminary rulings**

4. (1) If Indonesia considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. Indonesia shall submit any such 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. Brazil shall submit its response to the request before the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the respondent before the meeting, and any subsequent submissions of the parties in relation thereto before the meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

**Evidence**

5. (1) Each party shall submit all evidence to the Panel no later than during the substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or the meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.

7. (1) 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, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Brazil should be numbered BRA-1, BRA-2, etc. Exhibits submitted by Indonesia should be numbered IDN-1, IDN-2, etc. If the last exhibit in connection with the first submission was numbered BRA-5, the first exhibit in connection with the next submission thus would be numbered BRA-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) Insofar as a party considers that the compliance panel should take into account a document already submitted as an exhibit in the original panel proceeding, it should resubmit that document as an exhibit for the purpose of this proceeding. In its list of exhibits, it should refer to the number of the original exhibit in the original panel proceedings (OP) (example: BRA-1 (BRA-21-OP)).

(5) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit.

**Editorial Guide**

8. 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 (electronic copy provided).

**Questions**

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Before the meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during the meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally during the meeting, and in writing following the meeting, as provided for in paragraphs 16 and 21 below.

**Substantive meeting**

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. There shall be one substantive meeting with the parties.

16. The 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. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. 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. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

**Third party session**

17. Each third party may present its views orally during a session of the substantive meeting with the parties set aside for that purpose.

18. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third party session of the meeting with the Panel.

19. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

20. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

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

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

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.

c. Each third party should limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it

requires more time for its opening statement, it should inform the Panel and the parties at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

**Descriptive part and executive summaries**

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

23. Each party shall submit one integrated executive summary, which shall summarize the facts and arguments as presented to the Panel in the party's first written submission, second written submission, oral statement, and if possible, its responses to questions and comments thereon following the substantive meeting.

24. Each integrated executive summary shall be limited to no more than 15 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments.

**Interim review**

27. 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.

28. If 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.

**Interim and Final Report**

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

**Service of documents**

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

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

b. Each party and third party shall submit 2 paper copies of its submissions and 2 paper copies of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute. If any documents are in a format that is impractical to submit as a paper copy, then the party may submit such documents to the DS Registrar by email or on a CD-ROM, DVD or USB key only.

c. Each party and third party shall also send an email to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy of all documents that it submits to the Panel, preferably in both Microsoft Word and PDF format. All such emails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceeding. If it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with four copies of the Exhibits on USB keys, CD-ROMs or DVDs.

d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.

e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by email or other electronic format acceptable to the recipient without having to serve a paper copy, unless the recipient party or third party has previously requested a paper copy. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

f. Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

**Correction of clerical errors in submissions**

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

# ANNEX B

## ARGUMENTS OF THE PARTIES

## ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

## I. INTRODUCTION

1. Brazil has amply demonstrated that Indonesia has failed to comply with the recommendations and rulings of the Dispute Settlement Body (DSB) in this dispute.

2. After 10 years, Brazil's request for a veterinary health certificate remains stuck at the first step of Indonesia's approval procedures (desk review)—the very same step where Brazil's request was stuck when the original panel found that Indonesia had unduly delayed the undertaking and completion of its approval procedures and violated Article 8 and Annex C(1)(a) of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). After the adoption of the original panel report, Indonesia has continued to cause undue delay in the undertaking and completion of its approval procedures. Indonesia remained entirely passive after the adoption of the DSB recommendations and rulings and, once these compliance proceedings got underway, Indonesia merely looked for pretexts to further delay the undertaking and completion of its approval procedures. Indonesia has thus failed to comply with the DSB recommendations and rulings under Article 8 and Annex C(1)(a) of the SPS Agreement.

3. Indonesia additionally continues to impose several other WTO-inconsistent measures that restrict imports and that fail to comply with the DSB's recommendations and rulings.

4. Instead of removing, once and for all, these WTO-inconsistent barriers that Brazilian exports of chicken and chicken meat have been facing since 2009, Indonesia has continued to make frequent cosmetic changes to its import regime even after the compliance Panel was established. These cosmetic changes are designed to give the *appearance* of compliance but fail to achieve full substantive compliance with the DSB's recommendations and rulings. The frequent amendments to Indonesia's regulations merely preserve its ability to restrict trade.

5. Indonesia continues to enforce the cold storage requirement, which determines whether an intended use is allowed, in a manner inconsistent with Articles III:4 and XI:1 of the General Agreement on Tariffs and Trade (GATT 1994). Indonesia has also failed to eliminate the positive list requirement and thus continues to act inconsistently with Article XI:1 of the GATT 1994, as well as Article 4.2 and footnote 1 of the Agreement on Agriculture. Moreover, Indonesia continues to restrict importers from adjusting the terms of their licence, contrary to Article XI:1 of the GATT 1994. Accordingly, with respect to these measures, Indonesia has also failed to bring itself into compliance with the DSB's recommendations and rulings.

## II. INDONESIA CONTINUES TO UNDULY DELAY THE PROCESSING OF BRAZIL'S APPLICATION FOR A VETERINARY HEALTH CERTIFICATE

6. Annex C(1)(a) of the SPS Agreement requires WTO Members to ensure that procedures to check and ensure the fulfilment of sanitary or phytosanitary measures are undertaken and completed without undue delay. The original panel explained that the ordinary meaning of the term "delay" is "(a period of) time lost by inaction or inability to proceed".[1] A delay is "undue" when procedures are not "undertaken with appropriate dispatch", or "involve periods of time that are unwarranted, or otherwise excessive, disproportionate or unjustifiable".[2] The original panel also underscored that Annex C(1)(a) requires WTO Members "to take an action or proceed, despite the irregularities in the

[1] Original panel report, para. 7.519 (referring to Appellate Body Report, *Australia – Apples*, para. 437 (citing *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 635)).

[2] Original panel report, para. 7.526 (referring to Appellate Body Report, *Australia – Apples*, para. 437).

application, to the extent practical as opposed to waiting for the submission of all relevant information".[3]

7. In examining Brazil's claim of undue delay in the original proceedings, the original panel considered that a Member may not delay the completion of an SPS approval procedure because non-SPS related information, which the Member requires the applicant to submit, is outstanding from an application.[4] Applying this interpretation to the facts at issue, the original panel recalled that the only information which was outstanding related to halal assurances, which is not SPS related.[5] As a result, the original panel found that the delay was not justified and was, therefore, undue. The original panel thus concluded that Indonesia caused undue delay in the approval of the veterinary health certificate in violation of Article 8 and Annex C (1)(a) of the SPS Agreement.[6]

8. Compliance with Article 8 and Annex C(1)(a) of the SPS Agreement required Indonesia to begin the review of Brazil's veterinary health certificate application immediately after the adoption of the original panel report (if not sooner), and to carry out the approval procedures from beginning to end as expeditiously as possible.[7] Indonesia did not do so. In fact, Indonesia did nothing until 31 May 2018—more than six months after DSB adoption—when it requested Brazil to file an entirely new questionnaire all over again. This six-month period during which Indonesian authorities did nothing is time lost due to inaction. Indonesia's attempt to justify its inaction lacks any merit.

9. *First*, Indonesia alleges that it could not process Brazil's application before revising MoA 34/2016 and that the amendment of MoA 34/2016 took six months because of various factors.[8] However, under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Indonesia was required to bring itself into *full* compliance with its WTO obligations within the reasonable period of time for implementation (RPT).[9] The obligation to comply before the expiration of the RPT applies even in cases in which the respondent needs to undertake two consecutive implementing steps to achieve full compliance. In other words, even if implementation in this case required Indonesia to first amend MoA 34/2016 before processing Brazil's application, Indonesia was required to perform both steps before the expiration of the RPT.

10. Moreover, Indonesia would have known that it would undertake consecutive steps for the purposes of implementation when it *agreed* to the eight-month RPT in this case. In agreeing to the RPT, Indonesia acknowledged that the period was sufficient to undertake both steps, even if it considered that they had to be done consecutively. Accordingly, even if Indonesia were correct that MoA 34/2016 had to be amended before it could initiate the assessment of Brazil's application, this would not justify Indonesia's failure to bring itself into full compliance before the expiration of the RPT.

11. In any event, the text of MoA 34/2016 does not support Indonesia's assertion that desk review could not have been initiated prior to the amendment of MoA 34/2016.[10] While MoA 34/2016 contemplated "a desk review and on site review of the animal product safety of halal assurance system in the Business Unit"[11], this was separate from the "desk review and on site review of the implementation system of animal health and animal product safety assurance system in the Country of Origin".[12] MoA 34/2016 does not state that desk review of the safety assurance system cannot be initiated until the application for halal assurance has been filed.

12. *Second*, Indonesia refers to the eleventh WTO Ministerial Conference and the year-end closure of the WTO as events that delayed RPT negotiations and justified its inaction between the adoption of the original panel report and the expiry of the RPT. Neither event provides justification for Indonesia to delay taking implementing action. The DSU "requires cessation of all WTO-inconsistent conduct immediately upon the adoption of the DSB's recommendations and rulings or no later than

[3] Original panel report, para. 7.522. (original emphasis)
[4] Original panel report, para. 7.531.
[5] Original panel report, para. 7.532.
[6] Original panel report, para. 7.535.
[7] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1494. See also Panel Report, *US – Poultry (China)*, para. 7.353.
[8] Indonesia's first written submission, paras. 149-150.
[9] Appellate Body Report, *US — Zeroing (Japan) (Article 21.5 — Japan)*, para. 169.
[10] See Brazil's comments on Indonesia's response to Panel questions Nos. 5(a), 5(b) and 5(c).
[11] MoA 34/2016, Article 15(1)(c). (Exhibit BRA-10 (BRA-48-OP))
[12] MoA 34/2016, Article 15(1)(b). (Exhibit BRA-10 (BRA-48-OP))

upon expiration of the [RPT]".[13] Indonesia was thus required to take implementing action, including with respect to the adopted findings of the original panel under Article 8 and Annex C(1)(a), during the Ministerial Conference and during the year-end closure of the WTO. That the Ministerial Conference and the year-end closure may have prolonged the negotiations between the parties on the RPT is irrelevant.

13. Ultimately, Indonesia agreed to an RPT of eight months from the DSB's adoption of the original panel report, and thus accepted that this period was sufficient, regardless of the Ministerial Conference and the year-end closure, to bring itself into full compliance with the DSB's recommendations and rulings. In any case, it is unclear how a Ministerial Conference in Buenos Aires and the year-end closure of the WTO in Geneva would have any impact on the work of a technical agency in Jakarta.

14. *Third*, Indonesia seeks to justify its inaction between the adoption of the original panel report and the expiry of the RPT on the basis of an alleged need for updated information, which, according to Indonesia, was communicated to Brazil prior to its formal letter of 31 May 2018 during the negotiations of the RPT.[14] The e-mail relied on by Indonesia in support of its assertion that Indonesia had requested updated information from Brazil during RPT negotiations between the parties' Permanent Missions in Geneva is unavailing.

15. The bilateral negotiations between the two Missions then focussed on concluding an agreement with respect to the RPT pursuant to Article 21.3(b) of the DSU. Nothing discussed in these RPT negotiations purported to constitute a *compliance step* in relation to the DSB recommendations and rulings under Article 8 and Annex C(1)(a) of the SPS Agreement. If anything, the communications between the parties indicate agreement that the processing of Brazil's application was not contingent on Indonesia receiving updated information from Brazil.[15]

16. The reality is that the first time Indonesia requested Brazil to submit a new questionnaire was in its 31 May 2018 letter.

17. Since the adoption of the DSB recommendations and rulings, Brazil has been consistent in its position that the sanitary information that had already been submitted to Indonesia remained valid. Brazil reiterated its position to Indonesia in a letter sent on 29 March 2018, shortly after the notification of the agreed RPT.[16] If Indonesia had a different understanding from the bilateral discussions, it was incumbent on Indonesia to communicate its position to Brazil immediately upon receipt of the 29 March 2018 letter.

18. Indonesia did not do so. Instead, Indonesia waited until 31 May 2018 to reply to Brazil. It is telling that Indonesia's 31 May 2018 letter makes no reference to an alleged earlier request made to Brazil to submit updated questionnaires. If Indonesia was in fact relying on an earlier request made to Brazil, the natural thing would have been for Indonesia to mention the earlier request in the 31 May 2018 letter. The absence of any reference in the 31 May 2018 letter to an earlier request undermines Indonesia's attempt to rely on such supposed request.

19. In any event, Indonesia's authorities should have replied immediately to Brazil's letter of 29 March 2018, correcting any misunderstanding of the steps required in the process. Moreover, Indonesia's authorities should have begun the review of the application already in their possession since 2009. Implementation of the DSB recommendations and rulings required Indonesia to proceed as expeditiously as possible. This meant reviewing the information it already had and, to the extent information needed updating, being as narrow and precise as possible in requesting updated information.

20. The record, however, clearly shows that Indonesia did not even bother to review the information that had already been submitted by Brazil. The 31 May 2018 letter makes clear that the review procedures had not even been "trigger[ed]".[17] At the substantive meeting with the Panel,

[13] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 169.
[14] Indonesia's first written submission, paras. 152 and 154.
[15] See Brazil's response to Panel question No. 6; Brazil's comment on Indonesia's response to Panel question No. 5(d); Brazil's comment on Indonesia's response to Panel question No. 6.
[16] Exhibit BRA-02.
[17] Exhibit BRA-03.

Indonesia admitted that the decision to request Brazil to submit an entirely new application was made by its WTO Mission in Geneva. This further confirms that the decision was not based on a technical assessment by Indonesia's sanitary authorities. This again shows that, in the six months that elapsed from the adoption of the DSB recommendations and rulings, Indonesia's sanitary authorities had remained entirely passive, making absolutely no effort to comply with the DSB recommendations and rulings.

21. The above demonstrates that, although compliance with Article 8 and Annex C(1)(a) required Indonesia to proceed to undertake the desk review of Brazil's application immediately after the adoption of the original panel report on 22 November 2017, if not sooner, Indonesia did not do so. Indonesia did nothing until 31 May 2018—more than six months after DSB adoption—when its Permanent Mission, and not its technical authorities, requested Brazil to file an entirely new questionnaire all over again. This six-month period during which Indonesian authorities did nothing is time lost due to inaction. Indonesia has not provided a valid justification for such a prolonged delay.

22. Indonesia's self-serving response is to ask this compliance Panel to completely ignore the period preceding the expiration of the RPT.[18] According to Indonesia, "this Panel must start the assessment period … on 23 July 2018—a day after the end of the agreed RPT".[19] Yet, Indonesia *agreed* with Brazil that it would comply with the DSB's recommendations and rulings *within* the RPT.

23. Indonesia misunderstands its compliance obligations under Article 21 of the DSU. Article 21 requires "prompt compliance". Although full compliance must be achieved by the expiration of the RPT, this does not mean that the respondent Member can remain idle during the RPT. As noted by the Arbitrator in *Chile – Price Band System*, "whether or not a Member is able to complete implementation promptly, it must at the very least promptly commence and continue concrete steps towards implementation … [o]therwise, inaction or dilatory conduct by the implementing Member would exacerbate the nullification or impairment of the rights of other Members cause by the inconsistent measure".[20] Accordingly, the Panel must take into account Indonesia's failure to commence implementation promptly after the adoption of the DSB recommendations and rulings and the unjustified inaction prior to the expiration of the RPT.

24. In any event, after the expiration of the RPT and up to the establishment of the compliance Panel in June 2019, Indonesia continued to cause further undue delay in the undertaking and completion of its approval procedures. After Brazil submitted an updated application on 12 September 2018, Indonesia's authority took 9 months to review it and responded a day after the Panel was established. This period is excessive in normal circumstances, and all the more so in the context of complying with the DSB's recommendations and rulings.

25. Indonesia agreed to a RPT of 8 months, thus acknowledging that this period of time was sufficient to bring itself into compliance with its obligations under Article 8 and Annex C(1)(a) of the SPS Agreement. The nine-month period should have sufficed for Indonesia to comply with the recommendations and rulings of the DSB in this dispute because it exceeds the amount of time Indonesia itself deemed to be a reasonable period of time for compliance. In effect, from November 2017 to June 2019, Indonesia had the equivalent of more than two RPTs to undertake and complete its control, inspection and approval procedure. Yet, it has not even moved from step 1 of this procedure.

