

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

Third Party Submission of  
the United States of America

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## TABLE OF CONTENTS

Table of Acronyms .....	iii
Table of Reports.....	iv
Table of U.S. Exhibits.....	viii
I. Introduction.....	1
II. INDONESIA’S MEASURES ARE INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994 AND ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE .....	2
A. Article XI:1 of the GATT 1994 Applies to the Challenged Measures .....	3
B. Indonesia’s Import Licensing Regime for Animals and Animal Products Is Inconsistent with Indonesia’s Obligations under Article XI:1 of the GATT 1994.....	5
1. The Prohibition on the Importation of Animals and Animal Products Not Listed in Indonesia’s Regulations Is Inconsistent with Article XI:1 .....	6
2. The Restriction on the Importation of Animals and Animal Products Other Than for Certain Limited Use Is Inconsistent with Article XI:1 .....	7
3. The Application Windows and Validity Periods Constitute Restrictions Inconsistent with Article XI:1 .....	9
4. Restricting Imports of Animals and Animal Products During a Validity Period to Those of the Quantity, Type, Country of Origin, and Port of Entry Listed on the Original Import Documents for that Period Is Inconsistent with Article XI:1 .....	12
C. Indonesia’s defenses under Article XX of the GATT 1994 .....	13
D. Indonesia’s Import Licensing Regime for Animals and Animal Products Is Inconsistent with Indonesia’s Obligations Under Article 4.2 of the Agreement on Agriculture .....	15
1. A Complainant Need Not Show That a Measure Does Not Fall Within an Article XX Exception to Demonstrate a Breach Under Article 4.2.....	16
2. The Prohibition on the Importation of Animals and Animal Products Not Listed in Indonesia’s Regulations Constitutes a Quantitative Import Restriction or Similar Border Measure Inconsistent with Article 4.2 .....	17
3. The Restriction on the Importation of Animals and Animal Products Other Than for Certain Limited Uses Constitutes a Quantitative Import Restriction or a Similar Border Measure Inconsistent with Article 4.2 .....	18
4. The Application Windows and Validity Periods Constitute a Quantitative Import Restriction or Similar Border Measure Inconsistent with Article 4.2.....	19
5. Restricting Imports of Animals and Animal Products During a Validity Period to Those of the Type, Quantity, Country of Origin, and Port of Entry Listed on	

the Original Import Documents for That Period Constitutes a Quantitative Import Restriction or Similar Border Measure Inconsistent with Article 4.2.....	20
E. Indonesia’s Restriction on Imports Based on the “Insufficiency” of Domestic Production Is Inconsistent with Indonesia’s Obligations under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.....	21
1. Inconsistency with Article XI:1 of the GATT 1994 .....	21
2. Inconsistency with Article 4.2 of the Agreement on Agriculture .....	23
III. INDONESIA’S REQUEST FOR A PRELIMINARY RULING .....	24
A. Brazil has Sufficiently Identified and Presented the “General Prohibition” Requirement in its Panel Request .....	24
B. Brazil Need Not Identify the “Objective” of the “General Prohibition” Requirement under Article 6.2 of the DSU .....	26
IV. CONCLUSION.....	26

**TABLE OF ACRONYMS**

<b>Acronym</b>	<b>Full Name</b>
API-P	Producer Importer Identification Number
API-U	Registered Importer Identification Number
BULOG	Indonesian Bureau of Logistics
DGLAHS	Directorate General of Livestock and Animal Health Services
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
HS Code	Harmonized System Code
MOA	Indonesian Ministry of Agriculture
MOT	Indonesian Ministry of Trade
UPP	Trade Services Unit of the Ministry of Trade
WTO	World Trade Organization

**TABLE OF REPORTS**

<b>Short title</b>	<b>Full Citation</b>
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001
<i>Argentina – Import Measures (AB)</i>	Appellate Body Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
<i>Argentina – Import Measures (Panel)</i>	Panel Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R
<i>Australia – Apples (AB)</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010
<i>Brazil – Retreaded Tyres (AB)</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007
<i>Canada – Provincial Liquor Boards (EEC) (GATT)</i>	GATT Panel Report, <i>Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Canadian Provincial Marketing Agencies</i> , L/6304, adopted 22 March 1988
<i>Chile – Price Band System (Panel)</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R
<i>Chile – Price Band System (AB)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002
<i>China – HP-SSST (AB)</i>	Appellate Body Report, <i>China – Measures Imposing Anti-Dumping Duties on High Performance Stainless Steel Seamless Tubes</i> , WT/DS454/AB/R, adopted 14 October 2015

<i>China – Raw Materials (Panel)</i>	Panel Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R
<i>China – Raw Materials (AB)</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009
<i>EC – Bananas III (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC – Chicken Cuts (AB)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1
<i>EC – Seal Products (Panel)</i>	Panel Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/R / WT/DS401/R / and Add. 1, adopted 18 June 2014, as modified by Appellate Body Reports, WT/DS400/AB/R / WT/DS401/AB/R
<i>EC – Seal Products (AB)</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
<i>EC – Selected Customs Matters (Panel)</i>	Panel Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R
<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

<i>EEC – Oilseeds I (GATT)</i>	GATT Panel Report, <i>European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins</i> , L/6627, adopted 25 January 1990
<i>India – Autos (Panel)</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002
<i>India – Quantitative Restrictions (Panel)</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R
<i>Japan - Leather II (US) (GATT)</i>	GATT Panel Report, <i>Panel on Japanese Measures on Imports of Leather</i> , L/5623, adopted 15 May 1984, BISD 31S/94
<i>Korea – Dairy (AB)</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
<i>Korea – Various Measures on Beef (Panel)</i>	Panel Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R
<i>Korea – Various Measures on Beef (AB)</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
<i>Peru – Agricultural Products (AB)</i>	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R and Add.1, adopted 31 July 2015
<i>Turkey – Rice</i>	Panel Report, <i>Turkey – Measures Affecting the Importation of Rice</i> , WT/DS334/R, adopted 22 October 2007
<i>US – Gasoline (Panel)</i>	Panel Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R

<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>US – Anti-Dumping and Countervailing Duties (China) (AB)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010

TABLE OF U.S. EXHIBITS

US No.	Description	Short Title
US-1	“Indonesia – Importation of Horticultural Products, Animals, and Animal Products (DS477 / DS478) First Written Submission of the United States of America,” Office of the U.S. Trade Representative, November 13, 2015.	
US-2	Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013 Concerning Provisions on the Import and Export of Animals and Animal Products, as amended by Regulation of the Minister of Trade No. 57/M-DAG/PER/9/2013 Concerning Amendment to Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013, and Regulation of the Minister of Trade 17/M-DAG/PER/3/2014 Concerning Second Amendment to Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013	<i>MOT 46/2013 as amended</i>
US-3	Regulation of the Minister of Agriculture Number 139/Permentan/PD.410/12/2014 Concerning Importation of Carcasses, Meats, and/or their Processed Products into the Territory of the Republic of Indonesia, as amended by Regulation of the Minister of Agriculture Number 02/Permentan/PD.410/1/2015 Concerning Amendment to Regulation of the Minister of Agriculture Number 139/Permentan/PD.410/12/2014	<i>MOA 139/2014 as amended</i>
US-4	Rahwani Y. Rangkuti & Thom Wright, U.S. Department of Agriculture Foreign Agriculture Service, <i>GAIN Report No. ID1450: Retail Foods 2014</i> , Dec. 19, 2014	
US-5	Ministry of Trade, Import Approval for Beef, Sept. 25, 2014	
US-6	Indonesia, Applied MFN Tariff Schedule: Live Animals, Meat and Edible Meat Offal (2014), <i>WTO Tariff Download Facility</i> , <a href="http://tariffdata.wto.org/ReportersAndProducts.aspx">http://tariffdata.wto.org/ReportersAndProducts.aspx</a> (accessed Oct. 21, 2015)	
US-7	Law of the Republic of Indonesia Number 19 of 2013 Concerning Protection and Empowerment of Farmers	<i>Farmers Law</i>
US-8	Law of the Republic of Indonesia Number 18 of 2009 on Animal Husbandry and Animal Health	<i>Animal Law</i>
US-9	Law of the Republic of Indonesia Number 18 of 2012 Concerning	<i>Food Law</i>

	Food	
US-10	Ministry of Industry, “Minister of Agriculture: Agricultural Imports Will Be Tightened,” <a href="http://www.kemenperin.go.id/artikel/1872/Mentan:-Impor-Daging-Akan-Diperketat">http://www.kemenperin.go.id/artikel/1872/Mentan:-Impor-Daging-Akan-Diperketat</a>	

## I. INTRODUCTION

1. The United States welcomes the opportunity to present its views in this proceeding. Brazil has raised significant concerns regarding certain Indonesian measures that prohibit or restrict the importation of poultry meat and poultry products into Indonesia. Brazil has challenged certain aspects of Indonesia's import licensing regime for animals and animal products under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. This is of particular interest to the United States because, together with New Zealand, the United States has raised similar claims with respect to Indonesia's import licensing regimes for horticultural products and animals and animal products in an ongoing dispute, *Indonesia – Importation of Horticultural Products, Animals, and Animal Products* (DS477/DS478).

2. Therefore, in this submission, the United States focuses on the concerns Brazil raised in its first written submission regarding Indonesia's import licensing regime for animals and animal products. The United States explains in Section II that the prohibitions and restrictions of Indonesia's import licensing regime, and Indonesia's domestic insufficiency requirement, are inconsistent with Article XI:1 of the GATT 1994 and with Article 4.2 of the Agreement on Agriculture. In Section III, the United States comments on certain issues raised in Indonesia's preliminary ruling request to the Panel.

