

*Indonesia – Measures Concerning the Importation of Chicken Meat
and Chicken Products*
(DS484)

Responses of the United States of America to the Panel's
Questions to Third Parties

August 2, 2016

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<i>EC – Selected Customs Matters (AB)</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006
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<i>US – Zeroing (EC) (Article 21.5 – EC) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW and Corr.1, adopted 11 June 2009

Terms of Reference

1. Please comment on how the Panel is to take into account legal developments that have occurred, and may still occur, in the legal instruments underlying the measures at issue since the establishment of the Panel.

1. The United States considers that the measures that are within the Panel's terms of reference are those that were set out in Brazil's panel request, as they existed at the time of the Panel's establishment. In making an objective assessment of the matter referred to it, however, the Panel may examine any evidence it considers relevant, including legal instruments enacted after the Panel's establishment.

2. A panel's terms of reference are set out in Articles 7.1 and 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Specifically, when the Dispute Settlement Body ("DSB") establishes a panel, the panel's terms of reference under Article 7.1 are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "brief summary of the legal basis of the complaint."¹ As the Appellate Body recognized in *EC – Chicken Cuts*, "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."²

3. In *EC – Selected Customs Matters*, the panel and Appellate Body were presented with the precise question of what legal situation a panel is called upon, under Article 7.1 of the DSU, to examine. The panel and Appellate Body both concluded that, under the DSU, the task of a panel is to determine whether the measures at issue are consistent with the relevant obligations "*at the time of establishment of the Panel*."³ It is thus the challenged measures, as they existed at the time of the Panel's establishment, when the "matter" was referred to the Panel, that are properly within the Panel's terms of reference and on which the Panel should make findings.

¹ See *US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.

² *EC – Chicken Cuts (AB)*, para. 156.

³ See, e.g., *EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel's review of the consistency of the challenged measure with the covered agreements properly should "have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel"); *id.*, para. 259 (finding that the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they "might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel"); *China – Raw Materials (AB)*, para. 254 (finding that the panel correctly described the measure at issue as "all the measures through which export duties and quotas were imposed...at the time of the establishment of the Panel"); *EC – Approval and Marketing of Biotech Products*, para. 7.456 (finding that the "essential elements" characterizing the moratorium at issue were in effect as of the time of the establishment of the panel."); see also *US – Animals*, para. 7.118; *EC – IT Products (Panel)*, para. 7.167; *EC – Large Civil Aircraft (Panel)*, para. 7.116.

4. Pursuant to Article 11 of the DSU, the Panel can examine any evidence that it considers relevant to making an objective assessment of the matter referred to it, namely, whether the challenged measures breach Indonesia’s WTO obligations as of the date of the Panel’s establishment. As the panel and Appellate Body in *EC – Selected Customs Matters* explained, this evidence can include legal instruments enacted after a panel’s establishment, where, for example, such instruments are relevant to determining the content and operation of the challenged measures at the time the panel was established and its terms of reference were fixed.⁴

5. The United States notes that some past reports, such as in *Chile – Price Band System*, have in limited circumstances examined the replacement of a measure as it existed at the time of panel establishment.⁵ Given that the parties to the *Price Bands* dispute both agreed to the panel’s assessment, the issue was not analyzed extensively under the DSU, as it was in the subsequent *EC – Selected Customs Matters* reports. Moreover, the *Price Bands* report reasoned that the panel’s assessment of a replacement measure that supersedes the measure identified in the panel request was appropriate because the replacement measure was “of the same essence”.

6. Logically, however, the “same essence” approach leads to the conclusion that examining the replacement measure is neither necessary nor appropriate, for at least two reasons. First, if a replacement measure is “of the same essence”, a panel would make the same finding of consistency or of inconsistency were it solely to analyze and make findings on the original measure. Thus, it is not necessary to make findings on that replacement measure to resolve the dispute, and there is no need for a panel to examine a replacement measure not within its terms of reference.

