

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

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

February 17, 2016

## TABLE OF REPORTS

Short title	Full Citation
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001
<i>Argentina – Import Measures (AB)</i>	Appellate Body Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
<i>Argentina – Import Measures (Panel)</i>	Panel Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R
<i>Brazil – Retreaded Tyres (AB)</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007
<i>Chile – Price Band System (AB)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002
<i>Chile – Price Band System (Panel)</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R
<i>Chile – Price Band System (Article 21.5 – Argentina) (AB)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007
<i>China – Publications and Audiovisual Products (AB)</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010
<i>China – Raw Materials (AB)</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012

<p><i>China – Raw Materials (Panel)</i></p>	<p>Panel Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i>, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R</p>
<p><i>Colombia – Ports of Entry</i></p>	<p>Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i>, WT/DS366/R and Corr.1, adopted 20 May 2009</p>
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<p><i>EC – Bananas III (AB)</i></p>	<p>Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i>, WT/DS27/AB/R, adopted 25 September 1997</p>
<p><i>EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US) (AB)</i></p>	<p>Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i>, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr. 1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i>, WT/DS27/AB/RW/USA and Corr. 1, adopted 22 December 2008</p>
<p><i>EC – Chicken Cuts (AB)</i></p>	<p>Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i>, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1</p>
<p><i>EC – Seal Products (AB)</i></p>	<p>Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i>, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014</p>
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<i>EC – Selected Customs Matters (AB)</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006
<i>Guatemala – Cement I (AB)</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998
<i>India – Autos (Panel)</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002
<i>India – Quantitative Restrictions (Panel)</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R
<i>Japan – Alcoholic Beverages II (AB)</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
<i>Korea – Various Measures on Beef (AB)</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
<i>Korea – Various Measures on Beef (Panel)</i>	Panel Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R
<i>Peru – Agricultural Products (AB)</i>	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R and Add.1, adopted 31 July 2015
<i>Thailand – Cigarettes (Philippines) (AB)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011
<i>Turkey – Rice</i>	Panel Report, <i>Turkey – Measures Affecting the Importation of Rice</i> , WT/DS334/R, adopted 22 October 2007
<i>US – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002

<i>US – Clove Cigarettes (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012
<i>US – COOL (AB)</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
<i>US – Gambling (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010

**TABLE OF U.S. EXHIBITS**

<b>Exh. No.</b>	<b>Description</b>
US-68	KSO SUCOFINDO, “History in Brief,” <a href="http://www.scisi.co.id/scisi/en/other/company_profile/sejarahsingkat">http://www.scisi.co.id/scisi/en/other/company_profile/sejarahsingkat</a>
US-69	KSO, SUCOFINDO, “ Conditions for Verification of Import (VPTI) Commodity: Horticultural Products,” <a href="http://www.scisi.co.id/scisi/repository/upload/mod_commodity_files/1425444411_pica539cd580a.pdf">http://www.scisi.co.id/scisi/repository/upload/mod_commodity_files/1425444411_pica539cd580a.pdf</a>
US-70	Letter from Dr. Ir. Spudnik Sujono K. MM, Director General, Directorate of Horticulture, Ministry of Agriculture, to General Secretary of ASEIBSSINDO, Dec. 3, 2015
US-71	Letter from Dr. Ir. Spudnik Sujono K. MM, Director General, Directorate of Horticulture, Ministry of Agriculture, to General Secretary of ASEIBSSINDO, Dec. 21, 2015
US-72	Letter from Hendra Juwono, ASEIBSSINDO, to the Minister of Agriculture, Dec. 7, 2015
US-73	“Effective Dates of Indonesia’s Import Licensing Laws and Regulations,” Feb. 16, 2016
US-74	“Comparison of MOT 16/2013, as amended by MOT 47/2013, and MOT 71/2015,” Feb. 16, 2016
US-75	“Effect of MOT 40/2015 on MOT 16/2013, as amended by MOT 47/2013,” Feb. 16, 2016
US-76	“Effect of MOT 41/2015 on MOT 46/2013, as amended by MOT 57/2013 and MOT 17/2014,” Feb. 16, 2016
US-77	Ministry of Trade, Republic of Indonesia, “Regulations,” (accessed Feb. 16, 2016), <a href="http://jdih.kemendag.go.id/id/regulations">http://jdih.kemendag.go.id/id/regulations</a>
US-78	Ministry of Agriculture, Republic of Indonesia, “Regulations of the Ministry of Agriculture,” (accessed Feb. 16, 2016), <a href="http://perundangan.pertanian.go.id/p_menteri.php">http://perundangan.pertanian.go.id/p_menteri.php</a>
US-79	Northwest Horticultural Council, “Expanded U.S. Washington State Apple Exports to Indonesia, by Week,” Nov. 11, 2015
US-80	SUCOFINDO, “Horticulture,” (updated Feb. 11, 2016), <a href="http://www.scisi.co.id/scisi/en/comodities/20">http://www.scisi.co.id/scisi/en/comodities/20</a>
US-81	Thom Wright, U.S. Dep’t of Agriculture, Foreign Agriculture Serv., <i>GAIN Report ID 1547: Indonesia: Food and Agricultural Import Regulations and Standards</i> , Dec. 24, 2015

