

***Indonesia – Importation of Horticultural Products,
Animals, and Animal Products
(DS477 / DS478)***

Executive Summary of the Second Written Submission and
Opening Statement of the United States of America
At the Second Substantive Meeting of the Panel

May 17, 2016

EXECUTIVE SUMMARY OF U.S. SECOND WRITTEN SUBMISSION

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

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

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

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

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

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

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

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

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

6. *Application Windows and Validity Periods.* Products cannot be shipped until after Import Approvals are issued at the start of each import and must clear customs before the last day of the period. Therefore, there is a period of five to six weeks during each period when U.S. exporters cannot ship to Indonesia. Thus, based on their design, structure and operation, the Indonesian

measures restrict the importation of products in breach of Article XI:1. In addition, the United States submitted evidence demonstrating the effect of this no-shipment period on imports.

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

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

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

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

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

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

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

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

15. *Import Licensing Regimes as a Whole.* Due to the combined operation and interaction of the different requirements, the regimes, as a whole, are more restrictive than their components, taken singly. In particular, the regimes include requirements that cause importers to reduce the products they apply to import, while the fixed license terms requirement then strictly limits

imports in any period to the products listed on importers' permits for that period. The fixed license terms and application window and validity period requirements further restrict imports by preventing importers from responding to market forces by importing different products, or on a different time schedule, than they had foreseen. And, contrary to Indonesia's assertions, the co-complainants have also submitted copious evidence demonstrating that the regimes "operate[] to restrict the quantity of imports" of the covered products, although this is not necessary to show a breach of Article XI:1.

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

3. Trade Data Confirms Restrictive Effect of the Challenged Measures

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

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

18. Indonesia asserts that many of the co-complainants' claims fall outside the scope of Article XI:1 because the measures are "self-imposed" by private actors and are not "instituted or maintained" by Indonesia. The legal premise of this argument is incorrect. The Appellate Body in *Korea – Beef* considered this argument under Article III:4 of the GATT 1994 and found that "the intervention of some element of private choice does not relieve [a Member] of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product." Previous panels have found that this principle applies to Article XI:1. Further, Indonesia's assertion that the measures are "decisions of private actors" is inaccurate.

19. Regarding the *application windows and validity periods*, Indonesia is wrong that importers *decide* not to ship their products after a certain date. Under Indonesia's regulations, imported products that arrive after the end of the period for which their import approval is valid will not be accepted. Thus, exporters must stop shipping far enough in advance of the end of the period for their goods to clear customs by the last day. Importers do not "choose" to stop

importing at the end of one validity period and the beginning of another, or to reduce their imports accordingly. That choice is *forced* on them by Indonesia’s regulatory requirements.

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

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

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

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

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

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

25. Additionally, as a factual matter, Indonesia’s import licensing regimes are not “automatic.” Indonesia’s argument is based on an incorrect definition of “automatic” that, if

accepted, would mean Members could impose, through import licensing, *any* substantive restriction on importation, as long as import licensing agents could not exercise discretion in issuing licenses and licenses eventually were granted after all legal requirements were met. This definition of “automatic” has no support in the text of any of the covered agreements. Further, the suggestion that licensing regimes such as Indonesia’s are immune from scrutiny would undermine the prohibitions of Articles XI:1 and 4.2, because it would allow Members to impose substantive restrictions on importation under the guise of legitimate licensing procedures.

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

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

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

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

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

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

30. Appellate Body reports show this is insufficient. In *Thailand – Cigarettes (Philippines)*, the Appellate Body found that Thailand’s Article XX(d) defense failed because Thailand did not “identify precisely the ‘laws or regulations’ with which the measure . . . purportedly secures compliance.” Thailand had referred to its value-added tax law, “Chapter 4” of its Revenue Code,” and “reporting requirements of its VAT and other tax laws.” The Appellate Body found these references were insufficient to identify a WTO-consistent rule under Article XX(d), noting

that they “encompass a myriad of provisions . . . addressing various matters.” Indonesia’s references are even less precise and thus fail to meet the Article XX(d) standard.

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

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

33. With respect to the *application windows and validity periods*, Indonesia asserts that they “contribute to Indonesia’s ability to allocate resources effectively” among its ports. But it is not clear that the measure would make any contribution at all in this regard. Importers do not tie their imports to a particular port. Therefore, Indonesian officials would know at the beginning of the period only the maximum permitted imports for that period and the ports where such imports could possibly be brought in. It is unclear how resources could be allocated based on this information. Further, a less trade-restrictive way to achieve the objective of “providing advance notice of expected import volumes” would be a truly automatic import licensing regime where importers could apply on any day prior to the customs clearance of goods and receive permission to import goods of the type and quantity requested through the port specified. Such a regime could be administered in the same way as the current regime, and would, therefore, be “reasonably available.” It would provide more accurately and timely notice of planned imports, and, as such, would *better* assist Indonesia in allocating resources.