3. The United States notes at the outset that the measures within the Panel's terms of reference are those that were identified in Brazil's panel request, as those measures existed at the time of the Panel's establishment. The DSB establishes a panel and sets its terms of reference pursuant to Articles 6.2 and 7.1 of the DSU. Under DSU Article 6.2, the "matter" to be examined by the DSB, and with respect to which the DSB establishes the panel to make findings to assist the DSB, consists of "the specific measures at issue" and "brief summary of the legal basis of the complaint."<sup>1</sup>

4. 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."<sup>2</sup> In *EC – Selected Customs Matters*, 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."<sup>3</sup> It is thus the challenged measures, as they existed at the time of the Panel's establishment, when the "matter"

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

<sup>2</sup> *EC – Chicken Cuts (AB)*, para. 156.

<sup>3</sup> 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 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"); see also *China – Raw Materials (AB)*, para. 264; *EC – Approval and Marketing of Biotech Products*, para. 7.456.

was referred to the Panel, that are properly within the Panel’s terms of reference and on which the Panel should make findings.

5. Indonesia has promulgated other legal instruments related to the import licensing regime for animals and animal products since the establishment of the Panel, including Regulation of the Minister of Trade Number 5/M-DAG/PER/1/2016, and Regulation of the Ministry of Agriculture Number 58/Permentan/PK.210/11/2015. The United States refers to these legal instruments, as appropriate, as additional relevant post-panel establishment evidence for the Panel’s examination of whether Indonesia’s import restrictions on the importation of poultry meat and poultry products breach Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture as of the date of panel establishment.<sup>4</sup>

## **II. INDONESIA’S MEASURES ARE INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994 AND ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE**

6. Indonesia’s current restrictions on the importation of poultry meat and poultry products stem from its policy of self-sufficiency with respect to food. The goal of this policy is to increase reliance on domestic producers by gradually reducing and ultimately halting altogether imports of agricultural products. To further this goal, Indonesia has imposed numerous substantive prohibitions and restrictions on the importation of a variety of agricultural products, including the prohibitions and restrictions on poultry meat and poultry products that are at issue in this dispute.<sup>5</sup>

7. Brazil contends that certain individual measures within Indonesia’s import licensing regime prohibit and restrict the importation of poultry meat and poultry products in breach of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Specifically, (1) Indonesia prohibits the importation of poultry meat and poultry products not listed in its regulations,<sup>6</sup> (2) restricts their importation other than for certain limited uses<sup>7</sup>, and restricts their importation based on the (3) limited application windows and validity periods of the import licenses<sup>8</sup>, (4) fixed license terms<sup>9</sup>, and (5) transportation requirements.<sup>10</sup>

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<sup>4</sup> See *EC – Selected Customs Matters (AB)*, paras. 188 and 189; *EC – Selected Customs Matters (Panel)*, para. 7.37.

<sup>5</sup> The United States has set forth the background and context of Indonesia’s import licensing restrictions on animals and animal products in sections II.B.1 to 2 of the U.S first written submission in *Indonesia – Importation of Horticultural Products, Animals, and Animal Products (DS477 / DS478)* <https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.fin.pdf> (Exh. US-1).

<sup>6</sup> Brazil’s first written submission, section IV.B.1.2(b)(i)(1).

<sup>7</sup> Brazil’s first written submission, section IV.B.1.2(b)(i)(2).

<sup>8</sup> Brazil’s first written submission, section IV.B.1.2(b)(i)(3).

<sup>9</sup> Brazil’s first written submission, section IV.B.1.2(b)(i)(3).

<sup>10</sup> Brazil’s first written submission, section IV.B.1.2(b)(i)(4).

8. In response, Indonesia denies that its import licensing regime is inconsistent with its WTO obligations, and argues that Article XI:1 of the GATT 1994 is excluded from the present dispute because it is mutually exclusive with the more specific Article 4.2 of the Agreement on Agriculture.<sup>11</sup>

9. The United States agrees with Brazil that Indonesia’s import licensing measures (1) through (4) are inconsistent with Article XI:1 of the GATT 1994 and with Article 4.2 of the Agreement on Agriculture.<sup>12</sup> In this section, the United States will first address Indonesia’s argument that Article XI:1 of the GATT 1994 does not apply to the challenged measures in this dispute, followed by discussions regarding the measures’ consistency with Article XI:1 and Article 4.2.

**A. Article XI:1 of the GATT 1994 Applies to the Challenged Measures**

10. Indonesia asserts that Article 4.2 of the Agreement on Agriculture applies to the challenged measures to the exclusion of Article XI:1 of the GATT 1994. Indonesia argues that, because poultry meat and poultry products fall under the list of products in Annex 1 to the Agreement on Agriculture, the Agreement on Agriculture is the more specific agreement than the GATT 1994 with respect to the trade of these products.<sup>13</sup> If there is a difference between the obligations of these two agreements, in Indonesia’s view, the Agreement on Agriculture prevails because Article 21.1 of the Agreement on Agriculture subjects other WTO agreements (including the GATT 1994) to the Agreement on Agriculture.<sup>14</sup>

11. Indonesia further contends that an important difference between the GATT 1994 and the Agreement on Agriculture arises in the context of the present dispute because the complainant, not the respondent, bears the burden to show that the challenged measure is not maintained under “other general, non-agricultural-specific provisions of GATT 1994”, including the general exceptions of Article XX.<sup>15</sup> In Indonesia’s view, Article 21.1 therefore “excludes the application of Article XI:1 of the GATT 1994 to measures challenged by Brazil, as these measure fall more properly under a more specific provision – Article 4.2 of the Agreement on Agriculture.”<sup>16</sup>

12. Indonesia’s interpretation is not supported by the text of the WTO Agreements and is inconsistent with the findings of previous panels.

13. In this dispute, Brazil has challenged five of Indonesia’s individual measures as imposing prohibitions or restrictions on the importation of poultry meat and poultry products under both

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<sup>11</sup> Indonesia’s first written submission, paras. 5, 65-74.

<sup>12</sup> The United States takes no position on measure (5) regarding transportation requirements.

<sup>13</sup> Indonesia’s first written submission, paras. 65-66.

<sup>14</sup> Indonesia’s first written submission, para. 67.

<sup>15</sup> Indonesia’s first written submission, paras. 70-73.

<sup>16</sup> Indonesia’s first written submission, para. 68.

Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.<sup>17</sup> Prohibitions and restrictions are specifically addressed under Article XI:1 of the GATT 1994. Each of these measures is challenged under Article XI:1 of the GATT 1994, and the basis of the challenge to each measure under Article 4.2 of the Agreement on Agriculture is identical to the basis under Article XI:1. Therefore, the measures and claims at issue in this dispute are dealt with specifically under Article XI:1, and are not dealt with more specifically under the Agreement on Agriculture. Thus there is no difference between Article XI:1 and Article 4.2 in the context of this dispute.

14. Contrary to Indonesia’s assertion that Article 4.2 and Article XI:1 cannot apply simultaneously,<sup>18</sup> previous panels have found that a breach of Article XI:1 results in a breach of Article 4.2 with respect to border measures that impose prohibitions or restrictions inconsistent with Article XI:1 of the GATT 1994 and are also among the measures listed in footnote 1 to Article 4.2 or “other similar border measures.” The panel in *Korea – Various Measures on Beef*, for example, found that restrictions on importation maintained through state trading enterprises fell within the scope of both Article XI:1 and Article 4.2, as one of the measures listed in footnote 1.<sup>19</sup> Consequently, the panel found that,

[W]hen dealing with measures relating to agricultural products which should have been converted into tariffs or tariff-quotas, a violation of Article XI of GATT and its *Ad Note* relating to state-trading operations would necessarily constitute a violation of Article 4.2 of the *Agreement on Agriculture* and its footnote which refers to non-tariff measures maintained through state-trading enterprises.<sup>20</sup>

15. Moreover, Indonesia considers that the challenged measures are not inconsistent with Article 4.2 of the Agreement on Agriculture if they are “maintained under . . . other general, non-agriculture-specific provisions of GATT 1994” within the meaning of footnote 1 to Article 4.2, and Indonesia argues Article XX is such a provision.<sup>21</sup> In doing so, Indonesia’s own argument establishes that the Agreement on Agriculture is not more specific to the claims at issue in this

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<sup>17</sup> Indonesia first written submission, para. 61.

<sup>18</sup> Indonesia first written submission, para. 74.

<sup>19</sup> *Korea – Various Measures on Beef (Panel)*, paras. 751, 759.

<sup>20</sup> *Korea – Various Measures on Beef (Panel)*, para. 762. Other panels have reached similar conclusions. The panel in *India – Quantitative Restrictions* considered that the “legal status of India’s import restrictions” under Article 4.2 of the Agreement on Agriculture was “identical” to that under the GATT 1994. *India – Quantitative Restrictions (Panel)*, paras. 3.68, 5.241. Applying analogous reasoning, the panel in *EC – Seal Products* rejected Norway’s challenge to the EU seal regime under Article 4.2 of the Agreement on Agriculture entirely on the ground that the panel had already rejected Norway’s challenge under Article XI:1 of the GATT 1994, and Norway had relied on its evidence and arguments adduced under its Article XI:1 claim in its Article 4.2 claim. *EC – Seal Products (Panel)*, para. 7.665. And the panel in *US – Poultry (China)* exercised judicial economy with respect to China’s Article 4.2 claim on the grounds that its findings under Article XI:1 “effectively resolved the aspects in this dispute related to the ‘restrictions’ on Chinese poultry meat and poultry products into the United States.” *US – Poultry (China) (Panel)*, para. 7.486.

<sup>21</sup> Indonesia’s first written submission, paras. 70-72.

dispute. That is, Indonesia’s position is that the challenged measures do not breach Article 4.2 because they are “maintained” under Article XX. Therefore, the applicability of Article 4.2 in this dispute would turn on whether each measure is justified under the GATT 1994. Thus, under Indonesia’s own logic, the GATT 1994 is the agreement that deals more specifically, and in detail, with the matter raised in this dispute, even with respect to the claims under Article 4.2 of the Agreement on Agriculture.<sup>22</sup>

**B. Indonesia’s Import Licensing Regime for Animals and Animal Products Is Inconsistent with Indonesia’s Obligations under Article XI:1 of the GATT 1994**

16. The United States recalls the text of Article XI:1 of the GATT 1994, which states:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member.

