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

(DS477 / DS478)

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Appellee Submission
of the United States of America

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SERVICE LIST

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TABLE OF ACRONYMS

Acronym	Full Name
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
MOA	Indonesian Ministry of Agriculture
MOT	Indonesian Ministry of Trade
PI	Producer Importer
RI	Registered Importer
RIPH	Horticultural Product Import Recommendation
UPP	Trade Services Unit of the Ministry of Trade
WTO	World Trade Organization

TABLE OF REPORTS

Short title	Full Citation
Argentina – Footwear (EC) (AB)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001
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Argentina – Import Measures (Panel)	Panel Reports, *Argentina – Measures Affecting the Importation of Goods*, 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
Brazil – Retreaded Tyres (AB)	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007
Canada – Autos (Panel)	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R
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US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

I. INTRODUCTION

1. The measures at issue in this dispute consist of prohibitions and restrictions that Indonesia imposes through its laws and regulations governing the importation of horticultural products and of animals and animal products, and particularly through its import licensing regimes for those products. As the Panel report makes clear, these measures fall woefully short of meeting Indonesia's obligations under the WTO Agreement. Indeed, the measures at issue serve the express purpose of protecting Indonesia's domestic producers from import competition.

2. Indonesia's measures thus severely affect foreign suppliers and Indonesian importers, raise costs and reduce choices for Indonesian consumers, and are flatly contrary to basic WTO rules. Were Indonesia's exports to the United States or New Zealand subject to identical prohibitions or restrictions, Indonesia would no doubt agree.

3. In fact, Indonesia does not even attempt on appeal to argue that any of the measures at issue is substantively consistent with its WTO obligations. Indeed, it seems unlikely that Indonesia could seriously consider that this appeal would result in a different outcome to the dispute. Tellingly, at no point has Indonesia requested a substantive finding by the Appellate Body that any of the challenged measures *is* consistent with Indonesia's obligations under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") or the *Agreement on Agriculture*. Even in Indonesia's appeals of the Panel's interpretations of Article XX and Article XI:2(c)(ii) of the GATT 1994, Indonesia does not request the Appellate Body to complete the analysis or otherwise attempt to show that its defense of any of these measures should have been successful. Instead, Indonesia's arguments seek to undermine the analysis of the Panel based on spurious, technical legal arguments.

4. It is, therefore, an unfortunate and injudicious use of the resources of the parties and the Appellate Body that Indonesia has brought this appeal. We urge the Appellate Body to address only those claims that must be addressed to resolve this matter and, in so doing, make efficient use of its scarce time and resources.

5. The Appellate Body can resolve this dispute by making one finding only: that the Panel did not err in beginning its analysis with Article XI:1 of the GATT 1994. As the United States explains in this submission, it was within the Panel's discretion to structure its analysis as it did (and as several panels have done before in similar circumstances), and Indonesia has raised no argument that the order chosen by the Panel undermined the integrity of its findings under that provision.

6. 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. In particular, Indonesia's appeals concerning Article 4.2 of the Agreement on Agriculture would have no effect on the DSB recommendations in the dispute because that provision deals with a separate and independent obligation, the application of which does not affect the findings under Article XI:1 in any way. Similarly, Indonesia's appeals concerning its defences under Article XI:2(c) and Article XX of the GATT 1994 would not lead to any substantive change in the Panel's findings. Article XI:2(c) was an unsuccessful defense raised by Indonesia before the Panel for which it has not requested a favorable completion of the analysis, only a finding that the provision still has operational effect.

Similarly, regarding Article XX, Indonesia challenges the Panel's order of analysis, but does not request the Appellate Body to complete the analysis, admitting the lack of sufficient undisputed facts on the record on which to do so. Indonesia thus concedes that it cannot justify the relevant measures under either provision, and, therefore, the findings under Article XI:1 again would remain undisturbed in these appeals. Thus, a finding that the Panel did not err in commencing its analysis with Article XI:1 of the GATT 1994 would resolve the dispute between the Parties, and the Appellate Body's analysis of this appeal can end there.[1]

7. The untenable nature of Indonesia's appeal is clear when one considers what the Appellate Body would have to find for Indonesia's claims to alter the outcome of this dispute. The Appellate Body would have to find: (1) that there is a *mandatory* order of analysis between Article XI:1 and Article 4.2, such that the Panel *abused its discretion* in addressing the Article XI:1 claims before addressing identical arguments under Article 4.2; (2) that the findings under Article XI:1 must be reversed because the Panel failed to recognize that Article XI:1 *no longer applies* to prohibitions and restrictions on the importation of agricultural products; (3) that, in analyzing the appellees' claims under Article 4.2, the Panel should have imposed the burden of demonstrating, not only that the measures are of the type covered by that provision, but also that none of the measures was justified under Article XX of the GATT 1994; and (4) that, in completing the analysis under Article 4.2, because the appellees failed to make such a showing, no findings of WTO-inconsistency can be made under that provision either.

8. A finding for Indonesia on any one of these issues would be inconsistent with the text of the covered Agreements and how they have been interpreted by past panels and the Appellate Body. Such a result would be particularly disturbing in a dispute involving such a large number of measures that each breach a fundamental tenet of the WTO Agreement.

9. The sections that follow show that all of Indonesia's appeals lack merit. Section II addresses Indonesia's appeals concerning the Panel's findings under Article XI:1 of the GATT 1994, showing that both the legal appeal and the appeal under Article 11 of the DSU should be rejected. Section III shows that, even in the event that the Appellate Body reverses the Panel's findings under Article XI:1 of the GATT 1994, the factual findings of the Panel and uncontested facts on the record establish that the challenged measures are each also inconsistent with Article 4.2 of the Agreement on Agriculture. Sections IV and V show, respectively, that the Panel's analyses of the burden of proof under Article 4.2 and the inoperability, with respect to agricultural products, of Article XI:2(c) of the GATT 1994, were correct. Finally, Section VI shows that there is no basis for reversing the Panel's findings that none of the challenged measures is justified under Article XX of the GATT 1994.

[1] *See US – Wool Shirts and Blouses (AB)*, p. 19; *US – Upland Cotton (AB)*, paras. 508-511 (explaining that "irrespective of whether we were to uphold or reverse the Panel's finding on this issue, upon adopting of the recommendations and rulings by the DSB, the United States would be under no additional obligation regarding implementation," and, therefore the interpretation requested "[was] unnecessary for purposes of resolving this dispute" and the Appellate Body would not conduct it).

II. THERE IS NO BASIS TO REVERSE THE PANEL'S FINDING THAT THE CHALLENGED MEASURES ARE INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

10. In its appellant submission, Indonesia raised claims of legal error challenging the Panel's findings under Article XI:1 of the GATT 1994, as well as related claims under Article 11 of the DSU.[2] Specifically, Indonesia argues that the Panel committed reversible legal error in concluding that, for purposes of this dispute, the GATT 1994 is the more "specific" agreement, as compared to the Agreement on Agriculture, and beginning its analysis by assessing the co-complainants' claims under Article XI:1 of the GATT 1994.[3] Indonesia also argues that the Panel acted inconsistently with its obligations under Article 11 of the DSU by failing to make an objective assessment of the "applicability of Article 4.2 of the Agreement on Agriculture" to the measures at issue and by erring in its exercise of judicial economy.[4]

11. As shown in this section, both of these appeals lack merit and should be rejected. Indonesia has failed to show that the Panel's approach to the sequence of analysis constituted reversible legal error. In fact, the Panel's decision to commence its analysis with Article XI:1 of the GATT 1994 was within the Panel's margin of discretion to structure the order in which it assessed the parties' claims. Further, Indonesia has not challenged the Panel's substantive analysis under Article XI:1. Consequently, the Panel's sequence of analysis is not a basis for reversing its findings under Article XI:1. With respect to the claim under Article 11 of the DSU, because Indonesia's arguments are substantively the same as those made under Article XI:1 of the GATT 1994, the Appellate Body should reject this claim for the same reasons. Further, Indonesia has not adduced evidence and argumentation showing that the Panel failed to conduct an objective assessment of the applicability of the relevant covered agreements or exceeded its margin of discretion in its exercise of judicial economy. Consequently, Indonesia has not shown any basis for the Appellate Body to reverse the Panel's findings under Article XI:1.

12. This section first summarizes the relevant findings of the Panel concerning the sequence of its analysis of Articles XI:1 and XX of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. It then explains that Indonesia has not shown that the Panel committed reversible legal error in its analysis of the challenged measures under Article XI:1 of the GATT 1994. Finally, it shows that Indonesia has failed to show that the Panel failed to make an objective assessment of the matter before it, as referred to in Article 11 of the DSU.

A. Relevant Findings of the Panel as to the Sequence of Analysis of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

13. The Panel began its analysis by recalling the principle that, in general, "panels are free to structure the order of their analysis as they see fit," and, in particular, "may find it useful to take

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[2] *See* Indonesia's Appellant Submission, secs. II, IV.

[3] *See* Indonesia's Appellant Submission, sec. II.

[4] *See* Indonesia's Appellant Submission, sec. IV.

account of the manner in which a claim is presented to them by a complaining Member."[5] The Panel also noted that the first consideration is generally whether "a particular order is compelled by principles of valid interpretative methodology, which, if not followed, might constitute an error of law."[6] As is clear from the Panel report, before the Panel, neither the co-complainants nor Indonesia argued that this was the case.[7] Third parties agreed.[8]

14. The parties did disagree, however, as to how the Panel should choose to structure its analysis. The co-complainants considered that the Panel should commence its analysis with Article XI:1 of the GATT 1994 because, "in the context of considering quantitative restrictions," Article 4.2 is not the more specific provision.[9] Further, considerations of efficiency and judicial economy supported beginning with claims under the GATT 1994, as a finding that a measure was inconsistent with Article XI:1 and a finding as to whether it was justified under Article XX "would be determinative to resolving the dispute" as regards that measure.[10] Indonesia, by contrast, first asked the Panel to commence its analysis under Article 4.2 of the Agreement on Agriculture, then indicated at the first panel meeting that the Panel "could begin its analysis with Article XI:1 of the GATT 1994," and finally suggested that "considerations of efficiency and judicial economy favour the Panel beginning its analysis with Article 4.2."[11]

15. In considering the parties' arguments, the Panel noted the Appellate Body's guidance that "the provision from the agreement that 'deals specifically, and in detail' with the measures at issue should be analysed first."[12] In that regard, the Panel noted that all of the eighteen measures at issue were challenged under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture and that the claims under the two provisions were "identical."[13] The Panel therefore agreed with the co-complainants that "the provision that deals specifically with quantitative restrictions is Article XI:1 of the GATT 1994," while Article 4.2 of the Agreement

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[5] Panel Report, para. 7.28 (quoting *Canada – Wheat Exports and Grain Imports (AB)*, para. 126).

[6] Panel Report, para. 7.31 (citing *India – Autos*, para. 7.161).

[7] *See* Panel Report, paras. 7.28, 7.30 (explaining that the co-complainants considered that the Panel "should" start its analysis with Article XI:1 and that Indonesia first "asked the Panel to commence its analysis with Article 4.2," then indicated the Panel "could begin its analysis with Article XI:1 of the GATT 1994," and finally argued that "considerations of efficiency and judicial economy favour the Panel beginning . . . with Article 4.2").

[8] *See* Panel Report, para. 7.32 (explaining that two of the third parties agreed with the co-complainants and three "were comfortable with the Panel commencing its analysis under Article XI:1 of the GATT 1994").

[9] Panel Report, para. 7.28.

[10] Panel Report, para. 7.28 (citing *inter alia* U.S. response to Panel questions No. 6, 79, 89); *see also* U.S. response to Panel question No. 79, paras. 4-7 (arguing that "reasons of efficiency and judicial economy in not reaching legal issues unnecessarily counsel in favor of beginning the analysis with Article XI:1 of the GATT 1994").

[11] Panel Report, para. 7.30.

[12] Panel Report, para. 7.31 (quoting *EC – Bananas III (AB)*, para. 204).

[13] *See* Panel Report, para. 7.32.

on Agriculture "has a broader scope and refers to measures other than quantitative restrictions."[14]

16. The Panel also noted that beginning with the claims under the GATT 1994 would preclude needing to analyze under the Agreement on Agriculture any measures found to be justified under Article XX of the GATT 1994.[15] Specifically, as the Panel explained, "if the measures were to be justified under [Article XX], we would not need to analyse the claims under Article 4.2 of the Agreement on Agriculture," as footnote 1 to that provision provides that "measures maintained . . . under other general, non agriculture-specific provisions of GATT 1994" are not covered by Article 4.2.[16] The Panel noted that panels in all previous disputes in which the complainants brought claims under Article XI:1 and Article 4.2, and the responding Member raised a defense under Article XX, followed this sequence of analysis.[17]

B. The Panel's Approach to the Order of Analysis Was Not Legal Error

17. In its appellant submission, Indonesia argues that the Panel's decision to commence its examination by analyzing the claims under Article XI:1 of the GATT 1994 amounted to legal error because Article 4.2 of the Agreement on Agriculture is the more "specific" provision with respect to quantitative import restrictions on agricultural products.[18] Indonesia also argues that, as a consequence of Article 21.1 of the Agreement on Agriculture, Article 4.2 of that agreement renders Article XI:1 of the GATT 1994 *inoperable* with respect to import prohibitions and restrictions on agricultural products.[19]

18. As shown in this section, Indonesia's appeal lacks merit and should be rejected. The Panel's decision to begin its analysis under Article XI:1, rather than Article 4.2, was not legal error. 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, and the Panel's approach to begin with GATT 1994 Article XI:1 does that. Further, the guidance of the Appellate Body in numerous previous disputes demonstrates that there was no mandatory order of analysis between the two provisions and, therefore, neither approach would necessarily have resulted in legal error. Indonesia's one argument as to why legal error would have occurred – that Article 4.2 of the Agreement on Agriculture renders Article XI:1 of the GATT 1994 inoperative with respect to agricultural products – has no basis in the text of either provision or in past reports.

19. Consequently, even if the Appellate Body were to determine that the Panel should have begun its analysis with Article 4.2, that still would not provide a rationale for reversing the Panel's substantive findings under Article XI:1. At best, a finding that the Panel should have

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[14] Panel Report, para. 7.32.

[15] Panel Report, para. 7.33.

[16] Panel Report, para. 7.33.

[17] Panel Report, para. 7.33.

[18] *See* Indonesia's Appellant Submission, paras. 43-64.

[19] *See* Indonesia's Appellant Submission, paras. 52-53.

begun its analysis with Article 4.2 would only suggest that findings under Article 4.2 also may be appropriate (though this would have required the Panel to address legal interpretive issues not at issue under Article XI:1). In that case the Appellate Body could complete the legal analysis based on the Panel's factual findings, in particular those made in the context of the "identical" claims under Article XI:1. Therefore, none of Indonesia's arguments are a basis for reversing the Panel's findings under Article XI:1.

20. Additionally, Indonesia is wrong, even within the terms of its argument. In fact, Article 4.2 of the Agreement on Agriculture is not "more specific" with regard to quantitative import restrictions; Article XI:1 of the GATT 1994 is at least as "specific" with respect to such measures, if not more so. Further considerations of efficiency and judicial economy favored beginning the assessment with the claims under the GATT 1994.

1. No Mandatory Order of Analysis Applied with Respect to the Claims Under Article XI:1 and Article 4.2

21. The Panel's sequence of analysis did not amount to reversible legal error. In fact, the sequence of analysis with respect to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture was within the Panel's margin of discretion, as the order of analysis would have had no substantive effect on the analysis under either provision. In this regard, Indonesia's argument that Article XI:1 of the GATT 1994 does not apply to measures that impose prohibitions or restrictions on the importation of agricultural products is incorrect. Consequently, even if the Agreement on Agriculture were more "specific" with respect to the measures at issue, it would not suggest that it was reversible legal error for the Panel to have begun its analysis with Article XI:1 of the GATT 1994.

a. Panels Have Discretion Concerning Sequence of Analysis Provided the Sequence Does Not Result in Substantive Error

22. 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. The DSB established this Panel with standard terms of reference, namely "[t]o examine, in the light of the relevant provisions in . . . the covered agreement(s) cited by the parties . . . the matter referred to the DSB" by the complainant and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." Similarly, under DSU Article 11, a panel is to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." And under DSU Article 19.1 "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[] bring the measure into conformity with that agreement."

23. Thus, the Panel is charged with making such findings as may lead to a recommendation by the DSB to a WTO Member to bring a WTO-inconsistent measure into conformity with WTO rules. 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.

24. To the contrary, 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 that, "[i]n so doing, panels may find it useful to take account of the manner in which a claim is presented to them by a complaining Member."[20] 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."[21] Thus, the limit on panels' discretion is based on the substantive outcome, *i.e.*, whether the Panel's sequence of analysis prevented it from properly applying the relevant substantive provisions to the measures at issue and therefore interfered with the task of WTO adjudicators to assist the DSB in making the findings and recommendations necessary to assist the parties in securing a positive solution to the dispute.

25. Several panel and Appellate Body reports support this understanding. For example, the panel in *India – Autos* explained that, "In circumstances 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."[22] The panel in *Peru – Agriculture Products*, in considering claims under the GATT 1994 and Article 4.2 of the Agreement on Agriculture, similarly concluded that, other than where there is "a mandatory sequence of analysis, deviation from which would lead to an error of law and/or affect the substance of the analysis itself, panels have discretion to structure the order of their analysis."[23] Other panels have drawn the same conclusion.[24]

26. The Appellate Body also has made this point several times. In *Canada – Feed-In Tariff Program*, for example, it considered claims under the SCM Agreement, the TRIMs Agreement, and the GATT 1994.[25] The complainants had asked the panel to first analyze the claims made under the SCM Agreement, while the respondent had argued that the panel should first address the claims under Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.[26] The Appellate Body found that there was no mandatory sequence of analysis because the order did

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[20] *Canada – Wheat Exports and Grain Imports (AB)*, para. 126.

[21] *Canada – Wheat Exports and Grain Imports (AB)*, para. 127.

[22] *India – Autos*, para. 7.13.

[23] *Peru – Agricultural Products (Panel)*, para. 7.17.

[24] *See, e.g.*, *EC – Seal Products (Panel)*, para. 7.63 ("[A]s a general rule, panels are free to structure the order of their analysis as they see fit. Based on this general approach, it is the 'structure and logic' of the provisions at issue in each dispute that decide the proper sequence of steps in the panel's analysis, whether the panel's examination involves one provision, or more than one provision or WTO agreement. In other words, unless there exists a mandatory sequence of analysis which, if not followed, would amount to an error of law and/or affect the substance of the analysis itself, panels have the discretion to structure the order of their analysis."); *EC – Hormones (Panel)*, para. 8.42.

[25] *See Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.2.

[26] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.2.

not affect the substantive assessment at issue. As the Appellate Body explained[27]:

> These provisions address discriminatory conduct. We see nothing in these provisions to indicate that there is an obligatory sequence of analysis to be followed when claims are made under Article III:4 of the GATT 1994 and the TRIMs Agreement, on the one hand, and Article 3.1(b) of the SCM Agreement, on the other hand. Nor has Japan argued that the disposition of its claim under Article 3.1(b) of the SCM Agreement *would somehow pre-empt our assessment* under Article III:4 of the GATT 1994 and the TRIMs Agreement.

Consequently, the Appellate Body found that the panel had not erred in its order of analysis, as the approach the panel took was "was within [its] margin of discretion."[28]

27. Similarly, in *US – FSC*, the Appellate Body, in considering an argument that the panel had erred in its sequence of analysis under the SCM Agreement, explained[29]:

> In our view, it was not a legal error for the Panel to begin its examination of whether the FSC measure involves export subsidies by examining the general definition of a "subsidy" that is applicable to export subsidies in Article 3.1(a). In any event, whether the examination begins with the general definition of a "subsidy" in Article 1.1 or with footnote 59, we believe that the outcome of the European Communities' claim under Article 3.1(a) would be the same. The *appropriate meaning of both provisions can be established and can be given effect*, irrespective of whether the examination of the claim of the European Communities under Article 3.1(a) begins with Article 1.1 or with footnote 59.

Thus, the relevant inquiry was, again, whether the "meaning" of the two relevant provisions can be "established" and "given effect" under the sequence of analysis the panel adopted.

28. In its appellant submission, Indonesia entirely ignores the general rule that panels have discretion with respect to sequence of analysis and instead suggests that panels must begin with the agreement that is more "specific" in the context of the dispute.[30] In support of this argument, Indonesia cites the Appellate Body reports in *EC – Bananas III* and *Chile – Price Band System*, as well as several panel reports.[31] However, none of these reports support Indonesia's argument. In fact, the Appellate Body and previous panels have treated the issue of specificity as guidance related to convenience or efficiency and have dealt with the issue as distinct from whether there

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[27] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.5 (emphasis added).