26. The nine-month period between the submission of the updated questionnaire by Brazil and Indonesia's response is unjustifiable in itself. This is all the more so considering that Indonesia has not at all argued that the review required nine months because of the quantity of information that needed to be reviewed or because of the complexity of the information. Instead, the reasons given by Indonesia are all bureaucratic in nature and cannot justify the delay.[21]

27. Indonesia should have utilized every flexibility available to it to process Brazil's updated application with the appropriate dispatch required by Article 8 and Annex C(1)(a). Yet, Indonesia did not do so. It is well established, however, that "all flexibilities within the legal system of an

[18] Indonesia's first written submission, paras. 127-128.
[19] Indonesia's first written submission, para. 128.
[20] Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 43.
[21] Indonesia's first written submission, para. 111.

implementing Member must be employed in the implementation process".[22] Indonesia acknowledged during the substantive meeting with the Panel that its Expert Committee met on 12 February 2019, but did not consider Brazil's application. Indonesia also acknowledged that the applicable legislation allowed the Expert Committee to meet more frequently, but Indonesia failed to avail itself of this flexibility. In addition, Indonesia has admitted that other applications were given priority over Brazil's application, notwithstanding the fact that Brazil's application had been pending for almost 10 years.[23]

28. The evidence is clear that, by the time of the Panel's establishment, Indonesia continued to unduly delay the advancement of its approval procedures in contravention of Article 8 and Annex C(1)(a) of the SPS Agreement. For reasons that Brazil has explained, the date of this Panel's establishment is the appropriate end-date for the Panel's assessment under Article 8 and Annex C(1)(a).[24] Accordingly, Indonesia failed to comply with the DSB's recommendations and rulings under Article 8 and Annex C(1)(a) of the SPS Agreement and, by the time this Panel was established, continued to cause undue delay in the undertaking and completion of its approval procedures in violation of those provisions.

29. The undue delay continued after the Panel was established. On 2 August 2019, Brazil responded to Indonesia's letter of 25 June 2019 and provided all information that Indonesia had requested.[25] Indonesia waited two months, only to send a response on 14 October 2019 communicating a need for yet further information. Indonesia also stated in its 14 October 2019 letter that "[a]fter the documents are completed, the process of country approval can … proceed to the on-site inspection".[26]

30. Indonesia's bald assertion that it cannot proceed to on-site review unless and until it receives the additional information requested in its 14 October 2019 letter is unavailing, and fails to provide any technical reasons why on-site review is conditional on receiving this information. Indonesia is asking for *further* information that had not been previously requested and that could have been requested earlier.[27]

31. By continuously conditioning the advancement of its approval procedures on receiving further information, Indonesia continues to disregard the guidance of the original panel. In this regard, the original panel found that "Annex C(1)(a) requires WTO Members "to take an action or proceed, despite the irregularities in the application, to the extent practical as opposed to waiting for the submission of all relevant information".[28]

32. Therefore, Brazil has demonstrated, above, that there continued to be undue delay in the approval of Brazil's application for a veterinary health certificate over three periods: (i) between the adoption of the original panel report and the expiry of the RPT; (ii) between the expiry of the RPT and the establishment of the Panel; and, (iii) between the establishment of the Panel and the current period. Brazil underscores, however, that an assessment of "undue delay" within the meaning of Annex C(1)(a) of the SPS Agreement must take into account *all* relevant facts and circumstances[29] and, as such, Indonesia's actions and omissions should be viewed holistically, as part of a continuum during which Indonesia has refused to act with appropriate dispatch and, instead, has looked for pretexts to continue excluding Brazilian chicken from the Indonesian market, in continued violation of its WTO obligations.

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[22] Award of the Arbitrator, *China – GOES (Article 21.3(c))*, para. 3.46.

[23] Indonesia's first written submission, para. 140; Indonesia's responses to the Panel's question during the substantive meeting with the parties.

[24] Brazil's second written submission, paras. 43-49; Brazil's comment on Indonesia's response to Panel question No. 3.

[25] Brazil's response to the 25 June 2019 letter from the Ministry of Agriculture of the Republic of Indonesia (Directorate General of Livestock and Animal Health) (2 August 2019). (Exhibit BRA-18)

[26] Letter from the Ministry of Agriculture of Indonesia (Directorate General of Livestock and Animal Health Services) to the Ambassador of Brazil to Indonesia (25 June 2019). (Exhibit BRA-07)

[27] Brazil's opening statement, paras. 34-41; Brazil's comment on Indonesia's response to Panel question No. 15(b);

[28] Original panel report, para. 7.522.

[29] Panel Report, *US – Animal Products*, para. 7.116 (quoting Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1497). See also Panel Report, *US – Poultry (China)*, para. 7.354; Appellate Body Report, *Australia – Apples*, para. 437.

33. For the reasons stated above, Brazil respectfully requests the Panel to find that Indonesia has failed to implement the DSB's recommendations and rulings with respect to Article 8 and Annex C(1)(a) of the SPS Agreement.

## III. THE POSITIVE LIST REQUIREMENT IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994 AND ARTICLE 4.2 AND FOOTNOTE 1 OF THE AGREEMENT ON AGRICULTURE

34. Brazil has demonstrated that the positive list requirement—i.e., the requirement for the products at issue to be listed in order for their importation to be allowed[30]—continues to be inconsistent with Article XI:1 of the GATT 1994 and is also inconsistent with Article 4.2 of the Agreement on Agriculture. Although Brazil's first and second written submissions address the positive list requirement as reflected in different sets of legal instruments (due to the constant changes to Indonesia's import regime), the measure addressed in both submissions is the same – i.e., the requirement for the products at issue to be listed in order for their importation to be allowed.[31]

35. Brazil recalls that Article XI:1 sets forth a strict legal discipline proscribing Members from maintaining both prohibitions and restrictions "other than duties, taxes or charges" on imported products. The requirement that chicken meat and chicken products be listed in order for their importation to be allowed constitutes a "prohibition" or, in the alternative, a "restriction", within the meaning of Article XI:1 of the GATT 1994. Accordingly, Indonesia has failed to comply with the DSB recommendations and rulings concerning the positive list requirement.

36. The original panel found that the positive list requirement constitutes a "prohibition" within the meaning of Article XI:1. The original panel explained that "the positive list requirement qualifies as a 'legal ban' because the direct legal consequence of not being listed as a product is that importation of that product is not allowed".[32]

37. Accordingly, as found by the original panel, the positive list requirement is the requirement for the products to be on the list as a legal condition for importation. Hence, in order to comply with the DSB recommendations and rulings, Indonesia was required to eliminate the requirement for the products to be listed as a legal condition for their importation. Indonesia has not done so. The products at issue are still required to be listed in the appendices of Indonesia's regulations for their importation to be allowed.

38. Alternatively, the "legal condition" for importation represented by the positive list requirement constitutes an impermissible "restriction" under Article XI:1, because it generates significant uncertainty regarding market access for the products at issue. The fact that the products at issue must be included on a list that can be changed in order for their importation to be allowed signals to exporters that market access is neither certain nor guaranteed. Instead, market access is conditional on the products at issue remaining on the list, which, in turn, depends exclusively on the discretion of Indonesia's authorities. This generates uncertainty for exporters, affects the predictability needed to plan future trade, and thus has limiting effects on importation contrary to Article XI:1 of the GATT 1994.

39. The uncertainty generated by the positive list requirement is reinforced by elements of the measure's design and structure. The composition of the list is left entirely to the discretion of Indonesia's authorities. Indonesia has not identified any criteria that would limit Indonesian authorities' discretion to add or remove products from the list.

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[30] The original panel, citing relevant WTO case law, similarly noted "the difference between … measures at issue and the legal instruments embodying those measures". See original panel report, para. 7.81 (citing Panel Report, *Argentina – Footwear*, paras. 8.40 and 8.41; and Appellate Body Report, *US – Upland Cotton*, paras. 262 and 270).

[31] The original panel, citing relevant WTO case law, similarly noted "the difference between … measures at issue and the legal instruments embodying those measures". See original panel report, para. 7.81 (citing Panel Report, *Argentina – Footwear*, paras. 8.40 and 8.41; and Appellate Body Report, *US – Upland Cotton*, paras. 262 and 270).

[32] Original panel report, para. 7.116.

40. The lack of any criteria means that there is no transparency with respect to the exercise of Indonesian authorities' discretion, which, in turn, means that the process is not predictable. The panel in *Argentina – Import Measures* found a violation of Article XI:1 on the ground that the measure at issue was "characterized by a lack of transparency and predictability, which further discourages imports".[33] Indonesia's positive list requirement is similarly characterized by a lack of transparency and predictability.

41. Brazil recalls that "the very *potential*" to limit trade is sufficient to constitute a "restriction" within the meaning of Article XI:1.[34] Because market access is conditional on the products at issue remaining on the list, which, in turn, depends exclusively on the discretion of Indonesia's authorities, exporters face uncertainty as to the market access conditions that will apply to their products. Market access can be withdrawn arbitrarily and without notice, based on undefined discretion enjoyed by Indonesia's authorities. The positive list requirement thus does not "create the predictability needed to plan future trade", which Article XI:1 was designed to protect.[35]

42. Brazil acknowledges that WTO Members retain the right to restrict market access for products in pursuit of legitimate objectives as defined in Article XX of the GATT 1994, *provided* that the requirements of that provision are met. Indonesia has not suggested, much less substantiated, that the positive list requirement is justified under Article XX. This demonstrates that there is no legitimate purpose for the positive list requirement.

43. For the reasons stated above, the requirement that chicken meat and chicken products be listed in order for their importation to be allowed constitutes a "prohibition" or, in the alternative, a "restriction", within the meaning of Article XI:1 of the GATT 1994, which covers both situations. Accordingly, Indonesia has failed to comply with the DSB recommendations and rulings concerning the positive list requirement.

44. Indonesia argues that, if the Panel were to find that the positive list requirement constitutes a violation of Article XI:1 of the GATT 1994, Indonesia would have rebutted the presumption of nullification or impairment solely on the basis of the inclusion of the products at issue on the positive list.[36]

45. Indonesia misunderstands the mandate of the compliance panel under Article 21.5 of the DSU. If the compliance panel finds that the inclusion of the products on the list does not bring Indonesia into compliance with its WTO obligations, the compliance Panel would consequently conclude that Indonesia continues to violate Article XI:1 of the GATT 1994. Once the compliance panel reaches this conclusion, it would have completed its task under Article 21.5 of the DSU. Any question pertaining to the level of nullification or impairment in light of the operation of the positive list requirement with respect to the products at issue is to be determined by an arbitrator appointed under Article 22.6 of the DSU. This is not the task of this compliance Panel.[37]

46. In any event, even if nullification or impairment were relevant to the compliance Panel's task (*quod non*), Indonesia would bear the burden of rebutting the presumption that the violation of Article XI:1 nullifies or impairs benefits accruing to Brazil.[38] The threshold for rebutting the presumption of nullification or impairment is high. As the Appellate Body has held, "[t]he text of Article 3.8 of the DSU suggests that a Member may rebut the presumption of nullification or impairment by demonstrating that its breach of WTO rules has no adverse impact on other Members".[39] Highlighting the high threshold for rebutting the presumption of nullification or impairment flowing from a violation of obligations under the GATT 1994, "[a]t least one GATT Panel

[33] Panel Report, *Argentina – Import Measures*, para. 6.264.

[34] Panel Report, *China – Raw Materials*, para. 7.1081 (emphasis original). See also Brazil's response to Panel question No. 41.

[35] GATT Panel Report, *US – Superfund*, para. 5.2.2.

[36] Indonesia's response to Panel question No. 44.

[37] See Decision by the Arbitrator, *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 41.

[38] Article 3.8 of the DSU makes clear that: "In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge".

[39] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 299 (underlining added).

has described the presumption of nullification or impairment arising from a violation of GATT provisions 'in practice as an irrefutable presumption'".[40]

47. Despite this high threshold, Indonesia has failed to provide *any* substantiation for its assertion that the inclusion of the products at issue in the appendices of its regulations would rebut the presumption of nullification arising from a violation of Article XI:1. Indonesia must demonstrate that, with the inclusion of products in the appendices of its regulations, the positive list requirement has *no* adverse impact on competitive opportunities for potential Brazilian exports of the products at issue. Indonesia has not even *attempted* to demonstrate this, and has, instead, limited its argument to a bald assertion that the inclusion of the products at issue on the list rebuts the presumption of nullification or impairment.

48. Finally, as regards the consistency of the positive list requirement with Article 4.2 and footnote 1 of the Agreement on Agriculture, the positive list requirement clearly imposes a prohibited "quantitative import restriction" or a "similar border measure other than ordinary customs duties", within the meaning of Article 4.2 and footnote 1.[41] This is because 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".[42] This has not changed with the addition of the products at issue to the relevant annexes of MoA 42/2019 and MoT 29/2019, as amended by MoT 72/2019. The positive list requirement still exists and its nature has not changed because the entitlement of the products to be imported continues to derive from the positive list.

49. Accordingly, Brazil requests that the Panel find that the positive list requirement is inconsistent with Article 4.2 and footnote 1 of the Agreement on Agriculture.

## IV. INDONESIA HAS FAILED TO COMPLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS REGARDING THE INTENDED USE REQUIREMENT

50. Brazil has further demonstrated that Indonesia has failed to comply with the DSB's recommendations and rulings with respect to the intended use requirement and its enforcement provisions. In its submissions, Brazil demonstrated that the intended use requirement and its enforcement provisions under the regulations in force when the Panel was established continued to be inconsistent with Article III:4 of the GATT 1994, and were also inconsistent with Article XI:1 of that Agreement.[43]

51. Indonesia has not addressed, much less rebutted, Brazil's demonstration in this regard. Accordingly, the Panel should find that, at the date of its establishment, the intended use requirement and its enforcement provisions continued to be inconsistent with Article III:4 and were also inconsistent with Article XI:1.[44] The Panel should further conclude that Indonesia failed to comply with the relevant DSB recommendations and rulings within the RPT.

52. Turning to the intended use requirement and its enforcement provisions under the latest amendments to Indonesia's regulations, Brazil has demonstrated that, despite those amendments, the intended use requirement and its enforcement provisions continue to be inconsistent with Article III:4 of the GATT 1994, and are also inconsistent with Article XI:1 of that Agreement.[45]

53. Indonesia continues to enforce the cold storage requirement, which determines whether an intended use is allowed, in a manner that provides less favourable treatment to the "like" imported products at issue, in violation of Article III:4 of the GATT 1994. The original panel found that strict sanctions applied to importers deviating from the cold storage requirement by selling to places without cold chain facilities. The original panel also found that, by contrast, "domestic sellers who

[40] Panel Report, *Mexico – Corn Syrup*, para. 7.28 (quoting GATT Panel Report, *US – Superfund*, para. 5.1.3).

[41] Brazil's first written submission, para. 196.

[42] Brazil's first written submission, para. 196 (quoting Appellate Body Report, *Chile – Price Band System*, para. 227).

[43] Brazil's first written submission, paras. 103-155.

[44] See e.g. Appellate Body Report, *EC – Hormones*, para. 104. ("…It is also well to remember that a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case")

[45] Brazil's second written submission, paras. 135-148.

would sell frozen or chilled chicken without respecting the cold storage requirement, do not face a comparable sanction – if any sanction at all".[46] The original panel thus found that "the stricter sanctions applying to imported frozen and chilled chicken, result in a competitive disadvantage for imported products".[47] This finding also led the original panel to conclude that there was less favourable treatment of like imported products with respect to the enforcement provisions of the intended use requirement, in violation of Article III:4 of the GATT 1994.[48]

54. The original panel's findings continue to apply with respect to Indonesia's current regulations. Sanctions apply to importers deviating from the cold storage requirement by selling to places without cold chain facilities. As Indonesia accepts, "[o]nce the Import Recommendations or Import Approvals are issued, importers must comply", and if they do not, "indeed there will be sanctions".[49] If importers were to sell frozen or chilled chicken without respecting the cold storage requirement, they could be "proven to have submitted incorrect data and/or information", leading to the revocation of the Import Approval and total exclusion from the Indonesian market.[50] Indonesia also confirms that, if importation is inconsistent with information contained in an Import Approval, the imported product must be destroyed by the importer at its own expense in addition to the Import Approval being revoked.[51]

55. By contrast, domestic sellers "do not face a comparable sanction – if any sanction at all", as had already been found by the original panel.[52] MoA Decree 306/1994, the regulation that the original panel found to apply in respect of like domestic products, has not been modified.[53] Accordingly, the Panel should find that Indonesia continues to enforce the cold storage requirement, which determines whether an intended use is allowed, in a manner that provides less favourable treatment to the "like" imported products at issue, in violation of Article III:4 of the GATT 1994.