7. Second, a finding on the original measure means that both parties will be aware that a replacement measure “of the same essence” will be inconsistent (or consistent) in the same way as the original measure. Thus, in the case of a finding of inconsistency, to achieve compliance by the end of the implementation period would require the responding party to change its replacement measure to ensure that it is *not* “of the same essence” as the original measure. The panel’s finding on the original measure, then, is sufficient to assist the parties in finding a prompt solution to the dispute.

⁴ *EC – Selected Customs Matters (AB)*, para. 188 (“While there are temporal limitations on the measures that may be within a panel’s terms of reference, such limitations do not apply in the same way to evidence. Evidence in support of a claim challenging measures that are within a panel’s terms of reference may pre-date or post-date the establishment of the panel. A panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment.”).

⁵ *Chile – Price Band System (AB)*, paras. 134-144. See also *EC – IT Products*, paras. 7.137-7.146.

Alleged General Prohibition

2. What evidence other than specific instances of application would prove the existence of an unwritten measure? Please comment on how this would apply to the alleged general prohibition.

3. What evidence would a complainant have to show to prove how the different components operate together as part of a single measure and how a single measure exists as distinct from its components?

8. [U.S. response to Questions 2 and 3] The content and meaning of a measure is a factual question to be decided by a panel based on the totality of the evidence before it. The Appellate Body has found that “precisely how much and precisely what kind of evidence will be required” for the complainant to establish the existence of a measure “will necessarily vary from measure to measure, provision to provision, and case to case.”⁶ The question with respect to the existence of a single, unwritten measure comprised of multiple components is the same as that related to any fact asserted by a Member in the course of dispute settlement procedures: Does the evidence support the assertion?⁷

9. When assessing the evidence involving a single, unwritten measure, the panel in *Argentina – Import Measures* examined the evidence in a “holistic manner” and “based on the totality of the facts.”⁸ The panel in that dispute examined evidence including copies of domestic laws, regulations and policy documents; communications addressed to government officials by private companies; statements by government officials and notes posted on government websites; articles in newspapers and magazines; statements by industry officials; data from industry surveys; and reports prepared by market intelligence entities.⁹

10. Similarly, in *EC – Approval and Marketing of Biotech Products*, the complaining parties presented evidence that included press releases, fact sheets and other statements of the European Commission; speeches and news reports concerning statements of Commissioners; and statements by member State officials.¹⁰ The panel concluded that this evidence supported the complaining parties’ assertion that the EC applied a moratorium during the relevant time period.¹¹

⁶ *US – Wool Shirts and Blouses (AB)*, p. 14; see also *EC – Sardines (AB)*, para. 270.

⁷ See *EC – Approval and Marketing of Biotech Products*, paras 7.456, 7.459. In that dispute, the complaining parties, including the United States and Argentina, alleged that the EC had imposed a moratorium on the approval of biotech products. The EC contested the moratorium existed, and so the panel observed that “[i]t is therefore necessary to examine in detail whether the evidence supports the Complaining Parties’ assertion.”

⁸ *Argentina – Import Measures (Panel)*, para. 6.165.

⁹ *Argentina – Import Measures (Panel)*, para. 6.165.

¹⁰ *EC – Approval and Marketing of Biotech Products*, paras. 7.524-7.531.

¹¹ *EC – Approval and Marketing of Biotech Products*, para. 7.1272.

4. How do you assess the WTO-consistency of the general prohibition? Would all of the elements have to be WTO-inconsistent?

11. If the Panel determines that the general prohibition exists, the Panel should assess the WTO-consistency of the general prohibition no differently than it would assess any other measure before it. That is, the Panel would first determine whether Brazil has established a *prima facie* case of its claim that the general prohibition is inconsistent with Article XI of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) or Article 4.2 of the *Agreement on Agriculture*.¹² If Brazil meets its burden, then the Panel would proceed to consider whether Indonesia has rebutted Brazil’s claim or justified the measure under an exception.¹³ As noted above, “precisely how much and precisely what kind of evidence will be required to establish” the *prima facie* case “will necessarily vary from measure to measure, provision to provision, and case to case.”¹⁴