[28] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.8; *see also id.* (emphasizing that "Japan has not indicated why commencing the analysis with the SCM Agreement could lead to a different outcome than commencing with the GATT 1994 and the TRIMs Agreement, as the Panel did in this case").

[29] *US – FSC (AB)*, para. 89 (emphasis added).

[30] *See* Indonesia's Appellant Submission, paras. 50-57.

[31] *See* Indonesia's Appellant Submission, paras. 51-52, 55-56.

was a mandatory sequence of analysis that, if not followed, would amount to legal error.

29. In *EC – Bananas III*, the Appellate Body considered the panel's approach to two provisions that it found to be substantively the same, Article X(3)(a) of the GATT 1994 and Article 1.3 of the *Agreement on Import Licensing Procedures*.[32] The Appellate Body found that, in those circumstances, the panel "should" have begun with the agreement that "deals specifically, and in detail," with the measure at issue.[33] However, the order of analysis was not an issue raised on appeal, and the Appellate Body did not determine that the panel's order undermined the integrity of the legal analyses under either provision.[34] Rather, having determined that both provisions applied to the measure at issue, the Appellate Body's statement was made in the context of efficiency, namely that, if the panel had begun its analysis with the Import Licensing Agreement, "then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994."[35] None of the panel's findings under the substantive provisions was disturbed based on the structure of the panel's analysis.

30. The Appellate Body report in *Chile – Price Band System* also does not support Indonesia's argument.[36] There, the Appellate Body addressed an argument that the panel erred in beginning its analysis under Article 4.2 of the Agreement on Agriculture rather than Article II:1(b) of the GATT 1994.[37] Despite finding that it was "clear" that Article 4.2 "applies *specifically* to agricultural products, whereas Article II:1(b) of the GATT applies *generally* to trade in *all* goods," 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.[38] Indeed, it was undisputed that "the Panel's decision to proceed first with an assessment of Argentina's claim under Article 4.2 would 'not, by itself, be a reversible error,'" as it would not "alter the outcome of the case."[39] The Appellate Body noted, however, that given the nature of the measure at issue, if it began its own analysis by addressing the claims under Article 4.2 and found the measure to be inconsistent with that provision, it would not be necessary to address the claims under either element of Article II:1(b).[40]

31. In *Canada – Feed-In Tariff Program*, the Appellate Body also analyzed the issue of specificity only after concluding that there was no "obligatory sequence of analysis to be followed," stating that it also was "aware that, in a series of previous disputes, issues concerning the sequence of analysis have been dealt with by seeking to identify the agreement that 'deals

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[32] *EC – Bananas III (AB)*, para. 203.

[33] *EC – Bananas III (AB)*, para. 204.

[34] *See EC – Bananas III (AB)*, paras. 203-204.

[35] *EC – Bananas III (AB)*, para. 204.

[36] *See* Indonesia's Appellant Submission, paras. 52, 56-57.

[37] *Chile – Price Band System (AB)*, para. 178.

[38] *Chile – Price Band System (AB)*, para. 189.

[39] *Chile – Price Band System (AB)*, para. 189.

[40] *Chile – Price Band System (AB)*, paras. 190, 285-287.

specifically, and in detail, with' the measures at issue.'"[41] In discussing that issue, the Appellate Body disagreed that the SCM Agreement dealt with the import substitution subsidies more specifically than the GATT 1994 or the TRIMs Agreement, and as described above, instead found that the sequencing issues in the dispute were not "relevant to a logical consideration of claims" and therefore the order of analysis was within the panel's margin of discretion.[42]

32. Previous panels have also have treated specificity as guidance related to convenience or efficiency, not in terms of a mandatory sequence of analysis that would result in legal error if not followed.[43] In particular, the two panel reports Indonesia cites, *EC – Hormones* and *Indonesia – Autos* both confirm this is the case.[44] The former panel found that the structure of the GATT 1994 and SPS Agreements meant that the panel was "not *per se* required to address GATT claims prior to those raised under the SPS Agreement" and that considerations of efficiency suggested that it should "first examine the claims raised under the SPS Agreement."[45] The panel in *Indonesia – Autos* decided to address the claims raised under the TRIMs Agreement prior to addressing those under Article III of the GATT 1994, but did not suggest this sequence of analysis was mandatory.[46] A third panel took the opposite course when examining the GATT Article III before the TRIMs Agreement would "enable [it] to resolve the dispute before [it] in a more efficient manner."[47]

33. Thus, regardless of whether a certain provision deals more specifically with the measures at issue, an assessment of whether the order of analysis chosen by the panel constitutes legal

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[41] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.6.

[42] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.8.

[43] *See India – Autos*, para. 7.152 (recalling "the Appellate Body's comment in [*EC – Bananas III*] suggesting that a panel would normally be expected to examine the more specific agreement before the more general, where two Agreements apply simultaneously" and also recalling that "judicial economy" is a consideration in a panel's consideration of the "matters before it"); *China – Autos Parts (Panel)*, paras. 7.99, 7.368 (finding that it was not definite that the TRIMs Agreement is "more specific" than the GATT 1994 and, that, in any case, "we do not consider that the present case is one in which the relationship of the various provisions under which the complainants base their claims requires us to follow a particular mandatory sequence of analysis, which, 'if not followed, would amount to an error in law'" and beginning with the GATT claims and exercising judicial economy with respect to the TRIMs Agreement claims); *EC – Seal Products (Panel*), paras. 7.63-66 (finding that no "mandatory sequence of analysis was presented, but that, in light of the Appellate Body's guidance in *EC – Bananas III*, it would consider the claims under the TBT Agreement prior to "any examination under the GATT 1994"); *EC – Sardines (Panel)*, paras. 7.15-16 (stating that, since arguably the TBT Agreement deals "specifically, and in detail" with technical regulations," then "the Appellate Body's statement in *EC – Bananas III* is a guide [that] suggests . . . the analysis under the TBT Agreement would precede any examination under the GATT 1994"); *EC – Asbestos (Panel)*, para. 8.16 (referring to the approach "suggested" in *EC – Bananas III*); *Australia – Salmon (Panel)*, para. 8.48 (stating that, in light of *EC – Bananas III* guidance, and as the complainant presented the claims in the same particular order, "we consider it more appropriate" to pursue a particular order of analysis).

[44] *See* Indonesia's Appellant Submission, para. 51.

[45] *EC – Hormones (Panel)*, para. 8.42.

[46] *See Indonesia – Autos*, paras. 14.62-63 (stating only that the panel considered it "should" first address the claims under the TRIMs Agreement).

[47] *Canada – Autos (Panel)*, paras. 10.63-10.64.

error must focus on whether the order chosen by the panel undermined the integrity of its analysis under any provision. As discussed in the next section, such was not the case here.

b. The Sequence of the Panel's Analysis Did Not Undermine the Integrity of Its Findings Under Article XI:1

34. In this dispute, the Panel's decision to begin its assessment with the complainants' claims under Article XI:1 of the GATT 1994 instead of Article 4.2 of the Agreement on Agriculture did not affect the substance of the Panel's findings under the former provision. Indeed, given the independent and distinct nature of the obligations arising under the two provisions, it is not clear how this could be the case. Previous Appellate Body and panel reports confirm this is the case, as do the parties' arguments before the Panel. Indonesia puts forward no explanation in its appellant submission of how the Panel's failure to first analyze Article 4.2 undermined its analysis under Article XI:1.

35. 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 possible means,[48] including quantitative restrictions, while Article XI:1 addresses "quantitative restrictions" on importation for agricultural products and other products. Article XI:1 prohibits measures that are "prohibitions or restrictions" and specifies that such measures can be "made effective through quotas, import or export licenses or other measures." Article 4.2, by contrast, simply refers to "quantitative import restrictions" as one type of covered measure. Thus, Article XI:1 of the GATT 1994 prohibits a subset of measures that are *also* prohibited by Article 4.2 of the Agreement on Agriculture.[49] 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 in which analysis occurred.

36. The Appellate Body's previous guidance on the issue of sequence of analysis also supports this conclusion. As all the panels that have interpreted Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture have found, the two provisions are independent, cumulative legal obligations.[50] The outcome under the two provisions may be similar, as they cover some of the same measures, but each provision has independent legal force. Thus, panels and the Appellate Body have made findings under each provision separately, as the interpretation and application of the provisions do not depend on one another.[51] In other words, the

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[48] *Chile – Price Band System (AB)*, para. 187.

[49] *See Chile – Price Band System (Panel)*, para. 7.30; *Chile – Price Band System (AB)*, para. 256; *India – Quantitative Restrictions (Panel)*, paras. 5.241-242; *Korea – Beef (Panel)*, paras. 767-769.

[50] *See India – Quantitative Restrictions (Panel)*, paras. 5.122-242; *Korea – Various Measures on Beef (Panel)*, paras. 747-769; *EC – Seal Products (Panel)*, paras. 7.652-665; *US – Poultry (China) (Panel)*, paras. 7.484-487; *Turkey – Rice*, paras. 7.32-50; *see also* Indonesia's Appellant Submission, para. 26 ("Both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture discipline quantitative import restrictions. However, they have different obligations and different product coverage").

[51] *See, e.g., Argentina – Import Measures (AB)*, paras. 5.214-246; *Chile – Price Band System (AB)*, paras. 192-280.

"appropriate meaning of both provisions can be established and can be given effect" regardless of the order in which the provisions are analyzed.[52] In this regard, none of the five previous panels that considered claims under both provisions – neither the four that began with Article XI:1 nor the one that began with Article 4.2 – considered that an order of analysis was mandated by any effect on the substantive obligation of one provision by the other.[53]

37. Indeed, before the Panel, neither Indonesia nor the complainants suggested that the order of the Panel's analysis with respect to the Article XI:1 and Article 4.2 claims would have any effect on the substantive outcome.[54] In particular, it was undisputed that the two provisions lay down independent disciplines and that the interpretation of neither provision depended on the interpretation or application of the other.[55] Rather than arguing that there was a "mandatory sequence of analysis which, if not followed, would amount to an error of law and/or affect the substance of the analysis itself,"[56] the parties presented arguments regarding "efficiency and judicial economy."[57] This is consistent with the above panel and Appellate Body findings that starting the analysis with a more specific obligation could assist in making the proceeding more efficient but was not required to determine the order of analysis. Consequently, although the parties disagreed as to how the Panel "should" structure its analysis, neither suggested that the opposite approach would result in reversible legal error. The third parties agreed.[58]

38. Indonesia's arguments in its appellant submission 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] [on] quantitative import restrictions" with "different obligations and

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[52] *See US – FSC (AB)*, para. 89.

[53] *See*, *Turkey – Rice*, para. 7.48 (stating only that the panel considered that it "should" start with the claims under the Agreement on Agriculture); *India – Quantitative Restrictions (Panel)*, paras. 5.122-242; *Korea – Various Measures on Beef (Panel)*, paras. 747-769; *EC – Seal Products (Panel)*, paras. 7.652-665; *US – Poultry (China) (Panel)*, paras. 7.484-487.

[54] *See* Panel Report, paras. 7.28-30; Indonesia's Appellant Submission, paras. 13-20.

[55] See Indonesia's Appellant Submission, para. 26 ("Both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture discipline quantitative import restrictions. However, they have different obligations and different product coverage.").

[56] *See EC – Seal Products (Panel*), paras. 7.63-66; *Peru – Agricultural Products (Panel)*, para. 7.17; *India – Autos*, para. 7.13.

[57] *See* Indonesia's First Written Submission, paras. 43-46 (arguing that the panel "should . . . begin its analysis . . . with an examination of . . . Article 4.2 of the Agriculture Agreement, as the Agriculture Agreement is more specific to the products at issue than the GATT 1994 and this order of analysis offers the greatest opportunity to exercise judicial economy"); Indonesia's Second Written Submission, paras. 39-41 (arguing that "if considerations of efficiency and judicial economy favor one order of analysis over the other, they favor the Panel beginning its analysis with Article 4.2 of the Agreement on Agriculture"); Indonesia's Appellant Submission, para. 20; U.S. response to Panel's question No. 6, paras. 30-39; U.S. response to Panel's question No. 79, paras. 4-7; New Zealand's response to Panel question No. 6, para. 28; New Zealand's response to Panel question No. 80, paras. 6-8.

[58] *See* Panel Report, para. 7.32.

different product coverage."[59] Rather, Indonesia claims simply that because, as it asserts, Article 4.2 of the Agreement on Agriculture is more "specific" than Article XI:1 of the GATT 1994, the Panel's sequence of analysis is necessarily reversible error.[60] For the reasons discussed above, it is not. To the contrary, as discussed in section II.B.2 below, the Panel's order of analysis was the most appropriate sequence, in light of the claims raised by the parties.

39. For these reasons, the Panel was not required to order its analysis beginning with Article 4.2 of the Agreement on Agriculture, and beginning its analysis instead with Article XI:1 of the GATT 1994 was appropriate in light of the claims raised by all parties. Indonesia's only remaining argument as to why the Panel's Article XI:1 findings should be reversed is that Article XI:1 no longer applies to agricultural products *at all*. This contention, as explained in the following section, is clearly wrong.

c. Indonesia's Argument That, Pursuant to Article 21.1 of the Agreement on Agriculture, Article 4.2 Applies to the Exclusion of Article XI:1 of the GATT 1994 Is Incorrect

40. As described above, Indonesia's only argument attacking the substance of the Panel's findings under Article XI:1 is its claim that Article XI:1 no longer applies to agricultural products. Indonesia claims that Article 21.1 of the Agreement on Agriculture makes it "clear" that the agreement is "*lex specialis* compared to the GATT 1994" respecting "measures affecting trade in *agricultural goods*."[61] This means, as Indonesia argues, that the latter agreement applies "to the exclusion of the more general agreements" where "[it] contains specific provisions dealing specifically with the same matter."[62] Thus, no conflict is needed for the Agreement on Agriculture to render inoperative provisions of the GATT 1994 (or other covered agreement).[63] On this basis, Indonesia argues that Article 4.2 renders Article XI:1 inoperative as regards prohibitions and restrictions on the importation of agricultural products.[64] Thus, Indonesia argues, the Panel erred in analyzing Article XI:1 because it has not applied to the importation of agricultural products since the Agreement on Agriculture came into force.

41. Such a conclusion would come as a great surprise to WTO Members, and for a number of reasons is patently incorrect. Rather, the structure of the WTO Agreements, the text of Article 21.1 of the Agreement on Agriculture, and previous panel and Appellate Body reports all refute Indonesia's interpretation. The principle of *lex specialis*, not itself a customary rule of interpretation under public international law (DSU Article 3.2), cannot produce a different outcome than that under the text of the WTO Agreement, but in any event similarly provides no support for Indonesia's position. Therefore, as it is uncontested that there is no conflict between

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[59] *See* Indonesia's Appellant Submission, para. 26.

[60] *See* Indonesia's Appellant Submission, paras. 43-51, 54-62.

[61] Indonesia's Appellant Submission, para. 49.

[62] Indonesia's Appellant Submission, para. 53.

[63] Indonesia's Appellant Submission, para. 51.

[64] Indonesia's Appellant Submission, paras. 54-57.

the obligation of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, the correct interpretation is that both continue to apply to restrictions and prohibitions on the importation of agricultural products.

42. First, Indonesia's argument contradicts a foundational principle of the WTO dispute settlement system. Article II:2 of the WTO Agreement provides that, "The agreements and associated legal instruments included in Annexes 1, 2 and 3 . . . are integral parts of this Agreement, binding on all Members." Under this provision, "the Multilateral Trade Agreements contained in the annexes are all necessary components of the 'same treaty' and they, together, form a single package of WTO rights and obligations."[65] Consequently, "a single measure may be subject, at the same time, to several WTO provisions imposing different disciplines."[66] Therefore, as the Appellate Body has found, "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously."[67] In this regard, the interpretative note to Annex 1A to the WTO Agreement makes it clear that a provision of one covered agreement overrides another only "[i]n the event of conflict" and then only "to the extent of the conflict."

43. Indonesia's argument is inconsistent with the text of Article II:2 and Annex 1A of the WTO Agreement. It would render inutile, with respect to agricultural products, significant provisions of the GATT 1994, and potentially other covered agreements. Indonesia does not even attempt to provide a rationale for such an outcome, as it is undisputed that there is no conflict between the two provisions and that Members can comply with both at the same time. Thus, Indonesia's argument should be rejected as inconsistent with fundamental principles

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[65] *China – Raw Materials (AB)*, para. 5.47; *see also US – Upland Cotton (AB)*, para. 549. ("[T]he Agreement on Agriculture and the SCM Agreement are both Multilateral Agreements on Trade in Goods contained in Annex 1A of the Marrakesh Agreement . . . and, as such, are both integral parts of the same treaty, the WTO Agreement, that are binding on all Members. Furthermore, as the Appellate Body has explained, a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.") (internal quotations omitted); *EC – Asbestos (Panel)*, para. 8.16 ("We note that the Marrakesh Agreement Establishing the World Trade Organization constitutes a single treaty instrument that was accepted by the WTO Members as a single undertaking within whose framework all the applicable provisions must be given meaning. Both the GATT 1994 and the TBT Agreement form part of Annex 1A to the WTO Agreement and may apply to the measures in question.") (internal quotations omitted).

[66] *China – Rare Earths (Panel)*, para. 7.124; *see, e.g.*, *EC – Bananas III (AB)*, para. 204 (confirming that "Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply" to the measure at issue); *US – Softwood Lumber IV (AB)*, para. 134 ("[A] provision of an agreement included in Annex 1A of the WTO Agreement (including the SCM Agreement), and a provision of the GATT 1994, that have identical coverage, both apply, but … the provision of the agreement that 'deals specifically, and in detail' with a question should be examined first.").

[67] *US – Upland Cotton (AB)*, para. 549; *see also Argentina – Footwear (AB)*, para. 81 ("[A] treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously."); *Japan – Alcoholic Beverages II (AB)*, p. 12 ("A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness . . . . In [*US – Gasoline*], we noted that 'one of the corollaries of the general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.'").

expressed in the text of the WTO Agreement.

44. Second, the text of Article 21.1 of the Agreement on Agriculture offers no support for Indonesia's interpretation. Article 21.1 provides that, "The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement." Thus, the text states that the GATT 1994 "shall apply" to agricultural products but "subject to" the provisions of the Agreement on Agriculture. This text does not on its face render any provision of the GATT 1994 null or inoperative. Rather, it states that a provision of the GATT 1994 applies "subject to" any provision of the Agreement on Agriculture. Thus, to the extent a provision of the Agreement on Agriculture expressly supersedes a provision of the GATT 1994, the Agreement on Agriculture would prevail. And to the extent of a conflict, the rights or obligations of the Agreement on Agriculture would prevail. In other respects, both agreements (and other WTO agreements) "shall apply" in full.

45. The Appellate Body has similarly explained the meaning of Article 21.1 as follows[68]:

> Article 21 of the Agreement on Agriculture provides that: "[t]he provisions of [the] GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement." In other words, Members explicitly recognized that there may be conflicts between the Agreement on Agriculture and the GATT 1994, and explicitly provided, through Article 21, that the Agreement on Agriculture would prevail to the extent of such conflicts. Similarly, the General interpretative note to Annex 1A to the WTO Agreement states that, "[i]n the event of conflict between a provision of the [GATT 1994] and a provision of another agreement in Annex 1A ..., the provision of the other agreement shall prevail to the extent of the conflict." The Agreement on Agriculture is contained in Annex 1A to the WTO Agreement.

46. Thus, as the Appellate Body correctly explained, Article 21.1 of the Agreement on Agriculture is analogous to the interpretive note to Annex 1A to the WTO agreement. Therefore, the GATT 1994 continues to apply to agricultural products except that, in the event of a conflict, the provisions of the Agreement on Agriculture prevail "to the extent of the conflict." In this regard, as no conflict exists between the obligation of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture,[69] Article XI:1 continues to apply to agricultural products. Article 21.1 thus does not in any way preclude such continued application; rather, it confirms it.

47. Contrary to Indonesia's assertions, the Appellate Body's statement in *EC – Bananas III* quoted in paragraph 52 of Indonesia's appellant submission,[70] understood in context, reflects the same interpretation of Article 21.1 of the Agreement on Agriculture.

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[68] *EC – Export Subsidies on Sugar (AB)*, para. 221.

[69] *See, e.g.*, Indonesia's Appellant Submission, paras. 51-53 (not alleging any such conflict); *supra* sec. II.B.1.b (explaining that the two provisions set out independent prohibitions with overlapping scope).

[70] *See* Indonesia's Appellant Submission, paras. 52-53 (quoting *EC – Bananas III (AB)*, para. 155).