56. In its response to questions of the Panel after the substantive meeting, Indonesia, for the first time, identified MoA 14/2008 as a regulation that would apply where an importer sells chicken in a market without cold storage facilities. Indonesia further asserts that this regulation makes "no distinction between local products and imported products".[54]

57. The Panel cannot rely on any assertions made by Indonesia with respect to MoA 14/2008 because Indonesia failed to submit MoA 14/2008 as an exhibit in these proceedings. This precludes Brazil and the Panel from verifying Indonesia's allegations.

58. First, as the Appellate Body has held, it would be inconsistent with a panel's duty under Article 11 of the DSU for a panel to make any findings that lack a sufficient evidentiary basis in the record.[55] MoA 14/2008 is not in the record and thus cannot form the basis of any findings of the Panel in these proceedings.

59. Second, Brazil has not had an opportunity to verify and examine MoA 14/2008 as a consequence of Indonesia's failure to raise arguments pertaining to this regulation at a sufficiently early stage of these proceedings, and to place that regulation on the record. If Indonesia wished for MoA 14/2008 to be taken into account as evidence in these proceedings, it had an obligation to place MoA 14/2008 on the record in accordance with paragraph 5(1) of the Panel's Working Procedures. Indonesia had several opportunities to place MoA 14/2008 on the record of these proceedings and yet failed to do so.

60. Third, and in any event, Indonesia's assertions with respect to MoA 14/2008 contradict Indonesia's position in the original proceedings and the adopted findings of the original panel, and should be rejected accordingly. The title of MoA 14/2008 indicates that it entered into force in 2008;

[46] Original panel report, para. 7.326.
[47] Original panel report, para. 7.326.
[48] Original panel report, paras. 7.330.
[49] Indonesia's second written submission, para. 73.
[50] Article 15A and Article 28 of MoT 29/2019, as amended by MoT 72/2019. See also Indonesia's second written submission, para. 73.
[51] Indonesia's second written submission, para. 38 (referring to Article 31(2) and (3) of MoT 29/2019 )
[52] Original panel report, para. 7.326.
[53] Indonesia's comments on Brazil's response to Panel question No. 31, para. 43.
[54] Indonesia's response to Panel question No. 30, p. 20.
[55] Appellate Body Report, *EC – Fasteners (China)*, para. 441 ("Pursuant to Article 11 of the DSU, a panel, as a trier of facts, must base its findings on a sufficient evidentiary basis on the record").

*seven years* before the original panel was established. Yet, Indonesia never referred to MoA 14/2008 in the original proceedings and it is not on the record of the original proceedings.

61. The original panel expressly noted in this regard that "Indonesia has not referred to any sanction that could apply to the domestic distributor who sold the frozen chicken to the seller in the traditional market".[56] Indonesia did not appeal the original panel's finding that "domestic sellers who would sell frozen or chilled chicken without respecting the cold storage requirement, do not face a comparable sanction – if any sanction at all".[57] Yet, Indonesia now alleges that, pursuant to an alleged regulation already in force at the time of the original panel proceedings (MoA 14/2008), sanctions apply for failure to respect the cold storage requirement and "no distinction [is made] between local products and imported products".[58]

62. Indonesia's assertions cannot be reconciled with the adopted findings of the original panel that Indonesia accepted and did not appeal. As the Appellate Body has held, a "panel finding which is not appealed, and which is included in a panel report adopted by the DSB, must be accepted by the parties".[59] The Panel should accordingly reject Indonesia's assertions with respect to MoA 14/2008 as they contradict the adopted findings of the original panel and would inappropriately disturb the finality of adopted DSB recommendations and rulings.

63. Brazil turns now to its claim under Article XI:1 of the GATT 1994 with respect to the intended use requirement. The intended use requirement and its enforcement provisions as reflected in the latest amendments to Indonesia's regulations are also inconsistent with Article XI:1 of the GATT 1994. This is because they have a limiting effect on the importation of chicken meat and chicken products into Indonesia. As such, they constitute an impermissible "restriction" under Article XI:1. As the Appellate Body explained in *China – Raw Materials*, "Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported".[60]

64. The limiting effect is readily ascertainable based on the design, architecture, and revealing structure of the Indonesia's regulations. As noted, if importers were to sell frozen or chilled chicken without respecting the cold storage requirement—which determines whether an intended use is allowed—they could be "proven to have submitted incorrect data and/or information", leading to the revocation of the Import Approval and total exclusion from the Indonesian market.[61] Such penalties necessarily have a limiting effect on the importation of chicken meat and chicken products, as they reduce the number of market operators and foreclose the opportunity for certain operators to participate in the market.

65. Accordingly, the Panel should find that the intended use requirement and its enforcement provisions under Indonesia's regulations are inconsistent with Article XI:1 of the GATT 1994.

## V. INDONESIA'S REVISIONS TO THE LIMITATIONS ON AMENDING LICENCE TERMS ARE INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

66. Finally, Brazil has demonstrated in these proceedings that Indonesia has failed to comply with the DSB recommendations and rulings regarding the limitations on amending licence terms under Indonesia's licensing regime. In the original proceedings, those limitations were referred to as "fixed licence terms". The original panel described the fixed licence terms as "the limitation imposed by the relevant regulations … on the possibility of an importer to modify certain aspects of a MoA Import Recommendation and a MoT Import Approval".[62] The original panel found this limitation to constitute an impermissible "restriction" under Article XI:1 of the GATT 1994.

67. Indonesia asserts compliance based on the availability in its revised regulations of a procedure purportedly allowing importers to apply to amend licence terms. Yet, to comply with the DSB

[56] Original panel report, para. 7.326.
[57] Original panel report, para. 7.326.
[58] Indonesia's response to Panel question No. 30, p. 20.
[59] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 93.
[60] Appellate Body Reports, *China – Raw Materials*, para. 320.
[61] Article 15A and Article 28 of MoT 29/2019, as amended by MoT 72/2019. See also Indonesia's second written submission, para. 73.
[62] Original panel report, para. 7.361.

recommendations and rulings, Indonesia must not merely establish formal procedures for importers *to apply* for amendments. Instead, Indonesia must *allow* such amendments to be made automatically and expeditiously, without being subject to the discretion of Indonesia's authorities to reject applications for amendments. Only in this way can importers respond to changes in business opportunities and market conditions in real time.

68. The revisions to Indonesia's import licensing regime continue to constrain the ability of importers to amend licence terms. In particular, the ability of importers to amend licence terms is subject to undefined discretion that Indonesia has bestowed on its authorities to reject applications for amendments. As other panels have found, for instance in *China – Raw Materials* and *India – Quantitative Restrictions*, requirements allowing for "undefined discretion" in licensing agencies to reject applications can amount to an impermissible "restriction" within the meaning of Article XI:1.[63]

69. Indonesia's regulations require that applications to amend an Import Recommendation be accompanied by a stamped certificate stating "the reasons" for the requested amendment.[64] This indicates that modification of the Import Recommendation will depend on the analysis of the reasons given and thus on the discretion of Indonesian authorities. The regulation also expressly states that the change requested "can" be accepted, further indicating discretion on the part of Indonesian authorities.[65]

70. Indonesia asserts that the "requirement to submit a stamped affidavit stating the reasons for amending the licence terms is only to provide further information for administrative purpose".[66] Indonesia tries to explain that, if an importer requests to change the address of the company, reasons are required so that its authorities (in this case the Ministry of Agriculture) know whether "they have moved their office or whether the old address is still used or not or there is other reason".[67] However, Indonesia offers no explanation for why the Ministry of Agriculture would require such information.

71. In any event, if an importer has requested to amend the "address of the company", the reason for the amendment is evident from the application itself, i.e., that there has been a change of address. The same is true with respect to Indonesia's explanation of why reasons are required when an importer requests an amendment regarding the quantity of products to be imported. If an importer has requested to "increase the quantity" stated in an Import Recommendation, the reason for the amendment is evident from the application itself, i.e., that there has been an increase in demand for the products.

72. Similarly, Indonesia has not explained why its Ministry of Agriculture would "want to know the reasons why importers want to change the ports whether there is any problem with the existing port or whether there is other business opportunity in different cities or regions or if there is any other reason".[68] Again, Indonesia offers no explanation for why the Ministry of Agriculture would require this particular information. Nothing in MoA 42/2019 suggests that the Ministry of Agriculture is an agency responsible for the operation of Indonesia's ports. Nor is there any provision in MoA 42/2019 that indicates follow-up action on the part of the Ministry of Agriculture to address any reasons given for requesting amendments.

73. Hence, if anything, the examples put forward by Indonesia demonstrate that there is no purpose behind the requirement to submit reasons other than to reinforce the discretion of Indonesia's authorities to reject applications for amendments.

74. Indonesia further contends that the phrase "can be accepted" in Article 44(3) MoA 42/2019 means that Indonesian authorities have "the power to accept the application when it is complete

[63] Panel Report, *China – Raw Materials*, paras. 7.957-7.958. See also Panel Report, *India – Quantitative Restrictions*, para. 5.130. ("discretionary or non-automatic licensing systems by their very nature operate as limitations on action since certain imports may not be permitted")

[64] Article 44(2)(b) of MoA 42/2019.

[65] Article 44(3) of MoA 42/2019.

[66] Indonesia's response to Panel question No. 52.

[67] Indonesia's response to Panel question No. 52.

[68] Indonesia's response to Panel question No. 52.

and proper", and that this does not establish discretion to reject an application to amend a licence term.[69]

75. The terms "can" and "shall" carry distinct meaning. The former is discretionary while the latter is mandatory. Indonesia seeks to ascribe to the phrase "can be accepted" a meaning that it does not have, in an attempt to distort the fact that it has preserved for its authorities the discretion to reject applications for amendments. If Indonesia's authorities were required to accept any application for an amendment that fulfils importation requirements, the mandatory term "shall" rather than the discretionary term "can" would have been used in Article 44(3) of MoA 42/2019.[70]

76. Indonesia's authorities are not commanded to accept applications for amendments. Instead, they have the "power to accept" and also, by the same token, the power to reject an application.

77. For Indonesia, discretion would exist when "there is power to accept or reject but there is no clear objective guidance on what constitutes complete and proper".[71] Indonesia fails to recognize that the so-called "objective parameters on what constitutes complete and proper applications" are not objective at all.

78. One of these "parameters" is the requirement for the importer to provide a stamped statement giving reasons for the amendment, which must be attached to the application.[72] As Indonesia has acknowledged, an application will be rejected if a stamped certificate stating the reasons for the amendment is not attached.[73] While MoA 42/2019 requires reasons for an amendment to be provided by the importer, it *does not* say that those reasons must be automatically accepted by Indonesia's authorities, which means that discretion is bestowed on Indonesia's authorities.

79. Finally, Indonesia's argument that compliance could additionally be achieved in ways other than by allowing importers to amend existing licences contradicts its own understanding of what substantive compliance would entail. In this regard, Indonesia declared as its measure taken to comply with the original panel's findings MoA 23/2018 and MoA 65/2018, which Indonesia asserted "allowed [importers] to modify the information contained in the import licences".[74]

80. Although Indonesia understood then that its compliance obligations with respect to the panel findings on fixed licence terms required it to "allow … [importers] to modify the information contained in the import licences",[75] the fact is that Indonesia stopped short of achieving full substantive compliance by merely allowing for importers to *apply* for amendments to be made to licence terms, while retaining unfettered discretion to reject applications for amendments.[76]

81. To comply with the DSB recommendations and rulings, Indonesia must allow importers to automatically amend the terms of existing licences pertaining to port of entry and quantity of products so that importers may respond to changes in business opportunities. Indonesia has failed to do so by bestowing discretion on its authorities to reject applications to amend licence terms.

82. Accordingly, the Panel should find that the limitations on amending licence terms that continue to exist under Indonesia's licensing regime continues to violate Article XI:1 of the GATT 1994. Thus, the Panel should also conclude that Indonesia has failed to comply with the DSB recommendations and rulings regarding the limitations on amending licence terms under its licensing regime.

[69] Indonesia's second written submission, para. 30.
[70] Brazil's response to Panel question No. 56, para. 178.
[71] Indonesia's response to Panel question No. 55.
[72] Indonesia's second written submission, para. 28.
[73] Indonesia's second written submission, para. 31.
[74] WT/DS484/18/Add.3.
[75] WT/DS484/18/Add.3.
[76] That compliance is not achieved unless importers can actually make amendments rather than merely having the possibility to apply for amendments subject to the discretion of Indonesia's authorities is supported by the notion that a discretionary or non-automatic import licensing requirement is a restriction prohibited by Article XI:1 (see Panel Report, *India – Quantitative Restrictions*, para. 5.129).

## VI. CONCLUSION

83. For these reasons, Brazil requests the Panel to find that Indonesia has failed to achieve compliance with the recommendations and rulings of the DSB in this dispute.

## 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 SPS requirements. The burden falls heavily on the Government of Indonesia to ensure that Indonesia's food supply is safe. Food should be a source of nourishment and enjoyment, not a cause of disease or death.[1] Any potential risk of unsafe food must be clarified, verified, and assessed.

2. In this compliance panel, Brazil challenged Indonesia's laws and regulations relating to the importation of chicken meat and chicken products, including the positive list, the intended use requirements, the fixed license terms and the undue delays in the approval of sanitary requirements for the importation of chicken meat and chicken products.

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. Moreover, Indonesia is committed to further liberalize its trade by enacting measures that are fully consistent with Indonesia's legitimate interests in ensuring food safety. In fact, Indonesia's efforts at further liberalization have resulted in the changes of some measures challenged by Brazil in these proceedings. Indonesia will address these issues in detail in this executive summary.

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

4. Indonesia submitted its request for a preliminary ruling as an attachment to its first written submission concerning Brazil's claims in these compliance panel proceedings where the original panel did not make any rulings nor recommendations.[2] The original panel exercised judicial economy on Brazil's claim of inconsistency with Article 4.2 of the Agreement on Agriculture (AoA) concerning the positive list requirement as well as Brazil's claim of inconsistency with Article XI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) concerning the enforcement provisions of the intended use requirement.[3]

5. Indonesia submits that the Panel's terms of reference under Article 21.5 of the Dispute Settlement Understanding (DSU) shall only assess the measures taken to comply with the recommendations and rulings contained in the original report adopted by the DSB. Indonesia submits that the Panel should not be a venue to re-assess any claim that had not been assessed by the original panel. There must be some limits on claims that can be raised in Article 21.5 proceeding and Indonesia believes that for claims that the original panel did not make any rulings or recommendations shall be considered beyond the limit of Article 21.5 proceedings. Otherwise there will be a systematical issue that Article 21.5 proceedings can be used for re-litigating undecided claims or some sort of "completing the legal analysis" that is not provided in the DSU.

6. In addition, Indonesia submits that it is unnecessary for the Panel to make multiple findings on the same measure that is inconsistent with various provisions when a single finding of inconsistency would suffice to resolve the dispute.

7. Therefore, Indonesia requests the Panel to decline ruling on Brazil's claims where the original panel did not make any rulings nor recommendations, since those claims are outside the terms of

[1] WHO, International Push to Improve Food Safety – International Food Safety opens with call for greater global cooperation, available at https://www.who.int/news-room/detail/12-02-2019-international-push-to-improve-food-safety (accessed on 12 December 2019), Exhibit IDN-34.