17. Indonesia’s import licensing regime for animals and animal products imposes impermissible “restrictions” and “prohibitions” within the meaning of Article XI:1 of the GATT 1994. “Restriction,” as used in Article XI:1, refers to “[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation,” i.e., “to something that has a limiting effect.”<sup>23</sup> “Prohibition” refers to a “legal ban on the trade or importation of a specified commodity.”<sup>24</sup> Thus, Article XI:1 establishes a “general ban on import or export restrictions or prohibitions” other than duties, taxes, or other charges.<sup>25</sup>

18. Indonesia asserts that, with regard to the quantitative import restriction under Article XI:1 of the GATT 1994, Brazil must establish a “causal relationship between the alleged restriction and the “claimed trade distortion” to demonstrate that a challenged measure has a limiting effect.”<sup>26</sup> For example, regarding the limited application window and validity period requirements, Indonesia argues that Brazil “has not provided any evidence that the so called

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<sup>22</sup> *EC – Bananas III (AB)*, para. 204 (stating that a panel should begin its analysis with the “agreement [that] deals specifically, and in detail” with the matter at issue) (emphasis added).

<sup>23</sup> See *China – Raw Materials (AB)*, para. 319 (citing *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2553); *Argentina – Import Measures*, para. 5.217 (quoting same).

<sup>24</sup> *China – Raw Materials (AB)*, para. 319 (citing *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2363); *Argentina – Import Measures (AB)*, para. 5.217 (quoting same).

<sup>25</sup> See *India – Quantitative Restrictions (Panel)*, para. 5.128; *India – Autos (Panel)*, para. 7.265; *China – Raw Materials (Panel)*, para. 7.206; *Colombia – Ports of Entry*, paras. 7.233-235.

<sup>26</sup> Indonesia’s first written submission, paras. 112-113.

‘limited application and validity periods’ have caused any adverse effects to its exporters.”<sup>27</sup> In Indonesia’s view, because Brazilian exporters of chicken products do not have access to the Indonesian market, Brazil “is not in possession of any factual evidence on how Indonesia’s import licensing regime operates in practice.”<sup>28</sup> Absent such factual evidence, Indonesia concludes that “there is no [sic] any causal relationship between the challenged measure and the failure of Brazilian exporters to obtain access to Indonesia’s market.”<sup>29</sup> The United States disagrees with Indonesia’s interpretation to the extent that Indonesia is attempting to argue that a demonstration of actual trade effects is necessary to a showing under Article XI:1.

19. Properly interpreted, Article XI:1 does not require a complaining party to demonstrate quantitatively that a measure has adversely impacted the overall volume of imports. The ordinary meaning of “restriction”, as confirmed by past reports, is “a *limitation on action, a limiting condition* or regulation”; such a limitation on action or limiting condition on importation does not require negative effects on imports. With respect to Article XI:1, the Appellate Body affirmed this interpretation in *Argentina – Import Measures*, finding that a measure’s limitation on action or limiting condition on importation “need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effect can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.”<sup>30</sup> Thus, to the extent that Indonesia is using “causal relationship” to suggest a showing of actual trade effects, such usage runs contrary to the text of Article XI:1 as well as previous panel and Appellate Body interpretations.<sup>31</sup>

20. The aspects of Indonesia’s import licensing regime for animals and animal products challenged by Brazil breach Article XI:1 because, based on the text of Indonesia’s regulations, they constitute limitations on action or limiting conditions on importation.

21. In this section, the United States explains how each of the separate prohibitions or restrictions is inconsistent with Article XI:1.

### **1. The Prohibition on the Importation of Animals and Animal Products Not Listed in Indonesia’s Regulations Is Inconsistent with Article XI:1**

22. As discussed in section IV.B.1.2(b)(i)(1) of Brazil’s first written submission, Indonesia’s import licensing regime bans the importation of certain animals and animal products by allowing the importation only of those products listed in the appendices to its import licensing regulations.

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<sup>27</sup> Indonesia first written submission, para. 258.

<sup>28</sup> Indonesia first written submission, para. 258.

<sup>29</sup> Indonesia first written submission, para. 258.

<sup>30</sup> *Argentina – Import Measures (AB)*, para. 5.217.

<sup>31</sup> Indonesia makes the identical “causal relationship” argument in its responses to Brazil’s Article 4.2 claims. The United States notes that previous panels have found that analysis of a measure under Article 4.2 should focus on the measure’s “design, structure, and operation,” with trade data serving only as supplementary evidence. *Peru – Agricultural Products (AB)*, para. 5.147, n.373. See also *Turkey – Rice*, paras. 7.120-121.

This ban on importing certain products is inconsistent with Article XI:1 of the GATT 1994 because it is a prohibition within the meaning of Article XI:1.

23. A prohibition within the meaning of Article XI:1 of the GATT 1994 includes a “legal ban on the ... importation of a specified commodity.”<sup>32</sup> Indonesia’s import licensing regulations for animals and animal products impose a ban on the importation of certain products by prohibiting the importation of any animal or animal product that is not listed in the appendices of both the Ministry of Trade and Ministry of Agriculture import licensing regulations (MOT 46/2013 and MOA 139/2014).

24. Indonesian regulation MOT 46/2013, as amended, and MOA 139/2014, as amended, list all the types of animals and animal products “that can be imported” into Indonesia.<sup>33</sup> Numerous types of animals and animal products are not listed in the appendices to these regulations, including chicken cuts and parts (frozen and fresh or chilled). Applications for Recommendations or Import Approvals to import animals or animal products that are not listed in the appendices of *both* regulations will not be granted. And importers are prohibited from importing animals and animal products not specified on a valid Recommendation and Import Approval.<sup>34</sup>

25. Animals and animal products not listed in the appendices to MOT 46/2013, as amended, and MOA 139/2014, as amended, are therefore banned. Indeed, Indonesia does not contest that it prohibits the importation of poultry meat and poultry products through a positive list requirement.<sup>35</sup>

26. Indonesia’s positive list of animals and animal products that can be imported, and its consequent ban on importation of any products not included on that list, thus constitutes a “prohibition” in breach of Article XI:1 of the GATT 1994.

## **2. The Restriction on the Importation of Animals and Animal Products Other Than for Certain Limited Use Is Inconsistent with Article XI:1**

27. As described in Brazil’s first written submission, section IV.B.1.2(b)(i)(2), Indonesia requires, as a condition for importation, that animals and animal products be imported only for certain specific uses. This restriction varies in scope depending on the product at issue, but for all imported products, the permitted uses do not include retail sale in traditional Indonesian markets, where Indonesians purchase the vast majority of their meat.

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<sup>32</sup> *China – Raw Materials (AB)*, para. 319 (citing *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2363); *Argentina – Import Measures (AB)*, para. 5.217.

<sup>33</sup> See MOT 46/2013, as amended, article 2(2) (Exh. US-2); *id.* Appendix I, Appendix II (Exh. US-2); MOA 139/2014, as amended, article 8 (JE-28); *id.* Appendix I, Appendix II.

<sup>34</sup> MOA 139/2014 as amended, article 33(b) (Exh. US-3); MOT 46/2013 as amended, article 30(2)-(3) (Exh. US-2).

<sup>35</sup> Indonesia’s first written submission, para. 223.

28. Indonesia contends that Brazil has incorrectly challenged the use requirements for animals and animal products as border measures under Article XI:1. Instead, Indonesia characterizes the requirement as an internal measure that falls within the scope of Article III of the GATT 1994. However, based on the text of Indonesia’s regulations, the use requirements constitute a border measure subject to the scope of Article XI:1.

29. Indonesia’s use requirements are restrictions “on the importation” of animals and animal products. They are a condition on importation that is imposed, implemented, and enforced through Indonesia’s import licensing regime.

30. Specifically, importers of the animal products listed in Appendix II to MOT 46/2013 and MOA 139/2014 (non-bovine animals, meat, and offal) are only eligible to obtain a Recommendation from the Ministry of Agriculture if they indicate on their application a permitted use, including sale in manufacturing, hotels, restaurants, catering, or other limited purposes, or for sale in modern markets (i.e., supermarkets and convenience stores, but not in traditional markets).<sup>36</sup> These limited uses are then listed on each importer’s Recommendation. Importers that do not comply with the use requirement could lose their eligibility to import animals and animal products.<sup>37</sup> Therefore, the use requirements are restrictions imposed on the importation of animals and animal products and Brazil properly challenges them under Article XI:1.<sup>38</sup>

31. Indeed, Indonesia’s use requirements for imports of animals and animal products are a “restriction” on importation in breach of Article XI:1 of the GATT 1994. The use requirements impose a condition on importation that limits the opportunities of imported products in the Indonesian market.<sup>39</sup>

32. Under MOT 46/2013, as amended, and MOA 139/2014, as amended, animals can only be imported for purposes of improving genetic diversity, overcoming domestic shortfalls, or for scientific or research purposes.<sup>40</sup> The animal products listed in Appendix II to MOT 46/2013 and MOA 139/2014 (non-bovine animals, meat, and offal) are permitted to be imported for use only in manufacturing, hotels, restaurants, or catering, or for other limited purposes, and also can be sold in modern markets (i.e., supermarkets and convenience stores).<sup>41</sup> Imports are not

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<sup>36</sup> MOA 139/2014, as amended, article 32(2) (Exh. US-3).

<sup>37</sup> MOA 139/2014, 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 sanction in the form of having their Recommendation revoked and not being given a Recommendation in the future, and that it would be proposed to the Ministry of Trade to revoke their Import Approval and RI designation).