48. In *EC – Bananas III*, the EU had argued that Article 21.1 confirmed "the 'agricultural specificity'" of the agreement and showed that its rules "including the Schedules specifically referred to in Article 4.1, supersede the provisions of the GATT 1994 and the other Annex 1 Agreements, where appropriate."[71] On this basis, the EU argued that market access concessions for agricultural products made pursuant to the Agreement on Agriculture prevailed over Article XIII of the GATT 1994 and allowed Members to act inconsistently with Article XIII with respect to such concessions.[72] The panel had rejected this argument on the grounds that, while Article 21.1 "clearly suggests priority" for the Agreement on Agriculture over the GATT 1994, "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."[73]

49. On appeal, the Appellate Body agreed with the panel. Indonesia's suggestions to the contrary take the Appellate Body's findings out of context. The Appellate Body expressly based its findings in this respect on the question of whether market access commitments made under the Agreement on Agriculture "can be inconsistent with the provisions of Article XIII of the GATT 1994."[74] It concluded that Article 4 of the Agriculture Agreement did not deal specifically with the allocation of tariff quotas, and therefore could not conflict with Article XIII of the GATT 1994.[75] Therefore, the Appellate Body's findings do not suggest that specificity alone would create a conflict. Rather, the findings were based on compliance with one obligation resulting in noncompliance with the other. Subsequent Appellate Body applications of Article 21.1 of the Agreement on Agriculture confirm this interpretation.[76]

50. Third, previous Appellate Body and panel interpretations of substantive provisions of the Agreement on Agriculture also refute Indonesia's argument.[77] Contrary to Indonesia's claim, the Appellate Body in *Chile – Price Band System* did not suggest, in its discussion of the most appropriate sequence of analysis, that Article II of the GATT *no longer applied* to agricultural products by virtue of Article 4.2. In fact, the Appellate Body explicitly confirmed that both provisions applied to the challenged measure.[78] Similarly, the panel in *EC – Hormones* found

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[71] *See EC – Bananas III (AB)*, para. 20.

[72] *See EC – Bananas III (AB)*, paras. 21, 153.

[73] *EC – Bananas III (Panel)*, para. 7.126.

[74] *EC – Bananas III (AB)*, para. 155.

[75] *EC – Bananas III (AB)*, para. 155; *see also id.* para. 157 (noting several examples where the Appellate Body considered Article 21.1 would apply such that a provision of the GATT 1994 was rendered inoperative, including Article 13 of the Agreement on Agriculture, which "specific[ally]" abridged the right to bring disputes challenging certain types of measures under the dispute settlement provisions of the GATT 1994).

[76] *See US – Upland Cotton (AB)*, para. (explaining, in its interpretation of Article 21.1 as it regards Article 6.3 of the Agreement on Agriculture and Article 3.1(b) of the SCM Agreement, that the former did not render the latter inoperative with respect to agricultural products because "Article 6.3 . . . does not say that compliance with [that provision] insulates the subsidy from the prohibition in Article 3.1(b)").

[77] *See* Indonesia's Appellant Submission, paras. 51-52 (discussing the disputes discussed here, as well as *EC – Bananas III (AB)*, discussed above).

[78] *See Chile – Price Band System (AB)*, paras. 188-189.

that provisions of the GATT 1994 and the SPS Agreement both applied,[79] and the panel in *Indonesia – Autos* likewise did not suggest that provisions of the GATT 1994 no longer applied if provisions of the SCM Agreement applied to a particular measure.[80] In fact, the panel rejected Indonesia's argument that this was the case, finding that, as there was no general or specific conflict between the SCM Agreement and Article III of the GATT 1994, both agreements, as well as the TRIMs Agreement, applied to the challenged measures.[81]

51. Other panel and Appellate Body reports confirm that Article XI:1 of the GATT 1994 continues to apply to agricultural products. All previous panels that have examined claims under both Article XI:1 and Article 4.2 have confirmed that Article XI:1 of the GATT 1994 applies to measures also covered by Article 4.2 of the Agreement on Agriculture.[82] Other panels and the Appellate Body have addressed Article XI:1 claims concerning measures that apply to agricultural products.[83] Finally, the Appellate Body report in *Peru – Agricultural Products* confirms the principle that provisions of the GATT 1994 continue to apply where Article 4.2 of the Agreement on Agriculture disciplines the same type of measures.[84]

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[79] *EC – Hormones (Panel)*, para. 842; *see id.* paras. 8.272-273.

[80] *See Indonesia – Autos (Panel)*, paras. 14.36, 14.46, 14.56. In paragraph 51 of its appellant submission, Indonesia appears to cite, not findings of the panel, but paragraphs of the report that summarize the "General Response by Indonesia to Claims under Article III of GATT 1994" and Indonesia's argument that "[t]he SCM Agreement is the *lex specialis*" in the dispute. *See* Indonesia's Appellant Submission, para. 51, n. 41-42; *Indonesia – Autos (Panel)*, paras. 5.129, 5.131.

[81] *See Indonesia – Autos (Panel)*, para. 14.56 ("[W]e reject Indonesia's general defense that the only applicable law to this dispute is the SCM Agreement. We consider rather that the obligations contained in the WTO Agreement are generally cumulative, can be complied with simultaneously and that different aspects and sometimes the same aspects of a legislative act can be subject to various provisions of the WTO Agreement.").

[82] *See India – Quantitative Restrictions (Panel)*, paras. 5.122-242; *Korea – Various Measures on Beef (Panel)*, paras. 747-769; *EC – Seal Products (Panel)*, paras. 7.652-665; *US – Poultry (China) (Panel)*, paras. 7.484-487; *Turkey – Rice*, paras. 7.141-142; *see also India – Quantitative Restrictions (AB)*, paras. 5, 154 (recommending that the DSB request India to bring its measures "found to be inconsistent with Articles XI:1 and XVIII:11 of the GATT 1994, and with Article 4.2 of the Agreement on Agriculture, into conformity with its obligations under those agreements"); *Korea – Various Measures on Beef (AB)*, para. 5, 187 (recommending that the DSB request that Korea bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with Korea's obligations under the GATT 1994 and the *Agreement on Agriculture* into conformity with its obligations under those Agreements" when the panel report contained findings that certain measures affecting beef were restrictions on importation inconsistent with Article XI:1 of the GATT 1994).

[83] *See Argentina – Import Measures (Panel)*, paras. 6.169, 6.188-189, 6.192, 6.334, 6.364, 6.397 (showing that the two challenged measure applied to, *inter alia*, agricultural products); *id.* at 7.5(d), 7.6(a) (finding the two challenged measures to be inconsistent with Article XI:1 of the GATT 1994); *Argentina – Import Measures (AB)*, paras. 5.287-288 (upholding the panel's finding); *US – Animals*, paras. 7.730-732; *India – Agricultural Products (Panel)*, para. 7.803; *EC – Biotech*, para. 7.3429; *Japan – Apples (Article 21.5 – US)*, paras. 8.202-203; *Japan – Apples (Article 21.5)*, para. 8328; *see also Argentina – Hides and Leather (Panel)*, paras. 11.15-11.55 (all addressing such claims in the context of disputes also involving the SPS Agreement and exercising judicial economy with respect to the Article XI:1 claims and never suggesting that Article XI:1 did not apply to the measures at issue).

[84] *Peru – Agricultural Products (AB)*, paras. 5.74-75 (assessing the panel finding that, as the duties resulting from the challenged measure were not "ordinary customs duties" under Article 4.2 of the Agreement on Agriculture, and as the measure was not recorded in Peru's Schedule of Concessions, the measure was therefore

52. Finally, contrary to Indonesia's arguments, the principle of *lex specialis* does not support Indonesia's appeal.[85] As explained above, the principle of *lex specialis* cannot produce a different outcome than that under the text of the WTO Agreement. It is also not itself a customary rule of interpretation under public international law that must be applied pursuant to DSU Article 3.2 by WTO adjudicators in making their assessment of the applicability of and conformity with the covered agreements.

53. But even aside from this, *lex specialis* would not be applicable in the circumstance of the present dispute. As Indonesia stated at paragraph 36 of its submission, the principle of *lex specialis derogate lege generali* is a guide for what rule "ought to be observed . . . where parts of a document are in conflict."[86] Thus, *lex specialis* concerns situations where there is a conflict between two different provisions such that they cannot be applied simultaneously. The mere fact that one provision is more specific than another does not mean that the more general provision automatically is of no effect.

54. As the panel in *Indonesia – Autos* observed[87]:

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

55. In the present case, as explained above, there is no conflict between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.[88] Indeed, it is not clear how the provisions *could* conflict, given their nature as two substantive obligations prohibiting market

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inconsistent with the second sentence of Article II:1(b) and finding that the panel had not erred in assessing the "distinct legal obligations arising under [the] two different legal provisions").

[85] Indonesia's Appellant Submission, paras. 49-50.

[86] Indonesia's Appellant Submission, paras. 36 (quoting M.Koskenniemi, Report of the Study Group of the International Law Commission on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. No. A/CN.4/L.682, 13 April 2006, p. 36).

[87] *Indonesia – Autos*, para. 14.28, n.649 (quoting 7 *Encyclopedia of Public International Law* at 469 (North-Holland 1984); Wilfred Jenks, "The Conflict of Law-Making Treaties", *British Yearbook of International Law* at 425 *et seq* (1953) (internal bracketing added)) (emphasis added); *see also Thailand – Cigarettes (Panel)*, para. 7.1047 ("The *lex specialis* principle has been defined by the International Law Commission ("ILC") as 'a generally accepted technique of interpretation and conflict resolution in international law.'") (quoting Report of the International Law Commission, Fifty-eighth session (1 May-9 June and 3 July-11 August 2006) General Assembly Official Records Sixty-first session Supplement No. 10 (A/61/10), p 408).

[88] *See* Indonesia's Appellant Submission, paras. 48-62 (not alleging conflict); *supra* sec. II.B.1.b.

access barriers.[89] Indonesia's argument is, therefore, incorrect.

56. Thus, for all the reasons discussed in this section, Indonesia's argument that Article XI:1 does not apply to the measures at issue should be rejected.

2. In Any Event, the Agreement on Agriculture is Not More "Specific" Than the GATT 1994 with Respect to the Measures at Issue

57. As shown in the preceding section, there is no mandatory order of analysis in this dispute between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. On this basis alone, Indonesia's claim of error can be rejected, and it is not necessary for the Appellate Body to consider additional arguments Indonesia has put forward. For purposes of completeness, however, the United States notes that Indonesia's argument that the GATT 1994 is the more "specific" agreement is incorrect. Here, the GATT 1994 is at least as "specific" with respect to the challenged measure as the Agreement on Agriculture, if not more so. Moreover, considerations of efficiency and judicial economy favored beginning the assessment with the GATT claims.

a. Considerations of Efficiency and Judicial Economy Favored Beginning the Analysis With Article XI:1

58. Due to Indonesia's invocation of defenses under Article XX of the GATT 1994, considerations of efficiency and judicial economy favored beginning with the GATT 1994. Indonesia sought to justify each of the challenged measures under Article XX of the GATT 1994.[90] These defenses applied to the co-complainants' Article XI:1 claims and also, Indonesia asserted, through footnote 1 to Article 4.2 of the Agreement on Agriculture to the claims under Article 4.2.[91] Thus, regardless of whether the Panel started with Article XI:1 or Article 4.2, it would have had to turn to the GATT 1994 had it found any of the measures inconsistent with the relevant provision of either agreement.

59. The opposite was not true. If, as occurred, the Panel found one or more of the challenged measures to be inconsistent with Article XI:1, whether or not the measure was justified under Article XX, the Panel would not have needed to proceed to the Agreement on Agriculture. That is, any measure justified under Article XX would have been covered by the second element of footnote 1 to Article 4.2 and thus not have been inconsistent with that provision. On the other

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[89] *See generally Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.5 (noting that both provisions at issue "address discriminatory conduct" and that the Appellate Body saw "nothing in these provisions to indicate that there is an obligatory sequence of analysis to be followed"); *Chile – Price Band System (AB)*, para. 188-189 (finding that "Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994 must be examined *separately* to give meaning and effect to the distinct legal obligations arising under these two different legal provisions"); *Indonesia – Autos*, paras. 14.62 (finding that "the TRIMs Agreement and Article III remain two legally distinct and independent sets of provisions of the WTO Agreement" and that "if either of the two sets of provisions were not applicable the other one would remain applicable");

[90] Panel Report, paras. 7.27, 7.502, 7.507, 7.519.

[91] *See* Panel Report, paras. 7.27, 7.33, 7.502.

hand, any measure not justified under Article XX would have been inconsistent with Indonesia's WTO obligations under the GATT 1994, and proceeding to Article 4.2 would not have been necessary to resolve the dispute between the parties.[92]

60. Additionally, beginning the analysis with the GATT 1994 enabled the Panel to avoid reaching two novel and abstract legal issues. These issues were: (1) whether Article XX of the GATT 1994 can be applied directly to Article 4.2 of the Agreement on Agriculture; and (2) the complainant's burden of proof with respect to the reference in footnote 1 to Article 4.2 to measures justified under other non-agriculture specific provisions of the covered agreements.[93] Both of these issues were abstract in the context of this dispute, as the co-complainants brought identical claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture and put forward significant evidence and argumentation demonstrating that the challenged measures were not justified under Article XX of the GATT 1994.[94] Thus, reaching the issues was not necessary to resolve the dispute between the parties[95] and, by beginning its analysis under Article XI:1, the Panel avoided reaching these issues unnecessarily.

61. Thus, in addition to the Panel not being required to begin with Article 4.2 of the Agreement on Agriculture, beginning by analyzing the GATT 1994 provisions was appropriate in light of considerations of efficiency and judicial economy, which have been important factors in determining which agreement is more "specific" in the context of a particular dispute. Notably, in all previous disputes where complainants advanced claims under Article XI:1 and Article 4.2 and the responding Member invoked a defense under Article XX of the GATT 1994, the panel began its analysis with the complainant's Article XI:1 claims.[96] By contrast, no Article XX defense was raised in *Turkey – Rice*, where the panel began with Article 4.2 and exercised judicial economy concerning the Article XI:1 claims.[97] The same was true in *Chile – Price Band System* and *Peru – Agricultural Products*, where the panels analyzed claims under Article 4.2 prior to claims under Article II of the GATT 1994.[98]

b. Article XI:1 of the GATT 1994 Specifically Addresses Quantitative Restrictions on Importation, and Article 4.2 Is Not More Specific

62. Article XI:1 of the GATT 1994 specifically addresses the type of measure at issue in this

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[92] *E.g., Argentina – Import Measures (AB)*, para. 5.194; *Turkey – Rice*, para. 7.141; *EC – Bananas III (Panel)*, para. 7.186.

[93] *See* Indonesia's Appellant Submission, para. 70; U.S. Response to Panel's Question 79.

[94] *See infra* sec. [V].

[95] *E.g., Argentina – Import Measures (AB)*, para. 5.194; *Turkey – Rice*, para. 7.141; *EC – Bananas III (Panel)*, para. 7.186.

[96] *India – Quantitative Restrictions (Panel)*, paras. 5.122-242; *Korea – Various Measures on Beef (Panel)*, paras. 747-769; *EC – Seal Products (Panel)*, paras. 7.652-665; *US – Poultry (China) (Panel)*, paras. 7.484-487.

[97] *See Turkey – Rice*, para. 7.142.

[98] *See Chile – Price Band System (Panel)*, paras. 7.103-108; *Peru – Agricultural Products (Panel)*, paras. 7.19-20.

dispute, namely prohibitions and restrictions on importation. All of the claims in the dispute related to measures that, as the co-complainants argued, were restrictions and prohibitions on importation under Article XI:1 and were also "quantitative import restrictions" inconsistent with Article 4.2 of the Agreement on Agriculture.[99] Article XI:1 of the GATT 1994 applies specifically to "prohibitions and restrictions" on importation, and Article 4.2 does not apply any *more* specifically to such measures. Indeed, this was seemingly uncontested, as each of the measures was challenged under both Article XI:1 and Article 4.2 on identical grounds, and Indonesia's defenses also were identical with respect to the two provisions.[100] There is thus no support for the idea that, with respect to measures of this type, Article 4.2 imposes a substantively different (or more specific) prohibition than Article XI:1.

63. Indonesia argues 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.[101] However, these arguments do 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.

64. In fact, previous panels and the Appellate Body have considered that the scope of measures covered by a provision is relevant to the assessment of whether one provision is more "specific" than another.[102] Further, Indonesia presents no reason why, in this dispute, Article 4.2 is substantively more "specific" as to the products at issue, in the sense of setting out a clearer or more tailored legal obligation.[103] It is not clear, therefore, why the more limited product coverage renders the Agriculture Agreement more "specific" for purposes of the measures at issue. Thus, Indonesia suggests no reason why the number of measures covered is *not* relevant to the analysis of which is the more "specific" provision, nor why the more limited scope of the products covered *is* relevant, for purposes of this dispute. Nor does the Appellate Body report in *Chile – Price Band System* suggest a different conclusion,[104] as the relationship between the provisions at issue here is different than it was in that prior dispute.[105]

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[99] Panel Report, para. 7.32.

[100] *See* Indonesia's Second Written Submission (presenting coextensive arguments addressing the co-complainants' claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture; Panel Report, para. 7.32 (noting that "the co-complainants have brought identical claims under both provisions").

[101] *See* Indonesia's Appellant Submission, paras. 44-47.

[102] *See Canada – Feed-in Tariff Program*, para. 5.6.

[103] *See* Indonesia's Appellant Submission, paras. 44-47; *see also id.* paras. 48-62.

[104] *See* Indonesia's Appellant Submission, para. 45 (arguing that this is the case); *supra*.

[105] *See supra* sec. II.B.1.b (showing that Article XI:1 of the GATT 1994 prohibits a subset of measures that are *also* prohibited by Article 4.2 of the Agreement on Agriculture); *Chile – Price Band System (AB)*, para. 187 (comparing the scope of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994).

c. Other Arguments Raised by Indonesia Also Do Not Suggest That the Agreement on Agriculture Is More Specific

65. Contrary to Indonesia's argument, the fact that Article 4.2 of the Agreement on Agriculture rendered Article XI:2(c) of the GATT 1994 inoperative does not suggest that Article 4.2 is more "specific" for this dispute.[106] As the Appellate Body has explained, which agreement is most "specific," in light of considerations of efficiency and judicial economy, is determined by reference to the particular "measures at issue."[107] And Indonesia advances no reason why the relationship between Article 4.2 of the Agriculture Agreement and Article XI:2(c) renders the former more specific or detailed with respect to the "measures at issue" in this dispute.[108]

66. Further, as the Appellate Body has found, the relationship between the Agreement on Agriculture and the GATT 1994 established by Article 21.1 – by virtue of which Article 4.2 of the Agreement on Agriculture rendered partly inoperative Article XI:2(c) of the GATT 1994 – is not different from that set out in the Interpretative Note to Annex 1A to the WTO Agreement.[109] Specifically, in the event of a conflict between a provision of the GATT 1994 and a provision of another Annex 1A Agreement, the latter will prevail to the extent of the conflict. This relationship does not mean, however, that the GATT is always, *per se*, the less "specific" agreement in every dispute involving another covered agreement.[110] And it certainly does not mean that beginning with claims under the GATT 1994 is, *per se*, reversible error.[111]

67. Indonesia's assertion that the obligations under Article 4.2 and Article XI:1 are "different" because a Member is "required to convert into ordinary customs duties those measures falling within the first element of footnote 1 of Article 4.2" is also incorrect.[112] As the Appellate Body in *Chile – Price Band System* explained, the obligation to convert into ordinary customs duties the measures covered by Article 4.2 "began *during* the Uruguay Round," and such conversion "had to be verified before the signing of the *WTO Agreement* on 15 April 1994."[113] After that point, "there was no longer an option to replace measures covered by Article 4.2 with ordinary customs duties in excess of the levels of previously bound tariff rates."[114] Therefore, as the Appellate Body confirmed, the obligation of Article 4.2 is simply to not "maintain, revert to, or resort to measures covered by Article 4.2," not on an ongoing basis to

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[106] *See* Indonesia's Appellant Submission, para. 58.

[107] *Canada – Feed-in Tariff Program (AB)*, para. 5.6.

[108] *See* Indonesia's Appellant Submission, para. 58.

[109] *See EC – Export Subsidies on Sugar (AB)*, para. 221.

[110] *See, e.g.*, *Canada – Feed-in Tariff Program (AB)*, para. 5.6; *China – Autos Parts (Panel)*, para. 7.99; *Canada – Autos (Panel)*, paras. 10.63-64; *India – Autos*, paras. 7.155-162.

[111] *See Canada – Feed-in Tariff Program (AB)*, para. 5.6; *Chile – Price Band System (AB)*, para. 189; *EC – Seal Products (Panel*), paras. 7.63-66; *China – Autos Parts (Panel)*, para. 7.99.

[112] *See* Indonesia's Appellant Submission, para. 59.

[113] *Chile – Price Band System (AB)*, para. 206.