12. Whether each element of a single measure also will be WTO-inconsistent depends on the specific facts of the dispute. Even where, as here, a complainant has challenged both an overarching measure and each of the constituent elements of that measure, the WTO consistency of the constitutive elements is not determinative of the consistency of the overarching measure. Similarly, the panel need not adopt a novel approach to assessing the WTO-inconsistency of an overarching measure merely because it involves other, independent measures. As the panel in *US – Tuna II (Mexico)* found, no “legal, factual or logical obstacle” exists to an assessment of the WTO-consistency of the single measure, based on the fact that each of three individual elements of the measure is itself “*a priori* capable of constituting a measure... which may be challenged in dispute settlement proceeding under the DSU.”¹⁵

5. Concerning implementation, what would be the difference between a finding of WTO-inconsistency on the general prohibition and on all of the individual elements? Please comment, in particular, on whether the scope of “measures taken to comply” within the meaning of Article 21.5 of the DSU would differ.

13. If a panel finds that a challenged measure is inconsistent with a covered agreement, regardless of the nature of the measure, the responding party must bring that measure into conformity with its obligations under the WTO agreement.¹⁶ Thus, pursuant to Article 19.1, a finding of WTO-inconsistency for each of several measures necessarily results in a WTO recommendation to bring each such measure into conformity with the covered agreements. Therefore, any compliance obligation Indonesia may incur with respect to the general prohibition or any of its constituent elements will depend on the Panel’s findings with respect to each

¹² *EC – Hormones (AB)*, para. 104.

¹³ *EC – Hormones (AB)*, para. 104.

¹⁴ *US – Wool Shirts and Blouses (AB)*, p. 14.

¹⁵ *US – Tuna II (Mexico) (Panel)*, paras. 7.20, 7.26.

¹⁶ DSU, Article 19.1.

measure’s existence, meaning, and content, as well as the relevant WTO provision found to have been breached. A panel reviewing a claim under Article 21.5 of the DSU must address the measures the responding Member identifies as having been taken to comply with the recommendations and rulings of the Dispute Settlement Body (“DSB”), along with any measures identified by the complaining party as affecting the compliance obligations.

14. The Appellate Body’s consideration of the ordinary meaning of the terms used in Article 21.5 led it to conclude that “the phrase ‘measures taken to comply’ seems to refer to measures taken *in the direction of*, or *for the purpose of achieving*, compliance.”¹⁷ Such measures consist of the “measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB.”¹⁸ This link between the measures taken to comply and the recommendations and rulings of the DSB means that the Article 21.5 analysis for any particular claim involve a consideration of the original WTO-inconsistent measures, the recommendations and rulings of the DSB, and the particular factual and legal circumstances of the measures at issue.

Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

6. Please comment on whether a measure could be assessed simultaneously under Article XI:1 of the GATT 1994 and the Agreement on Agriculture.

15. As the United States and other third parties have noted, a panel may assess a measure under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.¹⁹

16. Article XI:1 of the GATT 1994 stipulates that Members shall not maintain impermissible “restrictions” and “prohibitions” on importation. Article 4.2 of the Agreement on Agriculture prohibits a Member from maintaining “measures of the kind which have been required to be converted into ordinary customs duties” including those specified in footnote 1, such as “quantitative import restrictions,” “minimum import prices,” and “similar border measures” other than ordinary customs duties. Where a measure constitutes a “prohibition or restriction” (other than duties, taxes or other charges) in breach of Article XI:1 of the GATT 1994, that measure also would run afoul of the prohibition in Article 4.2 on maintaining agricultural measures of the kind listed in footnote 1.²⁰

¹⁷ *US – Softwood Lumber IV (21.5 - Canada) (AB)*, para. 66; *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 202.

¹⁸ *Canada – Aircraft (21.5 – Brazil) (AB)*, para. 36.

¹⁹ See U.S. Third Party Submission, para. 54, Australia’s Third Party Submission, para. 30, EU’s Third Party Submission, paras. 22-27, Japan’s Third Party Oral Statement, paras. 3-6, Norway’s Third Party Oral Statement, para. 3, New Zealand’s Third Party Written Submission, paras. 63-66.

