

*Indonesia – Importation of Horticultural Products,
Animals, and Animal Products*

(DS477 / DS478)

(AB-2017-2)

Executive Summary of the Appellee Submission
of the United States of America

March 7, 2017

I. INTRODUCTION

1. As the Panel report makes clear, the measures at issue fall woefully short of meeting Indonesia's obligations under the WTO Agreement. Indeed, Indonesia does not even attempt to argue on appeal that any of the measures at issue is consistent with its WTO obligations. Instead, Indonesia seeks to undermine the Panel's analysis based on spurious, technical legal arguments. It is, therefore, an unfortunate and injudicious use of the resources of the parties and the Appellate Body that Indonesia has brought this appeal.

2. We therefore urge the Appellate Body to address only those claims that must be addressed to resolve this matter. It can do so by making one finding only: that the Panel did not err in beginning its analysis with Article XI:1 of the GATT 1994. This finding would resolve the dispute between the parties, and the Appellate Body's analysis can end there.

3. If the Panel's findings under Article XI:1 are upheld, none of Indonesia's additional appeals would alter the consequent recommendation that Indonesia bring each challenged measure into compliance with its obligations. Indonesia's appeals concerning Article 4.2 of the Agreement on Agriculture would have no effect on the DSB recommendations because that provision deals with a separate, independent obligation, the application of which does not affect the findings under Article XI:1. Indonesia's appeals concerning GATT Articles XI:2(c) and XX also would not lead to any substantive change in the Panel's findings. Article XI:2(c) was an unsuccessful defense raised by Indonesia for which it has not requested favorable completion of the analysis, only a finding that the provision still has operational effect. Regarding Article XX, Indonesia challenges the Panel's order of analysis, but does not request the Appellate Body to complete the analysis in its favor because of an admitted lack of sufficient undisputed facts on the record. As Indonesia concedes that it cannot justify the relevant measures under either provision, the findings under Article XI:1 would again remain undisturbed.

4. Indeed, for the outcome of this dispute to change on appeal, the Appellate Body would need to make a series of untenable legal findings that would be inconsistent with the text of the covered Agreements and how they have been interpreted by past panels and the Appellate Body, including that Article XI:1 does not apply to agricultural products and that a complainant bears the burden of proving the absence of an Article XX defense under Article 4.2. Such a result would be particularly disturbing in a dispute involving such a large number of measures that the Panel found to breach a fundamental tenet of the WTO Agreement.

II. THERE IS NO BASIS TO REVERSE THE PANEL'S FINDINGS UNDER ARTICLE XI:1

A. The Panel's Approach Was Not Legal Error

5. The DSU requires the Panel to make such findings as will assist the DSB in making the recommendations provided in the covered agreements, so that the DSB can assist the parties in resolving the dispute. Within this framework, neither the covered agreements nor the DSU imposes on panels any other mandatory rule for how panels should order their analysis of the various provisions or agreements that are necessary for resolution of the dispute.

6. The Appellate Body has found that, "[a]s a general principle, panels are free to structure the order of their analysis as they see fit" and "may find it useful to take account of the manner in which a claim is presented to them." The limitation on this freedom is that panels "must ensure

that they proceed on the basis of a properly structured analysis to interpret the substantive provisions at issue.” Thus, the limit on panels’ discretion is based on the substantive outcome.

7. Panel and Appellate Body reports support this understanding. The panel in *India – Autos* explained that, “other than where a proper application of one provision might be hindered without prior consideration of other issues, the adoption by a panel of a particular order of examination of discrete claims would rarely lead to any errors of law.” Other panels and the Appellate Body have drawn the same conclusion. In *Canada – FIT*, the Appellate Body found there was no mandatory sequence of analysis because the order did not affect the substantive assessment. In *US – FSC*, the Appellate Body found the panel’s order of analysis was not legal error, noting: “[t]he *appropriate meaning of both provisions can be established and can be given effect*, irrespective of” the order.

8. Indonesia ignores the rule that panels have discretion with respect to sequence of analysis and suggests that panels must begin with the agreement that is more “specific.” None of the reports cited by Indonesia support this argument.

9. In *EC – Bananas III*, the Appellate Body addressed the panel’s order of analysis and suggested the panel “should” have begun with the agreement that “deals specifically, and in detail” with the measure at issue. However, the Appellate Body did not determine that the panel’s order undermined the integrity of the legal analyses under either provision. Rather, the statement was made in the context of efficiency, as, if the panel had begun its analysis with one claim, “there would have been no need for it to address” the second. Similarly, in *Chile – Price Band System*, the Appellate Body addressed an argument that the panel erred in beginning its analysis under Article 4.2 rather than Article II:1(b). The Appellate Body found that, “[a]s these two provisions . . . establish distinct legal obligations,” the outcome of the dispute “would be the same, whether we begin our analysis” under either.