[114] *Chile – Price Band System (AB)*, para. 206.

convert such measures into ordinary customs duties.[115] The obligation not to maintain, revert to, or resort to certain measures is not different or more specific than the obligation under Article XI:1 of the GATT 1994.

3. Conclusion

68. There is no basis for the Appellate Body to reverse the findings of the Panel under Article XI:1 of the GATT 1994 on the grounds that it committed legal error.

69. Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture are two legal obligations set out in agreements covered by Annex 1A to the WTO Agreement. As such, they apply cumulatively except in the event of conflict. It appears to be uncontested that there is no such conflict. Therefore, both provisions apply. With respect to order of analysis, the United States has shown that there was no mandatory sequence of analysis with respect to the claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. These provisions set out independent legal obligations, and the interpretation of one does not depend on or alter the scope or content of the other. Indeed, other than Indonesia's contention that Article XI:1 no longer applies to agricultural products, none of Indonesia's arguments even suggest that the Panel committed reversible legal error in its analysis of Article XI:1, regardless of which agreement is more "specific." Consequently, Indonesia's appeal should be rejected.

70. Indonesia's additional arguments concerning the alleged greater specificity of Article 4.2 of the Agreement on Agriculture to the measures at issue cannot overcome the absence of legal error. Even if Indonesia were correct that Article 4.2 was more "specific," for purposes of this dispute, than Article XI:1, the Panel's decision to commence its analysis with Article XI:1 would not, in itself, constitute legal error, much less provide grounds for reversal of the Panel's substantive findings. Additionally, as shown in section II.B.2, the Agreement on Agriculture is not more "specific." Rather, considerations of judicial economy, as applied in previous disputes, counseled beginning with claims under the GATT 1994.[116] Thus, the Panel's approach was entirely appropriate.

C. Indonesia's Appeal of the Panel's Article XI:1 Findings Under Article 11 of the DSU Should Be Rejected

71. Indonesia argues that the Panel failed to conduct "an objective assessment of the applicability of the covered agreements or the conformity of the measures at issue with the covered agreements because it did not examine the co-complainants' claims under Article 4.2 of the Agreement on Agriculture."[117] Indonesia's claim of error is premised on the Panel's having

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[115] *Chile – Price Band System (AB)*, para. 206.

[116] *See EC – Bananas III (AB)*, para. 204 (finding that if the panel had begun its assessment with the claims under the *Licensing Agreement*, it would not have had to assess the claims under Article X:3(a) of the GATT 1994); *Chile – Price Band System (AB)*, para. 190 (finding that considerations of judicial economy counseled analyzing Article 4.2 of the Agreement on Agriculture rather than Article II:1(b), first sentence, of the GATT 1994).

[117] Indonesia's Appellant Submission, para. 101.

committed an error of law in addressing Article XI:1 before Article 4.2. However, if that appeal is rejected, Indonesia has advanced no independent legal basis for why the Panel's analysis would nevertheless be inconsistent with Article 11 of the DSU. Therefore, Indonesia is simply recasting its claim of legal error as a failure to make an objective assessment under DSU Article 11. As the Appellate Body has frequently admonished, this is inappropriate, and Indonesia's appeal should be rejected on this basis.

72. For this reason, and because Indonesia otherwise fails to meet the standard of Article 11, Indonesia's arguments should be rejected. This section first describes the legal standard of Article 11 of the DSU and then demonstrates that Indonesia has failed to meet that standard.

1. The Legal Standard of Article 11 of the DSU

73. Article 11 of the DSU provides that each panel must "make an objective assessment of the matter before it, including an objective assessment of the facts of the case." In examining a panel's obligation under Article 11, the Appellate Body has explained that "[a]n allegation that a panel has failed to conduct the 'objective assessment of the matter before it' required by Article 11 of the DSU is a very serious allegation" that "goes to the very core of the integrity of the WTO dispute settlement process."[118] Thus, for an Article 11 claim to succeed, it must be shown that the panel made "an egregious error that calls into question the good faith of the panel."[119]

74. The Appellate Body has also given guidance on the relationship between claims under Article 11 of the DSU and legal appeals. The Appellate Body has explained that "a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements."[120] Indeed, "in most cases . . . an issue will *either* be one of the application of the law to the facts *or* an issue of the objective assessment of facts," and not both.[121] Parties, therefore, must "distinguish[] a claim that the panel erred in applying a legal provision to the facts of the case from a claim that a panel failed to make an objective assessment of the matter as required by Article 11."[122] An error in the order of analysis is a claim that the panel has committed an error of law and should be raised directly under the relevant WTO provision, as Indonesia did in the earlier claim in its appeal.

75. Issues of judicial economy have also been addressed in the context of Article 11. The principle of judicial economy is that a "panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."[123] The Appellate Body has recognized that "panels have a margin of discretion with respect to the exercise of judicial

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[118] *EC – Poultry (AB)*, para. 133.

[119] *EC – Hormones (AB)*, para. 133.

[120] *EC – Fasteners (China) (AB)*, para. 442.

[121] *EC – Seal Products (AB)*, para. 5.232.

[122] *See China – Rare Earths (AB)*, para. 5.173.

[123] *US – Wool Shirts and Blouses*, p. 19.

economy" and that, to prevail on an Article 11 claim, an appellant must "demonstrate that the Panel exceeded this discretion."[124] This requires that the appellant show that the Panel "provided only a 'partial resolution of the matter at issue," or that an additional finding is "necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance."[125]

76. Indonesia has failed to substantiate a claim that the Panel erred under Article 11 of the DSU in assessing the appellees' claims. As explained below, with respect to its order of analysis claim, Indonesia did not put forward any arguments separate from or additional to the arguments alleged under its legal appeals. Indonesia also failed to meet the standard of Article 11 with respect to its appeal of the Panel's exercise of judicial economy.

2. Indonesia Has Recast Its Legal Claim of Error as an Error Under DSU Article 11 and Has Otherwise Failed To Meet the Standard of Article 11

77. Indonesia has failed to allege under Article 11 of the DSU any arguments separate from or additional to those arguments 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.

78. Indonesia's argument that Article 4.2 is the more "specific" provision is derivative of its legal appeals and does not provide a separate basis for reversing the Panel's findings. This is evident from the fact that Indonesia adduces no additional argument in support of its Article 11 claim that Panel erred in beginning with Article XI:1.[126] The claim thus has no independent effect: if Indonesia prevails in its argument that the Panel committed a legal error in addressing Article XI:1 before Article 4.2, Indonesia's Article 11 appeal becomes meaningless because Indonesia will have prevailed on this issue. Conversely, if Indonesia's legal appeal is rejected, Indonesia has advanced no reason why the Panel's analysis would nevertheless be inconsistent with Article 11 of the DSU.

79. Additionally, even aside from the fact that the Panel made no error in its sequence of analysis (as explained above), 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.

80. 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. Indonesia suggests that, by avoiding certain "novel and abstract legal issues" under Article XI:1 that would have been implicated if the Panel had begun its analysis under Article 4.2,[127] the Panel committed error

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[124] *See Canada – Feed-in Tariff Program (AB)*, para. 5.93.

[125] *See Canada – Feed-in Tariff Program (AB)*, para. 5.93.

[126] *See* Indonesia's Appellant Submission, paras. 103-104.

[127] Namely, the burden of proof under the second element of footnote 1 to Article 4.2 of the Agreement on Agriculture.

under Article 11.[128] This argument, however, does not meet the standard of Article 11, as 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.[129]

81. Indeed, it is difficult to see how this could be the case, as Article 4.2 of the Agreement on Agriculture does not insulate measures from being found inconsistent with Article XI:1 of the GATT 1994.[130] And as is undisputed between the parties, the appellees submitted before the Panel identical claims of inconsistency under both provisions. Thus, even if the burden of proof were on the co-complainants – and irrespective of whether that burden was satisfied – nothing in the disposition of the claims under Article 4.2 would affect the consistency of the measures with the GATT 1994. Again, therefore, Indonesia's DSU Article 11 claim lacks any basis independent from its legal appeals.

82. Contrary to Indonesia's argument, 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.[131] There, the exercise of judicial economy with respect to a novel legal issue was found to have caused a lack of clarity regarding the scope of the DSB recommendations to the responding Member.[132] Such is not the case here, however, as Indonesia did not argue that the analysis under Article 4.2 of the Agreement on Agriculture would narrow the scope of the measures covered by the Panel's findings under Article XI:1, and thereby affect the scope of the recommendations to Indonesia.

83. For these reasons, Indonesia's DSU Article 11 claim of error should be rejected. Indonesia has failed to allege under DSU Article 11 any arguments separate from or additional to the arguments Indonesia put forward with respect to its substantive legal appeals, and this alone provides a sufficient basis to reject the appeal. Indonesia has also not satisfied the standard of Article 11 with respect to its appeal of the Panel's exercise of judicial economy with respect to claims under Article 4.2 of the Agreement on Agriculture.

III. THE PANEL'S FINDINGS ESTABLISH THAT EACH OF THE CHALLENGED MEASURES IS INCONSISTENT WITH ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

84. As explained above, Indonesia has provided no basis to reverse the Panel's findings under Article XI:1 of the GATT 1994 because it was not necessary for the Panel to begin the

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[128] *See* Indonesia's Appellant Submission, paras. 105, 107.

[129] Indonesia's Appellant Submission, para. 105; *see Canada – Feed-in Tariff Program (AB)*, para. 5.93.

[130] In this regard, a previous panel similarly exercised judicial economy in a similar situation: a complaining Member brought identical claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, and the responding Member invoked a defense under Article XX(b) of the GATT 1994 with respect to both claims. *See US – Poultry (China)*, paras. 7.484-487.

[131] *But see* Indonesia's Appellant Submission, para. 100.

[132] *See Colombia – Textiles (AB)*, paras. 5.26-28.

analysis of the measures at issue with Article 4.2 of the Agreement on Agriculture. And, in any event, the factual findings of the Panel in the context of its application of Article XI:1 demonstrate that each of the measures found to be inconsistent with Article XI:1 of the GATT 1994 is inconsistent with Article 4.2 of the Agreement on Agriculture. Therefore, in the event that the Appellate Body were to reverse the Panel's findings under Article XI:1 of the GATT 1994, the United States would request the Appellate Body to 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.[133] Of course, were the Appellate Body to reject Indonesia's appeal of the Panel's findings under Article XI:1, it would not be necessary to complete the analysis of the U.S. claim under Article 4.2.

A. The Legal Standard of Article 4.2 of the Agreement on Agriculture

85. Article 4.2 of the Agreement on Agriculture states that a Member "shall not maintain, resort to or revert to any measures of the kind which have been required to be converted into ordinary customs duties." These types of measures "include" those listed in footnote 1 to that article, including "quantitative import restrictions, . . . minimum import prices, . . . and similar border measures other than ordinary customs duties . . . but not measures maintained under . . . general non-agriculture-specific provisions of the GATT 1994 or of the other Multilateral Trade Agreements in Annex 1 to the WTO Agreement." Therefore, if a measure falls within any one of the categories of the measures listed in footnote 1, including measures that are "similar" to those listed,[134] it is among the measures covered by Article 4.2.[135]

86. With respect to "quantitative import restrictions . . . and similar border measures" under Article 4.2, these may encompass a number of restrictions that could operate in relation to quantities or have the capacity to affect quantities of imports. Useful context suggesting the scope of the term may be found in Article XI of the GATT 1994, which addresses the "general elimination of quantitative restrictions", encompasses "prohibitions or restrictions other than duties, taxes or other charges" (suggesting that duties, taxes, or other charges could otherwise constitute "restrictions" for purposes of the article). Similarly, GATT 1994 Article XIII, addressing "non-discriminatory administration of quantitative restrictions," includes within such "import restrictions" measures such as quotas (XIII:2(a), 3(b)), import licenses (XIII:2(b), 3(a)), permits without a quota (XIII:2(b)), and tariff quotas (XIII:5). Thus, "quantitative import restrictions . . . and similar border measures" covers a broad range of measures, other than ordinary customs duties, that have the capacity to limit quantities of imports.[136]

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[133] *See EC – Asbestos (AB)*, para. 78; *EC – Hormones (AB)*, para. 222; *US – Gasoline (AB)*, p. 19; *Canada – Periodicals (AB)*, p. 24; *Colombia – Textiles (AB)*, paras. 5.30-5.116.

[134] *Chile – Price Band System (AB)*, para. 239.

[135] *Chile – Price Band System (AB)*, para. 221.

[136] *See Turkey – Rice*, para. 7.120 ("[e]ven without any systematic intention to restrict the importation of rice at a certain level, the lack of transparency and predictability of Turkey's issuance of Certificates of Control to import rice is similarly liable to restrict the volume of imports"); *id.* paras. 7.51, 7.117 and 7.121 (finding that Turkey's "denial, or failure to grant, licenses to import rice outside of the tariff rate quota" was "a quantitative

87. With respect to "minimum import prices . . . and similar border measures," the Appellate Body in *Chile – Price Band System* explained that the term "minimum import price" under Article 4.2 "refers generally to the lowest price at which imports of a certain product may enter a Member's domestic market."[137] A measure "similar to" a minimum import price is one that has "sufficient number of characteristics with, and has a design, structure, operation and impact similar, to a minimum import price."[138]

88. Unsurprisingly, given the text and structure of the two provisions, previous panels have found that border measures that impose prohibitions or restrictions inconsistent with Article XI:1 of the GATT 1994 also breach Article 4.2 of the Agreement on Agriculture.[139] 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.[140] 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.[141]

89. 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. 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 on the ground that the panel had already rejected Norway's challenge under Article XI:1 of the GATT 1994, and Norway had

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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").

[137] *Chile – Price Band System (AB)*, para. 236; *see Chile – Price Band System (Article 21.5 – Argentina)*, para. 7.30; *Peru – Agricultural Products (AB)*, para 5.129.

[138] *Peru – Agricultural Products, para. 5.144 (Quoting Chile – Price Band System (AB)*, para. 193.)

[139] In this regard, we note that, in past reports involving Article 4.2, the Appellate Body has observed that the Agreement on Agriculture, and Article 4.2 in particular, was meant to be a liberalizing force with respect to agricultural products, relative to the GATT 1947 and to the other trade agreements in Annex 1 to the WTO Agreement. *See Chile – Price Band System (AB)*, para. 196; *id.* para. 256. For example, the Appellate Body has noted that a key objective of the Agreement on Agriculture is "to establish a fair and market-oriented agricultural trading system," and that Article 4 is "the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products." *Peru – Agricultural Products (AB)*, paras. 5.37-38 (quoting *Chile – Price Band System (AB)*, para. 201; *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 145); *see also id.* para. 5.38 ("[T]he [Uruguay Round] negotiators decided that [certain types of] border measures should be converted into ordinary customs duties, *with a view to ensuring enhanced market access for such imports*. Thus, they envisioned that ordinary customs duties would, in principle, become the only form of border protection.") (emphasis added).

[140] *Korea – Various Measures on Beef (Panel)*, paras. 751, 759.

[141] *Korea – Various Measures on Beef (Panel)*, para. 762.

relied on its evidence and arguments adduced under its Article XI:1 claim in its Article 4.2 claim.[142] 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 and poultry products into the United States."[143] Similarly, the panel in *Chile – Price Band System* stated that the scope of Article 4.2 "certainly extends to measures within the scope of Article XI:1 of the GATT 1994, but also extends to other measures than merely quantitative restrictions."[144] The Appellate Body in that dispute also suggested that the scope of Article 4.2 included but "extends beyond" the measures that are prohibited by Articles II:1(b) and XI:1 of the GATT 1994.[145]

90. Thus, Article 4.2 covers a wide range of measures that, as the Appellate Body has found, "have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products in ways different from the ways that ordinary customs duties do."[146] Such measures include quantitative import restrictions and minimum import prices. Past panels and the Appellate Body have found that, in particular, measures covered by Article 4.2 would include those found to be inconsistent with Article XI:1.

B. The Panel's Findings Establish That Each of the Challenged Measures Is a Quantitative Restriction or Other Measure Listed in Footnote 1 to Article 4.2

91. The findings of the Panel under Article XI:1 of the GATT 1994 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 of the Agreement on Agriculture. Specifically, the following Panel findings establish that this is the case for each of the eighteen measures at issue:

92. Measure 1. The Panel's findings establish that the **limited application window and validity period requirements for horticultural products** are a quantitative import restriction or similar border measure inconsistent with Article 4.2.[147] In particular, the Panel found that, "[h]aving examined the design, architecture and revealing structure of Measure 1, we conclude that Measure 1 has a limiting effect on importation because, during certain periods of time, the operation of Measure 1 results in no imports of horticultural products into Indonesia."[148] The Panel also found that "the way Measure 1 is designed and structured results in a limitation of the competitive opportunities of importers in practice because it restricts the market access of

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[142] *EC – Seal Products (Panel)*, para. 7.665.

[143] *US – Poultry (China) (Panel)*, para. 7.486.

[144] *Chile – Price Band System (Panel)*, para. 7.30.

[145] *Chile – Price Band System (AB)*, para. 256.

[146] *Chile – Price Band System (AB)*, para. 227.

[147] *See* Panel Report, paras. 2.33-34 (finding that this measure "consists of a combination of the limited application windows and the six-month validity periods of RIPHs and Import Approvals"); *id.* paras. 7.77-92.

[148] Panel Report, para. 7.89.

imported products into Indonesia."[149]

93. Measure 2. The findings of the Panel establish that the **fixed import license terms for horticultural products** are a quantitative import restriction or similar border measure inconsistent with Article 4.2.[150] The Panel found: "[T]he various requirements [Measure 2] embodies and the way in which they interact, have the effect of an import quota. Indeed, Measure 2 fixes the amount and the type of products that can be imported for each validity period, *i.e.* every six months."[151] The Panel also noted that, "by prohibiting changes in originally specified parameters in the RIPHs [Horticultural Product Import Recommendation] and the Import Approvals and thus not allowing the importation of new or additional products during the validity period of these documents or the change of original port of entry, Measure 2 provides importers with fewer opportunities to import horticultural products into Indonesia."[152]

94. Measure 3. The Panel's findings establish that **the 80 percent realization requirement for horticultural products** is a quantitative import restriction or similar border measure inconsistent with Article 4.2.[153] The Panel found that it was "reasonable to conclude that the prospect of having their RI [Registered Importer] designation revoked and therefore not being able to import products for at least two years is a powerful enough incentive to induce importers to conservatively estimate or underestimate their desired import quantities to ensure they are able to satisfy [Measure 3]."[154] The Panel also found: "[W]e believe that . . . any importer will be induced to be more conservative in its estimations. In our view, this Measure exacerbates the risks inherent in conducting trade transactions. We thus consider that the design, architecture and revealing structure of Measure 3 shows that this measure has a limiting effect in terms of volume of imports of horticultural products into Indonesia."[155]

95. Measure 4. The Panel's findings establish that the **harvest period requirement** for horticultural products constitutes a quantitative import restriction or similar border measure in

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[149] Panel Report, para. 7.91.

[150] *See* Panel Report, paras. 2.34-35 (finding that this measure "consists of the requirement to import horticultural products only within the terms of the RIPHs and Import Approvals, including the quantity of the products permitted to be imported, the specific type of products permitted to be imported, the country of origin of the products, and the Indonesian port of entry through which the products will enter, and the impossibility to amend these terms during the validity period of RIPHs and Import Approvals"); *id.* paras. 7.105-112.

[151] Panel Report, para. 7.109.

[152] Panel Report, para. 7.110.

[153] *See* Panel Report, paras. 2.37-38 (finding that this measure "consists of the requirement that RIs of fresh horticultural products must import at least 80% of the quantity of each type of product specified on their Import Approvals for every six-month validity period" and that, pursuant to this measure "RIs must account for the quantity of their realized imports during a semester by submitting an Import Realization Control Card to the Director General of Foreign Trade at the Ministry of Trade on a monthly basis" and that an "RI that fails to file the Import Realization Control Card three times could have its designation revoked"); *id.* paras. 7.126-134.

[154] Panel Report, para. 7.129.