²⁰ See *India – Quantitative Restrictions (Panel)*, paras. 5.238-242; *Korea – Various Measures on Beef (Panel)*, para. 768 (“Since the panel has already reached the conclusion that the above measures are inconsistent with Article XI and the Ad Note to Articles XI, XII, XIII, XIV, and XVIII relating to state-trading enterprises, the same measures are necessarily inconsistent with Article 4.2 of *the Agreement on Agriculture* and its footnote

Agreement on Import Licensing Procedures versus GATT 1994/Agreement on Agriculture

7. *Can one distinguish between procedural and substantive licensing requirements? If so, how?*

17. To the extent that the Panel is referring to substantive rules on importation when it enquires about “substantive licensing requirements”, the *Agreement on Import Licensing Procedures* (“ILA”) distinguishes between import licensing procedures within the meaning of the ILA and underlying substantive rules that may be administered through import licensing procedures. Article 1.1 of the ILA defines “import licensing,” for purposes of that agreement, as “administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation . . . to the relevant administrative body.” Thus, the ILA distinguishes between “procedures” used to operate import licensing regimes, which the ILA covers, and the substantive rules of such regimes, which the ILA does not cover.

18. In *EC – Bananas III*, the Appellate Body confirmed this interpretation, finding that the title, preamble, and Article 1.1 of the ILA made it clear that the “agreement relates to import licensing procedures and their administration, not to import licensing rules.”²¹ The panel in *Korea – Various Measures on Beef* made the same finding.²²

8. *In respect of procedural licensing requirements, is the Agreement on Import Licensing Procedures lex specialis vis à-vis Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture? If so, what is the implication for the Panel's analysis?*

19. The principle of *lex specialis* concerns situations where there is a *conflict* between two different provisions such that they cannot both be applied simultaneously. The mere fact that one provision is more specific than the other does not mean that the more general provision is of no effect. As the panel in *Indonesia – Autos* observed:

The *lex specialis derogat legi generali* principle “which [is] inseparably linked with the question of conflict” . . . between two treaties or between two provisions (one arguably being more specific than the other), does not apply if the two treaties “... deal with the same subject from different point[s] of view or [are] applicable in different circumstances, or one provision is more far-reaching than but not inconsistent with, those of the other” *For in such a case it is possible*

referring to non-tariff measures maintained through state-trading enterprises”); *see also EC – Seal Products (Panel)*, para. 7.665 (rejecting Norway’s challenge to the EU seal regime under Article 4.2 on the ground that the panel had already rejected essentially the same challenge under Article XI:1 of the GATT 1994).

²¹ *EC – Bananas III (AB)*, para. 197.

²² *Korea – Various Measures on Beef (Panel)*, paras. 784-785 (stating: “It has been said repeatedly that . . . substantive matters are of no relevance to the *Licensing Agreement* which is concerned with the administrative rules of import licensing systems”).

*for a state which is a signatory of both treaties to comply with both treaties at the same time.*²³

20. In the present dispute, the United States does not see (nor has Indonesia identified) a conflict between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture on one hand, and Article 3.2 of the ILA on the other. Indeed, Article 3.2 of the ILA anticipates that there may be a separate WTO-consistent “restriction” “impos[ed]” through non-automatic licensing procedures.²⁴ If a Member imposes non-automatic import licensing and another provision of the WTO Agreement provides a WTO-consistent basis to impose that measure – such as a tariff-rate quota consistent with a Member’s Schedule and exempted from Article XI:1, for example – the Import Licensing Agreement, including Article 3.2, applies to ensure that the permissible measure is not implemented through an overly restrictive or burdensome licensing procedure. Nevertheless, licensing requirements that in themselves impose a limitation or limiting condition on importation or have a limiting effect on trade also would fall within the scope of Article XI:1 of the GATT 1994.²⁵

21. In cases in which two provisions are identical in coverage, it may be appropriate for a panel to consider the more specific provision *before* proceeding to one that is more general in nature,²⁶ but again that does not mean that the more general provision no longer applies.