[2] Brazil's first written submission, paras. 129-155 and 184-197; Brazil's request for the establishment of a compliance panel (WT/DS484/19).

[3] Original panel report, paras. 8.1(b)(iii) and 8.1(c)(iii)(5).

reference of the Panel in accordance to Article 21.5 of the DSU and addressing those claims is unnecessary to resolve the current dispute.

## III. INDONESIA HAS FULLY COMPLIED WITH THE PANEL FINDINGS AND RECOMMENDATIONS REGARDING THE POSITIVE LIST REQUIREMENT

8. The title of this dispute is "Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products". The measure at issue identified by Brazil in its panel request are certain measures imposed by Indonesia on the importation of meat from fowls of the species *Gallus Domesticus* and products from fowls of the species *Gallus Domesticus* classified under HS (i) 0207.11 (ii) 0207.12; (iii) 0207.13; (iv) 0207.14; and (v) 1602.32 which are referred to as "chicken meat and chicken products".[4] This product coverage has also been confirmed by the panel in the original panel report.[5] All of Brazil's claims regarding the positive list requirement in the original panel is about the non-inclusion of certain chicken products in the list of products that may be imported resulting in the prohibition on the importation of chicken cuts and other prepared or preserved chicken meat which is inconsistent with Article XI:1 of the GATT 1994.[6]

9. Therefore, by the inclusion of all chicken meat and chicken products in the list, Indonesia has fully complied with the panel findings and recommendations with respect to the positive list requirement because there is no more limitation or restriction for importers to apply for Import Recommendations and Import Approvals to import chicken meat and chicken products from any country pursuant to MoA 42/2019 and MoT 29/2019 (as amended by MoT 72/2019) or under MoA 23/2018.[7] The original Panel ruled that the positive list requirement is inconsistent with Article XI:1 of the GATT 1994 because certain chicken meat and chicken products are not listed in the relevant appendices resulting in no import recommendation and/or no import approval can be granted for such products.[8]

10. Yet this effort is still considered insufficient by Brazil. On the contrary to the panel finding, Brazil contends that the only way to comply with the Panel ruling is to abolish the positive list requirement as such.[9] Brazil assumes that all products outside the lists are legally banned. To respond to this false allegation, Indonesia has demonstrated that (1) there is no ban on the importation of animals or animal products outside the lists annexed to MoT 29/2019 as amended by MoT 72/2019; and (2) there is no evidence of nullification or impairment of benefit accruing to Brazil in relation to exporting animals and animal products outside the lists. Brazil never puts forwards any argument or even mentioned what types of animal or animal products, that are outside the list, that cannot be imported from Brazil to Indonesia because of the existence of positive list under MoT 29/2019.[10] In response to the Panel Question No. 37, finally, Brazil confirmed that they are not challenging other products aside from chicken meats and chicken products whether included in the list or not.[11]

11. Brazil's late clarification on the alternative argument to include 'restriction' under their Article XI claim on the positive list requirement only in the substantive meeting or even in the answer to the Panel's Questions would for sure infringe Indonesia's due process rights.[12] Nevertheless, Brazil's loose interpretation, to include possibility of future amendment of a regulation that could create uncertainty in market access as a 'restriction' under Article XI:1 of the GATT 1994, should not be accepted, otherwise, Indonesia believes all laws and regulations enacted by any WTO Member would be inconsistent with Article XI:1 of the GATT 1994.[13] In any event, Indonesia has demonstrated that

[4] Brazil's request for the establishment of a panel, p. 1 and original panel report, para. 2.1 and footnote 6.
[5] Original panel report, para. 2.1 and footnote 6.
[6] Original panel report, paras. 2.5 and para 3.1(b).
[7] Indonesia's first written submission, para. 16.
[8] Original panel report, para. 7.116-7.118.
[9] Brazil's first written submission, para. 181.
[10] Indonesia's second written submission, para. 19.
[11] Brazil's responses to Panel Question no. 37, para. 113.
[12] Indonesia's comments on Brazil's response to panel question no. 38, para.52.
[13] Indonesia's comments on Brazil's response to panel question no. 38, para.54.

since the appendices are integral part of the regulation, modification of the appendices must follow the same procedure as amending the text of the regulations.[14]

12. Therefore, there is no more inconsistency with either Article XI:1 of the GATT 1994 or Article 4.2 and footnote 1 of the AoA concerning the positive list requirement.

## IV. INDONESIA HAS FULLY COMPLIED WITH THE PANEL FINDINGS AND RECOMMENDATIONS REGARDING THE ENFORCEMENT OF THE INTENDED USE REQUIREMENT

13. The original Panel ruled that the enforcement of the intended use requirement is inconsistent with Article III:4 of the GATT 1994 because (1) there was stricter sanctions for imported frozen and chilled chicken, (2) the binding effect of distribution plan, and (3) distribution plan and distribution report increased administrative burden and cost.[15] Indonesia has made modifications following the panel ruling by eliminating any sanctions to importers deviating from the limitation on the allowed uses and by eliminating the obligation to submit distribution plan and weekly distribution report under the current regime, MoA 42/2019.[16] Yet this effort is still considered insufficient by Brazil because according to Brazil (1) importers still continue to have limited ability to switch between end uses and (2) stricter sanctions continue to apply to imported products.[17]

14. First, regarding the limited ability to switch between end uses, Indonesia has made it clear that there is no need for a procedure to enable importers to switch within general-purpose category since the general purpose already encompasses every place with the cold storage facility including foreign embassies, international institutions, research centers, religious or social institutions.[18] As for special-purpose category, Indonesia has clarified that this is for import duty and tax exemption purpose.[19] Following this clarification, Brazil has made it clear during the substantive meeting that Brazil is not challenging the special-purpose category as well as the cold storage requirement.[20] In addition, Brazil has confirmed that they no longer pursue its argument about switching uses either among the end uses within general-purpose and the special purpose category or switching uses between the general-purpose and the special purpose category.[21]

15. As for the sanctions, Indonesia has demonstrated that there is no sanction for importers selling chicken in a market without cold storage facilities under MoT 29/2019 or MoA 42/2019.[22] Equally, there is also no sanction for locally produced frozen chicken to be sold in a market without cold storage facilities under MoA Decree 306/1994. The sanction for selling frozen chicken in a market without cold storage facilities is regulated in MoA 14/2008 which is applicable for both imported and locally produced frozen chicken when sold in markets without cold storage facilities that has negative impact to its safety and quality.[23] In any event, responsibility of importers regarding the cold storage requirement is only until from the moment importer received the goods at the port of entry until the goods are transferred to their warehouse.[24]

16. Brazil's new argument invoking Article 31 of MoT 29/2019 relating to sanctions provision enforcing the cold storage requirement in the intended use requirement shall not be assessed by

[14] Indonesia's response to panel question no. 43.
[15] Original panel report, paras. 7.326 – 7.330.
[16] Indonesia's first written submission, para. 99.
[17] Brazil's second written submission, para. 129.
[18] Indonesia's second written submission, paras. 44-47.
[19] Indonesia's second written submission, para. 45.
[20] Indonesia's response to panel question no. 26; Brazil's response to panel question no. 29.
[21] Brazil's response to panel question no. 25.
[22] Indonesia's response to panel question no. 29.
[23] Indonesia's response to panel question nos. 30-31.
[24] Indonesia's response to panel question no. 28.

the Panel since it was only presented in the substantive meeting and this is not only a clear breach of Indonesia's due process right but also with paragraph 3 (1) of the Panel's Working Procedure.[25]

17. Therefore, there is no more inconsistency with either Article III:4 of the GATT 1994 or Article XI:1 of the GATT 1994 concerning the enforcement provisions of the intended use requirement.

## V. INDONESIA HAS FULLY COMPLIED WITH THE PANEL FINDINGS AND RECOMMENDATIONS REGARDING THE FIXED LICENSE TERMS

18. The original Panel ruled that the fixed license terms is inconsistent with Article XI:1 of the GATT 1994 because there is no procedure to modify certain aspect of import licensing particularly the quantity of the products and port of entry that results in impeding importers from making adjustments to the licensing documents that arise in the normal course of business.[26] Indonesia has made modifications following the panel ruling by adding a provision in the regulations to allow some modifications on certain aspects of an MoA Import Recommendation or an MoT Import Approval and there are no more sanctions for such modification.[27] In addition, importers can always apply for new Import Recommendation and Import Approval when business opportunities change that have impact on the terms in import licensing.[28] Indonesia has demonstrated that importers can have multiple Import Recommendations and Import Approvals even concerning the same products in the same validity period but different quantities, different ports of entry and/or different business units and there is no sanction for not realizing Import Recommendations and Import Approvals that have been granted.[29] Brazil confirms that their claim concerns only on the ability to change the quantity of products and ports of entry.[30]

19. There is a clear, simple and fast procedure to do either one as long as all requirements are fulfilled.[31] All complete and proper application will be accepted.[32] There is a clear definition in the regulation on what constitutes complete and proper application and therefore, there is no undefined discretion as claimed by Brazil. The requirement to submit a stamped affidavit stating the reasons for amending license terms is only to provide further information for administrative purpose.[33] Indonesia has demonstrated that there has been no single amendment application either for Import Recommendation or Import Approval that has been rejected because the authority disproved the reason for the amendment.[34] On the contrary, Brazil never submits any evidence showing that Indonesia has ever rejected an Import Recommendation amendment application because the authority disapproves the reason for an amendment.[35] Indonesia has explained the word "can be accepted" should be understood that the Director General has the power to accept the application when it is complete and proper.[36] To change the word "can" to "shall" will create misunderstanding because not all applications for amendment shall be accepted. Only complete and proper applications will be accepted.[37]

20. There is no cost to apply for Import Approval either for new application or for amendment.[38] As for Import Recommendation, there is a cost of IDR 250,000 or equal to USD 16,5 to apply for new Import Recommendation but there is no cost for amending Import Recommendation.[39] The cost

[25] Indonesia's comments on Brazil's response to panel question no. 33.
[26] Original panel report, para. 7.396.
[27] Indonesia's first written submission, paras. 64-65.
[28] Indonesia's opening statement, para. 22.
[29] Indonesia's response to panel question no. 57.
[30] Brazil's response to panel question no. 46, para. 166.
[31] Indonesia's second written submission, para. 26, Indonesia's closing statement, para. 5.
[32] Indonesia's second written submission, para. 31.
[33] Indonesia's response to panel question no. 52.
[34] Indonesia's response to panel question no. 52.
[35] Indonesia's response to panel question no. 52.
[36] Indonesia's second written submission, para. 30.
[37] Indonesia's response to panel question no. 56.
[38] Indonesia's response to panel question no. 57(d).
[39] Indonesia's response to panel question no.57.

for stamp duty is only IDR 6,000 or equal to around 40-cent USD.[40] Therefore, it shall not be considered to be burdensome requirements to the importers.

21. Therefore, there is no more inconsistency with either Article XI:1 of the GATT 1994 concerning the fixed licensed terms because there is no more impediment for the importers from making adjustments to the current business opportunities.

## VI. INDONESIA HAS FULLY COMPLIED WITH THE PANEL FINDINGS AND RECOMMENDATIONS REGARDING THE UNDUE DELAY IN THE APPROVAL OF THE VETERINARY HEALTH CERTIFICATE

22. The original Panel ruled that the undue delay in the approval of the veterinary health certificate is inconsistent with Article 8 and Annex C(1)(a) of the SPS Agreement because a Member may not delay the completion of an SPS approval procedure because of non-SPS related information i.e. information on halal assurances.[41] Brazil contends that the only way to comply with the Panel ruling is to immediately approve Brazil's health certificate for importation of chicken meat and chicken products and Indonesia has no right (1) to ask for any additional SPS related information including concerning the recent *Salmonella spp.* contamination in Brazil's poultry industry during the desk review stage, (2) to reject the application if the application cannot be verified during the on-site inspection stage or (3) to reject the application if the application does not pass the risk assessment stage because of the risk of *Salmonella spp.* contamination making Brazil's chicken meat and chicken products unsafe for human consumptions.[42] This understanding of the panel's findings and recommendations is incorrect. It is not correct to understand within the RPT, Indonesia must conclude all stages of SPS approval procedure regardless of any findings that substantiate Brazilian chicken meat and chicken products are unsafe for human consumption.

23. Indonesia has fully complied with the panel findings and recommendations concerning the undue delay in the approval procedures. Indonesia has made modifications following the panel ruling by (1) separating the halal requirement from SPS approval procedure, (2) setting up a strict timeframe in the SPS approval procedure and (3) processing the documents submitted by Brazil for desk review.

24. First, Indonesia has explained in details on how MoA 23/2018 as well as MoA 42/2019 have separated halal requirement from SPS approval procedure.[43] Some halal related provisions have been revoked and halal assurance was no longer part of the risk analysis as well as audit.[44] Halal requirement is now regulated as one of the administrative requirements.[45]

25. Second, Indonesia has explained in details where now there is a specific timeframe that should be fulfilled by the veterinary authority to conduct desk review, on-site inspection, risk analysis, and also to conclude and sign a health protocol. Desk review should be done no later than 6 months after the submission of complete and correct application and its required documents.[46] On-site inspection should be done within a period of no later than 6 months after the result of desk review.[47] Risk analysis is done within a period of no later than 12 months after the on-site inspection.[48] The conclusion and signing of a health protocol between Indonesia and exporting country are done within a period of no later than 12 months since the issuance of Ministry of Agriculture Decree concerning Country of Origin and Business Unit Approval.[49]

26. Third, Indonesia has processed Brazil's country of approval application for chicken products. In fact, there has been two desk reviews conducted by the Expert Committee of Animal Health and Veterinary Public Health regarding Brazil's application for country approval for importation of chicken meat and chicken products in June 2019 and October 2019.[50] Indonesia has explained the

[40] Indonesia's response to panel question no. 52.
[41] Original panel report, paras. 7.531-7.534.
[42] Brazil's second written submission, paras. 53-55.
[43] Indonesia's response to panel question no. 2.
[44] Indonesia's response to panel question no. 2.
[45] Indonesia's response to panel question no. 2.
[46] Article 23(4) of MoA 42/2019.
[47] Article 26(4) of MoA 42/2019.
[48] Article 27(3) of MoA 42/2019.
[49] Article 29(2)(b) of MoA 42/2019.
[50] Indonesia's response to panel question no. 2.

chronology of events relating to Brazil's country of origin application after the circulation of the original panel report to substantiate that there has been no undue delay in processing Brazil's country of approval application.[51] Indonesia has demonstrated that there is no undue delay since the adoption of the Panel report until the end of RPT or even from the end of RPT until the substantive meeting of the compliance panel.[52] Indeed, it certainly takes some times to process Brazil's application taking into account the regulation that needs to be revised, the overwhelming applications that needs to be reviewed by the desk review team, the transition period in the expert committee, the ongoing RPT negotiation, and the time needed by Brazil to respond to Indonesia's request for additional information regarding the *Salmonella spp.* contamination. To date, Indonesia cannot proceed Brazil's country of origin application to the on-site inspection stage because Brazil still has not submitted important information regarding the *Salmonella spp.* contamination.

27. The original panel found that a competent body is required to take any action or proceed, despite irregularities in the application, to the extent practical as opposed to waiting for the submission of all relevant information. However, the original panel also noted that inaction caused by the applicant's failure to submit information is justifiable if it relates to the evidence required in order to conduct a risk assessment or other control designed to protect human, animal or plant life or health.[53] To date, Indonesia is still patiently waiting for Brazil's response regarding our request for additional information concerning the presence of *Salmonella spp.* in Brazilian poultry meat. Indonesia need the result of investigations and measures taken by the Brazilian authority regarding their poultry meat products exported to the EU (Albania, Germany, Belgium, Bulgaria, the Netherlands and the United Kingdom), Kingdom of Saudi Arabia and Republic of Korea sent to the Embassy of Brazil in Jakarta on 14 October 2019 and resent on 13 December 2019. The additional information is needed to ensure that *Salmonella spp*. - which classified as foodborne zoonosis - will not contaminate chicken meat products that will be exported from Brazil to Indonesia.