[155] Panel Report, para. 7.130.

breach of Article 4.2.[156] As the Panel found: "Measure 4 constitutes a quantitative restriction amounting to a total prohibition because no imports are permitted during specified periods of time. Likewise, Measure 4 also constitutes a quantitative restriction when importation is not prohibited because the volume of imports that is allowed is reduced during a given time period."[157]

96. Measure 5. The findings of the Panel establish that the **storage ownership and capacity requirements** for horticultural products are a quantitative import restriction or similar border measure inconsistent with Article 4.2.[158] In particular, the Panel found that "Measure 5 imposes a limit on horticultural product imports that equals the storage capacity that an importer owns when it applies for a Recommendation and an Import Approval. We thus perceive the limiting effect of this Measure in terms of volume of imports."[159]

97. Measure 6. The Panel's findings establish that the set of **use, sale, and distribution requirements for horticultural products** is inconsistent with Article 4.2 because they are quantitative import restrictions or similar border measures within the meaning of Article 4.2.[160] As the Panel found: "[B]y requiring products imported by RI's to be traded or transferred to a distributor and not directly to consumers or retailers, Measure 6 restricts the competitive opportunities for imported products as it increases the costs of their marketing and affects the business plans of importers."[161]

98. Measure 7. The Panel's findings establish that the **reference price requirement for chilies and shallots** constitutes a minimum import price or similar border measure and a quantitative import restriction or similar border measure inconsistent with Article 4.2.[162] The Panel found that Measure 7 "results in a prohibition on importation each time the reference price system is triggered" and "has a limiting effect on importation even when not actually triggered

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[156] *See* Panel Report, paras. 2.39-40 (finding that this measure "consists of the requirement that the importation of horticulture products takes place prior to, during and after the respective domestic harvest seasons within a certain time period"); *id.* paras. 7.148-156.

[157] Panel Report, para. 7.151.

[158] *See* Panel Report, paras. 2.41-42 (finding that this measure "consists of the requirement that importers must own their storage facilities with sufficient capacity to hold the full quantity requested on their Import Application" and that "importers applying for designation as an RI are to provide 'proof of ownership of storage facilities appropriate for the product's characteristics'"); *id.* paras. 7.170-179.

[159] Panel Report, para. 7.175.

[160] *See* Panel Report, paras. 2.43-44 (finding that this measure "consists of the requirements on the importation by PIs and RIs of listed horticultural products that limit the use, sale and distribution of the imported products" and that "[d]esignation as an RI or PI can be revoked where the relevant importer is proven to have traded and/or transferred imported horticultural products" inconsistently with this measure); *id.* paras. 7.192-200.

[161] Panel Report, para. 7.198.

[162] *See* Panel Report, paras. 2.45-47 (finding that this measure "consists of the implementation of a reference price system . . . on imports of chillies and fresh shallots for consumption," pursuant to which "importation is suspended when the domestic market price falls below the pre-established reference price"); *id.* paras. 7.214-227.

because it influences importers' decisions at all times as they will have an incentive to elude the Measure and mitigate its consequences."[163] The Panel also found that the measure "is similar to minimum price requirements that previous WTO and GATT panels have found to be inconsistent with Article XI:1;"[164] noting that it "is even more 'categorical' than the minimum import prices . . . found to be restrictions by those previous panels because it prohibits *any* imports of chillies and shallots once the relevant reference price has been reached."[165]

99. Measure 8. The findings of the Panel establish that the **six-month harvest requirement** is a quantitative import restriction or similar border measure inconsistent with Article 4.2.[166] Specifically, the Panel found that "Measure 8 is designed to prohibit the importation of all horticultural products that have been harvested more than six months prior to importation. To us, this is an absolute ban on these products that . . . falls squarely into the definition of a 'prohibition' under Article XI:1 of the GATT 1994."[167] For the same reason, the ban is inconsistent with Article 4.2.

100. Measure 9. The Panel's findings establish that Indonesia's **import licensing regime for horticultural products, as a whole,** is a quantitative import restriction or similar border measure inconsistent with Article 4.2.[168] In particular, the Panel found that, "as evidenced through its design, architecture and revealing structure, the limiting effect of each of the challenged components constituting Measure 9 is compounded or exacerbated as a result of their inherent interaction as part of Indonesia's import licensing regime as a whole."[169]

101. Measure 10. The findings of the Panel establish that the **prohibition on the importation of unlisted animals and animal products** is a quantitative import restriction or similar border measure inconsistent with Article 4.2.[170] In analyzing this measure the Panel found that "Indonesia's regulations prohibit the importation of certain animals and animal products not listed in Appendices I and II of MOT 46/2013, as amended, and MOA 139/2014, as

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[163] Panel Report, para. 7.223.

[164] Panel Report, para. 7.220.

[165] Panel Report, para. 7.220.

[166] *See* Panel Report, paras. 2.48 (finding that this measure "consists of the requirement that all imported fresh horticultural products have been harvested less than six months prior to importation" and that, pursuant to this measure, "in order to obtain an RIPH for fresh horticultural products, an RI must produce a statement committing not to import horticultural products harvested over six months prior to importation"); *id.* paras. 7.238-243.

[167] Panel Report, para. 7.241.

[168] *See* Panel Report paras. 2.49 (finding that this measure "consists of Indonesia's import licensing regime for horticultural products, as maintained through MOT 16/2013, as amended, and MOA 86/2013, as a whole"); *id.* paras. 7.260-270.

[169] Panel Report, para. 7.269.

[170] *See* Panel Report, paras. 2.50-51 (finding that this measure "consists of the prohibition on the importation of bovine meat, offal, carcass and processed products that are not listed in Appendices I of MOT 46/2013, as amended, and MOA 139/2014, as amended; or non-bovine and processed products that are not listed in Appendices II of MOT 46/2013, as amended, and MOA 139/2014, as amended"); *id.* paras. 7.288-299.

amended."[171] The Panel then found that "this ban falls squarely into the definition of a 'prohibition' under Article XI:1 of the GATT 1994."[172]

102. Measure 11. The findings of the panel establish that the **limited application windows and validity periods for animals and animal products** are a quantitative import restriction or similar border measure inconsistent with Article 4.2.[173] The Panel found, based on an examination of the "design, architecture and revealing structure of Measure 11" that it has a "limiting effect . . . in terms of the volume of imports because, during certain periods of time, the operation of Measure 11 results in no imports of animals and animal products into Indonesia."[174] The Panel also found that "the way Measure 11 is designed and structured results in a limitation of the competitive opportunities of importers in practice because it restricts the market access of imported products into Indonesia."[175]

103. Measure 12. The findings of the Panel establish that the **fixed import license terms for animals and animal products** is inconsistent with Article 4.2 because it is a quantitative import restriction or similar border measure.[176] The Panel found that the "effect of this measure can be compared to that of a four-month quota" and that this effect is "the result of the manner in which Indonesia designed and structured this Measure."[177] The Panel noted "the limiting effect of this Measure in terms of volume of imports."[178] The Panel also found that "by restricting the import licensing parameters within which importers operate, this Measure results in fewer opportunities to import animals and animal products into Indonesia, with such restrictions having significant impact on the competitive opportunities available to imported products."[179]

104. Measure 13. The Panel's findings establish that the **80 percent realization requirement for Appendix I (beef) products** is a quantitative import restriction or similar border measure

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[171] Panel Report, para. 7.297.

[172] Panel Report, para. 7.297.

[173] *See* Panel Report, paras. 2.52-53 (finding that this measure "consists of a combination of requirements, including the prohibition on importers from applying for Recommendations and Import Approvals outside four one-month periods, the provision that Import Approvals are valid for only the three-month duration of each quarter, and the requirement that importers are only permitted to apply for Recommendations and Import Approvals in the month immediately before the start of the relevant quarter"); *id.* paras. 7.314-7.327.

[174] Panel Report, para. 7.324.

[175] Panel Report, para. 7.326.

[176] *See* Panel Report, paras. 2.54-55 (finding that this measure "consists of the requirement to only import animals and animal products within the terms of the Recommendations and Import Approvals, the prohibition of importing types/categories of carcasses, meat, and/or their processed products other than as specified in Import Approvals and Recommendations, and the prohibition from requesting changes to the elements specified in Recommendations once they have been issued"); *id.* paras. 7.341-349.

[177] Panel Report, para. 7.346.

[178] Panel Report, para. 7.346.

[179] Panel Report, para. 7.347.

inconsistent with Article 4.2.[180] The Panel found that Measure 13 "affects the decisions of importers of how much to request in their applications for Import Approvals" such that "any importer will be induced to be more conservative in its estimations."[181] The Panel also found that the measure "exacerbates the risk inherent in conducting trade transactions."[182] Therefore, Panel found that the measure "has a limiting effect in terms of volume of imports of animals and animal products into Indonesia."[183]

105. Measure 14. The findings of the Panel establish that the **use, sale, and distribution requirements for imported bovine meat and offal** are quantitative import restrictions or similar border measures inconsistent with Article 4.2.[184] The Panel found that "animals and animal products falling under the scope of the mentioned regulations cannot reach certain retail outlets, which as shown by the co-complainants, are where Indonesian consumers do a substantive proportion of their purchases, sometimes even amounting to at least half of their food shopping."[185] On this basis, the Panel concluded that "through its design, architecture and revealing structure, Measure 14 restricts the competitive opportunities for imported products because it impedes sale in modern stores or traditional markets or directly to the consumer."[186]

106. Measure 15. The Panel's findings establish that the **domestic purchase requirement for beef** is a quantitative import restriction or similar border measure inconsistent with Article 4.2.[187] The Panel found that "Measure 15 compels importers to purchase domestic beef as a condition to

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[180] *See* Panel Report, paras. 2.56-57 (finding that this measure "consists of the requirement whereby RIs must import at least 80% of each type of product covered by their Import Approvals every year" and that, pursuant to this measure, "RI designees are required to submit monthly import and export realization reports setting out all of their imports of animals and animal products" and that failure "RI designees are required to submit monthly import and export realization reports setting out all of their imports of animals and animal products"); *id.* paras. 7.367-375.

[181] Panel Report, para. 7.371.

[182] Panel Report, para. 7.371.

[183] Panel Report, para. 7.371.

[184] *See* Panel Report, paras. 2.58-59 (finding that this measure "consists of certain requirements that limit the use, sale and distribution of imported animals and animal products, including bovine meat and offal" and that, pursuant to this measure "the animals listed in Appendix I and Appendix II of MOT 46/2013, as amended, can only be imported for the purposes of improving genetic quality and diversity; developing science and technology; overcoming domestic deficiencies of seeds, breeders and/or feeders; and/or fulfilling research and development needs," the animal products listed in Appendix I of MOT 46/2013 "can be imported for the use and distribution of industry, hotels, restaurants, catering, and/or other special needs," and the animal products listed in Appendix II of MOA 139/2014, as amended by MOA 2/2015, "may be imported only for the same purposes as the bovine products specified in Appendix I and, additionally, for sale in 'modern markets'"); *id.* paras. 7.388-398.

[185] Panel Report, para. 7.396.

[186] Panel Report, para. 7.396.

[187] *See* Panel Report, paras. 2.60-61 (finding that this requirement "consists of the requirement imposed upon importers of large ruminant meats to absorb local beef" and that, pursuant to this measure, "in applying for a Recommendation, importers must submit proof of local beef purchases duly verified by the provincial agency or municipality of origin"); *id.* paras. 7.419-428.

receive an MOA Recommendation, and hence, as a condition to import beef into Indonesia."[188] The Panel noted that "as a consequence of this requirement, importers would generally be faced with two options: they can either sell the local beef purchased in the ordinary course of their import business or they can find other alternatives to use it, not necessarily connected with their business."[189] The first option would "mean that they would not need to import such quantity to cover demand, and thus they would be effectively substituting imported products with domestic products," while the second will "generate additional costs and affect their business plans."[190] The import substitution of the first option has "a direct limiting effect on importation," while the "additional costs" caused by the second option "are likely to discourage importation, thus creating a limiting effect on importation."[191] Thus "the import substitution effect inherent to Measure 15 has a limiting effect" on importation.[192]

107. Measure 16. The findings of the Panel establish that the **reference price for beef** constitutes a minimum import price or similar border measure and a quantitative import restriction or similar border measure inconsistent with Article 4.2.[193] As with the reference price for chili and shallots, the Panel found that, "once the reference price system is triggered, there is an absolute ban for the importation of [all bovine animals and animal products]."[194] The measure also "has limiting effects even when the reference price system has not been actually triggered, by creating uncertainty and affecting investment plans."[195] The Panel confirmed that "Indonesia's reference price is similar to minimum import price mechanisms that previous panels and GATT panels . . . have found to be inconsistent with Article XI:1 of the GATT," albeit "even more categorical . . . because it prohibits *any* imports once the reference price system has been triggered, and prohibits imports of *all* beef products, not only secondary cuts, if the price of secondary cuts falls below the reference price."[196]

108. Measure 17. The Panel's findings establish that Indonesia's **import licensing regime for animals and animal products, as a whole,** is a quantitative import restriction or similar border

[188] Panel Report, para. 7.426.

[189] Panel Report, para. 7.426.

[190] Panel Report, para. 7.426.

[191] Panel Report, para. 7.426.

[192] Panel Report, para. 7.426.

[193] *See* Panel Report, paras. 2.62-63 (finding that this requirement "consists of the implementation of a reference price system on imports of Appendix I animals and animal products and the ensuing suspension of imports when the domestic market price of secondary beef cuts falls below the pre-established reference price" and that, pursuant to this measure "in the event that the market price of secondary cuts of beef is below the reference price, imports of animals and animal products, as included in Appendix I, are suspended"); *id.* paras. 7.440-451.

[194] Panel Report, para. 7.445.

[195] Panel Report, para. 7.448.

[196] Panel Report, para. 7.446.

measure inconsistent with Article 4.2.[197] The Panel found that Measures 10 through 16 impose "restrictions and prohibitions on imports that not only limit the quantity of animals and animal products that can be imported . . . but also affect the competitive opportunities of imported products, increase the costs associated with importation, affect the investment plans of importers, cause uncertainty in the importation business, and create incentives among the importers to limit the amounts they effectively import."[198] Further, "the restrictive effects of each measure are compounded once they are seen as part of a system because they are interrelated and do not work in isolation."[199] Thus, "the limiting effect of each of the challenged components constituting Measure 17 is compounded or exacerbated as a result of their inherent interaction as part of Indonesia's import licensing regime as a whole."[200]

109. Measure 18. The findings of the Panel also establish that the **sufficiency of domestic production requirement** is a quantitative import restriction or similar border measure inconsistent with Article 4.2.[201] The Panel found that "the legislative provisions constituting Measure 18 set out a general condition on imports whereby they are restricted depending on the sufficiency of domestic production to fulfil domestic demand."[202] They "create mandatory and enforceable obligations which directly prohibit certain products in certain circumstances."[203] The measure further restricts importation because "the lack of transparency and predictability derived from the language of the legislative instruments . . . results in importers not being able to anticipate when certain products will be prohibited from importation on the basis that domestic production is deemed, or not deemed, sufficient by the government."[204]

110. Thus, the Panel found that all of the challenged measures restrict or prohibit importation and that, in particular, each of them has a limiting effect on the quantity of imports of the products at issue. Indonesia has not contested any of these findings by the Panel as to the design, structure, or operation of the measures, under Article XI:1 of the GATT 1994. Therefore, these findings of the Panel establish that, for the same reasons that each of the measures was found to be inconsistent with Article XI:1, each of these measures is also inconsistent with Article 4.2 of

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[197] *See* Panel Report, paras. 2.64 (explaining that this measure "consists of Indonesia's import licensing regime for animals and animal products, as maintained through MOT 46/2013, as amended, and MOA 139/2014, as amended by MOT 2/2015, as a whole"); *id.* paras. 7.468-478.

[198] Panel Report, para. 7.474.

[199] Panel Report, para. 7.474.

[200] Panel Report, para. 7.477.

[201] *See* Panel Report, paras. 2.65-66 (explaining that this measure "consists of the requirement whereby importation of horticultural products, animals and animal products depends upon Indonesia's determination of the sufficiency of domestic supply to satisfy domestic demand" and that, pursuant to this measure "consists of the requirement whereby importation of horticultural products, animals and animal products depends upon Indonesia's determination of the sufficiency of domestic supply to satisfy domestic demand"); *id.* paras. 7.491-501.

[202] Panel Report, para. 7.498.

[203] Panel Report, para. 7.498.

[204] Panel Report, para. 7.499.

the Agreement on Agriculture.

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

111. Indonesia argues that the Panel erred by failing to find that, to establish a *prima facie* case under Article 4.2 of the Agreement on Agriculture, the co-complainants were required to show that the challenged measures are not justified under Article XX of the GATT 1994.[205]

112. Contrary to Indonesia's assertion, the Appellate Body should not reverse the Panel's interpretation regarding the burden of proof under Article 4.2 of the Agreement on Agriculture. First, it is not necessary for the Appellate Body to make findings on this issue to resolve this dispute. That is, having upheld the Panel's findings under GATT 1994 Article XI:1 (as explained in the previous section), the Appellate Body would not need to reach this claim of error by Indonesia as it would not materially alter the DSB's recommendations, and the co-complainants themselves have not sought an additional finding of breach under Article 4.2 (except for in the circumstance of a reversal of the Panel's Article XI:1 conclusion). It thus would not be necessary for the Appellate Body to consider the remainder of Indonesia's arguments in relation to this appeal.

113. Second, for completeness, the United States notes that the Panel correctly found that the party relying on a defense under Article XX of the GATT 1994, including in the context of Article 4.2, bears the burden of identifying and establishing that defense. This flows from the text of Article 4.2 and Article XX, and prior Appellate Body and panel reports support such an interpretation. In the unlikely event that the Appellate Body finds that co-complainants to have had the burden of proof in this respect, the United States also provides a summary of the evidence and argumentation offered to demonstrate that none of Indonesia's challenged measures are justified under Article XX of the GATT 1994

A. The Appellate Body Need Not Make Findings on the Burden of Proof Under the Footnote to Article 4.2 of the Agreement on Agriculture to Resolve This Dispute

114. 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 of the Agreement on Agriculture, because such findings would not affect Indonesia's obligation to come into compliance with the recommendations and rulings of the DSB.

115. Article 3.3 of the DSU stipulates that

> The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective

[205] Indonesia's Appellant Submission, para. 84.

> functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

116. Moreover, Article 3.4 and Article 3.7 provide, respectively, that "[r]ecommendations or rulings of the DSB shall be aimed at achieving a satisfactory settlement of the matter" and "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute." As discussed in Section II.B.1.a above, pursuant to Articles 7.1 and 11 of the DSU, panels and the Appellate Body are charged with making those findings that may lead to such a recommendation.

117. On these bases, the Appellate Body has refrained from interpreting provisions of the covered agreements where doing so is "unnecessary for the purposes of resolving [the] dispute."[206] In *US – Upland Cotton*, for example, recalling that Article 3 of the DSU provides for "prompt" and "satisfactory" settlement of matter and aims for "positive resolution to a dispute,"[207] Appellate Body found that making a finding is unnecessary when "it would not affect the resolution of [the] particular dispute."[208] This is the case where the responding Member's obligation regarding compliance would not change "irrespective of whether [the Appellate Body] were to uphold or reverse the panel's finding" on the issue.[209]

118. A finding as to the burden of proof under the footnote to Article 4.2 of the Agreement on Agriculture is not necessary to resolve this dispute. The co-complainants brought identical claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, and the Panel found that these measures are inconsistent with the GATT 1994.[210] Pursuant to Article 19.1 of the DSU, the Panel recommended that Indonesia bring its measures into conformity with its obligations.[211]

119. As the United States showed in section II.B above, the Panel did not err in analyzing Articles XI:1 and XX of the GATT 1994 before considering Article 4.2 of the Agreement on Agriculture.[212] 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. If the Appellate Body were to affirm the Panel's finding under Article XI:1, the co-complainants are not requesting that the Appellate Body reach their claim under

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[206] *US – Upland Cotton (AB)*, paras. 510-511, 747; *see also India – Solar Cells (AB)*, paras. 5.156-5.163.

[207] *US – Upland Cotton (AB)*, para. 508.

[208] *US – Upland Cotton (AB)*, para. 510.

[209] *US – Upland Cotton (AB)*, para. 510.

[210] *See supra* sec. II.B.2; Panel Report, para. 8.1.

[211] Panel Report, para. 8.7.

[212] *See supra* sec. II.B.

Article 4.2. And, in this circumstance, it would be prudent to conserve resources by not opining on a novel legal issue that is purely theoretical in the context of this dispute.[213]

120. 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.

B. The Panel Did Not Err in Stating That It Was for Indonesia to Establish a Defense Under Article XX of the GATT 1994

121. As noted, if the Appellate Body affirms the Panel's findings under Article XI:1 of the GATT 1994, it need not consider Indonesia's further arguments in support of its Article 4.2 claim of error. For completeness, the United States notes that, in rejecting Indonesia's burden of proof argument, the Panel correctly interpreted Article 4.2. Therefore, even if the Appellate Body were to consider this issue, it should reject Indonesia's arguments and uphold the Panel's statement.

122. As noted above, Indonesia argues that Article 4.2 of the Agreement on Agriculture requires a complainant to prove the additional element, under footnote 1 to Article 4.2, that a challenged measure is not maintained under the exceptions set forth under, *inter alia*, Article XX of the GATT 1994.[214] Indonesia is introducing a new element to Article 4.2 of the Agreement on Agriculture that is not supported by the text of Articles 4.2 or XX, and which neither the Appellate Body nor previous panels have ever adopted.