²³ *Indonesia – Autos*, footnote 649 (quoting 7 Encyclopedia of Public International Law at 469 (North-Holland 1984); Wilfred Jenks, “The Conflict of Law-Making Treaties”, *The British Yearbook of International Law* (BYIL) 1953 at 425 *et seq* (internal bracketing added)) (emphasis added). *See also Thailand – Cigarettes (Panel)*, para. 7.1047 (“The *lex specialis* principle has been defined by the International Law Commission (“ILC”) as ‘a generally accepted technique of interpretation and conflict resolution in international law.’”) (quoting Report of the International Law Commission, Fifty-eighth session (1 May-9 June and 3 July-11 August 2006) General Assembly Official Records Sixty-first session Supplement No. 10 (A/61/10), p 408).

²⁴ Import Licensing Agreement, Article 3.2. *See also* Import Licensing Agreement, preamble (“Recognizing that import licensing may be employed to administer measures such as those adopted pursuant to the relevant provision of GATT 1994 . . .”).

²⁵ *See China – Raw Materials (Panel)*, para. 7.957 (finding that “licence requirement that results in a restriction additional to that inherent in a permissible measure would be inconsistent with GATT Article XI:1”) (findings mooted on appeal on other grounds).

²⁶ *See, e.g., EC – Bananas III (AB)*, para. 203 (“Although Article X:3(a) and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures.”).

Border Measure versus Internal Measure

9. Are Article III:4 of the GATT 1994 and Article XI:1 of the GATT 1994 mutually exclusive in their scope of application?

10. Can a measure be assessed as a border measure and internal measure simultaneously, if, and to the extent that, it affects competitive conditions of imports in different ways, i.e. has "different effects"?

22. [U.S. response to Questions 9 and 10] The United States considers Article XI:1 and Article III:4 of the GATT 1994 to have “distinct scopes of application.”²⁷ 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.”

23. 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.²⁸

24. 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.

11. In its opening oral statement Indonesia mentions MoA Decree 306/1994, which provides that frozen meat can only be sold in places with cooler facilities (Article 22 and 23 of Decree 306/1994). On its face the Decree applies to chicken irrespective of its origin. Please comment on whether this measure would affect a conclusion that the intended use requirement is a border measure.

25. The existence of a measure that requires frozen meat to be sold in places with cooler facilities does not change the intended use requirement’s characterization as a border measure. The intended use requirement is a condition on the importation of animal products and is implemented through Indonesia’s import licensing regime.

26. The United States recalls that Indonesia imposes the intended use requirement as a condition importers must meet to import animal products listed in Annex II of MOA 139/2014,

²⁷ *India – Autos*, para. 7.220.

²⁸ *India – Autos*, para. 7.220, citing to *Canada – FIRA (GATT)*, para. 5.14.

as amended.²⁹ Indonesia implements this requirement by specifying the limited uses of imported animal and animal products on the Ministry of Agriculture’s “Recommendation” for importation, which an importer must have to obtain the Import Approval from the Ministry of Trade.³⁰

27. Moreover, an importer that violates the provision of MOA 139/2014, as amended, concerning uses for which animals and animal products may be imported, is subject to sanction by revocation of its Recommendation and ineligibility for future Recommendations, as well as possible revocation of its Import Approval and, if applicable, its official designation as an importer.³¹ Thus, the intended use requirement is a border measure subject to Article XI:1 of the GATT 1994 because Indonesia imposes it, through its import licensing regime, as a condition on importation.

Article XI:1 of the GATT 1994

12. Please provide your views on the statement in paragraph 17 of the European Union's third-party submission that "[o]nly where there is a discernible quantitative dimension of the measure, in the form of a limiting effect on the quantity or value of a product being imported/exported can the measure fall under Article XI:1 of the GATT 1994".