US-82	<i>The New Shorter Oxford English Dictionary</i> 4 <sup>th</sup> edn., Lesley Brown et al. (eds.) (Oxford University Press, 1993), vol. 1, at 1782
US-83	Thom Wright & Titi Rahayu, U.S. Dep’t of Agriculture, Foreign Agriculture Serv., <i>GAIN Report No. ID1501: Indonesia Revises Seafood Import Rules</i> , Jan. 13, 2015
US-84	Ministry of Trade, “Regulations: Ketentuan Impor Dan Ekspor Hewan Dan Produk Hewan,” (accessed Feb. 14, 2016)
US-85	ASEAN-Australia-New Zealand FTA, Annex 1 – Schedules of Tariff Commitments – Indonesia, 2013, <a href="http://dfat.gov.au/trade/agreements/aanzfta/official-documents/Pages/annex-1-schedules-of-tariff-commitments.aspx">http://dfat.gov.au/trade/agreements/aanzfta/official-documents/Pages/annex-1-schedules-of-tariff-commitments.aspx</a>
US-86	ASEAN Trade in Goods Agreement, Annex 2 – Indonesia, 2012, <a href="http://www.aseansme.org/dbfile/fta/afta/2.2.3_Annex_2_Tariff_Schedules_Indonesia_(AHTN_2012).pdf">http://www.aseansme.org/dbfile/fta/afta/2.2.3_Annex_2_Tariff_Schedules_Indonesia_(AHTN_2012).pdf</a>

1. *[Advanced question No 1] (To New Zealand and the United States) In their first written submissions<sup>1</sup>, the co-complainants refer to Regulation of the Minister of Trade Number 40/M-DAG/PER/6/2015 Concerning Second Amendment to Regulation of the Minister of Trade Number 16/M-DAG/PER/4/2013, of 10 June 2015 (MOT 40/2015) and Regulation of the Minister of Trade 71//M-DAG/PER/9/2015 Concerning Provisions on the Import of Horticultural Products, of 28 September 2015 (MOT 71/2015) when describing Indonesia's import licensing regime for horticultural products. We recall that this Panel was established on 20 May 2015 and that MOT 40/2015 and MOT 71/2015 are not specifically referenced in the panel requests. The Panel also notes that Indonesia's description of this regime is mostly based on these regulations as well as the other regulations in force in 2015, and not necessarily to the measures which were in force at the time of the establishment of the Panel. The Panel wishes to know:*

- a. *Whether the co-complainants would like the Panel to consider MOT 40/2015 and MOT 71/2015 as within the Panel's terms of reference. In particular, whether they consider that MOT 40/2015 and MOT 71/2015 constitute "amendments, replacements, related measures, or implementing measures" as referenced in the panel requests;*

1. The United States considers that the measures that are within the Panel's terms of reference, and on which the United States is seeking findings, are those that were set out in the co-complainants' panel requests and first written submissions, as they existed at the time of the Panel's establishment.

2. A panel's terms of reference are set out in Articles 7.1 and 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Specifically, when the Dispute Settlement Body ("DSB") establishes a panel, the panel's terms of reference under Article 7.1 are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "brief summary of the legal basis of the complaint."<sup>2</sup> As the Appellate Body recognized in *EC – Chicken Cuts*, "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."<sup>3</sup>

3. In *EC – Selected Customs Matters*, the panel and Appellate Body were presented with the precise question of what legal situation a panel is called upon, under Article 7.1 of the DSU, to examine. The panel and Appellate Body both concluded that, under the DSU, the task of a panel is to determine whether the measures at issue are consistent with the relevant obligations "at the

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<sup>1</sup> *Question FN: For instance, New Zealand's first written submission, fn. 131; United States' first written submission, fn. 12 and 61.*

<sup>2</sup> *See US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.

<sup>3</sup> *EC – Chicken Cuts (AB)*, para. 156.



*time of establishment of the Panel.*<sup>4</sup> It is thus the challenged measures, as they existed at the time of the Panel’s establishment, when the “matter” was referred to the Panel, that are properly within the Panel’s terms of reference and on which the Panel should make findings.

4. Pursuant to DSU Article 6.2, the co-complainants identified in their panel requests the measures at issue in this dispute, which comprised certain *restrictions* and *prohibitions* on importation, as well as Indonesia’s import licensing *regimes* for horticultural products and animals and animal products in their totalities.<sup>5</sup> The panel requests identified and described the measures in substance, but the descriptions were necessarily based on the legal instruments in force at that time, through which the measures were being maintained, and which remained in force at the time of the Panel’s establishment.<sup>6</sup> The challenged measures comprised in the “matter” referred to the DSB and within the Panel’s terms of reference under DSU Article 7.1 are thus the regime and requirements identified in the U.S. and New Zealand panel requests, maintained through the framework legislation and Ministry of Trade and Ministry of Agriculture regulations cited in the requests. The Panel’s legal findings should refer, therefore, to the challenged measures, as maintained through those legal instruments.