<sup>38</sup> Indonesia raises the identical objection about whether Article 4.2 of the Agreement on Agriculture applies to its use restrictions. Because the use requirements are restrictions imposed on the importation of animals and animal products, Brazil can properly challenge them under Article 4.2 as well.

<sup>39</sup> See *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 320.

<sup>40</sup> See MOT 46/2013, as amended, article 3(1) (Exh. US-2).

<sup>41</sup> MOA 139/2014, as amended, article 32(2) (Exh. US-3).

permitted for sale in traditional markets, including small family-owned stores (warungs) and “wet markets”.<sup>42</sup>

33. As noted above, importers that do not comply with these requirements become ineligible to import animals and animal products.<sup>43</sup> Specifically, an importer that violates the provisions of MOA 139/2014, as amended, concerning the permitted uses of Appendix II products (non-bovine animals, meat, and offal) is subject to having its Recommendation and Import Approval revoked, and becomes ineligible to receive Recommendations in the future.<sup>44</sup>

34. Previous panels have found that measures imposing limitations of this kind are restrictions under Article XI:1. Notably, the *India – Quantitative Restrictions* panel found that the “actual user” requirement, imposed through India’s import licensing regime, was “a restriction on imports because it precludes imports of products for resale by intermediaries, i.e. distribution to consumers who are unable to import directly for their own immediate use is restricted.”<sup>45</sup> Further, in *Canada – Provincial Liquor Boards*, the GATT panel found that limitations on the points of sale available to imported beer were restrictions within the meaning of Article XI:1.<sup>46</sup> A similar analysis would apply to Indonesia’s measures, as Indonesia’s use restrictions restrict the purposes for which animals and animal products can be imported.

35. Through its use requirements, Indonesia precludes importers from importing non-bovine animals, meat, and offal for commercially important purposes, including retail sale in traditional markets. If an importer fails to comply with these limitations, Indonesia may revoke altogether that importer’s ability to import. The use requirements are, therefore, a limitation on action or limiting condition on importation constituting a “restriction” in breach of Article XI:1.

### **3. The Application Windows and Validity Periods Constitute Restrictions Inconsistent with Article XI:1**

36. In section IV.B.1.2(b)(i)(3) of its first written submission, Brazil challenges the combination of the limited time windows within which importers can apply for and receive

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<sup>42</sup> The preference for traditional markets is particularly pronounced with respect to animal products, as demonstrated by a 2010 survey showing that Indonesian consumers made 70 percent of their fresh meat purchases at traditional markets. Thus, the use restrictions for Appendix II products bar imports from competing for a significant portion of the sales in the Indonesian retail food market, while the restrictions for Appendix I products exclude imports from the retail market altogether. See Rahwani Y. Rangkuti & Thom Wright, U.S. Department of Agriculture Foreign Agriculture Service, *GAIN Report No. ID1450: Retail Foods 2014*, at 5-6, Dec. 19, 2014 (Exh. US-4).

<sup>43</sup> MOT 46/2013, as amended, article 26 (Exh. US-2); MOA 139/2014, 39(d) (Exh. US-3).

<sup>44</sup> MOA 139/2014, 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 sanction in the form of having their Recommendation revoked and not being given a Recommendation in the future, and that it would be proposed to the Ministry of Trade to revoke their Import Approval and RI designation).

<sup>45</sup> *India – Quantitative Restrictions (Panel)*, para. 5.142.

<sup>46</sup> *Canada – Provincial Liquor Boards (EEC) GATT*, para. 4.24.

import permits and the short validity periods within which imports can enter Indonesia, because these restrictions result in periods of time during which no imports can be made. These requirements constitute a limitation on action or a limiting condition on importation, and are thus a restriction inconsistent with Article XI:1 of the GATT 1994.<sup>47</sup>

37. Indonesia’s application window and validity period requirements create a period of several weeks at the end of one validity period and the beginning of another during which products *cannot* be exported to Indonesia. Specifically, Import Approvals are issued four times a year for a single three-month validity period (January to March, April to June, July to September, or October to December).<sup>48</sup> Import Approvals can be applied for only during the month preceding the start of a period; they cannot be submitted in advance. Further, an Import Approval application can be submitted only after the importer has received a Recommendation from the Ministry of Agriculture, which are issued on a rolling basis only during the month prior to the start of a validity period.<sup>49</sup>

38. If there is no delay, Import Approvals are issued on a date “at the beginning” of an import period.<sup>50</sup> Therefore, permission to import is granted only once the import period has begun, and could be granted well into the period if there are any delays.

39. This timing matters because Indonesia requires that, for animal or animal product imports to be accepted into Indonesia, the relevant Import Approval number must be written on the Certificate of Health that is issued *in the products’ country of origin*.<sup>51</sup> The effect of this requirement is that importers cannot begin placing orders, and exporters cannot begin shipping, until after Import Approvals have been issued for that period. Further, once orders are placed, it takes a certain amount of time for those products to be inspected, transported to a port, and shipped to Indonesia. For U.S. products, for example, this process takes at least four to six weeks. Thus, the earliest that U.S. animals and animal products could reach Indonesia (assuming Recommendations and Import Approvals are issued on the first day of the validity period) is about one month after the start of a validity period.

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<sup>47</sup> These requirements are not duties, taxes, or other charges, and, therefore, are within the scope of Article XI:1 of the GATT 1994.

<sup>48</sup> MOT 46/2013, as amended, article 12(1)-(2) (Exh. US-2). MOT 5/2016 changed the validity periods to four months: January-April, May-August, and September-December. MOT 5/2016, article 11 (BRA-03).

<sup>49</sup> MOT 46/2013, as amended, article 12(2) (Exh. US-3); *id.* article 11(1)-(2) (stating that, to receive an import approval, importers must attach their recommendation); MOA 139/2014 as amended, article 29 (Exh. US-3) (stating that recommendations are issued in December, March, June, and September). MOA 58/2015 reduced the application periods to three: importers must submit applications for Recommendations in December of the preceding year, April and August. MOA 58/2015, article 22. (Exh. BRA-01)

<sup>50</sup> MOT 46/2013, as amended, article 12(2) (Exh. US-2).

<sup>51</sup> Ministry of Trade, Import Approval for Beef (Exh. US-5) (stating that the “number and date” of the importer’s import approval must be written on the Certificate of Health issued by the product’s country of origin, meaning that the Certificate of Health *cannot* be issued, and thus the goods *cannot ship*, until after the import approvals for that period have been issued).

40. Moreover, all animals and animal products imported during a validity period (i.e. imported pursuant to Import Approvals valid for that period) must arrive in Indonesia and clear customs prior to the end of the period.<sup>52</sup> If the customs clearance process is not completed, even imports that arrived at the Indonesian port within the validity period are prohibited from entering Indonesia and must be re-exported.<sup>53</sup> This means that exporters must stop accepting orders and shipping to Indonesia up to several weeks before the end of the period, depending on the time it takes to transport products to a port, ship them to Indonesia, and clear customs. If importers continue to order and exporters continue to ship too close to the end of the period, they run a significant risk that the products will not arrive and clear customs before the end of the period and, therefore, will not be allowed into Indonesia. For U.S. exporters, for example, around four weeks prior to the end of the period, this risk becomes a near certainty and shipments from the United States must cease entirely.

41. Consequently, depending on their origin, there is a window of time of up to several weeks at the end of each period when Indonesian importers seeking to import animals or animal products are *precluded* from doing so due to the structure of the application window and validity period requirements. Imports ordered during this time could not arrive by the end of the current validity period, and importers cannot place orders for the next period because they do not yet have their Import Approvals for that period. These periods of time without orders and shipments can add up to several *months* per year during which certain imports cannot be shipped to Indonesia. U.S. products, for example, are denied the opportunity to compete in the Indonesian market for up to six months out of every year.

42. In *Colombia – Ports of Entry*, the panel assessed a Colombian measure restricting imports from Panama to two Colombian ports. That panel found that the measure had a limiting effect on imports because “uncertainties, including access to one seaport for extended periods of time and the likely increased costs that would arise for importers operating under the constraints of the port restrictions, limit competitive opportunities for imports arriving from Panama.”<sup>54</sup>

43. Indonesia’s application window and validity periods are even more restrictive than the measure examined in *Colombia – Ports of Entry*, in that they wholly exclude many imports from entering Indonesia for up to several weeks of each import period, and up to several months each

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<sup>52</sup> See Ministry of Trade, Import Approval for Beef (Exh. US-5) (stating that the import approval is valid for one validity period “until December 31, 2014, as proven by the date of a customs registration notice, Manifest (BC 1.1), in accordance with the valid customs provisions”).

<sup>53</sup> This general rule is subject to the limited exception that an importer can apply to extend the validity period of its Import Approval for products that were shipped prior to end of the validity period but failed to clear customs by the last day. However, the extension is not automatic, is for a maximum of 30 days, and cannot be requested for the fourth quarter of any year. Further, an importer is eligible for a maximum of one extension per import period.

<sup>54</sup> *Colombia – Ports of Entry*, para. 7.274.

year. These requirements are a limitation on action or limiting condition on importation, and therefore constitute a “restriction” in breach of Article XI:1 of the GATT 1994.<sup>55</sup>

**4. Restricting Imports of Animals and Animal Products During a Validity Period to Those of the Quantity, Type, Country of Origin, and Port of Entry Listed on the Original Import Documents for that Period Is Inconsistent with Article XI:1**

44. As Brazil described in its first written submission, section IV.B.1.2(b)(i)(3), during each three-month period, Indonesia limits the imports of animals and animal products to products of the type, quantity, country of origin, and port of entry listed on the Recommendations and Import Approvals granted at the beginning of that period. Importation of any animals and animal products without permits covering their type, quantity, country of origin, and port of entry is prohibited.<sup>56</sup> But once an import period begins, importers cannot apply for new permits to import different or additional products, or for products shipping from, or into, a new location.<sup>57</sup> Thus imports are strictly limited to the products specified on outstanding permits.