123. As described in section III.A, Article 4.2 states that a Member "shall not maintain, resort to or revert to any measures of the kind which have been required to be converted into ordinary customs duties." The types of measures "include" those listed in footnote 1 to that article. Footnote 1 sets out these measures (e.g., "quantitative import restrictions," "discretionary import licensing" and "similar border measures other than ordinary customs duties"), and goes on to say that such measures do not include "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." Therefore, footnote 1 specifies that Article 4.2 does not apply to "general, non-agriculture-specific" exceptions. This limitation thus includes, the "*General Exceptions*" found in Article XX of the GATT 1994.

124. Article XX of the GATT 1994, as noted above, is entitled *General Exceptions*. It states, in relevant part, that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures," for example, "necessary to protect human, animal or plant life or health." As written, and as consistently applied, Article XX is thus an affirmative

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[213] Indonesia's claim of error on the burden of proof under Article 4.2 would raise another novel and abstract legal issue: Whether a measure can be "maintained" under balance of payment provisions or Article XX of the GATT 1994 in footnote 1 to Article 4.2 without itself breaching another GATT 1994 provision. For example, would a panel need first to establish that a measure breaches Article XI:1 of the GATT 1994 to determine whether it is "maintained" under Article XX? As discussed above, judicial efficiency counsels against making findings on such issues to resolve this dispute.

[214] Indonesia's Appellant Submission, paras. 83-85.

defense, the burden of proof for which falls on the party asserting it. Indonesia does not contest that point.

125. In fact, Indonesia itself shared the view before the Panel that it is the respondent's burden to assert and demonstrate that its measures are maintained under Article XX of the GATT 1994 in defense of an Article 4.2 claim. In its First Written Submission, Indonesia specifically asserted affirmative defenses under Article XX in the event the Panel found that the co-complainants had made a *prima facie* case under Article 4.2:

> Should the Panel find that the Complainants have made a *prima facie* case that any of the challenged measures are inconsistent with Indonesia's obligations under Article 4.2 of the Agriculture Agreement, Indonesia asserts several defenses under GATT Article XX.[215]

126. Indonesia changed its understanding of Article 4.2 in its second written submission.[216] Indonesia then attempted to argue, as it argues now, 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. That is, in the context of Article 4.2, a complainant must bear both its own burden and that of the responding Member. Contrary to Indonesia's arguments, no such rule exists. As numerous panels and the Appellate Body have found, and as Indonesia acknowledges, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[217] If Indonesia's measures are "maintained" under a general exception, it would be for Indonesia to assert the exception and demonstrate its applicability.

127. Even where a provision excludes certain measures from its scope, that is not dispositive of burden of proof. In *Canada — Feed-In Tariff Program*, the Appellate Body addressed an analogous situation with respect to Article III:4 and Article III:8 of the GATT 1994. During the panel proceedings, the co-complainants asserted as their *prima facie* case that Canada's measure breached Article III:4 of the GATT 1994; Canada responded by asserting that the measure was outside the scope of Article III:4 because it is maintained under Article III:8.[218] The parties did not dispute, and the panel found no fault with, the allocation of the burden of proof in establishing the prima facie case.[219]

128. On appeal, the Appellate Body determined that Article III:8(a) of the GATT 1994 "establishes a derogation from the national treatment obligation of Article III for government procurement falling within its scope…not a justification for measures that would otherwise be

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[215] Indonesia First Written Submission, paras. 61-62.

[216] Indonesia Second Written Submission, para. 38.

[217] *US – Wool Shirts and Blouses (AB)*, p. 14, *EC – Seal Products (AB)*, para. 5.302; *US – Shrimp (AB)*, para. 160.

[218] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (Panel)*, para. 7.123.

[219] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (Panel)*, para. 7.123.

inconsistent with that obligation."[220] Nevertheless, the Appellate Body specifically found that "the characterization of the provision as a derogation does not pre-determine the question as to which party bears the burden of proof with regard to the requirements stipulated in the provision."[221] And it did not reverse the panel's findings on this issue.

129. The Appellate Body affirmed this approach in *China – Raw Materials*. In that dispute, the panel found that the respondent had the burden to prove that its measure is maintained under Article XI:2(a) because it is an exception to Article XI:1 of the GATT 1994.[222] Although the Appellate Body characterized Article XI:2(a) not as an exception, but as a limitation to the scope of Article XI:1 of the GATT 1994, it left undisturbed the panel's burden of proof analysis.[223]

130. Indonesia attempts to argue 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. Article 2.2 of the TBT Agreement, for example, imposes on Members the obligation not to apply TBT measures that are "more trade restrictive than necessary to fulfil a legitimate objective." Article 2.2 sets out a specific obligation a complaining party may assert has been breached; Article 2.2 does not incorporate Article XX into its text by reference and thereby reverse the burden of proof. Similarly, Article 2.4 of the TBT requires Members to base measures on "relevant international standards" where effective and appropriate for the fulfilment of a legitimate objective. Although this provision addresses legitimate objectives, it does not do so through incorporation of Article XX.

131. 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 in general and Article 4.2, in particular. The preamble to the Agreement on Agriculture states that it serves the purpose of establishing "strengthened and more operationally effective GATT rules and disciplines" and "substantial progressive reductions in . . . protection" in the agricultural products sector. The Appellate Body has also recognized that the Uruguay Round negotiators viewed the Agreement on Agriculture to have a liberalizing effect on trade in agricultural products, compared to the GATT 1947 and other trade agreements.[224] In particular, Article 4.2 was intended to be "the legal vehicle for requiring the conversion into ordinary customs duties" of market access barriers affecting agricultural product imports.[225]

132. Indonesia's interpretation, if adopted, would contradict this purpose of the agreement and the provision. Specifically, it would mean that, with respect to the restrictions and prohibitions covered by Article XI:1 and any other measures covered by both the Agreement on Agriculture

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[220] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.56.

[221] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.56.

[222] *China – Raw Materials (Panel)*, paras. 7.211-7.213.

[223] *China – Raw Materials (AB)*, para. 334.

[224] *See Chile – Price Band System (AB)*, para. 196; *id.* para. 256.

[225] *Peru – Agricultural Products (AB)*, paras. 5.37-38 (quoting *Chile – Price Band System (AB)*, para. 201; *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 145).

and the GATT 1994, the Agreement on Agriculture, concluded with the express purpose of lowering barriers to trade in agricultural products, actually *increased* the burden on Members challenging prohibitions and restrictions on importation, compared to what it is (or was, as Indonesia would argue) under the GATT. This argument is manifestly incorrect.[226]

133. Additionally, Indonesia's interpretation would create absurd and infeasible results in future disputes. Following Indonesia's interpretation with respect to Article 4.2 would require a complainant to demonstrate that each challenged measure is not maintained under any balance of payment provisions, provisions of each of the ten subparagraphs of Article XX of the GATT 1994; or other general, non-agriculture-specific provisions of the GATT 1994, including the essential security exception in Article XXI; as well as provisions of each of the eleven other Multilateral Trade Agreements listed Annex 1A to the WTO Agreement. The difficulty of ever satisfying that burden is remarkable, particularly considering that it is a responding Member that is best placed to identify and prove any applicable exception.

134. For all of these reasons, the Appellate Body should find that the Panel did not err in identifying the appropriate burden of proof under Article 4.2 of the Agreement on Agriculture when it found that Indonesia had the burden to demonstrate that its measures were maintained under a relevant provision of Article XX of the GATT 1994. This interpretation is consistent with the text of both provisions, as well as the structure and purpose of the Agreement on Agriculture, and is consistent with the application of Article 4.2 in all prior panel and Appellate Body reports.[227] Thus, Indonesia has not demonstrated that the Panel committed reversible error, and the Appellate Body should reject its appeal accordingly.

C. The United States Has Demonstrated that Indonesia's Measures Are Not Justified under Article XX of the GATT 1994

135. While not necessary to prevail in its claims under Article 4.2, we note that the co-complainants provided substantial evidence and argumentation that none of Indonesia's measure are maintained consistently with Article XX of the GATT 1994. Therefore, in the unlikely event that the Appellate Body were to evaluate co-complainants' showing as a result of Indonesia's appeal, sufficient Panel findings and undisputed facts exist to complete the analysis in favor of appellees.

136. In particular, the United States asserted that the objective of all the challenged measures is to protect domestic producers and to achieve food self-sufficiency by reducing imports.[228] Indeed, the Panel found the "text, structure and history of [Indonesia's] import licensing regulations and framework legislation" showed that "the actual policy objective behind all [of

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[226] This argument is particularly perverse when combined with Indonesia's mistaken interpretation of the exclusivity of Article 4.2 as applied to measures also within the scope of Article XI:1 of the GATT 1994. *See supra* sec. II.B.1.c.

[227] *Chile – Price Band System (Panel)*, paras. 7.17-7.101, *Chile – Price Band System (AB)*, para. 239. *Turkey – Rice*, para. 7.138, *Peru – Agricultural Products (Panel)*, para. 7.308-7.372.

[228] U.S. First Written Submission, paras. 12-19, 82-86.

Indonesia's] measures is to achieve self-sufficiency through domestic production by way of restricting and at times, prohibiting imports."[229] Based on the Panel's findings that protectionist objective of the Indonesia's measures, the co-complainants have shown none of the measures was adopted or enforced to pursue the objectives covered by Article XX(a), Article XX(b), and Article XX(d) of the GATT 1994.

137. Furthermore, the United States had provided extensive evidence and argumentation on each of the challenged measure to show that they are not maintained under Article XX of the GATT 1994.

138. Measures 1 and 11: The limited application windows and validity periods restrictions are not maintained under Article XX(d) because (1) the objective of the measures is to protect domestic producers from importers and not to enforce customs laws[230] and (2) the measures are not necessary to achieve the objective of customs enforcement.[231] These measures do not make any contribution to Indonesia's ability to allocate customs resources among its ports, and there are less trade restrictive ways to obtaining import volume information.[232]

139. Measures 2 and 12: The periodic and fixed import terms are not maintained under Article XX(d) because (1) the objective of the measures is to protect domestic producers from imports, not enforce customs laws[233] and (2) the measures are not necessary to achieve customs enforcement.[234] The fixed licensing terms restrictions offer no information that would allow Indonesian customs official to use to allocate its resources, and a reasonable alternative exists for Indonesia to obtain customs information.[235]

140. Measures 3 and 13: The 80 percent realization requirements are not maintained under Article XX(d) because (1) the objective of the measures is to protect domestic producers from importers and not to enforce customs laws[236] and (2) the measures are not necessary to achieve the objective of customs enforcement.[237] The customs problem that the realization requirement purports to address does not exist, the requirement does provide any useful information to customs officials, and the alleged misallocation of customs resources could be addressed by in a less trade restrictive manner.[238]

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[229] Panel Report, paras. 2.5-2.7, 7.821.

[230] U.S. Second Written Submission, paras. 130-134.

[231] U.S. Second Written Submission, paras. 136-141.

[232] U.S. Second Written Submission, paras. 13-138.

[233] U.S. Second Written Submission, paras. 130-134.

[234] U.S. Second Written Submission, paras. 142-146.

[235] U.S. Second Written Submission, paras. 143-145.

[236] U.S. Second Written Submission, paras. 130-134.

[237] U.S. Second Written Submission, paras. 147-152.

[238] U.S. Second Written Submission, paras. 148-150.

141. Measure 4: The harvest period restriction for horticultural products is not maintained under Article XX(b) because (1) the objective of the measure is to protect domestic products from imports during harvest seasons and not the protection of human health[239] and (2) the measure is not necessary to address problems (stockpile of rotting horticultural products, health authorities unable to inspect them) that do not exist.[240]

142. Measure 5: The storage ownership and capacity requirements are not maintained under Article XX(d) because (1) the objective of the measures is to protect domestic producers from importers and not to enforce customs laws,[241] and (2) the measures are not necessary to achieve the objective of customs enforcement.[242] The requirement for importers to own storage facilities horticultural products has no relevance at all to Indonesia customs enforcement.[243]

143. Measure 6: The use, sale, and distribution requirements for horticultural products are not maintained under Article XX(d) or Article XX(b) because (1) this measure neither secures compliance with any food safety laws nor pursues an objective of protecting human health,[244] and (2) the measure is not necessary to allow food safety officials to track pathogen-carrying products in the food supply.[245] The measure requiring importers to sell through a distributor lengthens the supply chain for imported horticultural products and would make tracking products more difficult, rather than easier.[246] This measure is not maintained under Article XX(a) because the objective of the measure is not to protect halal requirements.[247] The measure is also not necessary as it does not serve inform consumers whether a product is halal compliant.[248]

144. Measures 7 and 16: The reference prices requirements are not maintained under Article XX(b) because (1) the objective pursued by these measures is not the protection of human health,[249] and (2) the measures are not necessary to address problems (oversupply of horticultural products and beef) that do not exist.[250]

145. Measure 8: The six month harvest requirement for horticultural products is not

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[239] U.S. Second Written Submission, paras. 171- 174, 186.

[240] U.S. Second Written Submission, paras. 171, 187.

[241] U.S. Second Written Submission, paras. 130-134.

[242] U.S. Second Written Submission, paras. 153-156.

[243] U.S. Second Written Submission, paras. 154-155.

[244] U.S. Second Written Submission, paras. 157, 181-182.

[245] U.S. Second Written Submission, paras. 157-161, 183.

[246] U.S. Second Written Submission, paras. 157-161.

[247] U.S. Second Written Submission, paras. 157-161.

[248] U.S. Second Written Submission, paras. 211-212.

[249] U.S. Second Written Submission, paras. 208.

[250] U.S. Second Written Submission, para. 192.

maintained under Article XX(b) because it is not necessary to protect human health.[251] In particular, although this measure would purportedly ease food inspector's access to imported horticultural products that are in storage, there is no evidence that the measure provides for such inspections.[252] Further, Indonesia's health and SPS requirements, which are less trade restrictive than this measure, already apply to the same products.[253]

146. Measure 9 and 17: The import licensing regimes as a whole are not maintained under Article XX(d), Article XX(b), and Article XX(a). The objective of the measures is to protect domestic producers from importers and not to secure compliance with any laws or regulations, to protect human health, or to protect a public moral.[254]

147. Measure 10: The import prohibition of certain animal products is not maintained under Article XX(b) because it is not necessary to achieve the purported food safety objective of the measure (keep beef with growth hormone residue away from consumers).[255]

148. Measure 14: The use, sale, and transfer requirements for animal product are not maintained under Article XX(b) because (1) the objective of the measure is not to protect human health[256] and (2) prohibiting the sale of imported frozen or thawed meat is not necessary to protect human health.[257] Specifically, banning imported frozen or thawed meat from traditional markets does not contribute to the protection of human health because it poses no greater risks than freshly slaughtered domestic meat.[258] This measure is also not maintained under Article XX(a) because it was not adopted, enforced, or designed to protect the halal standard.[259] Even if protection of the halal standard is an objective, this measure is not necessary because all imported animal products must certified and labeled as halal before their shipment to Indonesia.[260]

149. Measure 15: The domestic purchase requirement for beef products is not maintained under Article XX(b) because (1) the objective is not to protect human health and (2) there is no connection between requiring importers to purchase three percent of domestic beef as a condition

[251] U.S. Second Written Submission, para. 187.

[252] U.S. Second Written Submission, para. 187.

[253] U.S. Second Written Submission, para. 188.

[254] U.S. Second Written Submission, paras. 163-164, 200-201, 229-230.

[255] U.S. Responses to Panel Question 123 [Advanced Question 55], para. 123; U.S. Opening Statement at the Second Panel Meeting, para. 53.

[256] U.S. Second Written Submission, para. 195.

[257] U.S. Second Written Submission, para. 196.

[258] U.S. Second Written Submission, para. 196.

[259] U.S. Second Written Submission, para. 222.

[260] U.S. Second Written Submission, para. 223.

to import and food safety.[261]

150. Measure 18: The sufficiency of domestic supply requirement is not maintained under Article XX(b) because the objective is to protect farmers for foreign competition by limiting imports, not to protect human health[262]

151. As shown above, even though the complainant bears no burden under Article 4.2 of the Agreement on Agriculture to show that the challenged measure is not justified under Article XX of the GATT 1994, the United States has provided argumentation and evidence to that effect. Indeed, the Panel considered the argumentation and evidence put forward by the parties and determined that none of the challenged measures meet the requirements of Article XX.[263]

V. THE PANEL CORRECTLY FOUND THAT ARTICLE XI:2(C) OF THE GATT 1994 HAS BEEN RENDERED INOPERATIVE BY ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

152. Indonesia raised Article XI:2(c)(ii) of the GATT 1994 in its Second Written Submission to attempt to exclude Measure 4 (harvest period requirement), Measure 7 (reference prices requirement for chili and shallot) and Measure 16 (beef reference price requirement) from the scope of Article XI:1.[264] Indonesia claimed that these import restrictions were necessary to remove a temporary surplus of chili, shallot, and beef in Indonesia's domestic market.[265]

153. As the Panel found, Article 21 of the Agreement on Agriculture provides that provisions of the GATT 1994 shall apply *subject to* the provisions of the Agreement on Agriculture.[266] Given this, the Panel found that Article 4.2 of the Agreement on Agriculture had rendered Article XI:2(c) inoperative with respect to agricultural measures because Article 4.2 prohibits members from maintaining "any measures of the kind which have been required to be converted into ordinary customs duties."[267] Footnote 1 to Article 4.2 stipulates that measures maintained under "general, non-agricultural-specific provisions of the GATT 1994" fall outside the scope of Article 4.2. Because Article XI:2(c)(ii) concerns agricultural products, it does not fall under the exclusion of "general, non-agricultural-specific provision[s]."[268]

154. Indonesia argues on appeal that the Panel got it wrong: 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

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[261] U.S. Second Written Submission, para. 198-199.

[262] U.S. Second Written Submission, para. 202-203.

[263] *See* Panel Report, para. 8.1(c).

[264] Indonesia Second Written Submission, paras. 197, 199, 203, 252-257.

[265] Indonesia Second Written Submission, para. 252.

[266] Panel Report, para. 7.60.

[267] Panel Report, para. 7.60.

[268] Panel Report, para. 7.60.

Agriculture. Specifically, Indonesia submits that Article XI:2(c) is a "scope" provision to, not an exception of, Article XI:1 of the GATT 1994.[269] Therefore, "it is not an exception captured by the second element of footnote 1 to Article 4.2 of the Agreement on Agriculture."[270] Instead, "Article XI:2(c) defines the 'quantitative import restrictions' in the first element of footnote 1 to Article 4.2."[271] In other words, Indonesia asserts a measure maintained pursuant to Article XI:2(c) is not a restriction on importation within the meaning of Article XI:1, and is also not a "quantitative import restriction" inconsistent with the obligation of Article 4.2.

155. As a preliminary matter, the United States submits in section A that the Appellate Body does not need to reach a finding on this issue because Indonesia had failed to address all the constitutive parts of Article XI:2(c), and therefore could not have prevailed in asserting this provision even were it available. For completeness, the United States notes in section B that the Panel correctly denied Indonesia's use of Article XI:2(c) to justify its Article XI:1 inconsistent measures. Contrary to Indonesia's claims, the Panel correctly reasoned that Indonesia cannot avail itself to Article XI:2(c) because the obligations of the GATT 1994 apply "subject to" the provisions of the Agreement on Agriculture.

A. The Appellate Body Need Not Make Specific Findings on Article XI:2(c) To Resolve This Dispute

156. As discussed in Section IV.A, the DSU directs that the Appellate Body should refrain from interpreting provisions of the covered agreements where doing so is "unnecessary for the purposes of resolving [the] dispute."[272] 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 even address, much less demonstrate, the conditions required to maintain measures under Article XI:2(c) before the Panel. Thus, whether the Appellate Body reverses or upholds the Panel's finding on the interpretive issue, Indonesia cannot in this appeal obtain findings that Article XI:2(c) applies. Therefore, this appeal cannot change Indonesia's obligations regarding compliance.[273]

157. If Article XI:2(c)(ii) had been available and Indonesia had sought to make out the elements necessary under that provision, Indonesia would have had to, *inter alia*: (1) identify the government measure which operated to remove the temporary surplus of like domestic product; (2) demonstrate that the surplus were available to consumers for free or at a discount; and (3) show that Indonesia provided public notice of the total quantity or value of the products permitted to be imported during a specified time and of any change in such quantity or value. As

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[269] Indonesia Second Written Submission, para. 116.

[270] Indonesia's Appellant Submission, para. 120.

[271] Indonesia's Appellant Submission, para. 120.

[272] *US – Upland Cotton (AB)*, paras. 510-511, 747; *see also India – Solar Cells (AB)*, paras. 5.156-5.163.