5. In this dispute, it is particularly critical for the Panel to make legal findings and recommendations that provide a basis for the parties to resolve the dispute. Indonesia frequently changes its import licensing regulations, amending or repealing and replacing its legal instruments a total of twenty-two times since they were first issued in late-2011 (for animals and animal products) and mid-2012 (for horticultural products).<sup>7</sup> This situation, therefore, is similar to that in previous disputes in which the complainants challenged annual measures that were replaced during the proceedings, such as the situation in *China – Raw Materials*. Consequently,

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<sup>4</sup> See, e.g., *EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel’s review of the consistency of the challenged measure with the covered agreements properly should “have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel”); *id.*, para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they “might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel”); see also *China – Raw Materials (AB)*, para. 264; *EC – Approval and Marketing of Biotech Products*, para. 7.456.

<sup>5</sup> See Request for Establishment of a Panel by the United States, WT/DS478/9, circulated March 24, 2015 (“U.S. Panel Request”) (Exh. US-5). The measures identified in the panel request included: (1) the limited application windows and validity periods (pp. 2, 4); (2) the fixed license terms (pp. 2, 4); (3) the realization requirements (pp. 2, 4); (4) the reference price requirements (p. 3); (5) the six month requirement for horticultural products (p. 3); (6) the restrictions on sale and transfer for imported horticultural products (p. 3); (7) the storage capacity requirement for horticultural products (p. 3); (8) the prohibition on the importation of unlisted animals and animal products (p. 5); (9) the local purchase requirement for beef products (p. 5); and (10) the end-use requirements for animals and animal products (p. 6). The United States also identified Indonesia’s licensing regimes for horticultural products and animals and animal products, in their respective totalities (pp. 2, 3, 4, 5), as well as Indonesia’s prohibition on the importation of horticultural products and animals and animal products when domestic production is deemed sufficient to fulfill domestic demand (p. 6).

<sup>6</sup> U.S. Panel Request, at 2-3 (referring to the “legal instruments through which Indonesia maintains the measured described”).

<sup>7</sup> See “Effective Dates of Indonesia’s Import Licensing Laws and Regulations,” Feb. 16, 2016 (Exh. US-73); see also Exh. IDN-10; Exh. IDN-11.

the United States considers that the approach of the panel and Appellate Body in that dispute is a useful model for this proceeding.

6. In *China – Raw Materials*, the complainants challenged “export duties” and “export quotas” “comprised of basic framework legislation and implementing regulations . . . and specific measures . . . [issued] on an annual or time-bound basis.”<sup>8</sup> As the three co-complainants requested, the panel made findings on the measures, as they existed at the time of the panel’s establishment, and, with respect to measures found to be WTO-inconsistent, made a recommendation under Article 19.1 of the DSU. The Appellate Body found that the panel had acted correctly, stating:

While a finding by a panel concerns a measure as it existed at the time the panel was established, a recommendation is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member’s implementation obligations.<sup>9</sup>

As in those disputes, the United States seeks legal findings on the challenged measures as they existed on the date of the Panel’s establishment. Those findings, and the resulting recommendation under DSU Article 19.1, would provide a basis for the parties to resolve the dispute, no matter how often Indonesia changes its legal instruments during this panel proceeding or during any appeal or implementation period.

7. If, as the United States requests, the Panel adopts the approach taken by the panel and Appellate Body in *China – Raw Materials* and makes findings on the challenged measures, as they existed on the date of the Panel’s establishment, it would not need to decide whether the phrase “amendments, replacements, related measures, or implementing measures” in the co-complainants’ panel requests covers MOT 40/2015 and MOT 71/2015. The United States would not be seeking findings on these instruments as measures but rather would refer to these legal instruments as evidence on which the Panel could make findings in examining the challenged measures in existence at the time of the Panel’s establishment.

***b. If not, whether the Panel should ignore MOT 40/2015 and MOT 71/2015 in its analysis or, otherwise, how they should be taken into account.***

8. The United States does not consider that the Panel should ignore MOT 40/2015 and MOT 71/2015. Pursuant to Article 11 of the DSU, the Panel can examine any evidence that it considers is relevant to making an objective assessment of the matter referred to it, namely, whether the challenged measures breach Indonesia’s WTO obligations as of the date of the Panel’s establishment. As the panel and Appellate Body in *EC – Selected Customs Matters* explained, this evidence can include legal instruments enacted after a panel’s establishment, where, for example, such instruments are relevant to determining the content and operation of the

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<sup>8</sup> *China – Raw Materials (AB)*, para. 264.

<sup>9</sup> *China – Raw Materials (AB)*, para. 260 (“While a finding by a panel concerns a measure as it existed at the time the panel was established, a recommendation is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member’s implementation obligations.”).

challenged measures at the time the panel was established and its terms of reference were fixed.<sup>10</sup> It was in this light that the United States cited MOT 40/2015 and MOT 71/2015 in its first written submission.