28. Indonesia has also followed this panel ruling by processing Brazil's application for the SPS approval procedure. As the application has been submitted for more than 10 years, according to Indonesia, it is not unreasonable to request Brazil to update all information contained in the questionnaire. Indonesia has explained what kind of information contained in the questionnaire that must have been changed since 2009 and this is confirmed by Brazil's updated questionnaire response that contains more recent information as well as references to new regulations enacted after 2009. This is only a one-time request after 10 years has lapsed and it should not be considered as not credible, irrelevant and causing undue delay. Although the updated application is not submitted to the proper channel pursuant to the regulation, Indonesia, based on good faith, continues to process Brazil's application and conduct desk review on Brazil's application.[54]

29. Nevertheless, due to the recent *Salmonella spp.* contamination in Brazil's poultry industry, EU member states have banned imports of chicken products from Brazil. [55]In addition, a large quantity of Brazilian chicken products has been recalled from Japan, China, Kuwait, Ghana, Bahrain, Gambia, Oman, Angola and Cuba due to the *Salmonella spp.* contamination.[56] As Indonesia has mentioned earlier, food should be the source of nourishment and enjoyment, not a cause of disease or death. The presence of *Salmonella spp.* in chicken products can cause some health risks which makes the food unsafe for consumption. *Salmonella spp.* contamination can cause many health problems such as typhoid fever. Typhoid fever is a systemic infection caused by *Salmonella* Typhi, usually through the ingestion of contaminated food or water and on severe cases may lead to serious complications or even death. According to the most recent estimates, between 11 and 21 million cases and

[51] Indonesia's first written submission, para. 109.
[52] Indonesia's first written submission, paras. 131-154.
[53] Original panel report, para. 7.529.
[54] Indonesia's first written submission, para. 139.
[55] C. Mandl and Ana Mano, "Brazil's BRF recalls chicken export products over salmonella fears", available at https://www.reuters.com/article/us-brf-recall-idUSKCN1Q210V (accessed 17 October 2019), see Exhibit IDN-31; A. Wasley, Alexandra Heal, Andre Campos and Diego Juqueira, "Brazil sent one miliion salmonella-infected chickens to UK in two years", available at https://www.theguardian.com/environment/2019/jul/03/brazil-one-million-salmonella-infected-chickens-uk (accessed 12 December 2019), Exhibit IDN-35.
[56] Indonesia's second written submission, para. 60.

128 thousand to 161 thousand typhoid-related deaths occur annually worldwide.[57] In addition, non-typhoidal *Salmonella* serovars can cause gastroenteritis.[58]

30. Nevertheless, instead of rejecting Brazil's application, Indonesia still opens an opportunity for Brazil to export its chicken meat and chicken products to Indonesia but Indonesia needs more information to ensure that Brazil's chicken meat and chicken products are safe for human consumption as well as animal life or health due to its potential contamination in the environments and facilities. This is not some administrative irregularities in the application, but the information requested is very crucial to ensure that Brazilian chicken meat and chicken products are safe for human consumption and free from *Salmonella spp.* contaminant. As the original panel explained inaction caused by the application's failure to submit information is justifiable if it relates to the evidence required in order to conduct a risk assessment or other control designed to protect human, animal or plant life or health. As we have said in our written submissions, what will be verified in the on-site inspection or how can Indonesia could conduct a risk assessment if information to ensure Brazil chicken products are safe for human consumption is not complete. Even up until this hearing Brazil has not responded to our request for additional information relating to the *Salmonella spp.* contamination sent by the Directorate General of Livestock and Animal Health Services on 14 October 2019 as the result of the second desk review on Brazil's country approval application for chicken meat and chicken products.[59] The letter has been resent by the Ministry of Foreign Affairs on 13 December 2019 to the Embassy of the Federative Republic of Brazil in Jakarta.[60] Indonesia asked for some documents related to the result of the investigation and measures taken by the Brazilian authority regarding the notifications due to the presence of *Salmonella* in Brazilian poultry meat from EU, Kingdom of Saudi Arabia and the Republic of Korea. The documents are needed to ensure that *Salmonella* will not contaminate chicken meat products that will be exported from Brazil to Indonesia. In addition, there has been no updated information submitted by Brazil concerning the questionnaire for business unit until this very moment.

31. However, it is not impossible for Brazil to obtain SPS approval for their chicken meat and chicken products. The same regulation also applies to bovine meat and Brazil has successfully completed the SPS approval process recently. It only took 19 months from application to the conclusion of health protocol on 23 September 2019 for bovine meat.[61] Many countries have also completed the same procedures for various animal products. Indonesia welcomes imported chicken meat and chicken products from Brazil or from any other countries as long as they are safe. If we cannot ensure that they are free from any bacteria, viruses or other contaminants that can cause health problems for our people, we have every right not to approve it and reject the application.

32. Indonesia requests this compliance panel to clarify that it is incorrect to understand the original panel ruling concerning undue delay that the only way Indonesia could comply with the ruling is by approving Brazil's Veterinary Health Certificate for their chicken meat and chicken products without any delay, without having the right to request for any additional information in the desk review stage no matter what the reason is, no matter what Indonesia found during the onsite inspection, no matter what the result of the risk assessment is. Anything that Indonesia does to ensure imported chicken meat and chicken products from Brazil is safe, according to Brazil, will always constitute undue delay which is inconsistent with Annex C(1)(a) and Article 8 of the SPS Agreement. This understanding is not in line with the original panel rulings and recommendations and it needs to be corrected.

33. If Brazil's chicken meat and chicken products are safe then prove it. Brazil should not always hide behind the original panel report to convince that the only outstanding information required to proceed with the desk review stage was only on the halal issue.[62] Once again, we would like to highlight, Indonesia is not anti imports. However, making sure that all imported foods are safe for

[57] World Health Organization, Immunization, Vaccines and Biologicals: Typhoid, available at https://www.who.int/immunization/diseases/typhoid/en/ (accessed on 30 January 2020)

[58] World Health Organization, Salmonella (Non-Typhoidal), available at https://www.who.int/news-room/fact-sheets/detail/salmonella-(non-typhoidal) (accessed on 30 January 2020)

[59] Letter from the Directorate General of Livestock and Animal Health, Ministry of Agriculture of the Republic of Indonesia regarding request for additional information which has been delivered through email dated 14 October 2019, Exhibit IDN-39.

[60] Letter to the Embassy of the Federative Republic of Brazil in Jakarta from the Ministry of Foreign Affairs regarding request for additional information through letter dated 14 October 2019, Exhibit IDN – 42.

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

[62] Brazil's second written submission, para. 61.

our people is of the utmost importance for Indonesia and the WTO shall not take away this right and obligation just because Indonesia is late in responding to Brazil's application. Indonesia is very sure provisions in the SPS Agreement are in line with this goal.

34. As Indonesia explained in all submissions, Indonesia has made modifications following the panel ruling by (1) separating the halal requirement from SPS approval procedure, (2) setting up a strict timeframe in the SPS approval procedure not only for poultry or meat products, but all products that wish to be exported to our market and (3) processing the documents submitted by Brazil for desk review and has presented the results from two desk reviews.[63]

35. With regards to the questionnaire, Brazil argued that Indonesia did nothing after the adoption of the Panel Report until the official letter from on 31 May 2018. To response this argument, Indonesia has explained in the substantive meeting and in its response to panel question specifically on the reason why Brazil's questionnaire should be updated[64] and Indonesia has given sufficient time for Brazil since we have mentioned about this request since February 2018 and followed up by email on 8 March 2018.[65] Indonesia is fully aware that the bilateral negotiations between the parties at the dispute is confidential, however the correspondence are crucial to show that Indonesia has shown some efforts to implement the panel rulings. Brazil has more than enough time to update the questionnaire but yet the designated authority has only received the revised questionnaire in November 2018. Indonesia also has explained why Brazil's application cannot be reviewed in the last meeting of the Expert Committee in February 2019.[66]

36. Further, Indonesia's request after the second desk review has been sent by the Directorate General of Livestock and Animal Health Services on 14 October 2019 to the Embassy of the Federative Republic of Brazil in Jakarta and has been resent by the Ministry of Foreign Affairs on 13 December 2019 where Indonesia asked Brazil to send the investigation result.[67] Now after two desk reviews, Indonesia hopes that Brazil will soon submit all additional information requested by the Expert Committee to prevent any further delay because all of this information is important for Indonesia to ensure Brazil's chicken products that will be exported to Indonesia is safe. Brazil in their response has confirmed that currently they are still compiling the required information and will submit it as soon as possible.[68]

## VII. CONCLUSION

37. 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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[63] Indonesia's first written submission, para. 107; Indonesia's opening statement, para. 10.

[64] Indonesia's response to panel question no. 15(c).

[65] Letter to the Embassy of the Federative Republic of Brazil in Jakarta from the Ministry of Foreign Affairs on 13 December 2019 regarding the request additional information through letter dated 14 October 2019, Exhibit IDN–43.

[66] Indonesia's response to panel question no. 16(a).

[67] Letter to the Embassy of the Federative Republic of Brazil in Jakarta from the Ministry of Foreign Affairs on 13 December 2019 regarding the request additional information through letter dated 14 October 2019, Exhibit IDN–43.

[68] Brazil's response to panel question no. 21.

# ANNEX C

## ARGUMENTS OF THE THIRD PARTIES

## ANNEX C-1

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA*

## I. INTRODUCTION

1. Chair, Members of the Panel, Australia appreciates this opportunity to present its views on the issues raised by the parties. As a major exporter of animal products to Indonesia[1], Australia has both systemic and legal concerns about Indonesia's trade restrictions, not only on chicken meat and chicken products, but on a wide range of agricultural imports. Australia's exports of animal products to Indonesia are subject to many of the same Indonesian laws and regulations that are at issue in this dispute.

2. These Indonesian measures are applied as part of a broader policy of the Indonesian Government to restrict agricultural imports in order to protect domestic industries and ultimately meet the claimed aim of food self-sufficiency. These broader policies and practices provide important context for the Panel's consideration of Indonesia's compliance.

3. Australia will first share some concerns regarding Indonesia's approach to import restrictions more generally – both in terms of WTO compliance and frequent changes to measures. Australia will then make some comments on the WTO-consistency of Indonesia maintaining a positive list requirement. Finally, we will provide views on Indonesia's revisions to fixed import license terms.

## II. WTO COMPLIANCE CONCERNS

4. Indonesia's import restrictions have had an adverse impact on Australian agricultural exports over a number of years.[2] This is well documented in Australia's participation in this dispute and the successful challenge by the United States and New Zealand in Indonesia – Import Licensing Regimes. We note there is substantial overlap between the measures at issue in this dispute and those in Indonesia – Import Licensing Regimes. While this is a separate dispute and the legal issues are distinct, the complainants in Indonesia – Import Licensing Regimes raised concerns about non-compliant measures that Indonesia has also yet to bring into compliance with WTO rules.[3]

5. Because both disputes relate to import restrictions, Australia is not only concerned at Indonesia's failure to bring the measures in this dispute into compliance with WTO rules but is also concerned that Indonesia may be experiencing difficulties in complying with its WTO obligations regarding import restrictions more generally

## III. THE IMPACT OF FREQUENT CHANGES TO MEASURES

6. Indonesia's regular amendments to the measures at issue have been outlined in the submissions of both parties. In its first written submission, Brazil alleges non-compliance based on one set of Indonesian laws[4] only to have Indonesia refute those claims on the basis of subsequent laws.[5] Brazil characterises Indonesia's practice of revoking, replacing, and amending measures as a "moving target strategy", creating an appearance of compliance, without achieving substantive compliance.[6]

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* Australia has requested that its oral statement serves as executive summary.

[1] Averaging A$1.1 billion in exports over the past three years (2016/17 – 2018/19), based on Australian Bureau of Statistics (ABS) Catalogue 9920.0.

[2] As detailed in Australia's submissions to the original panel in *Indonesia-Chicken* available at https://dfat.gov.au/trade/organisations/wto/wto-disputes/Pages/indonesia-measures-concerning-the-importation-of-chicken-meat-and-chicken-products-wtds484.aspx and Australia's submissions and oral statements in *Indonesia-Import Licensing Regimes* https://dfat.gov.au/trade/organisations/wto/wto-disputes/Pages/summary-of-australias-involvement-in-disputes-currently-before-the-world-trade-organization.aspx

[3] US statement at December 2019 DSB meeting claims Indonesia continues to fail to bring the measures into compliance with WTO rules.

[4] MoA 34/2016, MoA 23/2018 and MoT 29/2019.

[5] MoA 42/2019 and MoT 72/2019.

[6] Brazil's Second Written Submission at paras. 2, 127 and 162.

7. A practice of frequent changes to import licensing regimes, without adequate regard to WTO notification requirements[7] and with no or limited opportunity for consultation with trading partners, creates uncertainty in the trading environment and results in the perpetuation of non-compliant measures.

8. As the panel stated in EC – Fasteners (China), where measures are replaced following the establishment of a panel, to require the complainant:

in such circumstances to restart the dispute settlement process, potentially requiring a new request for consultations, would defeat the purpose of the DSU to provide for the "prompt settlement of situations in which a Member considers that benefits accruing to it" under a covered Agreement are being impaired by another Member's measure, as provided for in Article 3.3 of the DSU.[8]

9. As a general comment, Australia is therefore concerned about the impact of frequent changes to measures on due process in dispute proceedings.[9]

## IV. THE MAINTENANCE OF THE POSITIVE LIST REQUIREMENT

10. Brazil argues that Indonesia has failed to eliminate the positive list requirement and therefore continues to breach Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Indonesia contends that the positive list itself was not the issue, and the inclusion of the HS codes of chicken meat and chicken products on the list brings the measure into compliance.

11. Similar to the impact on Brazil, Indonesia's positive list approach has significantly reduced exports of animal products from Australia to Indonesia. For example, in 2014, the removal of various types of bovine offal from the positive list affected Australian exports of frozen bovine offal.

12. Australia agrees with Brazil's characterisation of the original panel's findings that "the positive list requirement qualifies as a 'legal ban' because the direct legal consequence of not being listed as a product is that importation of that product is not allowed"[10]. The combination of the positive list requirement coupled with Indonesia's practice of frequently amending regulations (and, in particular, this regulation – which was amended both during the original panel proceedings and during these compliance proceedings[11]) creates a system that restricts trade and is clearly inconsistent with Article XI:1.

13. The list itself is therefore an issue. Merely adding products to the list, or clarifying products on the list through including their HS Codes, does not resolve this fundamental inconsistency. In Australia's view, by maintaining the positive list requirement, Indonesia is continuing to not comply with the panel's ruling.

## V. THE REVISIONS TO THE LIMITATIONS ON FIXED LICENSE TERMS

14. Before the original panel, Brazil successfully argued that Indonesia's fixed license terms were inconsistent with Article XI:1. For Australia, those restrictions effectively prevented importers and exporters from responding to any developments in the Indonesian or Australian markets during that import period.

15. In these compliance proceedings Brazil argues that, although Indonesia has modified its system for import licences, several inconsistencies with Article XI:1 remain.

16. Australia acknowledges that Indonesia has made changes to its system. Indonesia asserts that, as a result of these changes, there are no more fixed term licenses and importers are able to modify information, enabling importers and exporters to respond to the market. Whether this is indeed the case will depend on the Panel's examination of how Indonesia's modifications currently

[7] For example requirements under the WTO Agreement on Import Licensing Procedures to provide copies of laws (Articles 1.4(a) and 8.2(b)), notification of changes (Articles 5.1-5.4) and completion of an annual questionnaire (Article 7.3 and Appendix).

[8] Panel Report, *EC – Fasteners (China)*, para. 7.34.

[9] Australia notes that paragraph 17 of Brazil's panel request extends to subsequent measures adopted by Indonesia, and Brazil has expressly supported the inclusion of subsequent measures within the Panel's terms of reference in its second written submission at paras. 100-104.

[10] Brazil's Second Written Submission, para. 107.

[11] The positive list was amended both during the original panel process when MoA58/2015 and MoT 05/2016 were amended by MoT37/2016; and during the current proceedings when MoA42/2019 and MoT 29/2019 were amended by MoT 72/2019.

operate in practice and whether these in effect enable importers and exporters to respond to developments in either the importing or exporting market in a timely manner.