45. Importers that do not comply with this requirement are subject to sanctions, including revocation of their Recommendations and ineligibility for future Recommendations and revocation of their Import Approvals,<sup>58</sup> and any goods not in compliance with the requirement will be re-exported at the importer’s expense.<sup>59</sup> Once a period begins, therefore, importers cannot make changes based on market or other developments that may be necessary to meet current demand, whether because certain products are no longer needed, because new or

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<sup>55</sup> See *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 320.

<sup>56</sup> MOA 139/2014, as amended, article 33(b) (Exh. US-3) (stating that importers are “prohibited from importing types/categories of carcasses, meat, and/or their processed products other than what is included in their Recommendation”); MOT 46/2013 as amended, article 30(2)-(3) (Exh. US-2) (stating that imports “whose quantity, type, business unit, and/or country or origin is not in accordance with their Import Approval . . . will be re-exported,” with the cost of re-export being borne by the importer).

<sup>57</sup> MOA 139/2014, 23(1) (Exh. US-3) (stating that recommendations can be applied for only in December, March, June, and September, i.e. the months preceding the four import approval validity periods); *id.* article 26 (stating that a recommendation application will be rejected if it does not meet the requirements described in article 23, *inter alia*); *id.*, article 33(a) (prohibiting importer from requesting changes to the elements specified on their recommendations once recommendations have been issued); MOT 46/2013, 12(1) (Exh. US-2) (stating that import approval applications are accepted only during December, March, June, and September, i.e. the months before the beginnings of the four validity periods).

<sup>58</sup> MOA 139/2014, as amended, article 39(e) (Exh. US-3) (stating that importers that do not comply with the prohibition on requesting changes to their Recommendations or on importing products other than those specified in their Recommendations are submitted to sanction “in the form of Recommendation revocation, not being given Recommendation in the future,” and having their Import Approval and RI status revoked as well); MOT 46/2013, as amended, article 30(1) (Exh. US-2).

<sup>59</sup> MOT 46/2013, as amended, article 30(2)-(3) (Exh. US-2) (stating that imports “whose quantity, type business unit and/or country of origin is not in accordance with their Import Approval . . . will be re-exported” and the “cost of re-export . . . is the responsibility of the importer”).

additional products are needed due to the unavailability or insufficiency of the original orders, or even due to changed circumstances regarding the importer itself.

46. The result of this requirement is that: (1) imports of certain products (those for which no Recommendations or Import Approvals were granted at the beginning of the import period) are effectively banned until the next period; (2) only a set quantity of each type of product can be imported until the next period; (3) products from WTO Members are restricted to the amounts originally requested by importers (may be zero for the period if the importer did not apply for the product before the beginning of the period); and, (4) if the original port of entry is no longer available or commercially feasible to use, the products cannot enter through a different port. The type, quantity, country of origin, and port of entry requirement imposed through Recommendations and Import Approvals is, therefore, a limitation on action or limiting condition on importation, and thus constitutes a “restriction” within the meaning of Article XI:1.

47. Previous panels have found that measures with similar limitations or limiting conditions were restrictions under Article XI:1.<sup>60</sup> Notably, in *India – Autos*, the panel found that a trade balancing requirement restricted imports because there was a practical limit to the amount of products that companies would have the “desire and ability to export,” which would, in turn, limit the quantity of products that they would be permitted to import.<sup>61</sup> The panel in *Argentina – Import Measures* found that the measure at issue was an import restriction because, *inter alia*, it did not “allow companies to import as much as they desire or need without regard to their export performance” and “impose[d] a significant burden on importers that is unrelated to their normal importing activity.”<sup>62</sup> The *Colombia – Ports of Entry* panel found that a measure restricting the entry of imports from Panama to two Colombian ports had a “limiting effect” on imports because “uncertainties, including access to one seaport for extended periods of time and the likely increased costs that would arise from importers operating under the constraints of the port restrictions, limit competitive opportunities for imports arriving from Panama.”<sup>63</sup>

### C. Indonesia’s defenses under Article XX of the GATT 1994

48. Indonesia seeks to justify the various requirements of its import licensing regime under Articles XX(a), XX(b), and XX(d) of the GATT 1994.

49. To establish that a measure is justified under Article XX, the responding Member asserting the defense must show that the measure at issue is: (1) provisionally justified under one of the Article XX subparagraphs; and (2) applied consistently with the requirements of the

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<sup>60</sup> See *India – Autos (Panel)*, para. 7.268; *Colombia – Ports of Entry*, paras. 7.274, 7.236-239; *Argentina – Hides and Leather (Panel)*, para. 11.20; *EEC – Oilseeds I (GATT)*; *Japan – Leather II (US) (GATT)* .

<sup>61</sup> *India – Autos (Panel)*, para. 7.268.

<sup>62</sup> See *Argentina – Import Measures (Panel)*, para. 6.474.

<sup>63</sup> *Colombia – Ports of Entry*, para. 7.274; *id.*, para. 7.274.

chapeau.<sup>64</sup> Indonesia has asserted defenses of challenged measures under subparagraphs (a), (b), and (d) of Article XX. These subparagraphs each incorporate two elements, namely: (1) the challenged measure must be adopted or enforced to pursue the objective covered by the subparagraph; and (2) the measure must be “necessary” to the achievement of that objective.<sup>65</sup>

50. It does not appear that Indonesia has successfully met its burden to justify the challenged measures under Article XX. For example, Indonesia contends that limited application and validity periods and the fixed license terms requirements are necessary to secure compliance with consumer protection and custom enforcement of halal and food safety laws under Article XX(d).<sup>66</sup> Indonesia identified certain general provisions of these laws that are purportedly related to the challenged measure at issue, but other than unsupported assertions (“It can...be hardly disputed...”),<sup>67</sup> Indonesia has not explained or offered evidence from the text, structure, or history of the challenged measures to show that the stated objective is, in fact, the objective of the measures.<sup>68</sup>

51. Moreover, even if Indonesia had succeeded in demonstrating the objective of the measures, other than asserting generalities about having limited customs enforcement resources,<sup>69</sup> Indonesia has not demonstrated how or why the limited application windows and validity periods and the fixed license term requirements are *necessary* to securing compliance with consumer protection and customs enforcement. Indeed, Indonesia has not offered any evidence on how these requirements contribute to the enforcement of consumer protection, customs and halal laws, nor engaged in any discussion as to the weighing and balancing of any such contribution with the measures’ significant degree of trade restrictiveness.

52. Finally, with respect to the chapeau, Indonesia merely restates the text and concludes that it has met its requirements:

Indonesia submits that the limited application and validity periods and the fixed license terms are applied in a non-discriminatory manner to chicken meat and products imported from all Members, and that these requirements do not constitute a disguised restriction on international trade. These measures are, therefore, justified under the chapeau of Article XX(d).<sup>70</sup>

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<sup>64</sup> *EC – Seal Products (AB)*, para. 5.297; *US – Gasoline (AB)*, pp. 22-23; *US – Gambling (AB)*, para. 282; *Korea – Various Measures on Beef (AB)*, para. 157.

<sup>65</sup> *EC – Seal Products (AB)*, para. 5.169; *Brazil – Retreaded Tyres (AB)*, paras. 144-145; *Korea – Beef (AB)*, para. 157.

<sup>66</sup> Indonesia first written submission, para. 297.

<sup>67</sup> Indonesia first written submission, para. 297.

<sup>68</sup> *EC – Seal Products (AB)*, para. 5.144.

<sup>69</sup> Indonesia first written submission, paras. 299.

<sup>70</sup> Indonesia first written submission, paras. 301.

Such a showing is not sufficient. When faced with a similar argument in *Thailand – Cigarettes (Philippines)*, the Appellate Body found that Thailand had failed to meet the requirements of the chapeau when it made only one cursory and conclusory reference to that provision during the panel proceeding.<sup>71</sup> Indonesia’s cursory and conclusory showing in this dispute warrants a similar finding.

**D. Indonesia’s Import Licensing Regime for Animals and Animal Products Is Inconsistent with Indonesia’s Obligations Under Article 4.2 of the Agreement on Agriculture**

53. Article 4.2 of the *Agreement on Agriculture* states:

Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties<sup>1</sup>, except as otherwise provided for in Article 5 and Annex 5.

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<sup>1</sup> The measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

54. Indonesia’s import licensing restrictions for animals and animal products are “measures of the kind which have been required to be converted into ordinary customs duties” within the meaning of Article 4.2 of the Agriculture Agreement. Footnote 1 to Article 4.2 provides that such measures include, *inter alia*, “quantitative import restrictions,” “minimum import prices,” and “similar border measures” other than ordinary customs duties. Where a measure constitutes a “prohibition or restriction” (other than duties, taxes or other charges) in breach of Article XI:1 of the GATT 1994, that measure also would run afoul of the prohibition in Article 4.2 on Members maintaining agricultural measures of the kind listed in footnote 1. The United States considers that Indonesia’s import licensing measures therefore breach Article 4.2 for the same reasons they breach Article XI:1 of the GATT 1994. When a measure concerning agricultural products has been found inconsistent with Article XI:1 of the GATT 1994, previous panels have found that the measure would also be inconsistent with Article 4.2 of the Agreement on Agriculture.<sup>72</sup>

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<sup>71</sup> *Thailand – Cigarettes (Philippines) (AB)*, para. 1791 (stating: “In its entirety, this reference consisted of Thailand’s argument that, ‘[g]iven that these measures are applied to all products, imported or domestic, subject to VAT, they are not applied in a manner that constitutes an arbitrary or unjustifiable discrimination or a disguised restriction on international trade.’ This cannot suffice to establish that the additional administrative requirements fulfil the requirements of the chapeau of Article XX.”)