9. In this dispute in particular, subsequent legal instruments can shed light on the meaning and operation of pre-existing legal instruments. Indonesia has amended or repealed and replaced its import licensing regulations an average of five times per year in the four years since they were first issued.<sup>11</sup> Throughout these iterations, however, the structures of the import licensing regimes and many of the requirements imposed through them have remained the same.<sup>12</sup> That is, substantial portions of amendment or replacement regulations simply re-imposed or clarified pre-existing requirements. Thus, MOT 40/2015 and MOT 71/2015 are very similar to the instrument in effect as of the Panel’s establishment (MOT 16/2013, as amended by MOT 47/2013). In significant part, they continue the same restrictions and in some instances provide clarity or specificity as to how those restrictions were being applied.<sup>13</sup>

10. For example, articles 25A and 26 of MOT 16/2013, as amended by MOT 47/2013, provided that Recognition as a Producer Importer (“PI”) of horticultural products and Confirmation as Registered Importer (“RI”) would be suspended if a company did not fulfill the realization requirement or failed to submit an import realization report once, and would be revoked if the importer failed to file the report three times.<sup>14</sup> Article 27 provided that the UPP Coordinator determined the “revocation” of the PI- or RI- designations but did not mention how the suspension would be determined. MOT 40/2015 amended article 27 and clarified that the UPP Coordinator would also determine the suspension, which presumably was already the case, given that the UPP Coordinator makes many of the decisions associated with the regime.<sup>15</sup> Thus MOT 40/2015 provided additional clarification regarding a restriction that was already imposed by MOT 16/2013.

11. Similarly, as described in the U.S. first written submission, article 1 of MOT 40/2015 amended article 13 of MOT 16/2013 and clarified a pre-existing requirement. Article 8 of MOT 16/2013, as amended by MOT 47/2013, provided that, to receive confirmation as an RI, a

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<sup>10</sup> *EC – Selected Customs Matters (AB)*, para. 188 (“While there are temporal limitations on the measures that may be within a panel’s terms of reference, such limitations do not apply in the same way to evidence. Evidence in support of a claim challenging measures that are within a panel’s terms of reference may pre-date or post-date the establishment of the panel. A panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment.”).

<sup>11</sup> See “Effective Dates of Indonesia’s Import Licensing Laws and Regulations” (Exh. US-73).

<sup>12</sup> See U.S. First Written Submission, sections III.A.1-3 and III.B.1-3 (describing the evolution of Indonesia’s import licensing regimes, including how many of the same restrictions continued through different regulations and amendments).

<sup>13</sup> See “Comparison of MOT 16/2013, as amended by MOT 47/2013, and MOT 71/2015,” Feb. 16, 2016 (Exh. US-74); “Effect of MOT 40/2015 on MOT 16/2013, as amended by MOT 47/2013,” Feb. 16, 2016 (Exh. US-75).

<sup>14</sup> See MOT 16/2013, as amended by MOT 47/2013, arts. 25A, 26 (JE-10).

<sup>15</sup> MOT 40/2015, art. I(6) (JE-11).

company had to submit an application including “Proof of ownership of storage facilities appropriate for the product’s characteristics.”<sup>16</sup> Article 8 also provided for verification of the information submitted concerning storage facilities.<sup>17</sup> MOA 86/2013, which was also in force at the time the Panel was established, contained a similar requirement.<sup>18</sup> MOT 40/2015 appears to have clarified what would be deemed “appropriate” storage facilities by stating that importers were required to demonstrate ownership of storage facilities with capacity equal to the total amount of horticultural products they were applying to import for the entire Import Approval validity period.<sup>19</sup>

12. In this way, MOT 40/2015 can be considered as shedding light on what certain provisions of MOT 16/2013 meant. We therefore would request that the Panel examine this evidence in order to make factual findings concerning the operation and content of the challenged measures.

***c. The United States, in footnotes 12 and 61 of its first written submission, refers to MOT 40/2015 and MOT 71/2015 as "post-establishment evidence". What does this mean for the purpose of the Panel's analysis and eventual recommendation?***

13. The phrase “post-establishment” was referring to the fact that MOT 40/2015 and MOT 71/2015 came into effect after the date of the Panel’s establishment. The statements referred to by the Panel were meant to suggest that, as described above, MOT 40/2015 and MOT 71/2015 clarified or re-imposed requirements that were already in effect (under MOT 16/2013, as amended by MOT 47/2013, and MOA 86/2013) at the time the Panel was established, and thereby provide evidence as to the meaning and operation of those requirements. As the Appellate Body in *EC – Selected Customs Matters* confirmed, a “panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment.”<sup>20</sup>

14. With respect to the Panel’s recommendation, the DSU sets out with precision the matter on which a panel makes findings and recommendations in a dispute settlement proceeding. First, the DSB refers a “matter” to a panel under DSU Article 7.1, comprised of the specific measures at issue and the legal basis of the complaint (DSU Article 6.2). Second, the panel makes an objective assessment of that “matter” under DSU Article 11, including an objective examination

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<sup>16</sup> MOT 16/2013, as amended by MOT 47/2013, art. 8(1) (JE-10).

<sup>17</sup> MOT 16/2013, as amended by MOT 47/2013, art. 8(2) (JE-10).

<sup>18</sup> MOA 84/2013, art. 8(2)(c)-(d) (JE-25).

<sup>19</sup> MOT 40/2015, art. I(2) (JE-11); *see also* Letter from Ministry of Trade, Director of Import, to RIs Regarding the Audit of Storage Facility and Transportation Vehicles, Feb. 16, 2015 (Exh. US-29) (announcing that the Ministry of Trade was conducting a compliance assessment on RIs and that it would “audit their storage capacity” in three tranches beginning with the RIs owning the most storage capacity); Ministry of Trade, Notification Regarding the Results of Audit of RI’s Storage Capacity (Exh. US-30) (notifying the importer that its storage capacities stated on its RI designation did not “conform with the real situation of storage owned” and that it should “submit changes to [its] Registered Importer” designation accordingly, to be received by a certain date); ASEIBSSINDO Letter (Exh. US-28).