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

35. Indonesia’s claim that the *realization requirement* is necessary for customs enforcement because it serves as a “safeguard against importers grossly overstating their anticipated imports” similarly fails. First, Indonesia has not provided any evidence that a problem with importers overstating their anticipated imports exists or explained how, if it did exist, it would impose a burden on customs officials. Second, Indonesia’s argument concerning “misallocation of limited resources” is based on the assumption that the import licensing requirements provide customs

officials with relevant information about planned imports. But this is not the case. Importers are *not* required to provide details on when and where products will be imported. Third, Indonesia’s argument ignores the fact that any over-estimation problem would not exist without the application windows and validity periods and the fixed license term requirements. Further, any marginal contribution the realization requirement could make to saving customs resources would be outweighed by the severe trade-restrictiveness of the measure.

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

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

38. With respect to its defense of the regimes “as a whole,” Indonesia provides no further explanation. We assume that Indonesia’s defense of the regime is derivative of its defenses of the regime’s individual components. Thus, Indonesia’s defense must fail for the same reasons as its defenses of the individual measures. Moreover, any small contribution that the regimes might make to one of these objectives would have to be “necessary” even in light of the extremely trade-restrictive effect of the regimes as a whole, which Indonesia has not shown. Elimination of the underlying restrictions, imposition of an automatic import licensing regime and continued reliance on other more relevant measures related to food safety would provide reasonably available alternative measures Indonesia could take to remediate the inconsistencies with Articles XI:1 and 4.2.

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

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

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

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

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

43. Indonesia’s argument that *six-month restriction* on fresh horticultural products is “necessary for the protection of human, plant, or animal life or health” also lacks merit. The first element of Article XX(b) is not met because, as with the other challenged measures, Indonesia

has presented no evidence to suggest that this measure pursues the objective of food safety. The second element is not satisfied because Indonesia has not shown how the measure would make any contribution to food safety. Indeed, Indonesia has not even asserted that the requirement is “necessary” to food safety, merely stating that authorities would “prefer” products to be stored locally. Finally, Indonesia ignores the fact that it has health and SPS requirements for horticultural products, including the requirement that all imports be accompanied by health and SPS certificates. Since all horticultural product imports are certified as meeting Indonesia’s health and SPS standards prior to their being shipped, a less trade-restrictive alternative measure would be to continue to rely on these requirements and not impose the six-month requirement, which is highly trade-restrictive and makes no contribution to food safety.

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

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

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

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

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

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

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

50. Indonesia asserts that the *use, sale, and transfer* restrictions on horticultural products are necessary to protect consumers from purchasing non-Halal horticultural products at traditional markets. While the United States agrees that upholding the Halal food requirements in Indonesia is a “public moral” under Article XX(a), Indonesia has not demonstrated that restrictions relate to this objective. The texts of the legal instruments setting forth the restrictions contain no reference to Halal requirements at all. Moreover, Indonesia fails to provide any other evidence showing connection between the restrictions and any Indonesian Halal requirements.

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

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

measure, its statements concerning traditional markets do not address the prohibition on all retail sale (including in modern markets) with respect to Appendix I products.

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

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

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

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

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

57. Finally, with respect to Article XX(d), Indonesia has shown no connection between the application windows and validity periods, fixed license terms, realization requirements, storage capacity requirements, and use, sale, and transfer restrictions and the objective of securing compliance with customs laws. Because none of these restrictions relate to achieving their purported objective, these restrictions exist solely to restrict imports and protect the domestic industry and, therefore, result in arbitrary and unjustifiable discrimination.

IV. CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

68. Indonesia’s Article XX(d) defenses also fail. Indonesia has not adequately identified the WTO-consistent laws and regulations purportedly enforced by the import licensing measures. Indonesia identified 13 legal instruments whose compliance is allegedly secured by its import licensing regimes, but the mere listing of legal instruments and cursory references to general provisions fall short of identifying the relevant rule under Article XX(d). Indonesia put forward almost *no* evidence that any of the challenged measures were taken “to secure compliance” with the Customs Law or any other listed legal instrument. With respect to the necessity element, Indonesia did not explain how its import licensing measures contribute to *securing compliance* with any requirement of a customs or food safety law or regulation. Merely asserting that the import licensing regimes “contributed to the monitoring of the flow of goods” is not sufficient.

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