<sup>72</sup> See *India – Quantitative Restrictions (Panel)*, paras. 5.238-242; *Korea – 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

55. The United States recalls that the Agreement on Agriculture applies to the products listed in Annex 1 to that Agreement, which include products listed under HS Chapters 1 to 24. The animals and animal products covered by Indonesia’s import licensing regime fall within these HS Chapters, and thus are covered by the Agreement on Agriculture.<sup>73</sup>

56. In its first written submission, Indonesia raised a legal question about the whether the complainant bears the burden in an Article 4.2 claim of showing that each measure is maintained under Article XX of the GATT 1994<sup>74</sup>. In this section, the United States will first address Indonesia’s argument on the burden of proof, followed by discussions of each of the separate prohibitions or restrictions’ consistency with Article 4.2.

**1. A Complainant Need Not Show That a Measure Does Not Fall Within an Article XX Exception to Demonstrate a Breach Under Article 4.2**

57. Footnote 1 of Article 4.2 of the Agreement on Agriculture provides that the scope of Article 4.2 does not extend to measures maintained under “general, non-agriculture-specific provisions of the GATT 1994,” which include Article XX.<sup>75</sup> Indonesia asserts that to make a *prima facie* case that a challenged measure is inconsistent with Article 4.2, the complainant bears the burden to show that a measure does not fall within one of the exceptions of Article XX.<sup>76</sup>

58. The United States questions the soundness of Indonesia’s interpretation. Adopting Indonesia’s interpretation would render a successful Article 4.2 claim nearly impossible. Taking Indonesia’s interpretation to its logical conclusion means that a complainant must present arguments and evidence to prove a negative; that is, none of the measures at issue are maintained under the ten sub-articles of Article XX or under other general, non-agricultural-specific provisions of GATT 1994 or of the other WTO multilateral trade agreements. Indeed, Indonesia has not cited to any previous panel or Appellate Body reports that found that the complainant must prove that a measure is not maintained under Article XX or any other WTO provision in its Article 4.2 *prima facie* case. In fact, the panel in *India-Quantitative Restrictions* indicated that it is the respondent who must prove that the exceptions in footnote 1 apply: “Since India does not invoke any of the other exceptions contained in the footnote to Article 4.2, we find that the measures at issue violate Article 4.2.”<sup>77</sup> Such an interpretation is also consistent with previous panel and Appellate Body findings indicating more generally that the party that invokes a

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necessarily inconsistent with Article 4.2 of the Agreement on Agriculture and its footnote 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).

<sup>73</sup> See Indonesia, Applied MFN Tariff Schedule: Live Animals, Meat and Edible Meat Offal (2014), *WTO Tariff Download Facility*, (Exh. US-6).

<sup>74</sup> Indonesia’s first written submission, paras. 70–73.

<sup>75</sup> *Chile – Price Band (Panel)*, para. 7.68.

<sup>76</sup> Indonesia first written submission, paras. 70-72.

<sup>77</sup> *India – Quantitative Restrictions (Panel)*, para. 5.242.

justification under Article XX of the GATT 1994 bears the burden to demonstrate that the inconsistent measures come within its scope.<sup>78</sup>

59. In any event, the United States notes that the Panel need not reach Indonesia’s novel legal interpretations, because Brazil has raised claims under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. If the Panel begins its analysis with Article XI:1, followed by an examination of Indonesia’s defenses under Article XX, and if the Panel were to find that each measure breaches Article XI:1 and that Indonesia has made out an affirmative defense for any measure, then the Panel would not need to reach the issue raised by Indonesia under footnote 1 to Article 4.2 at all because that provision would not apply.

60. Thus, reasons of efficiency and judicial economy in not reaching novel and complex legal issues unnecessarily counsel in favor of beginning the analysis with Article XI:1 of the GATT 1994 in order to resolve any issues of consistency with respect to “other general, non-agricultural-specific provisions of the GATT 1994.”

## **2. The Prohibition on the Importation of Animals and Animal Products Not Listed in Indonesia’s Regulations Constitutes a Quantitative Import Restriction or Similar Border Measure Inconsistent with Article 4.2**

61. The United States has already described why Brazil has demonstrated that Indonesia’s use of its import licensing regime to ban the importation of animals and animal products not listed in the appendices of both MOT 46/2013 and MOA 139/2014 is a “prohibition” inconsistent with Article XI:1 of the GATT 1994.<sup>79</sup> For the same reasons, it is also a “quantitative import restriction” inconsistent with Article 4.2 of the Agreement on Agriculture.

62. The panel in *India – Quantitative Restrictions* reasoned that, just as a measure prohibiting the importation of certain products is a “restriction” under Article XI:1, so it is a “quantitative restriction” within the scope of, and inconsistent with, Article 4.2 of the Agreement on Agriculture. That panel considered a measure under which some products were designated for “canalization” and under which no import licenses were granted for those products except to the designated state trading agency.<sup>80</sup> The panel found that this restriction was inconsistent with Article XI:1, based in part on evidence that, for many products, there had been zero importation through the state trading entity,<sup>81</sup> such that they effectively were banned. The panel went on to examine the measure under Article 4.2 of the Agreement on Agriculture and explained that the “legal status of India’s import restrictions under the Agreement on Agriculture is . . . identical to

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<sup>78</sup> *Turkey – Rice*, para. 7.2, citing *US – Wool Shirts and Blouses (AB)*, p. 14, DSR 1997:I, p. 323 at p. 335, *US – Shrimp (Panel)*, para. 7.14; *US – Gasoline (Panel)*, para. 6.20.

<sup>79</sup> See *supra* sec. II.B.1.

<sup>80</sup> *India – Quantitative Restrictions (Panel)*, paras. 3.24, 5.135.

<sup>81</sup> *India – Quantitative Restrictions (Panel)*, paras. 5.135-136.

that under GATT 1994.”<sup>82</sup> Having found that the restrictions were inconsistent with Article XI:1 of the GATT 1994, therefore, the panel concluded that the measure breached Article 4.2 of the Agreement on Agriculture based on its inconsistency with the GATT 1994.<sup>83</sup>

63. Similarly, the panel in *US – Poultry (China)* considered a measure that “operate[d] as a prohibition on the importation of poultry products from China into the United States.”<sup>84</sup> Having found that the measure was inconsistent with Article XI:1 of the GATT 1994, the panel exercised judicial economy with respect to China’s Article 4.2 claim, reasoning that, “in making findings under Article XI:1 of the GATT 1994, the Panel considers that it has effectively resolved the aspects in this dispute related to the ‘restrictions’ on Chinese poultry meat and poultry products into the United States.”<sup>85</sup>

64. As described above and in section IV.B.1.2(b)(ii)(1) of Brazil’s first written submission, Indonesia’s positive list for import-eligible products bans the importation of certain products, namely, those not appearing on the lists in Appendices I and II of MOT 46/2013 and MOA 139/2014. A ban on importation limits the quantity permitted to be imported to zero. Such a ban constitutes a prohibition in breach of Article XI:1 of the GATT 1994. For the same reason, Indonesia’s prohibition on the importation of unlisted animals and animal products also constitutes a “quantitative import restriction” for purposes of footnote 1 to Article 4.2 of the Agreement on Agriculture, and therefore breaches this provision as well.

### **3. The Restriction on the Importation of Animals and Animal Products Other Than for Certain Limited Uses Constitutes a Quantitative Import Restriction or a Similar Border Measure Inconsistent with Article 4.2**

65. In section IV.B.1.2(b)(ii)(2) of Brazil’s first written submission, Brazil explains how Indonesia’s use requirements for imported animals and animal products – prohibiting the importation of animals, beef products, and other animal products except for certain specific purposes – are inconsistent with Article XI:1 of the GATT 1994. These requirements are also inconsistent with Article 4.2 of the Agreement on Agriculture because they are “quantitative import restrictions” or “similar measures” within the meaning of Article 4.2.

66. The United States recalls that Indonesia prohibits the importation of non-bovine animal products, including poultry meat and poultry products, for sale in traditional Indonesian markets. Consequently, imports of these products are denied access to a substantial portion of the Indonesian market for such products. Thus, the use requirements restrict imports by limiting their access to only certain segments of the Indonesian market, as overall demand for those products would be greater, were they able to access the entire Indonesian market.

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<sup>82</sup> *India – Quantitative Restrictions (Panel)*, para. 5.239.

<sup>83</sup> *India – Quantitative Restrictions (Panel)*, paras. 5.241-5.242.

<sup>84</sup> *US – Poultry (China)*, para. 7.485.

<sup>85</sup> *US – Poultry (China)*, para. 7.486.

67. The panel in *India – Quantitative Restrictions* also considered an import licensing regime that included such a use restriction, specifically, a requirement that goods could be imported only by their “actual user.” The panel found that the “actual user” requirement was a “restriction” inconsistent with Article XI:1 because it “preclude[d] imports of products for resale by intermediaries, i.e. distribution to consumers who are unable to import directly for their own immediate use is restricted.”<sup>86</sup> Finding that the legal status of India’s import licensing regime, including the “actual user” requirement, was identical under both the GATT 1994 and Article 4.2 of the Agreement on Agriculture, the panel went on to find that the restriction was inconsistent with Article 4.2 as well.<sup>87</sup>

68. Based on the foregoing, and for the same reasons they breach Article XI:1 of the GATT 1994, Indonesia’s use requirements are “quantitative import restrictions” or “similar border measures” inconsistent with Article 4.2 of the Agreement on Agriculture.

#### **4. The Application Windows and Validity Periods Constitute a Quantitative Import Restriction or Similar Border Measure Inconsistent with Article 4.2**

69. As discussed above and in Brazil’s first written submission at section IV.B.1.2(b)(ii)(3), Indonesia’s application window and validity period requirements are a “restriction” inconsistent with Article XI:1 of the GATT 1994.<sup>88</sup> For similar reasons, these requirements are also inconsistent with Article 4.2 of the Agreement on Agriculture because they are a “quantitative import restriction” or “similar border measure.”