17. Australia submits that any system that purports to grant flexibility to allow amendments but is discretionary, overly cumbersome, or creates additional requirements, would not in effect enable importers and exporters to respond to market developments in any commercially meaningful way.

## VI. CONCLUSION

18. Thank you for the opportunity to present Australia's views on these systemic and legal issues in these proceedings.

## ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

### I. WHAT IS REQUIRED FOR A MEMBER TO BRING ITSELF INTO COMPLIANCE WITH A FINDING OF UNDUE DELAY UNDER ANNEX C(1)(A) OF THE SPS AGREEMENT

1. In Canada's view, achieving compliance with a finding of undue delay requires the responding party to remove the causes of the undue delay and take reasonable steps to undertake and complete the procedure whose operation was in issue before the original panel. What constitutes reasonable steps can only be determined having regard to all of the circumstances relating to the subject matter of the procedure in question.

2. In this regard, Canada considers that there are several key principles that should be taken into account when assessing whether a responding party has brought itself into compliance with its obligations under Annex C(1)(a) following a panel finding of undue delay in the operation of a SPS approval procedure.

3. First, undertaking and completing SPS approval procedures without undue delay requires that they be conducted with "appropriate dispatch"[1], and that the amount of time taken must not include periods of time that are unwarranted, otherwise excessive, disproportionate or unjustifiable. In short, there must be no "unjustifiable loss of time"[2].

4. Second, "whether a relevant procedure has been unduly delayed is […]not an assessment that can be done in the abstract, but one which requires a case-by-case analysis as to the reasons for the alleged failure to act with appropriate dispatch, and whether such reasons are justifiable"[3]. A determination whether a delay exists must be made in light of the nature and complexity of the procedure to be undertaken and completed.[4]

5. Third, whether delay is undue cannot be determined based solely on an assessment of whether the responding Member has failed to follow the express terms of its own procedure. This is because undue delay in the operation of a procedure can arise from the design of the procedure itself. If it were otherwise, Members could simply design and apply their procedures in such a way that delays were unavoidable and the Member concerned could defend such delays on the grounds that the procedure in question was merely being followed.

6. In this regard, Canada recommends that the Panel study Indonesia's approval procedure closely; while Canada does not take a position on the ultimate question of whether Indonesia remains non-compliant in light of the operation of this procedure, Canada echoes the European Union's comments[5] regarding the apparent allocation of insufficient resources to enable the procedure to function in a manner consonant with the requirement in Annex C(1)(a) to undertake and complete such procedures without undue delay. On this point, Canada also notes paragraphs 78-80 in Brazil's second written submission, where Brazil appears to identify flexibility elements even within Indonesia's regulatory regime that would seem to make it possible for Indonesia to act with greater dispatch than it has indicated in its submissions.

7. Fourth, Canada recalls the observation of the panel in *US – Animals* that:

> If a WTO Member could indefinitely postpone the completion of a procedure by invoking the need to reconfirm information that had become outdated by virtue of its own inaction, this would create a dangerous loophole in the disciplines of

[1] Appellate Body Report, *Australia – Apples*, para. 437.
[2] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1495.
[3] Appellate Body Report, *Australia – Apples*, para. 437.
[4] Panel Report, *US – Animals*, para. 7.114.
[5] European Union's third-party written submission, para. 66.

> [Annex C(1)(a)] and would reward behaviour opposite to the diligence called for by Annex C(1)[6].

8. As an example, Canada notes Indonesia's demands, as set out in Table 7 of Indonesia's first written submission[7], for Brazil to update the 2009 questionnaire. Indonesia does not make it clear in its submission why the questionnaire needs to be updated, nor does Indonesia explain why it makes this demand only at the end of May 2018, more than six months after the original panel report had been adopted, and more than a year after Indonesia received the original panel's final report.

9. Fifth, Canada also considers that bringing oneself into compliance in the face of a finding of a violation arising from undue delay in the operation of an approval procedure calls for action by the Member concerned that is qualitatively different from what might be required to cure other types of violations. This is because the very essence of the obligation in Annex C(1)(a) is timeliness. As a result, the gravamen of a violation of this obligation arises from the time lost. In these circumstances, Canada considers that it is reasonable to expect that acting with "appropriate dispatch" should not be equated with a business-as-usual approach, even if it requires the allocation of resources beyond those normally allocated to the conduct of the approval procedure in question.

10. At the same time, Canada it does not necessarily mean that the responding party must undertake and complete the approval procedure within the reasonable period of time. As Canada noted, a determination of what constitutes undue delay must be made on a "case-by-case basis, taking account of the relevant facts and circumstances"[8]. This is equally true whether the claim of undue delay arises in an original panel proceeding or in a proceeding to determine whether the responding Member has brought itself into compliance. Thus, even in the latter situation, time legitimately taken by the responding party to determine with adequate confidence that its relevant SPS requirements are fulfilled cannot be considered as creating undue delay, even if, as in the matter before this Panel, it extends beyond the expiry of reasonable period of time.

11. This is not to say that the expiry of the 8-month reasonable period of time is an irrelevant consideration in determining whether Indonesia has brought itself into compliance. As Brazil notes[9], Indonesia agreed to this time period, and must therefore be presumed to have agreed that it was sufficient to cure the violation that had been identified by the original panel. In these circumstances, it is reasonable for there to be an onus on Indonesia to demonstrate, with compelling evidence, that the operation of its approval procedure no longer gives rise to undue delay, despite the fact that it has not yet rendered a final decision on Brazil's application, and is to all appearances not anywhere close to doing so.

12. Turning to an examination of what Indonesia claims to have done to cure the violation, Canada notes that 19 months elapsed between the adoption of the original panel report on 22 November 2017 and 24 June 2019, the date of the compliance panel's establishment[10]. This included an 8-month reasonable period of time (RPT) agreed to by Indonesia during which it was to bring its measures into compliance with its WTO obligations[11].

13. During the 8-month RPT, Indonesia made certain changes to its approval regime. Notably, it indicates that it adopted strict time lines to be applied to each of the four stages of the approval procedure[12]. For example, according to Indonesia, the desk review in step 1 must not take more than 6 months. Canada recalls that, whether the operation of a given procedure gives rise to undue delay is not dependent on the presence or absence of specific time-lines, or the passage of a particular period of time[13]. However, even if we accept at face value that Indonesia's four-stage procedure, with a 36-month maximum time line, does not give rise to undue delay *per se*, Indonesia

[6] Panel Report, *US – Animals*, para. 7.143.
[7] Indonesia's first written submission, para. 109.
[8] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1497 and *US – Poultry (China)*, para. 7.354.
[9] Brazil's second written submission, para. 41.
[10] Indonesia's first written submission, para. 109, Table 7.
[11] Brazil's first written submission, para. 6.
[12] Indonesia's first written submission, para. 111.
[13] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1496.

has failed to meet its own standard because, despite the passage of 19 months, at the time of the establishment of the compliance panel, Brazil's application remained at step 1 of the procedure.

14. More specifically, of the 19 months only approximately 9.5 months appear to be periods of time covering genuine activities relating to the operation of the approval procedure. 6.25 months elapsed between the adoption of the panel report and Indonesia's letter of 31 May 2018 to Brazil, asking it to submit a new questionnaire. During that time, no concrete steps appear to have been taken by Indonesia to advance the approval process vis-à-vis Brazil's application. Further, despite Indonesia imposing a 6-month limit on itself for the completion of step 1 of its approval procedure, more than 9 months elapsed between Indonesia receiving Brazil's completed questionnaire in September 2018 and its reply to Brazil concerning that questionnaire in June 2019. Canada recalls that the panel in *EC – Approval and Marketing of Biotech Products* found that a Member cannot be legally responsible for delays not attributable to it[14], and none of these delays can be attributed to Brazil. This leaves more than 9 months where no progress appears to have been made towards completion of the approval procedure.

15. Further, Indonesia's argument that its right to food safety would be compromised by a finding of undue delay is a red herring and should not constitute a valid reason for the Panel to decline to find undue delay on the facts before it. There is an onus on Indonesia under Annex C(1)(a) to process applications without undue delay. It has already been found to be in violation of this obligation once; for this Panel to refrain making from a further finding of undue delay because Indonesia has a right to food safety under the SPS Agreement would be to reward its continued inaction with respect to Brazil's application.

16. This is true even if Indonesia is correct that the potential presence of *salmonella* in Brazilian chicken requires it to gather and analyze further information from Brazil concerning the presence of *salmonella* in Brazilian facilities. Indonesia's inaction following the adoption of the original panel report would be rewarded if Indonesia can now claim that the possibility of *salmonella* in Brazilian chicken entitles it to conduct its approval procedure without regard for the previous finding of undue delay, and despite the consequences arising from its dilatory behaviour between November 2017 and June 2019.

17. This does not mean that Indonesia, due to its previous inaction, is compelled to abandon completely the various procedural steps in its approval process, or to approve automatically Brazil's application without regard for the risks involved. It does mean, however, that Indonesia, in order to avoid a further finding of undue delay, should have been making extra efforts to move the application as efficiently as possible through the process, including assigning the necessary resources to facilitate the completion of the process so that a decision can be taken. There is no evidence that Indonesia was making such efforts, at least prior to the establishment of this Panel.

18. In any event, a finding of undue delay in these proceedings would not compel Indonesia to approve Brazil's application without ensuring that its food safety standards are met, but it may be that Indonesia will either have to compensate Brazil for the nullification and impairment caused by the continued undue delay, or face possible suspension of concessions by Brazil if such authorization is sought by Brazil and granted by the DSB, at least until Indonesia completes its procedure and renders a decision.

19. In regard to the question of whether this Panel should take into account post-Panel establishment actions by Indonesia in determining whether it has brought itself into compliance with Annex C(1)(a), Canada is of the view that it can and should do so, based on the following considerations.

20. Canada agrees with Brazil that the date of panel establishment is the appropriate cut off date for determining whether Indonesia has acted inconsistently with Annex C(1)(a). The Panel must therefore determine whether, as of 24 June 2019, Indonesia's conduct of its approval procedure had given rise to undue delay.

21. However, this does not mean that Indonesia is precluded from acting to bring itself into compliance after panel establishment, nor does it preclude the Panel from taking such actions into

[14] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1497.

account. Evidence demonstrating that Indonesia has rectified the operation of its procedure in a manner that removes the causes of the undue delay would have a bearing, not on a finding whether there was undue delay, but on whether the undue delay remains, and if it does not, whether the Panel should nevertheless recommend that Indonesia bring itself into compliance with respect to the operation of its approval procedure.

22. Taking such evidence into account would be consistent with both Article 3.4 ("aimed at achieving a satisfactory settlement of the matter") and Article 3.7 ("The aim of the dispute settlement system is to secure a positive solution to a dispute") of the *Understanding on Rules and Procedures Governing the Settlement of Disputes.* It would also comport with previous disputes where panels have taken into account changes in circumstances pertaining to measures that are the subject of a claim after the establishment of the panel[15]. While these disputes dealt with questions relating to measures that had been amended or had expired during the course of the proceedings, the principle is equally applicable in the context of determining whether there is undue delay in the operation of an approval procedure[16].

23. An obvious means of rectifying undue delay would be for Indonesia to complete the procedure in relation to the subject matter of the claim made by the complaining party. However, Canada is also of the view that it is not necessarily the case that, for a panel to find that the undue delay has been cured, the procedure in question has been completed, as long as the causes of the undue delay have been removed and the procedure is operating in a manner that does not involve any unjustifiable delays.

24. However, in such circumstances, what constitutes "appropriate dispatch" may differ from what would constitute appropriate dispatch in normal circumstances, in the sense that there would be greater onus on the responding party to ensure that the application that has been subjected to undue delay is processed as efficiently as possible, without compromising the achievement of the responding party's appropriate level of protection.

25. If the panel determines that undue delay existed at the time of panel establishment but ceased to exist during the panel proceedings, it would still be required to make a finding of undue delay, but, depending on the circumstances, may decide not to recommend that the responding party bring its measures into compliance with respect to that undue delay.

[15] See, for example, Panel Report, *India – Autos*, paras. 7.29 – 7.30; Appellate Body Report, *Chile – Price Band System*, para. 144; and Appellate Body Reports, *China – Raw Materials*, para. 264.

[16] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1670.

## ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

### I. THE POSITIVE LIST REQUIREMENT

1. The original panel found the positive list requirement in Indonesian import licensing system to be inconsistent with Article XI:1 of the GATT 1994, because the "direct consequence of not being listed as a product is that importation of that product is not allowed" and because "no import recommendation and/or no import approval are granted if and when a product is not contained in the relevant appendices". Thus, the positive list requirement constituted "a prohibition" on the importation of a product of the territory of another Member "made effective through a licence" within the meaning of Article XI:1.

2. For the European Union, it is clear that compliance with the original panel's recommendation to bring Indonesia's measure into conformity with its obligations under Article XI:1 requires Indonesia to abolish the positive list requirement.

3. The inclusion of additional products in a positive list of products that may be imported, in this case the HS codes of products that Brazil indicated as relevant to this dispute, does not constitute an appropriate remedy, as the obligation to be on that list continues to apply and the importation of products from other WTO Members remains prohibited unless the product concerned is included in the list governing the importation of animal products.

4. The European Union considers that positive lists specifying the products that may be imported from other Members are in direct contradiction with Article XI:1, which requires WTO Members to eliminate any import prohibitions or restrictions other than duties, taxes or other charges. This flows not only from the explanations of the original panel referred to above, but also from the text of Article XI:1 itself.

5. As regards Indonesia's request for a preliminary ruling that Brazil's claim under Article 4.2 and footnote 1 of the Agreement on Agriculture is outside the Panel's terms of reference, the European Union agrees that the scope of Article 21.5 proceedings is narrower than the scope of original dispute settlement proceedings. However, it does not follow from the considerations underlying Article 21.5 that claims in respect of which the original panel exercised judicial economy must automatically be excluded from the terms of reference of a panel in compliance proceedings.

6. As the measures that a Member takes ostensibly to comply with the DSB recommendations and rulings may be very different from those that were assessed by the original panel, it should be possible for a panel to make the findings that are necessary to resolve the dispute, regardless of whether the original panel had refrained from making multiple findings regarding the inconsistency of the original measure with various provisions. This is in line with the objective of promoting the prompt resolution of disputes and does not oblige the Panel to re-examine a claim on which the original panel has already ruled.

7. If the Panel were to find the revised measure consistent with Article XI:1, that measure should not automatically be held consistent with Indonesia's obligations under Article 4.2 of the Agreement on Agriculture. As the original panel recalled, the principle of judicial economy allows a panel to refrain from making multiple findings only in case the same measure is *inconsistent* with various provisions and a single, or a certain number of findings of inconsistency, are sufficient to resolve the dispute. Furthermore, it should be noted that since the original Panel refrained from ruling on Brazil's Article 4.2 claim, the complaining party has not failed to appeal a finding of the original Panel on that claim.

### II. THE INTENDED USE REQUIREMENT

8. The real object of Brazil's Article III:4 claim is the unfavourable treatment stemming from the inability for imported products to switch between end uses after importation. Therefore, the Panel should examine carefully whether the abolition of the obligation to submit a distribution plan at the

time of applying for an Import Recommendation was not accompanied by the introduction of other provisions allowing the Indonesian authorities to ensure that imported products do not deviate from the intended end use declared in advance by the importer. The Panel could namely inquire whether changes in the end use of imported products, in order to take advantage of business opportunities, will not be considered by the authorities as an indication that the importer submitted false information or documents with its application for an Import Recommendation.

9. The European Union considers that Brazil is not precluded from raising a claim in respect of the role played by the monthly import realization report in the enforcement of the intended use requirement, even if the obligation to submit such a report already existed at the time of the original proceedings. Although the term "measures taken to comply" does place some limits on the scope of proceedings under Article 21.5 of the DSU, at the same time a panel must be able to take full account of the factual and legal background against which relevant measures are taken. Limits on the scope of Article 21.5 proceedings should not allow Members to circumvent their obligations by complying through one measure, while, at the same time, negating compliance through another.