<sup>20</sup> *EC – Selected Customs Matters (AB)*, para. 188.

of the facts and the applicability of and conformity with the covered agreements. Third, the panel issues a report under DSU Article 15 setting out its “findings of fact, the applicability of relevant provisions, and the basic rationale” for those findings (DSU Article 12.7). Article 19 then sets out in mandatory terms the recommendation that follows from those legal conclusions: where 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” (italics added). The United States therefore considers that the Panel’s recommendation necessarily addresses the measures found to be inconsistent that are within its terms of reference, i.e., the challenged measures, as they existed at the time of the Panel’s establishment.

15. The Panel’s recommendation would not, however, be limited in its application to a particular set of legal instruments. As the Appellate Body recognized in *China – Raw Materials*, once the recommendation to bring a measure into conformity has been adopted by the DSB, the responding Member will need to bring its inconsistent measures into compliance by the end of the reasonable period of time given for implementation, or further procedural consequences may follow.<sup>21</sup> Compliance will be judged on the basis of the measures taken to comply, as of the end of that period. The relevant measures at that time may be set out in instruments generations removed from those through which the challenged measures were maintained at the time of panel establishment and that were at issue in the original dispute.

**2. [Advanced question No 2] (To New Zealand and the United States) In their first written submissions<sup>22</sup>, the co-complainants refer to Regulation of the Minister of Trade Number 41/M-DAG/PER/6/2015 Concerning Third Amendment to Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013, of 10 June 2015 (MOT 41/2015) when describing Indonesia's import licensing regime for animals and animal products. The Panel also notes that Indonesia's description of this regime is mostly based on this regulation as well as the other regulations in force in 2015, and not necessarily to the measures which were in force at the time of the establishment of the Panel. We recall that this Panel was established on 20 May 2015 and that MOT 41/2015 is not specifically referenced in the panel requests. The Panel wishes to know:**

- a. **Whether the co-complainants consider MOT 41/2015 within the Panel's terms of reference. In particular, whether they consider that MOT 41/2015 is an amendment, replacement, related measure, or implementing measure as referenced in the panel requests;**

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<sup>21</sup> *China – Raw Materials (AB)*, para. 260 (“While a finding by a panel concerns a measure as it existed at the time the panel was established, a recommendation is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member’s implementation obligations.”).

<sup>22</sup> *Question FN: For instance, New Zealand's first written submission, para 20; United States' first written submission, para. 97.*

16. The United States’ response to this question is the same as to Question 1(a) above. We consider that the measures that are within the Panel’s terms of reference are those that were set out in the panel request and in the U.S. first written submission, as they existed at the time of the Panel’s establishment. This is consistent with a panel’s terms of reference, as set out in Article 7.1 and 6.2 of the DSU.<sup>23</sup>

***b. If not, whether the Panel should ignore MOT 41/2015 in its analysis or, otherwise, how it should be taken into account.***

17. The United States’ response to this question is likewise essentially the same as the response to Question 1(b) above. Pursuant to DSU Article 11, the Panel can examine any evidence that it considers is relevant to determining the content of the measures within its terms of reference, including legal instruments enacted after the Panel’s establishment.<sup>24</sup> In this light, the United States considers that MOT 41/2015 is relevant to the Panel’s assessment of the measures within its terms of reference.

18. Indonesia frequently amends or repeals and replaces its import licensing regulations for animals and animal products but often maintains the same structures and requirements throughout different iterations of the regulations.<sup>25</sup> Consequently, subsequent instruments can shed light on what pre-existing requirements meant and how they operated. In particular, certain provisions of MOT 41/2015 are illustrative of how some of the challenged measures operated at the time of the Panel’s establishment.<sup>26</sup>

19. For example, Article 1 of MOT 41/2015 provides that with respect to “Mother cows . . . an application for Import Approval can be submitted at any time.”<sup>27</sup> This confirms that, in general, applications to import animals and animal products may *not* be submitted at any time, which is supportive of the co-complainants description of the application windows and validity period requirements for Import Approvals.<sup>28</sup>

20. Similarly, MOT 41/2015 amends article 18 of MOT 46/2013, as amended, to state that the Government can appoint state-owned enterprises to import beef products (including secondary cuts of beef, which are listed in Appendix I to MOT 46/2013) “to ensure food security and price stability.”<sup>29</sup> This confirms that, both before and after MOT 41/2015 was promulgated, in the event of food insecurity or high beef prices, importers *could not*, in the course of ordinary business activities, import more beef into Indonesia. This is supportive of the co-complainants

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<sup>23</sup> *EC – Chicken Cuts (AB)*, para. 156; *EC – Selected Customs Matters (AB)*, para. 187.

<sup>24</sup> *EC – Selected Customs Matters (AB)*, para. 188.

<sup>25</sup> See U.S. First Written Submission, sections III.B.1-3.

<sup>26</sup> See “Effect of MOT 41/2015 on MOT 46/2013, as amended by MOT 57/2013 and MOT 17/2014,” Feb. 17, 2016 (Exh. US-76).

<sup>27</sup> MOT 41/2015, art. I(2) (JE-22).

<sup>28</sup> See U.S. First Written Submission, section IV.D.2.