10. Thus, regardless of whether a certain provision deals more specifically with the measures at issue, an assessment of whether a panel’s order of analysis chosen by the panel constitutes legal error must focus on whether that order undermined the integrity of its analysis under any provision. Such was not the case here.

11. Rather, the Panel’s decision to begin its assessment with Article XI:1 instead of Article 4.2 did not affect the substance of the Panel’s findings under the former provision.

12. First, the structure of Article XI:1 and Article 4.2 shows that no mandatory order of analysis is warranted. Article 4.2 deals with “preventing the circumvention of tariff commitments on agricultural products” by numerous means, including quantitative restrictions, while Article XI:1 addresses “quantitative restrictions” on importation for agricultural products and other products. Thus, Article XI:1 prohibits a subset of measures that are *also* prohibited by Article 4.2. However, neither provision incorporates or necessarily depends on the other. Consequently, the outcome of the analysis under each would be the same regardless of the order.

13. Further, all the panels that have interpreted Article XI:1 and Article 4.2 have found that the provisions are independent, cumulative legal obligations. And panels and the Appellate

Body have made findings under each provision separately. Thus, the “appropriate meaning of both provisions can be established and can be given effect” regardless of the order of analysis. Indeed, none of the previous panels that considered claims under both provisions considered that an order of analysis was mandatory. And, before the Panel, no party suggested this was the case.

14. Indonesia’s arguments on appeal also do not suggest that the Panel’s sequence of analysis had any effect on the substance of its findings under Article XI:1. Indeed, it appears uncontested that this is not the case, in light of Indonesia’s description of the two independent “discipline[s]” with “different obligations and different product coverage.” Rather, Indonesia claims simply that because Article 4.2 is more “specific” than Article XI:1, the Panel’s sequence of analysis is necessarily reversible error. But that argument is wrong.

15. Further, Indonesia’s only argument attacking the substance of the Panel’s findings under Article XI:1, *i.e.*, the argument that, pursuant to Articles 21.1 and 4.2 of the Agreement on Agriculture, Article XI:1 no longer applies to agricultural products, is incorrect.

16. First, this argument contradicts a foundational WTO principle. Under Article II:2 of the WTO Agreement, the “[a]greements contained in the annexes are all necessary components of the ‘same treaty’ and they, together, form a single package of WTO rights and obligations.” Consequently, “a single measure may be subject, at the same time, to several WTO provisions imposing different disciplines,” and “a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.” The interpretative note to Annex 1A makes it clear that a provision of one agreement overrides another only “[i]n the event of conflict” and then only “to the extent of the conflict.”

17. Indonesia’s argument contradicts these principles because it would render inutile, as to agricultural products, significant provisions of the GATT 1994. Indonesia does not even attempt to provide a rationale for this outcome, as it is undisputed that there is no conflict between the provisions.

18. Second, Article 21.1 of the Agreement on Agriculture offers no support for Indonesia’s interpretation. The provision states that the GATT 1994 “shall apply” to agricultural products “subject to” the provisions of the Agreement on Agriculture. Thus it renders no provision of the GATT 1994 inoperative. Rather, it states that, to the extent a provision of the Agreement on Agriculture expressly supersedes a provision of the GATT 1994, the Agreement on Agriculture would prevail. In other respects, both agreements “shall apply” in full.

19. The Appellate Body’s statement in *EC – Bananas III* reflects this interpretation. The EU had argued that Article 21.1 confirmed “the ‘agricultural specificity’” of the agreement and showed that its rules “supersede[d] the provisions of the GATT 1994.” The panel rejected this argument because “giving priority to Article 4.1 . . . does not necessitate, or even suggest, a limitation on the application of Article XIII,” because “[t]he provisions are complementary, and do not clash.” The Appellate Body agreed, concluding that Article 4 did not deal specifically with the allocation of tariff quotas, and therefore could not conflict with Article XIII of the GATT 1994. Therefore, these findings do not suggest that specificity alone creates a conflict.

20. Third, previous interpretations of substantive provisions of the Agreement on Agriculture also refute Indonesia’s argument. Contrary to Indonesia’s claim, the Appellate Body in *Chile – Price Band System* did not suggest that Article II of the GATT *no longer applied* to agricultural products by virtue of Article 4.2. In fact, it confirmed that both provisions applied. Also, all previous panels that have examined claims under both Article XI:1 and Article 4.2 have confirmed that Article XI:1 applies to measures also covered by Article 4.2.