10. The European Union agrees with Indonesia that the changes introduced by regulation MoA 42/2019, as explained in Indonesia's second written submission, eliminate the inconsistency with Article III:4 of the GATT which was found by the original panel in respect of the intended use requirement. The indication of the "general purpose" category of intended use appears to grant the importer sufficient flexibility to distribute its products among clients with cold storage facilities, and thus take advantage of available business opportunities.

11. Article III.4 and Article XI of the GATT 1994 are not mutually exclusive and can, in certain circumstances, apply concurrently to a measure at issue, provided that the legal standard of each obligation is fulfilled. Nonetheless, in this case the provisions on intended use apply only to imported animals and animal products. In the absence of equivalent internal provisions applying to domestic like products, there is no reason to examine the measure in the light of Article III:4.

## III. LIMITATIONS ON AMENDMENTS TO INDONESIA'S FIXED IMPORT LICENCE TERMS

12. The European Union submits that introducing a procedure that allows importers to apply for amendments to these and other aspects of Import Recommendations issued by the MoA may not be sufficient to ensure compatibility with Article XI:I GATT. The term "substantive compliance" used by the original panel means that Indonesia is required to ensure that importers are able to adjust the terms of their import licenses in order to respond to changes in business opportunities and market conditions. For instance, as the EU noted in its oral statement, Indonesia is silent on whether importers will be allowed to increase the quantity of products specified in an Import Recommendation.

13. A factual assessment will be needed in order to determine how the procedure for amending fixed license terms attenuates the restrictive effect on imports of the Indonesian licensing system. Compliance will depend on whether the relevant authorities process amendment requests expeditiously and without imposing an excessive burden on importers requesting such amendments. The possibility to apply for a new Import Recommendation or Approval at any time, the possibility of having multiple Recommendations, or the absence of sanctions for not realizing Import Recommendations that have been granted, would not constitute substantive compliance. Indonesia is required to ensure that the license terms can be swiftly amended in order to allow importers to respond to changes in market conditions. Thus, the procedure for amending license terms concerning ports of entry and the quantity of imported products must be simple, fast, and not excessively costly.

## IV. DELAY IN THE APPROVAL OF THE VETERINARY HEALTH CERTIFICATE PROPOSED BY BRAZIL

14. The European Union recalls the original panel's finding that Annex C(1)(a) of the SPS Agreement requires Members to ensure that relevant procedures are undertaken and completed without undue delay, which means that such procedures should not involve periods of time that are unwarranted, or otherwise excessive, disproportionate or unjustifiable. In this case, even by the standards of Indonesia's four-stage SPS approval procedure that will normally take around 3 years to complete, a delay of 10 years appears unusually long.

15. Indonesia's own explanations for the delay reveal that it has not availed itself of the human resources necessary to administer the complex and bureaucratic procedures it has devised for conducting SPS approval procedures. Therefore, it has been unable to process Brazil's application "with appropriate dispatch", which would have required a more proactive interaction with Brazil's authorities, in particular to obtain relevant information concerning any outbreak of Salmonella, for instance.

16. A Member's self-induced limited capacity for administering its own SPS approval procedures cannot constitute a justification for the delay. The European Union therefore agrees with Brazil that Indonesia continues to cause undue delay in the approval of Brazil's proposed veterinary health certificate. Indonesia in its second written submission failed to explain which supplementary information was still needed in order to move on to the next step of the procedure. The RPT of eight months, if used from the beginning, would have allowed the Indonesian authorities to complete conduct all steps of its procedures and sign the health protocol with Brazil.

17. The European Union acknowledges that by simply eschewing further delays in the procedure, Indonesia would not be eliminating the effects or consequences of the undue delay in which it has incurred in the past. However, this inability to account for, or compensate for, a breach of obligations that have occurred in the past, i.e. before the original panel's findings, seems inherent to a system of dispute settlement that provides only for prospective remedies. Given the limitations of a system of prospective remedies, it is important that responding Members are not allowed to act upon a restrictive interpretation of the recommendations addressed to them. This is the reason why, according to the European Union, Indonesia was required to take all the measures necessary to complete its SPS approval procedure during the RPT agreed for compliance with the recommendations of the DSB. Any further delays must be carefully scrutinized by the compliance Panel.

## ANNEX C-4

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

## I. INTRODUCTION

1. Japan welcomes the opportunity to present its views as a third party in this dispute due to its systemic interest in the proper interpretation of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). Japan addresses below the scope of claims within this Panel's terms of reference, and the proper legal interpretation of Articles III:4 and XI:1 of the GATT 1994.

## II. CLAIMS WITHIN THIS PANEL'S TERMS OF REFERENCE

2. With respect to the claims within the scope of this proceeding, we note that Indonesia has requested that the Panel decline to rule on Brazil's claims where the original panel has not made any rulings or recommendations. Specifically, Indonesia requests that the Panel decline to consider whether the measures at issue are consistent with Article 4.2 of the Agreement on Agriculture or Article XI:1 of the GATT 1994, as the original panel exercised judicial economy with respect to both claims. Japan does not agree that the absence of a finding by the original panel necessarily removes such claims from this Panel's terms of reference.

3. In *EC – Bed Linen (Article 21.5 – India)*, the panel ruled that a complainant should not be able to raise new claims in an Article 21.5 proceeding regarding unchanged aspects of the measures that could have been raised during the original proceedings.[1] The Appellate Body has, however, permitted claims to be reasserted in Article 21.5 proceedings when the exercise of judicial economy has caused a claim to remain unresolved without a decision on the merits while an essentially overlapping issue was deliberated upon and decided on the merits in the original proceedings.[2]

4. For example, in *US – Oil Country Tubular Goods Sunset Reviews*, the United States argued that the compliance panel should not review its import volume analysis because the original panel had exercised judicial economy with respect to this argument, and so had "declined to make any recommendations or rulings regarding the volume analysis".[3] The Appellate Body rejected that argument, noting that the volume analysis was an "integral part" of the likelihood-of-dumping determination, and the United States had a reasonable period of time to bring that determination into compliance.[4] The Appellate Body in that case further pointed out that the complaining party's "arguments relating to the finding on import volumes were not raised for the first time in the Article 21.5 proceedings,"[5] but rather, "the parties had offered arguments and counterarguments on the issue twice, first in the original proceedings, and then in the[se] Article 21.5 proceedings".[6] These arguments alerted the United States to the possibility of the inconsistency and gave the United States a "reasonable period of time" to bring its measure into conformity.[7]

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[1] Panel Report, *EC – Bed Linen (Article 21.5 - India),* para. 6.43.

[2] *See* Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.20; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 148. See also Appellate Body Report, *EC – Bed Linen (Article 21.5 - India)*, footnote 115 to para. 96, which reads in part:

"We believe that in a situation where a panel, in declining to rule on a certain claim, has provided only a partial resolution of the matter at issue, a complainant should not be held responsible for the panel's false exercise of judicial economy, such that a complainant would not be prevented from raising the claim in a subsequent proceeding."

[3] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 134.

[4] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 148.

[5] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 150.

[6] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 150.

[7] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 150.

5. In the original proceeding of this dispute, the panel deliberated and decided against Indonesia on the merits of other claims that involved the same set of relevant facts and were substantially identical to the issues of inconsistency with respect to Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994. The respondent therefore had the opportunity to bring its measures into compliance, and had reason to anticipate the withdrawal of substantially equivalent concessions in the event of noncompliance.

6. For these reasons, Japan believes that Brazil's claims of inconsistency with respect to Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994 fall within this Panel's terms of reference.

## III. ARTICLE XI OF THE GATT 1994

7. Japan notes that, under MoT 34/2016 and MoT 29/2019, importers are required to declare the intended usage of the imports, and are restricted from deviating from the use reported at the time of importation. Such intended use measures may thus be appropriately categorized as restrictions instituted at the border that limit imports into Indonesia.

8. Article XI:1 of the GATT 1994 precludes WTO Members from instituting or maintaining "prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures," on the importation or exportation of any product of the territory of any other Member. The Appellate Body has previously recognized that a "restriction" is "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation, and thus refers generally to something that has a limiting effect".[8]

9. To the extent Indonesia's intended use measures constitute a restriction on imports, including by having a limiting effect on those imports, the measures would thus be inconsistent with Article XI:1 of the GATT 1994.

10. The legal discipline under Article XI of the GATT 1994 leaves little room for the policy objective of a measure to be taken into account, and measures that are inconsistent with Article XI of the GATT 1994 can only be justified, as appropriate, by exception provisions such as Article XX of the GATT 1994. Thus, where the intended use measures violate Article XI of the GATT 1994, Indonesia would need to demonstrate that the measures are otherwise justified under Article XX of the GATT 1994. In the course of doing so, Indonesia would need to show that applying such intended use measures at the border, and enforcing these measures against only importers, is otherwise reasonable.

## IV. ARTICLE III:4 OF THE GATT 1994

11. Japan submits that an analysis of "less favourable" treatment in the context of Article III:4 of the GATT 1994 should involve an assessment of the legitimacy of the objectives pursued by the measure at issue, as well as whether there is a reasonable explanation as to why the measure is chosen to achieve such objective. That is, Article III:4 of the GATT 1994 requires WTO Members to accord imported products treatment no less favourable than that accorded to like domestic products. With regard to the interpretation of treatment "no less favourable" in relation to regulatory measures, regulatory purposes can and should be taken into consideration.

12. The purpose of Article III:4 of the GATT 1994 is to preserve "equality of competitive opportunities for imported products as compared to like domestic products".[9] However, not every form of differential treatment has a detrimental impact on competitive opportunities.[10] For instance, where sound, fair and effective competition in a market does not exist or is limited in the absence of the measure, the modification of the conditions of competition should not be regarded as discrimination prohibited under Article III:4 of the GATT 1994 to the extent that the measure is designed to ensure sound, fair, and effective competition.

[8] Appellate Body Reports, *China – Raw Materials*, para. 319.

[9] Appellate Body Report, *EC – Seal Products,* para. 5.101.

[10] *See* Panel Report, *China – Publications and Audiovisual Products*, para. 7.1469. See also Appellate Body Report, *Korea – Various Measures on Beef*, paras. 135-137.

13. The determination of whether a particular measure ensures sound, fair, and effective competition involves a case-by-case analysis, depending on the measure and particular market at issue. This analysis should include an assessment of the legitimacy of the objectives pursued by the measure at issue, as well as whether there is a reasonable explanation as to why the measure is chosen to achieve such objective. The implementing Member should identify the policy objective of the measure, allowing for review of the relevance and the reasonableness of the measure.

14. Japan notes that, while Article XX of the GATT 1994 provides for the consideration of certain enumerated policy justifications, those justifications are limited. The consequence of failure to consider policy objectives outside of Article XX is that any minimal difference in treatment that arises from legitimate objectives not enumerated in Article XX may be found to be inconsistent with the GATT 1994. This approach would surely be too sweeping, and would infringe upon a WTO Member's freedom to set domestic policy priorities.

15. Japan recalls that the Appellate Body has indirectly taken such regulatory objectives into account when the objectives have a bearing under one of the criteria of the "like products" analysis, as was the case in *EC – Asbestos*.[11] In that case, the measure at issue was a French law prohibiting the importation and internal use and sale of asbestos and asbestos-containing products. In that proceeding, the Appellate Body looked to the regulatory purpose of the measure—protecting against the deadly effects of asbestos—to demonstrate important differences between those products containing asbestos and those without in order to suggest that those products are not 'like'. In this way, the regulatory purpose played an important evidential role in the determination of the relevant comparator.

16. The panel applied a related approach in *EC — Approval and Marketing of Biotech Products.* In that case, the panel rejected a claim under Article III:4 of the GATT 1994 on the basis that Argentina had not alleged that the treatment of products differed depending on their origin. It determined that, "[i]n these circumstances, it is not self-evident that the alleged less favourable treatment of imported biotech products is explained by the foreign origin of these products rather than, for instance, a perceived difference between biotech products and non-biotech products in terms of their safety".[12]

17. In the present case, however, Indonesia has not identified any rational policy objective for its measures prohibiting sales to markets without cold storage facilities. Although Indonesia's measures might have been adopted in pursuit of a legitimate objective, it is doubtful that there exists a reasonable explanation for subjecting only importers to the stricter enforcement measures. The difference in treatment would thus result in "less favourable" treatment accorded to imported products as compared to domestic products, within the meaning of Article III:4 of the GATT 1994.

18. Japan notes that, in case a panel is required to contemplate on the exclusivity of application of Articles XI:1 and III:4 of the GATT 1994, the difference in how policy objectives are considered with respect to measures falling within the scope of each provision should be taken into consideration as a context. Specifically, the legal discipline under Article XI leaves little room for the policy objective of a measure to be taken into account, and measures that are inconsistent with Article XI can only be justified by exception provisions. On the other hand, a panel may consider a wider range of policy objectives, unlimited to the ones stipulated in these exception clauses, in its "no less favourable" analysis under Article III:4.

## V. CONCLUSION

19. The Government of Japan thanks the Panel for the opportunity to comment on the important issues in this proceeding, and respectfully requests the Panel to take these comments into account.

[11] Appellate Body Report, *EC – Asbestos*, paras. 113-116. See also Appellate Body Report, *US – Clove Cigarettes*, paras. 117-119.

[12] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.2514.

## ANNEX C-5

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NEW ZEALAND*

**Introduction**

1. New Zealand's participation in this dispute reflects its interest in the measures challenged, and its concern over Indonesia's failure to bring those measures into compliance with its WTO obligations.

2. Since 2009, Indonesia has enacted a series of laws and regulations that prohibit and restrict agricultural imports. These measures have resulted in a complex web of licencing requirements that are designed to impede imports, and favour domestic production. This has had a significant adverse impact on the export interests of Indonesia's trade partners.

3. Following the release of the original Panel report, Indonesia undertook to bring its measures into compliance by 22 July 2018. Indonesia has failed to meet this timeline. As a result, imports continue to be restricted, and exporters continue to be adversely impacted.

4. The role of a compliance panel is to assess whether a Member has taken measures to comply with the initial panel ruling and - if so - to determine whether those measures are fully consistent with the Member's WTO obligations.[1]

5. To the extent that Indonesia has taken measures to comply with the WTO decision, these measures fall short of what is required to attain WTO consistency. New Zealand will take this opportunity today to highlight two features of the measures taken to comply. These not only demonstrate that Indonesia has failed to comply with the original Panel decision - but also provide insight into the manner in which Indonesia uses its regulatory system to stall, delay and block imports into its territory.

**Use of licencing processes to informally restrict imports**

6. First, we address the use of licencing processes to impermissibly delay and impede imports. Indonesia has constructed a complex maze of rules and regulations that importers must navigate in order to bring product into the country. This system includes complex licencing, certification and authorisation processes that impede imports and provide opportunities for unnecessary delay.

7. The measures challenged in the present case provide two examples of this in practice. First, the process for applying to amend import licence terms is an apt example of a process that facilitates impermissible trade restriction. Second, Indonesia's continued failure to process Brazil's application for a veterinary certificate provides an example of how such processes can be implemented to effectively block the entry of imports.

*a. Process for requesting changes to licence terms*

8. The original Panel found that Indonesia's fixed import licence terms[2] were inconsistent with GATT Article XI(1) because they prevented importers from responding to market conditions and, accordingly, had a limiting effect on trade.[3]

9. Indonesia has since inserted new provisions into its regulations, which on their face appear to permit changes to licence terms. In practice, however, they simply grant Indonesian officials an opaque and vague discretion to permit changes to licence terms – or not. This, combined with the fact that importers continue to face severe sanctions if they act outside of the terms of their import

* New Zealand has requested that its oral statement serves as executive summary.

[1] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)* at para 79. See also Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 - Canada)* at paras 67–69.

[2] In respect of the licence terms relating to ports of entry and the quantity of imported products.

[3] Original Panel Report, at paras 7.396 and 7.400.

licence,[4] means that these provisions can and will, continue to impede imports in a manner contrary GATT Article XI(1).