<sup>29</sup> MOT 41/2015, art. I(3)-(4) (JE-22).

description of the restrictive effect of the fixed license terms measure and of the import licensing regime overall.<sup>30</sup>

21. Thus, MOT 41/2015 can be considered to shed light on what certain provisions of MOT 46/2013, as amended, meant at the time the Panel was established. The United States therefore considers that the Panel could include MOT 41/2015 in its analysis and factual findings.

***c. In footnote 171 of its first written submission, the United States refers to MOT 41/2015 as "relevant post-panel establishment evidence." What does this mean for the purpose of the Panel's analysis and eventual recommendation?***

22. As described in response to Question 1(c) above, the Panel may examine and make factual findings regarding MOT 41/2015 to the extent this evidence sheds light on the measures within its terms of reference. As the Appellate Body stated in *EC – Selected Customs Matters*, a panel is not precluded from considering evidence that post-dates the panel’s establishment, if such evidence is relevant to the panel’s consideration of the challenged measures, “as they existed . . . at the time of establishment of the Panel.”<sup>31</sup>

23. The United States considers that the Panel’s eventual recommendation would address any measures within its terms of reference that it found to be inconsistent with a covered agreements.

***3. [Advanced question No 3] (To New Zealand) The Panel refers to paragraphs 131-146 of its first written submission where New Zealand argues its claims under Article XI:1 of the GATT 1994 with respect to the prohibition on the importation of certain animal products. New Zealand appears to be challenging two separate measures or two aspects of the same measure (i.e., the prohibition of importation itself, on the one hand, and the exception to that prohibition in emergency circumstances, on the other hand). We note, however, that in paragraphs 38 to 45 of its first written submission dedicated to the facts as well as its argumentation concerning its claims pursuant to Article 4.2 of the AA in paragraphs 309 to 312 of its first written submission, New Zealand appears to consider the prohibition and its exception as one single measure. The Panel would welcome a clarification from New Zealand in this regard; in particular, with respect to the recommendation it seeks from the Panel.***

24. The United States and New Zealand both argue that Indonesia’s prohibition on the importation of all animals and animals products not listed in the appendices to its import licensing regulations is inconsistent with Article XI:1 of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) and Article 4.2 of the *Agreement on Agriculture*.<sup>32</sup> The co-complainants also agree that the ban on bovine carcasses and beef secondary cuts is a subset of this broader prohibition and that, with respect to this subset of products, there is a limited

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<sup>30</sup> U.S. First Written Submission, section IV.D.3.

<sup>31</sup> *EC – Selected Customs Matters (AB)*, paras. 187-188.

<sup>32</sup> See New Zealand First Written Submission, para. 131; U.S. First Written Submission, para. 259.

exception under which Indonesia allows state-owned enterprises to import prohibited products to meet certain emergency conditions.<sup>33</sup>

25. The United States chose to challenge the prohibition on unlisted animals and animal products as a single measure, and considers that the panel's finding on such measure would include Indonesia's prohibition on the importation of all products covered by the Ministry of Trade and Ministry of Agriculture regulations and not listed in the first or second appendices to such regulations. However, we consider that it is possible to challenge this measure in a variety of ways – as a single prohibition on all unlisted products, as many prohibitions on each individual unlisted product, or as several prohibitions on a few categories of unlisted products (e.g., bovine products, secondary cuts of beef, etc.). The United States considers that the Panel's analysis should be substantively the same with respect to any of these claims.

**4. [Advanced question No 4] (To the United States) The United States' panel request includes a number of claims pursuant to Article III:4 of the GATT 1994 in footnotes 7, 12 and 14. The United States' first written submission does not however contain any argument with respect to those claims. The Panel wishes to know whether the United States has decided to withdraw its claims pursuant to Article III:4 of the GATT 1994 as formulated in footnotes 7, 12 and 14 of its panel request.**

26. The United States has not presented any argumentation concerning Article III:4 of the GATT 1994 and has not asked the Panel to make findings concerning the inconsistency of the challenged measures with Article III:4. Nor has the United States at this point definitively withdrawn these claims.

27. The United States considers that the claims advanced by New Zealand under Article III:4 of the GATT 1994 – that is, claims against the domestic purchase requirement, the use restrictions on imported animals and animal products, and the use, sale, and distribution requirements on imported horticultural products<sup>34</sup> – are covered by the co-complainants' panel requests and, therefore, within the Panel's terms of reference in this dispute.<sup>35</sup>

**5. [Advanced question No 5] (To New Zealand and the United States) The co-complainants' panel requests both include claims pursuant to Article 2.2(a) of the Import Licensing Agreement (ILA) in footnotes 5 and 8. These claims have not been argued by the co-complainants in their first written submissions. The Panel wishes to know whether the co-complainants have decided to withdraw their claims pursuant to Article 2.2(a) of the ILA as set out in footnotes 5 and 8 of their panel requests.**

28. The United States' answer to this question is similar to the answer to Question 4 above. The United States has not presented any argumentation concerning Article 2.2 of the Import Licensing Agreement and we have not asked for findings concerning the consistency of the

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<sup>33</sup> New Zealand First Written Submission, paras. 135-137; U.S. First Written Submission, para. 260, n.188.

<sup>34</sup> See New Zealand First Written Submission, sections IV.C.2-4.