21. Finally, the principle of *lex specialis* does not support Indonesia’s appeal. Indeed, it is not applicable. The principle is a guide for what rule “ought to be observed . . . where parts of a document are in conflict.” Thus, it concerns situations where two provision conflict and so cannot be applied simultaneously. In the present case, there is no such conflict.

22. Additionally, Indonesia’s argument that the Agreement on Agriculture is more “specific” is incorrect. Due to Indonesia’s invocation of defenses under Article XX of the GATT 1994, considerations of efficiency and judicial economy favored beginning with that agreement. Further, Article XI:1 specifically addresses the type of measure at issue, namely prohibitions and restrictions on importation, and Article 4.2 is not more specific.

23. Indonesia’s argument that the fact that Article 4.2 has “a broader scope of coverage than Article 4.2” is “not determinative” of which is the more specific provision and that Article 4.2 is more specific as to product coverage does not suggest that the Agreement on Agriculture is more specific than the GATT 1994 for purposes of this dispute or that any mistake in the sequence of analysis would be reversible error. Also, the fact that Article 4.2 rendered Article XI:2(c) of the GATT 1994 inoperative does not suggest that it is more “specific” in this dispute. Indonesia advances no reason why this would be the case. Indonesia’s assertion that the obligations under Article 4.2 and Article XI:1 are “different” is also incorrect. The obligation of Article 4.2 is simply to not “maintain, revert to, or resort to measures covered by Article 4.2,” and thus is not different than the obligation under Article XI:1.

B. Indonesia’s DSU Article 11 Appeal Should Be Rejected

24. Indonesia has failed to allege under Article 11 of the DSU any arguments separate from or additional to those Indonesia put forward with respect to its substantive legal appeals. This alone provides a sufficient basis for the Appellate Body to reject Indonesia’s Article 11 appeal. Additionally, Indonesia has adduced no evidence or argument suggesting any alleged error was so egregious as to call into question the objectivity of the Panel’s assessment.

25. Indonesia has also not met the standard of Article 11 of the DSU with respect to its claim that the Panel’s exercise of judicial economy was inappropriate. Specifically, Indonesia does not allege that the Panel’s decision not to address the issues resulted in “only a ‘partial resolution of the matter at issue,’” or that a finding as to the burden of proof under Article 4.2, footnote 1, was necessary for sufficiently precise DSB recommendations and rulings. The Appellate Body report in *Colombia – Textiles* supports the conclusion that the Panel’s exercise of judicial economy in this dispute was not in error.

III. THE CHALLENGED MEASURES ARE INCONSISTENT WITH ARTICLE 4.2

26. Article 4.2 of the Agreement on Agriculture covers a range of measures that include quantitative import restrictions and minimum import prices. Past panels and the Appellate Body have confirmed that measures covered by Article 4.2 include those inconsistent with Article XI:1. Here, the findings of the Panel under Article XI:1 establish that each of the challenged measures is also a “quantitative import restriction” or “similar border measure” or a “minimum import price” or “similar border measure” under Article 4.2. Therefore, in the event that the Appellate Body reverses the Panel’s findings under Article XI:1, the United States requests that it complete the analysis of the consistency with Article 4.2 of each of the measures, based on the factual findings of the Panel and the uncontested facts on the record.

IV. THE PANEL DID NOT ERR IN ITS ANALYSIS OF ARTICLE 4.2

27. If the Appellate Body upholds the Panel’s findings under Article XI:1 of the GATT 1994, it need not make any findings with respect to the burden of proof under the footnote to Article 4.2. The Panel did not err in analyzing Articles XI:1 and XX of the GATT 1994 before considering Article 4.2. Therefore, any findings with respect to the burden of proof of Article 4.2 of the Agreement on Agriculture would not change Indonesia’s obligation to implement the findings and recommendations of the Panel with respect to Article XI:1 of the GATT 1994, once they are adopted by the DSB. For this reason alone, the Appellate Body can and should reject Indonesia’s appeal concerning the burden of proof under the footnote to Article 4.2.

28. For completeness, the United States notes that, in rejecting Indonesia’s burden of proof argument, the Panel correctly interpreted Article 4.2.