70. Animals and animal products imported into Indonesia during any import approval validity period must be shipped, arrive, and clear customs within that validity period – i.e., products cannot be shipped until after Import Approvals are issued for that period and must clear customs before the validity period ends. Depending on the origin of the imports, this means shipments must stop up to several weeks prior to the end of a validity period to ensure that goods arrive and clear customs during that period. At the same time, exporters cannot start shipping for the next validity period, because, as discussed, importers must have the next period’s Import Approval numbers in order to do so, which they will not receive until the beginning of that period.<sup>89</sup> Consequently, there are up to several weeks of each period, and therefore several months out of every year, when many imports are effectively blocked from access to the Indonesian market.

71. By creating periods of time when importation will not occur, the application window and import approval validity requirements effectively limit the quantity permitted to be imported during those periods to zero. The panel in *Turkey – Rice* considered a measure that was similar

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<sup>86</sup> *India – Quantitative Restrictions*, para 5.142.

<sup>87</sup> *India – Quantitative Restrictions*, paras. 5.143, 5.239, 5.242.

<sup>88</sup> *See supra* sec. II.B.3.

<sup>89</sup> *See supra* sec. II.B.3.

in that it allowed imports for a certain level and period of time and effectively banned additional importation. The measure at issue was Turkey’s failure to grant during certain “periods of time” the permits that Turkey required for imports of rice outside Turkey’s tariff rate quota (“TRQ”), effectively banning such imports.<sup>90</sup> The panel found that the measure was a “quantitative import restriction” under Article 4.2 of the Agriculture Agreement on the grounds that, even without “any systematic intention to restrict the importation of rice at a certain level,” the measure was “liable to restrict the volume of imports.”<sup>91</sup>

72. Similarly, the application window and validity period requirements permit importation only during the period after permits have been obtained and for which the permits pertain, but do not permit an importer to obtain permits for the subsequent time period until a limited window prior to that period. The combined effect of these requirements precludes uninterrupted imports from most markets and means that U.S. animals and animal products are precluded from importation into the Indonesian market for up to six months out of every year. Thus, the requirements effectively limit the quantity permitted to be imported during those periods to zero. As the requirements are inconsistent with Article XI:1 of the GATT 1994, Indonesia’s application window and validity period requirements also constitute a “quantitative import restriction” or “similar border measure” in breach of Article 4.2 of the Agreement on Agriculture.

**5. Restricting Imports of Animals and Animal Products During a Validity Period to Those of the Type, Quantity, Country of Origin, and Port of Entry Listed on the Original Import Documents for That Period Constitutes a Quantitative Import Restriction or Similar Border Measure Inconsistent with Article 4.2**

73. Indonesia’s limitation on imports of animals and animal products during any import approval validity period to products of the type, quantity, country of origin, and port of entry listed on the original permits issued at the beginning of the import period is a “restriction” inconsistent with Article XI:1.<sup>92</sup> For the same reasons, the fixed license terms requirements impose a “quantitative import restriction” or “similar border measure” inconsistent with Article 4.2 of the Agreement on Agriculture.

74. As described in Brazil’s first written submission, section IV.B.1.2(b)(ii)(3), Indonesia’s type, quantity, country of origin, and port of entry requirements restrict imports because, during any import approval validity period, the only animals and animal products that can be imported are those that conform to the products listed on importers’ original Recommendations and Import Approvals issued at the beginning of that period. Moreover, importers cannot change the specifications on their import permits or apply for new permits once the import period has

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<sup>90</sup> *Turkey – Rice*, para. 7.118.

<sup>91</sup> *Turkey – Rice*, paras. 7.121-122.

<sup>92</sup> *See supra* sec. II.B.4.

begun.<sup>93</sup> Thus, once a period begins, importers cannot make changes to the products, based on market developments or other circumstances, in order to take advantage of unforeseen opportunities (e.g., to import a greater quantity of a product based on a spike in demand, or to import a different product based on high demand or an excess supply of that product) or to mitigate losses.

75. The *Turkey – Rice* panel found that Turkey’s “denial, or failure to grant, licenses to import rice outside of the tariff rate quota” was “a quantitative import restriction, within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture” because it had “restricted the importation of rice for periods of time.”<sup>94</sup> Indonesia’s type, quantity, country of origin, and port of entry requirements are a “quantitative import restriction” or “similar border measure” for similar reasons. As described above, importers are prohibited from engaging in importation not falling within the specifications established in its original import permits, and importers cannot request new or revised permits after the import period has begun to allow them to import a greater quantity of products or any products of a different type, country of origin, or port of entry as those listed on their Recommendation and Import Approval for that period. Thus, the requirements effectively limit the quantity permitted to be imported other than as set out on the original Recommendations and Import Approvals to zero.

76. Based on the foregoing, and for the same reasons they breach Article XI:1 of the GATT 1994, Indonesia’s type, quantity, country of origin, and port of entry requirements fall within the scope of footnote 1 to Article 4.2 of the Agreement on Agriculture, and therefore breach that provision.

**E. Indonesia’s Restriction on Imports Based on the “Insufficiency” of Domestic Production Is Inconsistent with Indonesia’s Obligations under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture**

**1. Inconsistency with Article XI:1 of the GATT 1994**

77. Brazil also challenges Law 18/2009 (“Animal Law”) and Law 18/2012 (“Food Law”) as part of Indonesia’s general prohibition on the importation of poultry meat and poultry products.<sup>95</sup> Under these laws, Indonesia permits imports of horticultural products and animals and animal products only when, and to the extent that, domestic supply of those products is deemed insufficient to meet Indonesian consumers’ needs. Otherwise, imports are prohibited. This conditioning of imports on the insufficiency of domestic supply is inconsistent with Article XI:1 of the GATT 1994 because it is a “restriction” on imports inconsistent with that provision.

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<sup>93</sup> MOA 139/2014 as amended, article 23(1) (Exh. US-3); *id.* article 26; *id.*, article 33(a); MOT 46/2013, as amended, article 12(1) (Exh. US-2).

<sup>94</sup> *Turkey – Rice*, paras. 7.51, 7.117 and 7.121.

<sup>95</sup> Indonesia first written submission, sections III.E.1, IV.A.2.2, IV.B.1.2(a).

78. Indonesia’s domestic insufficiency requirement explicitly places a limiting condition on imports by conditioning all importation of animals and animal products on the insufficiency of domestic products to meet Indonesian consumers’ needs. The requirement thus severely limits the opportunities for importation, in that imported products are given market access only if, and to the extent that, domestic supply is deemed insufficient to satisfy domestic needs.

79. Indonesia implements this requirement with respect to animals and animal products through the Animal Law, and the Food Law.<sup>96</sup> Individually and collectively, these laws provide that importation of animals and animal products is permitted only if domestic production of those products is deemed by the government not sufficient to fulfill the needs of Indonesian consumers.<sup>97</sup> Indonesian officials have confirmed that imports are permitted only in light of insufficiencies in domestic supply, explaining that “[i]mports are only for covering domestic shortfalls.”<sup>98</sup>

80. The domestic sufficiency requirement places a limiting condition on importation in that imports are allowed only on the condition that domestic production is deemed by the government not “sufficient” to fulfill domestic demand. Otherwise, importation is prohibited. If importation is permitted, the domestic sufficiency requirement still places a limitation on importation, as it is allowed only to the extent of the “domestic shortfall”<sup>99</sup> that the Indonesian Government identified. The restriction also has a limiting effect on trade to the extent that the Indonesian market would, in the absence of the restriction, import more products than the quantity that the government deemed to be the domestic shortfall.

81. The lack of transparency and predictability in the implementation of the domestic insufficiency requirement itself has a limiting effect on imports. Indonesia does not announce how or when the sufficiency of domestic production to satisfy Indonesian consumers’ needs will be determined or how the degree of the shortfall (if any) will be calculated. As a result, importers are unable to anticipate whether and when imports of a particular product will be prohibited because domestic production is deemed sufficient, or what level of imports will be permitted to make up for a shortfall in domestic production.

82. Previous panels have confirmed that measures that limit the market access and competitive opportunities of imported products are “restrictions” under Article XI:1. The panel in *Argentina – Import Measures*, for example, considered a measure that, *inter alia*, required

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<sup>96</sup> The United States notes that the Farmers Law also implements the domestic insufficiency requirement. Farmers Law, article 30 (Exh. US-7) (stating that “Every person is prohibited from importing Agricultural Commodities when the availability of domestic Agricultural Commodities is sufficient”);

<sup>97</sup> See Animal Law, Article 36(4) (Exh. US-8) (stating that “Import of animals or cattle and animal products from foreign countries shall be done if local production and supply of animals or cattle and animal products is not sufficient to fulfill consumption needs of the society”); Food Law, article 36 (Exh. US-9) (stating that “Import of Food can only be done if the domestic Food Production is insufficient” and/or if products are not “produced domestically”).

<sup>98</sup> Ministry of Industry, “Minister of Agriculture: Agricultural Imports Will Be Tightened,” (Exh. US-10).

<sup>99</sup> Ministry of Industry, “Minister of Agriculture: Agricultural Imports Will Be Tightened,” (Exh. US-10).

companies to reduce their imports in order to protect domestic producers.<sup>100</sup> The panel found that the “import reduction requirement involve[d] *per se* a limitation on imports.”<sup>101</sup> The panel also noted that companies did not know when a restriction would be imposed and that the “uncertainty” generated by Argentina’s measure was “an additional and significant element in limiting imports.”<sup>102</sup> The panel explained:

This uncertainty creates additional negative effects on imports, for it negatively impacts business plans of economic operators who cannot count on a stable environment in which to import and who accordingly reduce their expectations as well as their planned imports into the Argentine market.<sup>103</sup>

Similarly, Indonesia’s domestic insufficiency requirement imposes an explicit limiting condition on importation, the restrictive effect of which is exacerbated by the lack of predictability and transparency in how the requirement is administered.