<sup>35</sup> See U.S. Panel Request, at n.12, n.14, n.7.



challenged measures with Article 2.2(a). Nor has the United States at this point definitively withdrawn these claims.

29. We consider, however, that claims under Article 2.2(a) are within the Panel’s terms of reference, based on the co-complainants’ panel requests.<sup>36</sup>

**6. [Advanced question No 6] (To New Zealand and the United States) The order of the analysis of the claims presented by both co-complainants in their first written submissions commence with Article XI:1 of the GATT 1994, followed by Article 4.2 of the Agreement on Agriculture (AA), Article III:4 of the GATT 1994 in the case of New Zealand, and Article 3.2 of the ILA. Indonesia, however, submits in paragraph 43 et seq. of its first written submission, that "[c]ontrary to the order of analysis suggested by the Complainants, this Panel should begin its examination with an analysis of the Agriculture Agreement before moving on to the GATT 1994." Please provide your views on this statement and ensuing argumentation by Indonesia concerning the adequate order of analysis of the claims that the Panel should follow in these proceedings.**

30. Indonesia asserted in its first written submission that the Panel must begin with Article 4.2 because the Agreement on Agriculture is, *per se*, more specific with respect to agricultural products than the GATT 1994 and thus is the agreement that “deals specifically, and in detail” with the matter at issue.<sup>37</sup> We note that at the first meeting of the Panel with the parties, Indonesia suggested in its reply to the responses of co-complainants and third parties regarding this question that it may no longer continue to pursue the argument that Article 4.2 must be considered first. We nevertheless provide the following comments regarding the proper order of analysis in this dispute for the Panel’s consideration.

31. In the context of the claims at issue in this dispute, the Agreement on Agriculture is not the more “specific” agreement, and, consequently, the Panel does not have an obligation to begin with the co-complainants’ claims under that agreement.

32. First, we note that each U.S. claim relates to a measure that imposes a prohibition or restriction on the importation of horticultural products or animals and animal products. Prohibitions and restrictions are specifically addressed under Article XI:1 of the GATT 1994. Each of these measures is challenged under Article XI:1 of the GATT 1994, and the basis of the challenge to each measure under Article 4.2 of the Agreement on Agriculture is identical to the basis under Article XI:1. Therefore, the measures and claims at issue in this dispute are dealt with specifically under Article XI:1 and are not dealt more specifically under the Agreement on Agriculture.

33. Indeed, the parties do not appear to disagree on this issue, as both Indonesia and the co-complainants have advanced the same arguments under Article XI:1 of the GATT 1994 and

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<sup>36</sup> U.S. Panel Request, at n.5, n.8.

<sup>37</sup>Indonesia’s First Written Submission, paras. 43-44.

Article 4.2 of the Agreement on Agriculture.<sup>38</sup> 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.

34. Further, with one exception, in all of the previous disputes in which the complainants challenged a measure (or measures) under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, the panel began with the Article XI:1 claims.<sup>39</sup> Several of these disputes involved an appeal proceeding, and in none of them did the Appellate Body criticize the panel’s order of analysis.<sup>40</sup> The panel that pursued the opposite approach justified doing so on the basis that the Agreement on Agriculture was more specific “inasmuch as [it] refers to” prohibitions and restrictions “only when applied to products falling within the scope of the Agreement [on] Agriculture.”<sup>41</sup> But the panel did not suggest that the discipline imposed by Article 4.2 on such prohibitions and restrictions on importation was more specific (or, indeed, different) than that imposed by Article XI:1.<sup>42</sup> To the contrary, having found the challenged measure inconsistent with Article 4.2, the panel found that “an additional finding regarding the same measure under Article XI:1” would not be “necessary to resolve the matter at issue.”<sup>43</sup>

35. Moreover, Indonesia has sought to justify its challenged prohibitions and restrictions under Article XX of the GATT 1994. Indonesia raises this defense regarding the claims under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. By attempting to assert a defense under Article XX with respect to claims under *both* agreements, Indonesia’s arguments also suggest that the GATT 1994 is the more specific agreement with respect to the particular claims and measures at issue in this dispute.

36. With respect to Article 4.2, Indonesia asserts that the challenged measures are not inconsistent with Article 4.2 of the Agriculture Agreement because they are “maintained under . . . other general, non-agriculture-specific provisions of GATT 1994” within the meaning of footnote 1 to Article 4.2, and Indonesia argues Article XX is such a provision.<sup>44</sup>

37. In doing so, Indonesia’s own argument establishes that the Agreement on Agriculture is not more specific to the claims at issue in this dispute. That is, Indonesia’s position is that the

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<sup>38</sup> See, e.g., Indonesia’s First Written Submission, paras. 72, 77, 81, 83, 86, 89, 91, 94, 95, 103, 106, 107, 110, 113 (incorporating by reference Indonesia’s arguments under Article XX to respond to co-complainants’ claims under Article 4.2); *id.* para. 163 (incorporating by reference previous arguments made under Article 4.2 to respond to the co-complainants’ claims under Article XI:1).

<sup>39</sup> See *India – Quantitative Restrictions (Panel)*, paras. 5.112-242; *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.

<sup>40</sup> See *India – Quantitative Restrictions (AB)*, paras. 5, 156; *Korea – Various Measures on Beef (AB)*, para. 5; *EC – Seal Products (AB)*, para. 1.8-1.9.