[273] *US – Upland Cotton (AB)*, para. 510.

appellees explained before the Panel,[274] Indonesia did not even address any of these conditions.[275]

158. Indonesia should not benefit on appeal from a claim that it had wholly failed to develop during the Panel proceedings. Indonesia failed even to attempt to establish the *prima facie* case that its measures are maintained under Article XI:2(c)(ii). Thus, the Appellate Body should decline to make findings on the interpretive issue raised by Indonesia because Indonesia cannot in this appeal obtain findings that Article XI:2(c) applies. Resolving this claim of error is not necessary to resolve this dispute as this claim of error would not change the scope of the DSB's recommendations to Indonesia to bring its measures into conformity with the obligations of Article XI:1.

B. The Panel Correctly Rejected Indonesia's Assertion of Article XI:2(c)

159. The Appellate Body need not reach Indonesia's arguments on this claim of error. For completeness, however, 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.

160. The measures maintained under Article XI:2(c)(ii) include import restrictions on agricultural or fisheries products that would otherwise be inconsistent with the prohibition of Article XI:1. Article 4.2 of the Agreement on Agriculture, however, prohibits Members from maintaining quantitative import restrictions and similar border measures altogether. As the provisions of the GATT 1994 apply "subject to" the provisions of the Agreement on Agriculture pursuant to Article 21.1, the exclusion in the GATT 1994 of certain measures from the obligation in Article XI:1 could not create an implicit limitation on the scope of a provision of the Agreement on Agriculture covering similar matters. Rather, these obligations would apply cumulatively.

161. Furthermore, footnote 1 to Article 4.2 provides that Article 4.2 does not extend to measures maintained under "general, *non-agriculture-specific* provisions of the GATT 1994." Because Article XI:2(c)(ii) applies only to "agricultural and fisheries products," Indonesia's measures, which it argues fall under XI:2(c)(ii), are not maintained under a "general, non-agriculture-specific provision." Therefore, Indonesia cannot seek to justify restrictions not consistent with Article 4.2 under Article XI:2(c)(ii) because (1) Indonesia's import measures fall within the scope of Article 4.2 of the Agreement on Agriculture and (2) pursuant to Article 21 of the Agreement on Agriculture, the provisions of GATT 1994 apply "subject to" the provisions of the Agreement on Agriculture.

162. The Panel's finding also finds support in the interpretation adopted in *EC – Bananas III (US) (Panel)*. In that dispute, the panel recognized that "Article 4.2 of the Agreement on Agriculture prohibits the use of certain measures that might otherwise be authorized by Article

[274] U.S. response to Panel question 114, paras. 110-113.

[275] Indonesia's Second Written Submission, paras. 197, 199, 203, 252-257.

XI:2 of GATT."[276] The panel considered Article 4.2 as a substantive provision in that it prohibits the use of certain nontariff barriers, subject to certain qualifications.[277] As a substantive provision, it prevails over GATT provisions such as Article XI:2(c).[278]

163. Thus, 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 THAT NONE OF THE CHALLENGED MEASURES IS JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

164. Indonesia argues that the Panel's findings under Article XX concerning Measures 9 through 17 should be reversed on the grounds that the Panel did not first examine those measures under the Article XX subparagraphs Indonesia invoked.[279] For the reasons discussion this section, the Panel should reject Indonesia's claim.

165. This section proceeds in three parts. Section A explains that, as a preliminary matter, Indonesia's appeal of the Panel's Article XX findings is moot, as Indonesia has not requested that the Appellate Body complete the analysis to find that any of the challenged measures is, in fact, justified under Article XX. Although the Appellate Body's analysis may end there, for completeness, the United States notes in the following sections that the Panel correctly analyzed each of the challenged measures in light of each of the Article XX defenses raised by Indonesia. Specifically, section B explains the legal standard of Article XX, as relevant to this dispute, and section C explains that Indonesia has failed to show that the Panel's analysis under Article XX of Measures 9 through 17 reflects a substantive legal error affecting the Panel's conclusions. There is, thus, no basis for reversing the Panel's finding that none of the challenged measures is justified under Article XX of the GATT 1994.

A. Indonesia's Appeal Concerning the Panel's Article XX Findings Is Moot

166. As a preliminary matter, it is not necessary for the Appellate Body to consider Indonesia's appeal concerning the Panel's findings under Article XX of the GATT 1994.

167. A responding Member bears the burden of demonstrating that a measure found

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[276] *EC – Bananas III (US) (Panel)*, para. 7.122. The Appellate Body reasoned that, in order to establish priority for rules of Agreement on Agriculture, Article 21.1 of the Agreement specifies that provisions of GATT 1994 and other Multilateral Agreements "shall apply subject to the provisions of this Agreement[,]" but there must be a provision of the Agreement on Agriculture that is relevant in order for this priority provision to apply.

[277] *EC – Bananas III (US) (Panel)*, para. 7.124.

[278] *EC – Bananas III (US) (Panel)*, para. 7.124.

[279] *See* Indonesia's Appellant Submission, para. 150.

inconsistent with a provision of the GATT 1994 is justified under Article XX.[280] Thus, in this dispute, Indonesia bore the burden of demonstrating that any of the challenged measures found inconsistent with Article XI:1 was nevertheless not inconsistent with Indonesia's obligations under the GATT 1994 because it was justified under Article XX.[281] The Panel found that Indonesia did not discharge that burden with respect to any of the challenged measures.[282]

168. On appeal, although Indonesia argues that certain of the Panel's findings under Article XX reflect legal error and should be reversed, Indonesia does *not* request that the Appellate Body complete the analysis and find that the Article XX defense is made out with respect to *any* of the challenged measures.[283] Indeed, Indonesia states explicitly that it considers that the Appellate Body could not complete the analysis of its affirmative defenses because sufficient undisputed facts do not exist on the record for it to do so.[284] Indonesia thus effectively concedes that it did make the case to justify any of the challenged measures, including Measures 9 through 17, under Article XX of the GATT 1994.

169. Therefore, Indonesia's appeal could result in no change to the DSB recommendations and rulings, or Indonesia's obligations regarding implementation, because the findings under Article XI:1 will remain undisturbed. In that circumstance, it is not necessary for the Appellate Body to consider this appeal for purposes of assisting the DSB in making the recommendations to secure a positive solution to the dispute.[285]

170. The Appellate Body's analysis may, therefore, end here, this leaving in place any findings of breach under Article XI:1 of the GATT 1994. For completeness, we nonetheless continue our analysis to address the substance of the Panel's findings under Article XX below.

B. The Legal Standard of Article XX of the GATT 1994

171. As relevant to this dispute, Article XX of the GATT 1994 provides:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
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> (a) necessary to protect public morals;

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[280] *EC – Seal Products (AB)*, para. 5.302; *US – Shrimp (AB)*, para. 160.

[281] Panel Report, para. 7.805 (citing *EC – Seal Products (AB)*, para. 5.302; *US – Shrimp (AB)*, para. 160).

[282] *See* Panel Report, para. 8.1(c).

[283] *See* Indonesia's Appellant Submission, para. 161.

[284] *See* Indonesia's Appellant Submission, para. 161.

[285] DSU, Articles 3.4, 3.7, 7.1, 11, 12.7, 17.6, 19.1; *see US – Upland Cotton (AB)*, para. 510.

> (b) necessary to protect human, animal, or plant life or health; . . . [or]
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement. . . .

172. Thus, Article XX sets out the circumstances in which measures that have been found to be inconsistent with another provision of the GATT 1994 will nevertheless be justified and therefore not be found inconsistent with a Member's WTO obligations. There are two components of a successful Article XX defense, namely that the challenged measure is: (1) provisionally justified under one of the Article XX subparagraphs, and (2) applied consistently with the requirements of the chapeau.[286] The burden of demonstrating both elements rests with the responding Member.[287]

173. With respect to provisional justification, each of the subparagraphs at issue incorporates two elements: (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.[288] As to the first element, a panel should make an objective determination of the objective(s) of a measure based on the evidence before it, including the "texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure at issue."[289] As to the "necessary" standard, a responding member must show that the measure makes a real and sufficient contribution to its legitimate objective.[290] Panels should also balance the "trade-restrictiveness of the measure" against is contribution to its covered objective.[291] Further, a panel may also consider any less trade-restrictive alternative measures proposed by the complaining Member.[292]

174. The chapeau of Article XX similarly incorporates multiple analytical elements, namely whether the application of the measure "results in discrimination" that occurs "between countries where the same conditions prevail" and whether "the discrimination is arbitrary and unjustifiable."[293] As the Appellate Body has found, assessing discrimination under the chapeau

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[286] *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.

[287] *See* Panel Report, para. 7.805 (citing *EC – Seal Products (AB)*, para. 5.302; *US – Shrimp (AB)*, para. 160.

[288] *EC – Seal Products (AB)*, para. 5.169; *Brazil – Retreaded Tyres (AB)*, paras. 144-145; *Korea – Beef (AB)*, para. 157.

[289] *EC – Seal Products (AB)*, para. 5.144.

[290] *See Korea – Various Measures on Beef (AB)*, para. 161 (finding that a "necessary" measure is "significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to' [its objective]"); *Brazil – Retreaded Tyres (AB)*, para. 141.

[291] *EC – Seal Products (AB)*, para. 5.169; *Korea – Various Measures on Beef (AB)*, para. 163.

[292] *Brazil – Retreaded Tyres (AB)*, para. 156.

[293] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.301; *EC – Seal Products (AB)*, paras. 5.299, 5.303; *US – Shrimp (AB)*, para. 150; Panel Report, para. 7.566. These elements have been presented in a somewhat different order in past Appellate Body reports, but the Appellate Body has made it clear that the substantive analysis

necessitates an assessment of whether a measure "results in discrimination" between countries where the "conditions" are relevantly "the same."[294] The "conditions" relevant to this analysis are those that relate "to the particular policy objective under the applicable subparagraph."[295] Thus, discrimination results "when countries in which the same conditions prevail are differently treated."[296] If a responding Member "considers that the conditions prevailing in different countries are not 'the same' in relevant respects, it bears the burden of proving that claim."[297]

175. With respect to the third element, the assessment of whether discrimination is "arbitrary or unjustifiable" should "focus on the cause of the discrimination or the rationale put forward to explain its existence.'"[298] One of the "most important factors" in this regard is "whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX."[299] In particular, the Appellate Body has found that it had "difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against" the objective of the measure covered by the Article XX subparagraph.[300]

176. Additionally, a measure that constitutes a "disguised restriction on trade" is inconsistent with the chapeau of Article XX.[301]

C. The Panel's Analysis and Conclusions Do Not Reflect Legal Error

177. In examining Indonesia's defenses under Article XX, the Panel recognized that "the assessment of a claim of justification under Article XX involves a two-tiered analysis in which a measure must be "provisionally justified under one of the subparagraphs of Article XX" and "applied in a manner consistent with the chapeau."[302] The Panel conducted twelve analyses of Measures 1 through 8, covering all three of the subparagraphs under which Indonesia asserted defenses.[303] The Panel then conducted a chapeau analysis that addressed all of Indonesia's

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they described is consistent. *See EC – Seal Products (AB)*, paras. 5.299, 5.303, 5.306; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.301 (citing *US – Shrimp (AB)*, para. 150).

[294] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.301; *EC – Seal Products (AB)*, para. 5.299.

[295] *EC – Seal Products (AB)*, para. 5.300; *see id.* para. 5.299 ("The question is thus whether the conditions prevailing in different countries are *relevantly* 'the same'").

[296] *EC – Seal Products (AB)*, para. 5.303; *US – Shrimp (AB)*, para. 165.

[297] *EC – Seal Products (AB)*, para. 5.301.

[298] *EC – Seal Products (AB)*, para. 5.303; *Brazil – Retreaded Tyres (AB)*, para. 226.

[299] *EC – Seal Products (AB)*, para. 5.306; *US – Shrimp (AB)*, para. 165

[300] *EC – Seal Products (AB)*, para. 5.306.

[301] *See US – Gasoline (AB)*, p. 25.

[302] Panel Report, para. 7.561.

[303] *See* Panel Report, paras. 7.521-804.

Article XX defenses with respect to each of the challenged measures.[304] In this analysis, the Panel found that Indonesia had not shown that any of the challenged measures did not result in arbitrary and unjustifiable discrimination between countries where the same conditions prevail, in light of the covered objective(s) Indonesia asserted for each measure.[305] The Panel, therefore, found that each of the challenged measures was not justified under Article XX.[306]

178. Indonesia argues that the Panel's findings under Article XX concerning Measures 9 through 17 should be reversed on the grounds that the Panel did not first examine those measures under the subparagraphs Indonesia invoked.[307] In fact, however, the Panel's analysis of those measures under the chapeau of Article XX without having analyzed the subparagraphs first is not *per se* reversible legal error. Rather, the issue is whether the interpretive approach or order has substantively affected the legal analysis. The Panel's findings should be reversed only if its analysis was substantively incorrect. In the circumstances of this dispute, the Panel's analysis reflected the correct application of the chapeau of Article XX to the measures at issue. There is thus no basis for reversing the Panel's findings under Article XX of the GATT 1994.

179. At the outset, it is important to recall that, as discussed in Section II.B.1 above, panels are, in general, "free to structure the order of their analysis as they see fit," provided that the sequence of analysis does not prevent a panel from properly interpreting "the substantive provisions at issue."[308] Thus, multiple sequences of analysis may be acceptable, provided the "appropriate meaning of [the] provisions can be established and can be given effect."[309] While there may be reasons in logic or prudence that counsel approaching one aspect of a legal analysis first, with respect to a particular analysis, an asserted error in the panel's sequence is grounds for reversal, in itself, only if it caused a panel's conclusion to be substantively wrong.

180. In this regard, nothing in the text of Article XX suggests that it is not possible to conduct an appropriate legal analysis of the provision beginning with the chapeau. The chapeau and the subparagraphs are two independent but related requirements, both of which must be satisfied for a measure to be found justified under Article XX.[310] The phrase "subject to," in the Article XX chapeau does not suggest that it is required to conduct that analysis after analyzing the subparagraphs.[311]

181. Indonesia cites the Appellate Body report in *US – Shrimp* to the contrary, but

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[304] *See* Panel Report, paras. 7.805-826.

[305] *See* Panel Report, paras. 7.812-826.

[306] Panel Report, paras. 7.829-830.

[307] *See* Indonesia's Appellant Submission, paras. 150-152.

[308] *Canada – Wheat Exports and Grain Imports (AB)*, para. 127; *see supra* sec. II.B.1.a.

[309] *US – FSC (AB)*, para. 89.

[310] *See US – Gasoline (AB)*, p. 22.

[311] We note that Indonesia makes the opposite argument in connection with Article 21.1 of the Agreement on Agriculture, which also uses the phrase "subject to." *See supra* sec. II.B.1.c.

misunderstands that report.[312] Read together with the panel report, the Appellate Body report does not suggest that it is impossible to conduct a correct Article XX analysis beginning with the chapeau. In particular, the panel in that dispute did not engage in *any* assessment at all of whether the measure resulted in discrimination under the chapeau in light of the Article XX subparagraphs the responding Member had raised.[313] The panel also failed to consider the relationship between the "discrimination" caused by the measure and the two covered objectives the responding Member argued the measure served. Instead, the panel found that the challenged measure fell within a category of measures – those "conditioning access to [a Member's] market for a given product upon the adoption by the exporting Members of certain policies" – that could *never* be justified under Article XX.[314]

182. The Appellate Body found that the panel had erred in formulating a standard that had "no basis either in the text of the chapeau or in that of either of the two specific exceptions claimed by the United States."[315] The Appellate Body explained that, when applied in a particular dispute, "the actual contours and contents of [the chapeau] standards will vary as the kind of measure under examination varies."[316] What is arbitrary or unjustifiable discrimination "in respect of one category of measures, need not be so with respect to another group or type of measures."[317] Therefore, the Article XX subparagraph under which a measure is claimed to be justified is substantively relevant to the chapeau analysis, and consequently, "[t]he task of interpreting the chapeau . . . is rendered very difficult, if indeed it remains possible at all, where the interpreter . . . has not first *identified and examined the specific exception* threatened with abuse."[318] The Appellate Body did not find, however, that analyzing the chapeau before a subparagraph is legal error that requires reversal.

183. Subsequent Appellate Body reports confirm that the relevant Article XX subparagraph, and the asserted policy objective of the measure covered by that subparagraph, are relevant to the chapeau analysis in two ways. First, a measure's "particular policy objective" under the relevant Article XX subparagraph provides "pertinent context" for determining the "conditions" that are relevant to assessing whether a measure discriminates, for purposes of the chapeau.[319] Second, a factor in assessing whether discrimination under the chapeau is "arbitrary and unjustifiable" is whether it "can be reconciled with, or is rationally related to, the policy objective" of the

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[312] *See* Indonesia's Appellant Submission, paras. 152-154.

[313] *See US – Shrimp (Panel)*, paras. 7..33-61.

[314] *US – Shrimp (Panel)*, para. 7.45.

[315] *US – Shrimp (AB)*, para. 121.

[316] *US – Shrimp (AB)*, para. 120.

[317] *US – Shrimp (AB)*, para. 120.

[318] *See US – Shrimp (AB)*, para. 120 (emphasis added).

[319] *EC – Seal Products (AB)*, paras. 5.299-300 (citing *US – Shrimp (AB)*, para. 120); *see US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.306-308 (citing *EC – Seal Products (AB)*, para. 5.300).

measure covered by the applicable Article XX subparagraph.[320]

184. The Panel here took a very different approach from the panel in *US – Shrimp* and, indeed, took into account the objective with respect to which Indonesia claimed each measure was justified in the manner set out by the Appellate Body in these previous disputes.

185. As a preliminary matter, to understand the context of the Panel's chapeau analysis, it is important to recall that this dispute involved fifteen separate aspects of Indonesia's import licensing regimes, as well as the regimes as a whole and the framework legislation. These measures operate separately, but are also interrelated, both legally and in practice. Indeed, several of the measures at issue are substantively identical, with the only difference being the products covered.[321] Additionally, for many of the measures, Indonesia raised identical or highly related Article XX defenses.[322] By the time the Panel reached the chapeau stage of its analysis, it had already determined that eight of the challenged measures were not justified under Article XX and had analyzed all of the Article XX subparagraphs (specifically, subparagraphs (a), (b), and (d)) under which Indonesia had advanced defenses.[323]

186. In this context, the Panel analyzed, with respect to each of the challenged measures and each of Indonesia's Article XX defenses whether: (1) the measure discriminated, within the meaning of the chapeau, for purposes of the Article XX defenses raised by Indonesia; and (2) the discrimination found to exist was "arbitrary and unjustifiable," in light of the policy objective(s) Indonesia claimed the measures pursued. Thus, the Panel "identified and examined the specific exception threatened with abuse" in each instance and took into account the two ways in which the Appellate Body previously found the subparagraph objectives are relevant to the chapeau analysis. In the circumstances of this dispute, therefore, the Panel's chapeau analysis was legally correct with respect to measures for which Indonesia advanced defenses under subparagraphs (a), (b), and (d) of Article XX.[324]

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[320] *EC – Seal Products (AB)*, para. 5.306 (citing *US – Shrimp (AB)*, para. 165); *see US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.316.

[321] *See* Panel Report, paras. 2.33-34, 2.52-53 (describing Measures 1 and 11, the limited application windows and validity periods); *id.* paras. 2.35-36, 2.54-55 (describing Measures 2 and 12, the fixed license term requirements); *id.* paras. 2.37-38, 2.56-57 (describing Measures 3 and 13, the 80% realization requirements); *id.* paras. 2.45-47, 2.62-63 (describing measures 7 and 16, the reference price requirements).

[322] With respect to Indonesia's Article XX(a) defenses, see Panel Report, paras. 7.637, 7.694, 7.819; *see also* Indonesia's Second Written Submission, paras. 91-103, 207-216. With respect to Indonesia's Article XX(b) defenses, see Panel Report, paras. 7.573-585, 7.594-595; *see also* Indonesia's Second Written Submission, paras. 109-123, 224-249. With respect to Indonesia's Article XX(d) defenses, see Panel Report, paras. 7.807, 7.814; *see also* Indonesia's Second Written Submission, paras. 112-124, 207, 217-240.

[323] Panel Report, paras. 7.521-804

[324] The Appellate Body in *Canada – Wheat Exports and Grain Imports* considered an analogous situation. Specifically, it considered the panel's decision to rely on assumptions and to analyze subparagraph (b) of Article XVII of the GATT 1994 before subparagraph (a). *Canada – Wheat Exports and Grain Imports (AB)*, paras. 113-114. The panel had "interpreted some elements of subparagraph (a)" and "identified the differential treatment alleged to constitute discrimination inconsistent with subparagraph (a)" but then proceeded to analyze claims under

1. The Panel Correctly Analyzed the Chapeau with Respect to Indonesia's Article XX(a) Defenses

187. With respect to Indonesia's defenses under Article XX(a), the Panel first considered whether the measures for which Indonesia had asserted defenses discriminated for purposes of the chapeau, in light of the objective Indonesia asserted the measures pursued. In this regard, the Panel noted that Indonesia identified the same public moral for all of the measures with respect to which it had asserted an Article XX(a) defense,[325] namely, the protection of halal.[326] As the Panel found, Indonesia's argument concerning Article XX(a) was that "there is no discrimination between imported or domestic products as domestic products are also required to have a halal label."[327] Indonesia did not argue that the "conditions" relevant to the protection of halal were different between Indonesia and exporting countries for any of the relevant measures.[328] Thus, Indonesia's entire argument was that the measures did not discriminate because both domestic products and imports are required to have a halal label.

