INDONESIA – IMPORT LICENSING REGIMES[1]
(DS477, 478)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	*New Zealand* *United States*	*GATT Arts. XI and XX* *AA Art. 4.2*	Establishment of Panel	*20 May 2015*
			Circulation of Panel Report	*22 December 2016*
Respondent	*Indonesia*		Circulation of AB Report	*9 November 2017*
			Adoption	*22 November 2017*

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** These two disputes concerned 18 measures imposed by Indonesia on the importation of horticultural products, animals and animal products. Most of these measures (17) concerned Indonesia's import licensing regimes for horticultural products and animals and animal products. In addition, the co-complainants challenged Indonesia's conditioning of importation of these products on the sufficiency of domestic production to fulfil domestic demand.

- **Product at issue:** Horticultural products, animals and animal products.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **Order of analysis: AA Art. 4.2 (market access)/GATT Art. XI:1 (quantitative restrictions):** The Appellate Body held that Art. 4.2 does not apply to the exclusion of Art. XI:1. Rather, both provisions contain the same substantive obligations in relation to the claims at issue and therefore apply cumulatively. The Appellate Body also found that there is no mandatory sequence of analysis between these two provisions and therefore upheld the Panel's decision to begin with Art. XI:1.

- **Burden of proof: GATT Art. XX (general exceptions)/AA Art. 4.2 footnote 1:** The Appellate Body upheld the Panel's finding that Art. 4.2 and its footnote do not contain any express indication that Art. XX is no longer an affirmative defence when it is applied through the reference in the second part of footnote 1. Furthermore, the Appellate Body held that nor does Art. 4.2 or its footnote provide that a complainant bringing a claim under this provision must establish that the challenged measure is not maintained under Art. XX or under any of the other provisions referred to in the second part of footnote 1. The Appellate Body noted that while the phrase "but not" in the second part of footnote 1 makes clear that measures prohibited under Art. 4.2 do not include measures maintained under one of the provisions mentioned in the second part of footnote 1, this phrase is neutral as to the allocation of the burden of proof under these provisions, including under Art. XX.

- **GATT Art. XI:2(c)/AA Art. 4.2:** The Appellate Body agreed with Indonesia that that the term "quantitative import restrictions" in the first part of footnote 1 to Art. 4.2 should be interpreted in light of prohibition of quantitative restrictions under Art. XI:1. However, with respect to the relationship between Art. 4.2 and Art. XI:2(c), the Appellate Body observed that there is no express language in Art. XI that suggests that the derogations under Art. XI:2(c) are relevant not only to the prohibition under Art. XI:1 but also to the prohibition under Art. 4.2. The Appellate Body noted that measures prohibited under Art. 4.2 did not include those maintained under general, non-agriculture-specific provisions of GATT 1994 and that Art. XI:2(c) "does not qualify as a 'general, non-agriculture-specific provision' because it is "agriculture-specific" as its application is limited to *agricultural* or fisheries products by its express terms. The Appellate Body held that although Art. XI:2(c) carves out quantitative restrictions from the *prohibition* contained in Art. XI:1, they are still quantitative restrictions within the meaning of Art. 4.2. Therefore, Members cannot maintain quantitative import restrictions on agricultural products that satisfy the requirements of Art XI:2(c) without violating Art 4.2. This is because the prohibition on quantitative import restrictions under Art 4.2 does not allow for the kind of derogations recognized under "agriculture-specific" provisions such as Art. XI:2(c).

3. OTHER ISSUES[2]

- **Sequence of analysis GATT Art. XX:** The Appellate Body recalled that it had set out the sequence of analysis in previous reports. However, the Appellate Body accepted that a panel that deviates from the sequence of analysis might not, for that reason alone, commit a legal error. But the Appellate Body stressed the importance of following the normal Art. XX sequence of analysis.

1 *Indonesia – Importation of Horticultural Products, Animals and Animal Products*
2 AA Art. 21.1 conflict, GATT Art. XX(a), preliminary ruling request, enhanced third-party rights.