28. To the extent that the EU’s Third Party Submission suggests that a complaining party must demonstrate some trade effects to prove a claim under Article XI:1 of the GATT 1994, the United States submits that such evidence is neither necessary nor sufficient to show that a measure is inconsistent with Article XI:1 of the GATT 1994. The text of Article XI:1 *does not* support the EU’s assertion that a complainant must show a “discernible quantitative dimension” as a necessary element of an Article XI:1 claim. Previous panel and Appellate Body reports have confirmed this interpretation

29. Article XI:1 of the GATT 1994 refers to “restrictions . . . on the importation” of products. Relying on the ordinary meaning of the term “restriction,” the Appellate Body has recognized that a “restriction’s” limiting effect on importation “need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.”³² Thus, a complainant can demonstrate a measure’s inconsistency with Article XI:1 by

²⁹ MOA 139/2014, as amended, article 32(2) (Exh. US-3): “Intended use, as described in [the Recommendation] for carcasses, and/or non-bovine meat and processed meats . . . includes for: hotel, restaurant, catering, manufacturing, other special needs, and modern markets.”

³⁰ MOA 139/2014, articles 30 and 32 (Exh. US-3). MOT 46, as amended, article 10 (Exh. US-2). See also Brazil’s First Written Submission, paras. 87-89.

³¹ MOA 139/2014, article 39(d) (Exh. US-3) (stating that importers who violate article 32 of MOA 139/2014 (on the intended uses of Appendix I and Appendix II products) “will be subject to sanctioning in the form of Recommendation revocation, not being given Recommendation in the future, and will have their Import Approval Letter (SPI) and status as a Registered Importer (IT) of Animal Products proposed to the Minister of Trade for revocation”).

³² *Argentina – Import Measures (AB)*, para. 5.217; see *China – Raw Materials (AB)*, para. 319.

showing that its design, structure, and operation, in themselves, impose a limitation on importation (actual or potential).³³ This interpretation is in accord with the Appellate Body’s interpretation of other provisions of the GATT 1994 that do not explicitly require a showing of trade effects.³⁴

30. The United States notes that a panel may examine whether a measure is a restriction on importation, including a quantitative restriction, by looking to its design, structure, and operation. Where available, the panel may look to relevant statistical data as additional evidence of the effects of a measure, but such evidence is neither necessary nor sufficient to establish a breach of Article XI:1. The suggestion that presenting statistical evidence of trade effects is a necessary element of Article XI:1 would mean that a complaining party *could not prevail* if it did not export the product at issue. This would be at odds with the findings of many previous panels and the Appellate Body that Article XI:1, like other articles of the GATT 1994 (including Articles I, II, and III) “protects competitive opportunities of imported products, not trade flows.”³⁵

Article 4.2 of the Agreement on Agriculture

13. *In the context of determining whether a measure constitutes "discretionary import licensing" under Footnote 1 to Article 4.2 of the Agreement on Agriculture, please provide your views on the conceptual relationship between discretionary import licensing and non-automatic import licensing. In your response please refer to the relevant case law.*

31. Examining the plain meaning of the different terms used in footnote 1 of the Agreement on Agriculture and Article 3.1 of the Import Licensing Agreement, in their respective contexts, the term “non-automatic import licensing” overlaps to an extent with “discretionary import licensing”, but they are not co-extensive. “Discretionary” import licensing goes to the basis for the decision to provide a license – the lack of mandatory criteria and the vesting of decision-making authority in the issuer. In the context of Footnote 1 to Article 4.2 of the Agreement on Agriculture, “discretionary import licensing” has been interpreted as the “discretionary use by

³³ See *Indonesia – Importation of Horticultural Products, Animals, and Animal Products* (DS477 / DS478) First Written Submission of the United States of America, paras. 139-145. (Exh. US-1)

³⁴ See, e.g., *EC – Seal Products (AB)*, para. 5.82 (on Articles I:1 and III:4); *US – Clove Cigarettes (AB)*, para. 176; *China – Publications and Audiovisual Products (AB)*, para. 305; *Thailand – Cigarettes (Philippines) (AB)*, para. 126 (on Article III:4); *Japan – Alcoholic Beverages II (AB)*, p. 16 (on Article I:1); *Brazil – Retreaded Tyres (AB)*, para. 229 (Article XX); *EC – Bananas III (Article 21.5 – Ecuador II) / (Article 21.5 – US) (AB)*, para. 469 (on Article III:2).