188. The Panel found that Indonesia's argument did not address "discrimination in the sense of the chapeau of Article XX," because "compliance with Halal labelling or other requirements is not at issue in this dispute."[329] The Panel further found that the measures apply to imported products and "are not equally applicable to domestic products" and that they "affect the competitive opportunities of importers and imported goods."[330] Further, Indonesia had presented no evidence that substantively "similar or equivalent measures" were imposed on domestic products.[331] Thus, as the Panel found, the measures treated imported and domestic products differently, and Indonesia's argument did not suggest that this difference was not discrimination

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subparagraph (b). *Id.* para. 117. The Appellate Body expressed "concern about the manner in which the Panel conducted its analysis" and noted that "panels that ignore or jump over a prior logical step of the analysis run the risk of compromising or invalidating later findings," particularly in the case of "two legally interrelated provisions, where one of those provisions must, as a matter of logic and analytical coherence, be analyzed before the other, as was the case with subparagraphs (a) and (b) of Article XVII:1." *Id.* paras. 126-127. Nevertheless, the Appellate Body found that, in the "particular circumstances" of the dispute, the panel had not committed legal error because its analysis was substantively correct and it had "ensured that its inquiry under subparagraph (b) remained within the appropriate context." *Id.* 122, 124-125.

[325] The measures with respect to which Indonesia asserted an Article XX(a) defense were Measure 5 (storage ownership and capacity requirements), Measure 6 (use, sale and distribution requirements for horticultural products), Measure 9 (import licensing regime for horticultural products as a whole), Measure 14 (use, sale and distribution of imported bovine meat and offal requirements), and Measure 17 (import licensing regime for animals and animal products *as a whole*). *See* Panel Report, paras. 7.519, 7.819.

[326] Panel Report, para. 7.807; *see id.* paras. 7.637, 7.694, 7.819; *see also* Indonesia's Second Written Submission, paras. 91-103, 207-216.

[327] *See* Panel Report, paras. 7.807, 7.812.

[328] Panel Report, para. 7.825.

[329] Panel Report, para. 7.812.

[330] Panel Report, para. 7.813.

[331] Panel Report, para. 7.813.

under the chapeau.[332] Consequently, the Panel found that all of the challenged measures for which Indonesia had asserted an Article XX(a) did so discriminate.[333]

189. Subsequently, the Panel considered whether the discrimination arising from these measures "can be reconciled with, or is rationally related to, protecting the public moral of Halal (under Article XX(a))."[334] The Panel found that Indonesia had not "explain[ed] how the discrimination arising from these measures can be reconciled with, or is rationally related to, protecting the public moral of Halal."[335] Specifically, the Panel explained that based on the evidence, "relevant imported goods can only come into Indonesia if accompanied by the necessary Halal certifications."[336] Given that halal protection thus "is already ensured through a different set of regulations," the Panel "[could] find no rational connection between" any of the challenged measures with respect to which Indonesia asserted and Article XX(a) defense "and the protection of public morals."[337]

190. Indonesia has argued that the Panel's failure to see any connection between the discrimination caused by the challenged measures and the protection of public morals, specifically halal, stemmed from the Panel's failure to "examine the objectives" that the measures in question allegedly pursued.[338] However, that argument is incorrect. The Panel did examine the objective Indonesia asserted that Measures 5, 6, 9, 14, and 17 pursued, namely the protection of halal.[339] It was simply that, based on that examination, the Panel found that Indonesia had advanced no explanation for the discrimination caused by the amended measures that had "any rational connection" to the protection of halal.[340] (Indeed, as described above, Indonesia simply asserted that they did not discriminate.)

191. Thus, consistent with the Appellate Body's guidance in previous disputes, the Panel analyzed whether each of the challenged measures gave rise to discrimination between countries where the same conditions prevailed, looking to the relevant objective with respect to which

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[332] Panel Report, para. 7.812.

[333] Panel Report, para. 7.813 (making this finding with respect to each of the measures for which Indonesia had asserted and Article XX(a) defense, namely Measures 5, 6, 9, 14, and 17).

[334] Panel Report, para. 7.818.

[335] Panel Report, para. 7.819.

[336] Panel Report, para. 7.819.

[337] Panel Report, para. 7.819.

[338] Indonesia's Appellant Submission, para. 153.

[339] Panel Report, paras. 7.813, 7.819.

[340] Panel Report, para. 7.819; *see also* Indonesia's Second Written Submission, paras. 150-154 (setting out Indonesia's argument that its import licensing regimes are applied consistently with the Article XX chapeau and arguing, as to halal, only that "there is no discrimination between imported or domestic products as domestic products are also required to have a Halal label"); *id.* para. 249 (arguing, with respect to the individual elements of Indonesia's import licensing regime under the chapeau of Article XX, only that "for halal assurance . . . concerns Indonesia applies these requirements on a non-discriminatory basis").

Indonesia asserted each measure was justified.[341] Having found that the challenged measures did give rise to discrimination, the Panel, again consistent with the Appellate Body's guidance, analyzed whether the discrimination caused by each of the challenged measures with respect to which Indonesia had asserted an Article XX(a) defense was arbitrary or unjustifiable, in light of the objective with respect to which Indonesia asserted each measure was justified. The Panel also found that this was the case.[342]

192. Therefore, the order of the Panel's analysis led to no error that rendered infirm its conclusion under the chapeau and its ultimate finding that Indonesia had not made out any of the Article XX defenses it asserted.

2. The Panel Correctly Analyzed the Chapeau with Respect to Indonesia's Article XX(b) Defenses

193. The Panel then considered whether the measures for which Indonesia had asserted Article XX(b) defenses discriminated under the chapeau, in light of the objective that Indonesia asserted they pursued. As with Article XX(a), Indonesia asserted that all the measures[343] with respect to which it put forward and Article XX(b) defense pursued the same objective, *i.e.*, the protection of human health.[344] In its argumentation concerning the chapeau, Indonesia simply argued that the distinctions between imported and domestic products were "not in any way more onerous than necessary" and referred, in particular, to a quarantine regulation that Indonesia asserted applied to imports and domestic products.[345] Indonesia again did not put forward any arguments that the relevant conditions were different between exporting countries and Indonesia with respect to any of the challenged measures.[346] Thus, Indonesia's whole defense under the chapeau was that the challenged measures did not discriminate because distinctions were not more onerous than necessary, in particular as related to quarantine requirements.

194. The Panel found that Indonesia's argument did not suggest that the measures at issue did not discriminate for purposes of the chapeau, in particular because "none of the measures at issue

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[341] *See EC – Seal Products (AB)*, para. 5.300.

[342] *See EC – Seal Products (AB)*, para. 5.306; *US – Shrimp (AB)*, para. 165.

[343] The measures with respect to which Indonesia asserted an Article XX(b) defense were: Measure 4 (harvest period requirement), Measure 5 (storage ownership and capacity requirements), Measure 6 (use, sale and distribution requirements for horticultural products), Measure 7 (reference prices for chilli and fresh shallots for consumption), Measure 8 (six-month harvest requirement), Measure 9 (import licensing regime for horticultural products as a whole), Measure 10 (prohibition of importation of certain beef and offal products, except in emergency circumstances), Measure 14 (use, sale and distribution of imported bovine meat and offal requirements), Measure 15 (domestic purchase requirement for beef), Measure 16 (beef reference price), and Measure 17 (import licensing regime for animals and animal products as a whole). *See* Panel Report, paras. 7.519, 7.820.

[344] *See* Panel Report, paras. 7.807, 7.814; *see also* Indonesia's Second Written Submission, paras. 112-124, 207, 217-240.

[345] Panel Report, paras. 7.807, 7.814; *see also* Indonesia's Second Written Submission, para. 150.

[346] Panel Report, paras. 7.814, 7.825.

relates to quarantine of imports."[347] The Panel recalled that it had found that each of the measures with respect to which Indonesia asserted an Article XX(b) defense "affect[ed] the competitive relationship between imported and local products" and noted that Indonesia had not shown that similar restrictive requirements applied to domestic products.[348] Thus, as the measures at issue negatively affected imports vis-à-vis domestic products, and as Indonesia had not submitted any evidence or argumentation suggesting this different treatment was not discrimination under the chapeau, the Panel found that the measures did discriminate.[349]

195. The Panel later considered whether the discrimination arising from the measures with respect to which Indonesia asserted Article XX(b) defenses "can be reconciled with, or is rationally related to . . . ensuring food safety (under Article XX(b))."[350] The Panel found that Indonesia had not explained how the discrimination arising from any of the measures with respect to which Indonesia had asserted a defense "can be reconciled with, or is rationally related to, protecting human, animal or plant life or health."[351] Specifically, Indonesia had advanced only one argument addressing the "distinctions which exist between imported and domestic products" under such measures, arguing that "the regulation concerning quarantine of animal and plant products applies to imports, exports, as well as domestic transportation."[352] This argument did not explain the discrimination, however, as "none of the measures at issue relates to quarantine of imports."[353]

196. Consequently, the Panel found that the discrimination between imports and domestic products imposed by all the measures with respect to which Indonesia had asserted an Article XX(b) defense bore "no relationship to the protection of human life or health and Indonesia does not suggest one."[354] Further, as the Panel findings also establish, none of Indonesia's arguments concerning any of the challenged measures addressed the different treatment accorded all

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[347] Panel Report, para. 7.814.

[348] Panel Report, para. 7.814.

[349] Panel Report, para. 7.814 (making this finding with respect to each of the measures for which Indonesia had asserted and Article XX(b) defense, namely Measures 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, and 17).

[350] Panel Report, paras. 7.818, 7.820.

[351] Panel Report, para. 7.820.

[352] Panel Report, para. 7.820 (citing Indonesia's Second Written Submission, para. 150); Indonesia's Second Written Submission, paras. 150-154 (setting out Indonesia's argument that its import licensing regimes are applied consistently with the Article XX chapeau and arguing, with respect to the objective covered by subparagraph (b), only that the "distinctions which exist between imported and domestic products are not in any way more onerous than necessary" and giving the example of "the regulation concerning quarantine of animal and plant products appl[ying] to all imports, exports, as well as domestic transportation"); *see also id.* paras. 248-249 (setting out Indonesia's chapeau arguments with respect to the individual elements of its import licensing regimes and not mentioning the objectives covered by Article XX(b)).

[353] Panel Report, para. 7.820.

[354] Panel Report, para. 7.820.

imported products, on the one hand, and all domestic products, on the other.[355] Thus, Indonesia put forward no rationale for the discrimination caused by the challenged measures that related to their asserted objective of protecting human health.

197. As with the subparagraph (a) defenses, therefore, the Panel's analysis under the chapeau of the measures with respect to which Indonesia asserted Article XX(b) defenses was correct, and the particular order of analysis followed did not lead to any legal error in the Panel's legal conclusion under the chapeau or, as a result, to the finding that Indonesia's Article XX defenses had not be made out.

3. The Panel Correctly Analyzed the Chapeau with Respect to Indonesia's Article XX(d) Defenses

198. Finally, the Panel considered whether the measures for which Indonesia had asserted Article XX(d) defenses discriminated under the chapeau, in light of the objective that Indonesia asserted they pursued. The Panel noted that Indonesia put forward the same defense with respect to all the measures[356] for which it invoked Article XX(d), namely that the measures were

[355] *See* Panel Report, paras. 7.607-608, 7.627 (showing that, even aside from whether Indonesia substantiated its arguments regarding the health risks of oversupply, Indonesia's arguments concerning Measure 4 put forward no reason why such asserted risks would differ for imported and domestic horticultural products); *id.* paras. 7.662, 7.674 (showing that with respect to Measure 5, even aside from whether Indonesia substantiated its assertion concerning the "heightened risk of spoilage" in Indonesia, Indonesia did not acknowledge or give a rationale for the distinction between imported and domestic products drawn by the storage owner ship and capacity requirements); *id.* paras. 7.722-723, 7.734 (showing that Indonesia submitted no evidence or argumentation concerning any human health rationale for the distinction drawn by Measure 6 between the uses for which imported and domestic horticultural products are permitted to be sold); *id.* paras. 7.752-753 (summarizing Indonesia's arguments concerning the "reference price system," Measures 7 and 16 – Indonesia presented the integrated or identical arguments for both reference prices – and showing that Indonesia did not give any reason for distinguishing imported from domestic products); *id.* paras. 7.778-779 (showing that Indonesia's only asserted justification for the 6-month harvest requirement imposed by Measure 8 only on imported products was that "it is not difficult to understand why [Indonesia's] health authorities would prefer such produce to be stored locally"); 7.293-294 (showing that, even aside from whether Indonesia has substantiated its assertions, Indonesia's defense of Measure 10 did not address at all many of the products covered by the ban (and thus did not distinguish them from domestic products) and that Indonesia had acknowledged that some products are banned for non-health reasons, *i.e.*, because, as Indonesia asserted, without support, "there is no demand for such products in Indonesia"); *id.* paras. 7.388, 7.392, 7.723 (showing that, even aside from whether Indonesia has substantiated its assertions, Indonesia's defense of Measure 14 did not address the prohibition on importation of animals for certain purposes or the prohibition in the importation of Appendix I animal products "for sale in modern markets" or address non-frozen imported products); *id.* para. 7.413 (showing that Indonesia's assertion regarding Measure 15 did not address at all the distinction drawn by the measure between imported and domestic products and finding that the measure is "designed to force the substitution of imports").

[356] The measures with respect to which Indonesia asserted Article XX(d) defenses were: Measures 1 and 11 (limited application windows and validity periods), Measures 2 and 12 (periodic and fixed import terms), Measures 3 and 13 (80% realization requirement), Measure 5 (storage ownership and capacity requirements), Measure 6 (use, sale and distribution requirements for horticultural products), Measure 9 (import licensing regime for horticultural products as a whole), and Measure 17 (import licensing regime for animals and animal products as a whole). *See* Panel Report, paras. 7.519, 7.821.

necessary to secure compliance with customs enforcement.[357] The Panel found that Indonesia's argument under the chapeau, with respect to this defense, was that the measures did not discriminate between domestic and imported products because "the import licensing regime is applied invariably between all importing countries."[358] Indonesia had not advanced any argument as to why different conditions applied between exporting countries and Indonesia.[359]

199. The Panel found that Indonesia's argument did not address the "discrimination against imported products vis-à-vis domestic products" caused by each of the measures with respect to which Indonesia had asserted an Article XX(d) defense.[360] Further, Indonesia had not shown that similar substantive requirements were imposed on domestic actors.[361] Therefore, in the absence of argumentation addressing the adverse effect on the competitive opportunities of imports caused by the challenged measures with respect to which Indonesia raised Article XX(d) defenses, the Panel found that all such measures discriminated under the chapeau.[362]

200. The Panel later analyzed whether the discrimination arising from these measures "can be reconciled with, or is rationally related to . . . securing compliance with customs enforcement (under Article XX(d))."[363] As regards customs enforcement, the Panel had already found that Indonesia had simply argued that no discrimination existed because import licensing regimes always apply only to imports.[364] Thus, Indonesia had put forward no justification for the substantive requirements with respect to which Indonesia asserted Article XX(d) defenses.[365] In particular, the Panel noted that "enforcing customs can be achieved irrespective of" the measures at issue.[366] Thus, the Panel could not find "any rational connection" between the measures at issue and "enforcing customs."[367]

201. The Panel's analysis under the chapeau of Indonesia's Article XX(d) defenses was, therefore, correct. The order of analysis led to no error in its legal conclusion under the chapeau, and, therefore, the Panel did not err in finding that the Article XX defenses were not made out.

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[357] *See* Panel Report, paras. 7.573-585, 7.594-595.

[358] Panel Report, para. 7.815.

[359] Panel Report, para. 7.825.

[360] Panel Report, para. 7.815.

[361] Panel Report, para. 7.815.

[362] Panel Report, para. 7.815 (making this finding with respect to each of the measures for which Indonesia had asserted and Article XX(d) defense, namely Measures 1, 2, 3, 5, 6, 9, 11, 12, 13, and 17).

[363] Panel Report, paras. 7.818, 7.820.

[364] Panel Report, para. 7.815.

[365] Panel Report, para. 7.821 ("Indonesia did not explain how the discrimination arising from these measures can be reconciled with, or is rationally related to, securing compliance with its WTO-consistent laws and regulations.").

[366] Panel Report, para. 7.821.

[367] Panel Report, para. 7.821.

4. Conclusion

202. As described in the preceding sections, the Panel appropriately assessed Indonesia's defenses and found that all of the challenged measures discriminated for purposes of the chapeau, and all such discrimination was arbitrary and unjustifiable, in light of the objective Indonesia asserted the measures pursued. Additionally, the Panel agreed with the co-complainants that "the actual policy objective behind all these measures is to achieve self-sufficiency through domestic production by way of restricting and, at time, prohibiting imports."[368] The Panel found that this "rationale for discriminating does not relate to the pursuit of or would go against" the objectives of the subparagraphs of Article XX.[369] Consequently, the Panel found that each of the individual measures at issue, including Indonesia's import licensing regimes overall, are applied inconsistently with the Article XX chapeau, "given the absence of a rational connection between the discrimination and the policy objectives protected under subparagraphs (a), (b) and (d) of Article XX of the GATT 1994."[370]

203. We further note that Indonesia's argument invoking the principle *jura novit curia* also lacks merit.[371] In making this argument, Indonesia asserts that the Panel considered it was legally required to follow the approach Indonesia had taken in presenting its defense under the chapeau and that this was its justification for its approach to Measures 9 through 17.[372] But Indonesia misunderstands the Panel's reasoning. In fact, the point of the Panel's statement was that Indonesia had adduced no evidence or argumentation concerning why any of the challenged measures individually were applied consistently with the Article XX chapeau.[373] This naturally limited the Panel's ability to consider arguments concerning the individual measures being applied consistently with the chapeau.[374] The Panel did not, however, adopt any incorrect legal interpretation advanced by Indonesia. Further, as described above, the Panel did analyze each of the challenged measures under the chapeau in light of each of the Article XX subparagraphs with respect to which Indonesia raised a defense.

204. Contrary to Indonesia's arguments, therefore, the fact that the Panel conducted the

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[368] Panel Report, para. 7.822.

[369] Panel Report, para. 7.823.

[370] Panel Report, para. 7.824.

[371] *See* Indonesia's Appellant Submission, paras. 157-159.

[372] Indonesia's Appellant Submission, para. 158.

[373] *See* Panel Report, para. 7.805, n. 2272 ("Indonesia briefly addressed the compliance of the 'individual elements' of its import licensing regime with the *chapeau* in paragraphs 248 through 251 of its second written submission. Indonesia argued that none of the individual measures results in discrimination because: 'the same legal, technical and administrative requirements are applied on all trading partners' (para. 249); custom enforcement measures understandably do not apply to domestic products as by definition they are border measures; and, as far as halal assurance and food safety are concerned, the requirements are applied on a non-discriminatory basis. As to whether the individual measures concerned constitute disguised restrictions of international trade, Indonesia argued that, in the present case, there is no lack of transparency due to the publication of each requirement and response to applications (para. 249).").

[374] Panel Report, para. 7.805 (citing *EC – Seal Products (AB)*, para. 5.302; *US – Shrimp (AB)*, para. 160).

chapeau analysis without separately analyzing the relevant subparagraph for some of the challenged measures (albeit, as noted, the Panel in each case did make the chapeau analysis in the light of the relevant subparagraph objective invoked by Indonesia) did not render the Article XX analyses overall substantively incorrect. As shown in this section, the Panel nevertheless conducted a substantively correct analysis of the chapeau of Article XX. Thus, in light of the text of Article XX of the GATT 1994, and as found previously by the Appellate Body,[375] the Panel's sequence of analysis was not, in itself, reversible error. There is, therefore, no basis for reversing the Panel's finding that none of the challenged measures is justified under Article XX of the GATT 1994.

VII. CONCLUSION

205. Based on the foregoing, the United States respectfully requests the Appellate Body to reject all of Indonesia's claims on appeal, and uphold the Panel's findings.

[375] *See Canada – Wheat Exports and Grain Imports (AB)*, paras. 113-127; *see also US – FSC (AB)*, para. 89; *Chile – Price Band System (AB)*, para. 189.