29. Indonesia attempted to argue that because *the scope* of Article 4.2 is limited to measures not maintained under Article XX, the burden of proof under *an affirmative defense* necessarily must shift. No such rule exists. Rather, “the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.” If Indonesia’s measures are “maintained” under a general exception, it would be for Indonesia to assert the exception and demonstrate its applicability. Even where a provision excludes certain measures from its scope, that is not dispositive of burden of proof.

30. Indonesia argues that other provisions of the WTO Agreements also “convert exceptions under Article XX of the GATT 1994 into positive obligations,” but none of the examples Indonesia identifies is analogous. Further, reversing the burden of proof with respect to the exceptions identified in footnote 1 to Article 4.2 would be inconsistent with the structure and purpose of the Agreement on Agriculture and Article 4.2. Additionally, Indonesia’s interpretation would create absurd and infeasible results.

31. Finally, while not necessary to prevail in its claims under Article 4.2, the co-complainants provided substantial evidence and argumentation that none of Indonesia’s measure are maintained consistently with Article XX of the GATT 1994.

V. THE PANEL’S FINDING ON ARTICLE XI:2(C) WAS CORRECT

32. Indonesia argues that Article XI:2(c)(ii) of the GATT 1994 remains a viable provision even with the existence of Article 4.2 of the Agreement on Agriculture. Making findings on the

interpretation of Article XI:2(c) is not necessary to resolve this dispute because Indonesia has requested only that the Appellate Body reverse the Panel’s legal conclusion regarding inoperability of this provision; it has not requested completion of the analysis. And even if it had, Indonesia failed to address, much less demonstrate, the conditions required to maintain measures under Article XI:2(c). Thus, Indonesia cannot in this appeal obtain findings that Article XI:2(c) applies.

33. For completeness, the United States notes that the Panel did not err when it found with that Article XI:2(c) of the GATT 1994 is not available for Indonesia. The Panel correctly found that Article 4.2 of the Agreement on Agriculture prohibits import restrictions maintained under Article XI:2(c). Because these import restrictions are agriculture-specific, Indonesia cannot rely on the “maintained under other general, non-agriculture-specific provisions of the GATT 1994” limitation to Article 4.2 of the Agreement on Agriculture.

VI. THERE IS NO BASIS TO REVERSE THE PANEL’S FINDING UNDER ARTICLE XX

34. It is not necessary for the Appellate Body to consider Indonesia’s appeal concerning the Panel’s findings under Article XX. Indonesia does *not* request completion of the analysis and a finding that the Article XX defense is made out with respect to *any* of the challenged measures. Therefore, Indonesia’s appeal could result in no change to the DSB recommendations and rulings.

35. Further, the fact that the Panel analyzed the chapeau of Article XX in relation to certain measures without having analyzed the subparagraphs first is not *per se* reversible legal error. Rather, the Panel’s findings should be reversed only if its analysis was substantively incorrect.

36. Indonesia misunderstands the Appellate Body report in *US – Shrimp* in this respect. That report found that the subparagraph under which a measure is claimed to be justified is relevant to the chapeau analysis, because the chapeau must be analyzed in light of the specific policy objective identified by the respondent. The Appellate Body did not find that analyzing the chapeau first constitutes legal error that requires reversal.

37. Subsequent reports confirm that the relevant policy objective is relevant to the chapeau analysis because it: (1) provides “pertinent context” for determining the “conditions” that are relevant to assessing whether a measure discriminates; and (2) is a factor in assessing whether discrimination is “arbitrary and unjustifiable.”

38. The Panel here correctly analyzed the chapeau with respect to Indonesia’s defenses under Articles XX(a), XX(b), and XX(d).

39. For each subparagraph, the Panel considered whether the measures for which Indonesia had asserted defenses discriminated under the chapeau, in light of the objective(s) Indonesia asserted the measures pursued. The Panel found that Indonesia’s arguments did not address “discrimination in the sense of the chapeau” at all. The Panel then considered whether the discrimination caused by the measures “can be reconciled with, or is rationally related to” the objective(s) Indonesia asserted each measure pursued and found that the discrimination caused by each of the challenged measures was arbitrary or unjustifiable, in light of those objectives.

40. Additionally, the Panel found that “the actual policy objective behind all these measures is to achieve self-sufficiency . . . by way of restricting and, at time, prohibiting imports.” This “rationale . . . does not relate to the pursuit of or would go against” the objectives of the Article XX subparagraphs.

41. Thus, the Panel appropriately assessed Indonesia’s defenses under the chapeau in light of the objectives Indonesia asserted the measures pursued.

VII. CONCLUSION

42. The United States respectfully requests the Appellate Body to reject all of Indonesia’s claims on appeal, and uphold the Panel’s findings