³⁵ *Argentina – Import Measures (Panel)*, para. 6.265; *China – Raw Materials (Panel)*, para. 7.1081; see *Argentina – Import Measures (AB)*, para. 5.217; *EC – Seal Products (AB)*, para. 5.82 (on Articles I:1 and III:4); *US – Clove Cigarettes (AB)*, para. 176; *China – Publications and Audiovisual Products (AB)*, para. 305; *Thailand – Cigarettes (Philippines) (AB)*, para. 126 (on Article III:4); *Japan – Alcoholic Beverages II (AB)*, p. 16 (on Article I:1); *Brazil – Retreaded Tyres (AB)*, para. 229 (Article XX); *EC – Bananas III (Article 21.5 – Ecuador II) / (Article 21.5 – US) (AB)*, para. 469 (on Article III:2).

authorities in an importing country of the concession, or refusal to grant, a particular document which is necessary for the importation of a good, as an instrument to administer trade.”³⁶

32. However, the element of discretion is not required for import licensing procedures to be considered non-automatic. Article 3.1 of the ILA defines non-automatic import licensing procedures in the negative, as “import licensing not falling within the definition contained in paragraph 1 of Article 2.” Article 2.1 defines “automatic import licensing” as “import licensing where approval of the application is granted in all cases, and which is in accordance with the requirements of paragraph 2(a).” Paragraph 2(a), in turn, provides that automatic licensing procedures “shall not be administered in such a manner as to have restricting effects on imports,” and that procedures shall be deemed to have such trade-restricting effects “unless, *inter alia*: . . . (ii) applications for licenses may be submitted on any working day prior to the customs clearance of the goods.” Regardless of whether a procedure involves the exercise of discretion, if it does not satisfy the requirements of Article 2.1, it is “non-automatic” under the Import Licensing Agreement.

33. Thus, because not all applications would be approved in all cases, discretionary import licensing is, by definition, non-automatic import licensing within the meaning of the Import Licensing Agreement. The converse is not true, however. Because any licensing procedure that is not automatic is considered “non-automatic”, not all non-automatic import licensing procedures would be “discretionary.”

Article III:4 of the GATT 1994

14. *Regarding Brazil's statement "there is a reiterated understanding in WTO jurisprudence that if origin is the only factor distinguishing between imported and domestic products, there is no need to conduct a full likeness analysis" (see Brazil's first written submission, paragraph 264):*

a. *Does this jurisprudence apply to the intended use requirement?*

b. *Does it apply to the implementation of halal labelling requirements?*

15. *In the likeness analysis, how should the Panel determine what the imported product at issue is? Should this determination be made on the basis of the de jure scope (fresh, frozen, chilled) of the challenged measure or the de facto (frozen) operation of such measure?*

34. [U.S. response to Questions 14 and 15] Generally, the United States considers that there is a difference between treatment based on origin alone, and treatment based on origin-neutral factors. For example, if a Member bans the sale of products from certain WTO Members in its regulations, but permits the sale of its own products, the measure appears to provide differential treatment based exclusively on origin. In that circumstance, the United States agrees that there is

³⁶ *Turkey – Rice*, para 7.133.

no need to examine whether the domestic and imported products are “like” using other factors. This is also the reasoning in the report cited by Brazil.³⁷

35. However, if a Member determines that it will not permit the sale of a product with a particular characteristic, and this characteristic is only found in the products of certain countries, this would not appear to be differential treatment based *exclusively* on origin. In this circumstance, a panel would need to continue the analysis to determine whether the imported and domestic product at issue are in fact like, based on an analysis of their competitive relationship.

36. Therefore, to demonstrate “likeness” based on the reasoning cited by Brazil, a complaining party would need to show that origin was the sole factor utilized in a measure to determine differential treatment to be applied to an imported product.

³⁷ *Argentina - Import Measures (Panel)*, para. 6.274.