*b. Delay in processing Brazil's veterinary certificate*

10. Indonesia's undue – and extraordinarily protracted – delay in processing Brazil's application for a veterinary certificate is an apt example of the way in which Indonesia uses its opaque regulatory processes to restrict trade. As set out in our written submissions, the many changing reasons given for the lack of progress, the sheer length of the delay, and its legislative context, lead to the unavoidable conclusion that the continued failure to process Brazil's application is motivated by a desire to block imports - contrary to Annex C(1)(a) read with Article 8 of the SPS Agreement.

**Replacement of measures found to be non-compliant with new rules that have the same or similar practical effect**

11. The second feature that we wish to highlight today is the replacement of measures that have been found to be WTO inconsistent with new rules having the same or similar practical effect. The repeated amendments to Indonesia's positive list provide an apt example of this. As set out in detail in our written submissions, Indonesia has relied on no less than four iterations of these provisions in the course of these proceedings alone.

12. These constant regulatory changes create an impression of compliance, while still preserving their WTO inconsistent trade restrictive effect. New Zealand asks that the Panel look beyond this regulatory 'noise' and identify the breach of Article XI(1) GATT, which continues to be given effect through these provisions.

**Conclusion**

13. It is the role of a compliance panel to assess whether a measure taken to comply is fully consistent with the obligations set out in the covered agreements.[5] In the present case, Indonesia has taken steps to create an impression that it has brought its measures into compliance. In many instances, however, these steps have simply acted to obfuscate or distract from the continued imposition of impermissible trade restrictions. These actions fall short of what is required in order to comply with the original Panel decision, and reflect a continuation of Indonesia's non-compliance with its WTO obligations. New Zealand asks that the Panel find them as such.

[4] As set out in Brazil's first written submission, 13 September 2019, at para 224.
[5] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)* at para 79.

## ANNEX C-6

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

**Executive Summary of the U.S. Responses to Panel Questions to Third Parties**

1. Response to Question 3: The United States considers Article XI:1 and Article III:4 of the GATT 1994 to have "distinct scopes of application." Article XI:1 applies to prohibitions or restrictions (other than duties, taxes or other charges) instituted or maintained on the *importation* of products. Article III:4 applies to "laws, regulations and requirements affecting [products'] *internal* sale, offering for sale, purchase, transportation, distribution or use."

2. Indeed, the panel in *India-Autos* found that the GATT 1994

> ***distinguishes between measures affecting the 'importation' of products, which are regulated in Article XI:1, and those affecting 'imported products', which are dealt with in Article III. If Article XI:1 were interpreted broadly to cover also internal requirements, Article III would be partly superfluous.***

3. It is possible, however, for a particular law, regulation, or other measure to have one aspect that restricts importation and another aspect that leads to less favorable treatment after importation. The fact that both restrictions appear in one legal instrument does not mean that only one of the two legal provisions could be invoked.

4. Response to Question 4: The original Panel found that fixing the quantity and the port of entry with respect to the importation of animals and animal products is inconsistent with Article XI of the GATT 1994. Specifically, the original Panel found that the fixed license terms have a limiting effect on trade because the measure "impedes importers from making adjustment to the licensing documents that arise in the normal course of business" and prevents importers from "responding to changes in market conditions." Thus, to come into compliance with Article XI of the GATT 1994, any measure Indonesia takes to remove the limiting effects of its measure would need to eliminate the impediment to adjusting the import documents and allow importers to respond to market conditions. The measures also must not introduce any new or different limitations or limiting effects on importation.

5. The United States considers the propositions set forth in (a), (b), and (c) of Question 4 relevant to assessing whether Indonesia has come into "substantive compliance" with the DSB's rulings and recommendations with respect to Indonesia's fixed license terms. But the existence of these changes alone is not sufficient. The Panel should examine Indonesia's measure as a whole in determining whether Indonesia has removed the measure's limiting effects on importation. This examination should include, *inter alia*, (1) whether Indonesia has stipulated these propositions in its regulations, (2) whether Indonesia continues to subject implementation of these propositions to the discretion of its authorities, and (3) whether Indonesia implements the propositions in a manner that creates delays or imposes a restrictive administrative burden on importation.

6. The United States notes that the relevant Indonesian regulations do not appear to have eliminated the limiting effects on the importation of animals and animal products. Article 32 of MOA 34/2016, as amended by MOA 23/2018, appears to provide the Ministry of Agriculture the discretion to reject an importer's application to amend its Recommendation if it fails to comply with "Import requirements". Article 17 of MOT 29/2019 requires an importer to submit a Recommendation when applying for an amendment to the Import Approval, effectively subjecting any amendments to the Ministry of Agriculture's discretion.

7. Furthermore, for any importer intending to adjust how much to import and where the importation would take place, Indonesia continues to require the importer to submit multiple documents to two ministries and wait for the government's approval. As Brazil notes, the burden on importers to submit a document such as a statement declaring the reasons for amending a license may, in itself, be a restriction on importation.

# ANNEX D

## PRELIMINARY RULING

## ANNEX D-1

PRELIMINARY RULING OF THE PANEL

**Adopted on 7 February 2020**

## 1 PRELIMINARY RULING REQUEST BY INDONESIA

1.1. On 18 October 2019, Indonesia filed its first written submission, which included a request for a preliminary ruling. Indonesia requested the Panel to decline to rule on Brazil's claims under Article 4.2 of the Agreement on Agriculture regarding the "positive list" requirement and Brazil's claims under Article XI:1 of the GATT 1994 concerning the enforcement provisions of the "intended use" requirement.[1]

1.2. On 21 October 2019, the Panel informed the parties and third parties that if they wished to comment on Indonesia's request, they could do so in their second written submissions and third-party written submissions, respectively. On 1 November 2019, the European Union and New Zealand submitted their comments on Indonesia's request for a preliminary ruling. On 15 November 2019, Brazil submitted its comments. Brazil requested the Panel to reject Indonesia's preliminary ruling request.[2]

## 2 PANEL'S EVALUATION OF INDONESIA'S PRELIMINARY RULING REQUEST

2.1. Indonesia requests the Panel to decline to rule on Brazil's claims under Article 4.2 of the Agreement on Agriculture regarding the positive list requirement and on Brazil's claims under Article XI:1 of the GATT 1994 concerning enforcement provisions of the intended use requirement. These are claims that Brazil also raised in the original proceedings and on which the panel in those proceedings exercised judicial economy.[3]

2.2. Based on this fact, Indonesia raises three separate grounds for the Panel to decline to rule on these claims. Indonesia argues that (1) the claims are outside the Panel's terms of reference, (2) Brazil should not be able to re-litigate these claims, and (3) it is not necessary for the Panel to make multiple findings on the same measure that is inconsistent with various provisions when a single finding of inconsistency would suffice to resolve the dispute.[4] We address these arguments in turn.

### 2.1 Whether these claims are within the Panel's terms of reference

2.3. Indonesia argues that the two claims at issue are outside the Panel's terms of reference because there are no adopted DSB recommendations and rulings from the original panel on them. Indonesia submits that Article 6.2 of the DSU requires an Article 21.5 panel request to at least reference the DSB recommendations and rulings that the responding party allegedly failed to implement.[5] In this regard Indonesia refers to the Appellate Body's reference, in *US – Softwood Lumber IV (Article 21.5 – Canada)* to an "express link" between the measures taken to comply and the DSB's recommendations and rulings, and its statement that "determining the scope of 'measures taken to comply' in any given case must also involve examination of the recommendations and rulings contained in the original report(s) adopted by the DSB".[6] Indonesia submits that the two claims are beyond the scope of an Article 21.5 proceeding because the Panel would not be able to

[1] Indonesia's request for a preliminary ruling, para. 5.1.
[2] Brazil's second written submission, para. 30.
[3] Indonesia's request for a preliminary ruling, para. 4.
[4] Indonesia's request for a preliminary ruling, para. 21.
[5] Indonesia's request for a preliminary ruling, para. 22, referring to Appellate Body Report, *US – FSC (Article 21.5)*.
[6] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 II – Canada)*, para. 68; see also Indonesia's request for a preliminary ruling, para. 23.

"determine the scope of 'measures taken to comply' or find any link between the 'measures taken to comply' and the recommendations and rulings of the DSB".[7]

2.4. Brazil submits that the Appellate Body was referring to an express link between *measures* taken to comply — not claims — and the DSB recommendations and rulings. Brazil stresses that the Appellate Body report therefore does not contain any limitations on *claims* that can be raised in compliance proceedings.[8] Brazil also argues that because a complaint under Article 21.5 must specify how measures taken to comply have brought about new WTO inconsistencies, these new WTO inconsistencies fall within the scope of Article 21.5 proceedings, even if they do not concern adopted recommendations and rulings in the original proceedings.[9]

2.5. We recall that a panel's terms of reference are governed by the panel request.[10] Article 6.2 provides that a panel request must identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[11] Article 6.2 is generally applicable to panel requests under Article 21.5.[12] However, the requirements under Article 6.2 as they apply to an original panel request need to be adapted to a panel request under Article 21.5.[13] Specifically:

> [I]n order to identify the "specific measures at issue" and to provide "a brief summary of the legal basis of the complaint" in a panel request under Article 21.5, the complaining party must identify, at a minimum, the following elements in its panel request. First, the complaining party must cite the recommendations and rulings that the DSB made in the original dispute as well as in any preceding Article 21.5 proceedings, which, according to the complaining party, have not yet been complied with. Secondly, the complaining party must either identify, with sufficient detail, the measures allegedly taken to comply with those recommendations and rulings, as well as any omissions or deficiencies therein, or state that no such measures have been taken by the implementing Member. Thirdly, the complaining party must provide a legal basis for its complaint, by specifying how the measures taken, or not taken, fail to remove the WTO-inconsistencies found in the previous proceedings, or whether they have brought about new WTO-inconsistencies.[14]

The parties do not dispute these requirements.[15]

2.6. Indonesia does not dispute that the *measures* to which the claims in question relate have been properly identified in the panel request and are measures taken to comply. It is therefore not in dispute that the positive list requirement and the intended use requirement are within our terms of reference. Rather, Indonesia argues that the *claims* pertaining to these *measures*, cannot be subject to review because these *claims* do not link back to any of the DSB recommendations and rulings in the original proceedings.

2.7. In our view, while the proper identification of *measures* taken to comply in the panel request requires a link to the relevant rulings and recommendations, the proper provision of a legal basis, i.e. the proper presentation of *claims*, does not. Such a requirement would effectively limit the scope of Article 21.5 proceedings to claims on which a panel made findings of violations in the original proceedings. However, it is well-settled that Article 21.5 panels are not merely called upon to examine whether measures taken to comply effectively implement specific recommendations and rulings adopted by the DSB in the original proceeding. Instead, the mandate of Article 21.5 panels, according to the terms of that provision, is to examine either the existence of measures taken to comply or their consistency with a covered agreement.[16] As rightly pointed out by Brazil, a

[7] Indonesia's request for a preliminary ruling, para. 22.
[8] Brazil's second written submission, para. 21.
[9] Brazil's second written submission, para. 20.
[10] Appellate Body Reports, *China – Raw Materials*, para. 251.
[11] Appellate Body Report, *Korea – Dairy*, para. 120.
[12] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 59.
[13] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 59.
[14] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 62.
[15] See, e.g. Indonesia's request for a preliminary ruling, para. 22; and Brazil's first written submission, para. 19.
[16] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 79.

complaining party in an Article 21.5 proceeding may thus raise claims, arguments, and factual circumstances different from those raised in the original proceeding.[17]

2.8. In sum, a complaining party is not prevented from including, in the panel request, claims for which there have been no DSB recommendations and rulings in the original proceeding. We therefore find that Brazil's claims under Article 4.2 of the Agreement on Agriculture regarding the positive list requirement and under Article XI:1 of the GATT 1994 concerning the intended use requirement with respect to its enforcement provisions are within our terms of reference. Whether Brazil is barred from re-litigating such claims is a distinct issue, which we discuss in the next section.

### 2.2 Whether Brazil is barred from re-litigating these claims

2.9. Indonesia argues that a compliance panel is not a "second chance" to raise claims that the original panel did not assess. In Indonesia's view, Article 21.5 proceedings must be limited to exclude claims on which the original panel did not make any rulings or recommendations, which are beyond the scope of Article 21.5 proceedings.[18]

2.10. Brazil argues that Article 21.5 only proscribes giving a party a "'second chance' to reargue a claim that has been decided in an adopted report".[19] Brazil maintains that because the original panel did not rule on the merits of the claims that are the subject of the preliminary ruling request, those claims are not deemed "decided", and Brazil is not barred from raising those claims in the current proceeding.[20]

2.11. The scope of claims that may be raised in an Article 21.5 proceeding is not limitless.[21] In particular, a complaining party may not re-litigate claims that were decided on the merits in the original proceeding.[22] Thus, a complaining party that failed to make a *prima facie* case in the original proceedings regarding a claim against an element of the measure that remained unchanged since the original proceedings may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings.[23]

2.12. However, as Brazil rightly points out, a complaining party can raise claims that were *not* decided on the merits.[24] In the original proceedings of this dispute Brazil did not obtain a decision on the merits of the two claims at issue. Rather the panel exercised judicial economy with regard to them. The limitations described above do not apply to claims where the panel exercised judicial economy, which has been confirmed in a number of cases.[25] Consequently, a complainant is not barred from raising such claims again in Article 21.5 proceedings.

2.13. In view of the above, we find that Brazil is not barred from raising the two claims at issue in this compliance proceeding.

### 2.3 Whether it is necessary to decide on these claims

2.14. Indonesia argues that the Panel's findings regarding whether Indonesia has implemented the DSB rulings and recommendations on the positive list requirement under Article XI:1 of the GATT as well as those on the enforcement provisions of the intended use requirement would suffice to fully resolve the matters in issue in the dispute.[26] In Indonesia's view, "there is no need for the Panel

[17] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 79.
[18] Indonesia's request for a preliminary ruling, para. 24.
[19] Brazil's second written submission, para. 25.
[20] Brazil's second written submission, para. 25.
[21] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210. See also Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 71 to 72 and fn 110.
[22] See e.g. Appellate Body Report, EC – Bed Linen *(Article 21.5 – India)*, paras. 93 and 98.
[23] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210.
[24] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.21.
[25] See Appellate Body Reports, *EC – Bed Linen (Article 21.5 – India)*, fn 115; and *US — Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 152. See also Panel Reports, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 7.91 and 7.96; and *US – Zeroing (Article 21.5 - EC)*, para. 8.262 and fn 895).
[26] Indonesia's preliminary ruling request, para. 27.

to rule on every claim especially on claims that the original panel never issued any rulings nor recommendations."[27]

2.15. Brazil submits that Indonesia is requesting the Panel to exercise judicial economy with regard to the two claims at issue, which is premised on the Panel making findings on the merits of other claims at issue. This would not occur until the end of the current proceeding. Brazil submits that it would thus be inappropriate for the Panel to exercise judicial economy at this stage.[28]

2.16. A panel's mandate, as defined in Article 11 of the DSU, is to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." In exercising this mandate, a panel is not required to examine all legal claims made by the complaining party.[29] Instead, a panel has the discretion to determine the claims it must address to resolve the dispute between the parties.[30]

2.17. We agree with Brazil that Indonesia's request is premature at this stage of the proceeding. We can only assess whether to exercise judicial economy with regard to the two claims at issue if and when we have made findings on the merits of other claims at issue.[31] At this stage of the proceeding, we are therefore not in a position to decide whether to exercise judicial economy with regard to the two claims at issue and consequently decline to do so.

## 3 CONCLUSION

3.1. In view of the above considerations, we reject Indonesia's preliminary ruling request and find that Brazil's claims regarding the positive list requirement under Article 4.2 of the Agreement on Agriculture and the intended use requirement with respect to its enforcement provisions under Article XI:1 of the GATT 1994 are properly within our terms of reference. We also find that Brazil is not barred from raising these claims. Finally, we consider that it is premature, at this stage, to decide whether to exercise judicial economy with regard to these claims.

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[27] Indonesia's preliminary ruling request, para. 27.
[28] Brazil's second written submission, para. 29.
[29] Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 18-19, DSR 1997:I, p. 339.
[30] Appellate Body Report, *India – Patents (US),* para. 87.
[31] Brazil's second written submission, para. 29.