83. Because the domestic insufficiency requirement limits market access directly by placing a limiting condition on importation, and has further limiting effects by creating uncertainty as to whether, and at what levels, imports will be permitted at any given time, the requirement is a “restriction” within the meaning of Article XI:1 of the GATT 1994.

## **2. Inconsistency with Article 4.2 of the Agreement on Agriculture**

84. The section above describes how the Indonesian measures conditioning importation on the insufficiency of domestic production to satisfy Indonesian consumers’ needs are inconsistent with Article XI:1 of the GATT 1994. For similar reasons, the domestic insufficiency provisions are also inconsistent with Article 4.2 of the Agreement on Agriculture because they operate as a “quantitative import restriction” within the meaning of footnote 1 to Article 4.2.

85. First, the domestic insufficiency provisions constitute an explicit quantitative limit on imports, in that they limit imports to whatever quantity is deemed necessary to satisfy Indonesians’ needs, over and above the amount produced by domestic producers. If domestic production of a particular product is deemed sufficient, no imports are permitted. If domestic production is not deemed sufficient, imports are permitted only to make up what the government considers to be the “shortfall” between domestic production and consumers’ needs. These restrictions are, on their face, “quantitative.”

86. The panel report in *Turkey – Rice* addressed Turkey’s failure to grant necessary import permits for rice outside of Turkey’s TRQ, effectively blocking such imports.<sup>104</sup> The panel found

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<sup>100</sup> *Argentina – Import Measures (Panel)*, para. 6.255.

<sup>101</sup> *Argentina – Import Measures (Panel)*, para. 6.257.

<sup>102</sup> *Argentina – Import Measures (Panel)*, para. 6.260.

<sup>103</sup> *Argentina – Import Measures (Panel)*, para. 6.260.

<sup>104</sup> *Turkey – Rice*, para. 7.118.

that the measure was a quantitative restriction within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture and, therefore, inconsistent with that provision, because “[t]hrough this practice, the Turkish authorities have restricted the importation of rice for periods of time.”<sup>105</sup>

87. Further, the lack of transparency and predictability in the operation of the domestic insufficiency condition also has a negative impact on the competitive opportunities of imports of animals and animal products. There is no explanation in Indonesia’s laws or regulations of how the government determines the sufficiency or insufficiency of domestic production or, where domestic production is deemed insufficient, the extent of the “shortfall,” and, consequently, the volume of imports to be permitted. It is clear, however, that these determinations inform the operation of Indonesia’s import licensing regimes for animals and animal products.

88. In *Chile – Price Band System*, the Appellate Body upheld the panel’s finding that Chile’s system of imposing special duties on each shipment of imports based on the difference between government determined upper and lower threshold prices and a weekly “reference price” to be inconsistent with Article 4.2 of the Agreement on Agriculture, based in part of the inherent lack of transparency and unpredictability of the system.<sup>106</sup> Similar to the measure at issue in *Chile – Price Band System*,<sup>107</sup> the lack of transparency and predictability caused by the domestic insufficiency requirement is liable to restrict imports and to prevent transmission of the global price for beef and other animal and animal products into the Indonesian market.

89. For all of these reasons, and for the same reasons they breach Article XI:1 of the GATT 1994, the measures imposing the domestic insufficiency condition on imports are “quantitative import restrictions” or “similar border measures” in breach of Article 4.2 of the Agreement on Agriculture.

### III. INDONESIA’S REQUEST FOR A PRELIMINARY RULING

90. Indonesia requests that the Panel find several of Brazil’s claims outside the terms of reference of the Panel. The United States directs its comments to the requests regarding the “general prohibition.”

#### A. Brazil has Sufficiently Identified and Presented the “General Prohibition” Requirement in its Panel Request

91. In its request for a preliminary ruling, Indonesia argues that Brazil failed to “present the problem clearly” with regard to the “general prohibition” on chicken meat and products because

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<sup>105</sup> *Turkey – Rice*, para. 7.121.

<sup>106</sup> *Chile – Price Band System (Panel)*, paras. 2.4-2.7, 8.1, *Chile – Price Band System (AB)*, para. 288.

<sup>107</sup> *Chile – Price Band System (AB)*, para. 234; *see also id.*, para. 261 (noting that Chile’s system “creates intransparent and unpredictable market access conditions” and has “the effect of disconnecting Chile’s market from international price development in a way that insulates Chile’s market from the transmission of international prices, and prevents enhanced market access for imports of certain agricultural products”).

“it is not clear in Brazil’s panel request which allegations of violation pertain to which particular measure or set of measures identified in its panel request.”<sup>108</sup>

92. Article 6.2 of the DSU requires that the complainant “identify the specific measures at issue” and “provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly” in its panel request. These two distinct requirements – “(i) the identification of the specific measures at issue; and (ii) the provision of a brief summary of the legal basis of the complaint” – “constitute the ‘matter referred to the DSB,’ which forms the basis of a panel’s terms of reference under Article 7.1 of the DSU.”<sup>109</sup>

93. The Appellate Body has stated that the “legal basis of the complaint . . . [is] ‘the specific provision of the covered agreement that contains the obligation alleged to be violated.’”<sup>110</sup> The identification of the covered agreement provision claimed to have been breached is thus the “minimum prerequisite” for presenting the legal basis of the complaint.<sup>111</sup> Further, the requirement of a “brief summary” sufficient to “present the problem clearly” entails connecting the challenged measure with the provisions alleged to have been infringed.<sup>112</sup> Consequently, “to the extent that a provision contains not one single distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged.”<sup>113</sup>

94. Thus, to demonstrate that a particular claim falls outside a panel’s terms of reference, the responding party must show that the panel request did not clearly identify the obligation or provision alleged to be breached by the challenged measure.<sup>114</sup> Indonesia has not made such a showing.

95. A close examination of the panel request suggests that Brazil has presented this claim in a manner consistent with Article 6.2 of the DSU. In section I of its panel request, Brazil identified a single measure consisting of seven components, each described narratively in detail. Brazil went on to list the five legal instruments through which the single measure is maintained below the narrative description. Finally, Brazil listed 15 provisions of the WTO agreements with which

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<sup>108</sup> Indonesia’s request for a preliminary ruling, para. 1.19.

<sup>109</sup> *Argentina – Import Measures (AB)*, para. 5.39.

<sup>110</sup> *China – HP-SSST (AB)*, para. 5.14; *US – Products from China (AB)*, para. 4.12; *EC – Selected Customs Matters (AB)*, para. 130.

<sup>111</sup> *China – HP-SSST (AB)*, para. 5.14; *Korea – Dairy (AB)*, para. 124.

<sup>112</sup> *China – HP-SSST (AB)*, para. 5.15; *China – Raw Materials (AB)*, para. 220; *US – Products from China (AB)*, para. 4.8.

<sup>113</sup> *China – HP-SSST (AB)*, para. 5.15; *China – Raw Materials (AB)*, para. 220; *US – Products from China (AB)*, para. 4.8.

<sup>114</sup> *China – HP-SSST (AB)*, para. 5.14 (“the reference in Article 6.2 of the DSU to the ‘legal basis of the complaint’ refers to the claims pertaining to a specific provision of a covered agreement containing the obligation alleged to be violated; and that it is the claims, and not the arguments, that are to be set out in a panel request in a way that is sufficient to present the problem clearly”).

it considered the single measure to be inconsistent, including the aspect of each of those provisions Brazil was invoking. That is, the single measure was identified and then connected with each of the WTO provisions with which Brazil claimed that measure to be WTO inconsistent. Indonesia appears to misread the panel request to contain in Section I challenges to the aspects of the measure identified rather than challenges to a single, general prohibition on poultry meat and poultry products.

96. The Appellate Body has also made clear the distinction between jurisdictional issues and substantive issues to be resolved on the merits. In *Australia – Apples*, the Appellate Body opined that “as long as the specificity requirements of Article 6.2 are met, [there is] no reason why a Member should be precluded from setting out in a panel request any act or omission attributed to another Member as the measure at issue.”<sup>115</sup> With respect to the “general prohibition,” Brazil has sufficiently identified the single measure and the legal bases for its claims to bring the matter within the Panel’s terms of reference. Questions of whether Brazil has demonstrated that such a measure exists in Indonesia, or whether the identified measure breaches any of the 15 WTO provisions, are substantive issues to be resolved by the Panel on the merits.<sup>116</sup>

#### **B. Brazil Need Not Identify the “Objective” of the “General Prohibition” Requirement under Article 6.2 of the DSU**

97. Indonesia argues that Brazil’s failure to identify the “objective” of Indonesia’s general prohibition requirement in the panel request renders this claim insufficiently precise and therefore outside of the Panel’s terms of reference.<sup>117</sup> The United States disagrees that Article 6.2 requires a complainant to identify in its panel request the “objective” of a measure.

98. As described above, Article 6.2 requires that the complainant “identify the specific measures at issue” and “provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly” in its panel request. Identification of the objective a measure is not required for purposes of Article 6.2. To the extent the objective of a measure is relevant to the ultimate resolution of a substantive claim, that issue would be resolved by the panel on the merits.<sup>118</sup>

#### **IV. CONCLUSION**

99. The United States thanks the Panel for the opportunity to submit its views on the issues raised in this dispute.

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<sup>115</sup> *Australia – Apples (AB)*, paras. 423-425.

<sup>116</sup> *See Australia – Apples (AB)*, paras. 423-425.

<sup>117</sup> Indonesia’s request for a preliminary ruling, paras. 1.36-1.41.

<sup>118</sup> *See Australia – Apple (AB)*, paras. 423-425.