<sup>41</sup> *Turkey – Rice*, para. 7.48.

<sup>42</sup> See *Turkey – Rice*, para. 7.48.

<sup>43</sup> See *Turkey – Rice*, para. 7.142.

<sup>44</sup> Indonesia’s First Written Submission, para. 61.

challenged measures do not breach Article 4.2 because they are “maintained” under Article XX. Therefore, the applicability of Article 4.2 in this dispute would turn on whether each measure is justified under the GATT 1994. Thus, under Indonesia’s own logic, the GATT 1994 is the agreement that deals more specifically, and in detail, with the matter raised, even with respect to the claim under the Agreement on Agriculture.<sup>45</sup>

38. We also note that in all previous disputes where complainants advanced claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture and also invoked a defense under Article XX of the GATT 1994, the panel began its analysis with the complainants’ Article XI:1 claims.<sup>46</sup>

39. Finally, if the Panel were to commence its analysis with Article XI:1 and then examine Indonesia’s attempted defense under Article XX, and if the Panel were to agree with the co-complainants that each measure breaches Article XI:1 and that Indonesia has not made out an affirmative defense for any measure, then the Panel would not need to reach the issue raised by Indonesia under footnote 1 to Article 4.2 at all because that provision would not apply. Thus, reasons of efficiency and judicial economy in not reaching a legal issue unnecessarily would counsel in favor of commencing the analysis under Article XI:1 of the GATT 1994.

**7. *[Advanced question No 7] (To New Zealand and the United States) In both panel requests and in the United States' first written submission, the claims are presented first in relation to the importation regime for horticultural products, followed by the claims concerning the importation regime for animals and animal products. This order is inverted in New Zealand and Indonesia's first written submissions. The Panel seeks the views of the parties as to which order the Panel should follow in its analysis with respect to the measures at issue.***

40. The United States considers that there is no legal reason to consider the claims relating to the importation regime for horticultural products before the claims relating to the importation regime for animals and animal products, or vice versa, and does not have a preference as to the order in which the panel addresses the two regimes.

41. We note that there is significant factual overlap in the design, structure, and operation of the two regimes, but there are also some important differences that should be analyzed separately. For example, the storage capacity, six-month, and domestic harvest period restrictions apply only to the import licensing regime for horticultural products, whereas the prohibition on the importation of unlisted products is a feature of only the regime for animals and animal products. The Reference Price requirements and the end-use requirements are also different between the two regimes.

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<sup>45</sup> *EC – Bananas III (AB)*, para. 204 (stating that a panel should begin its analysis with the “agreement [that] deals specifically, and in detail” with the matter at issue) (emphasis added).

<sup>46</sup> See *India – Quantitative Restrictions (Panel)*, paras. 5.112-242; *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.

**11. [Advanced question No 8] (To New Zealand and the United States) Indonesia submits in several instances throughout its first written submission that its import licensing system is "automatic" and "transparent".<sup>47</sup> Please provide your views on Indonesia's contention.**

42. Indonesia’s assertions that its import licensing regimes are “automatic” and “transparent” are based on an incorrect legal premise and are factually inaccurate.

43. First, with respect to the legal error, Indonesia’s assertions that its import licensing regimes are “automatic” and “transparent” are based on the premise that, if this were the case, Indonesia’s import licensing regimes would fall outside the scope of Article 4.2 of the Agreement on Agriculture. This is incorrect.

44. The text of Article 4.2 covers “any measures of the kind which have been required to be converted into ordinary customs duties.” The only measures that are specifically *excluded* from Article 4.2 are “ordinary customs duties.” All other types of measures are potentially covered. The Appellate Body has confirmed the broad scope of Article 4.2, stating in *Chile – Price Band System* that Article 4.2 was intended to address all border measures that “restrict the volume or distort the price of imports of agricultural products” by converting them into ordinary customs duties and was thus the “legal vehicle” for the conversion of all forms of border protection into ordinary customs duties.<sup>48</sup> “All forms of border protection” would not necessarily exclude automatic import licensing regimes, for example, to the extent that they are other similar border measures to those listed in footnote 1.

45. Further, the text of Article XI:1 of the GATT 1994 is explicit that “import or export licenses” are capable of imposing restrictions on importation within the meaning of Article XI:1. As discussed in response to Question 3 above, previous panels have found that “restrictions” under Article XI:1 are also inconsistent with Article 4.2 of the Agreement on Agriculture. These findings further support the interpretation that import licensing regimes are potentially within the scope of Article 4.2.<sup>49</sup> Thus, a label such as “automatic” or “transparent” would not suffice to exclude, *per se*, Indonesia’s import regimes from the ambit of these provisions. Rather, the panel would still need to assess the precise content of the challenged measures in order to make an objective assessment of their WTO-consistency.

46. Second, as a factual matter, Indonesia’s import licensing regimes are neither “automatic” nor “transparent.”

47. Indonesia’s assertion that its import licensing regimes are “automatic” is based on an incorrect definition of “automatic” licensing and a misrepresentation of Indonesia’s import licensing requirements. At paragraph 63 of its first written submission, Indonesia explains that,

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<sup>47</sup> *Question FN: Indonesia's first written submission, paras. 19, 34, 35, 63, 72, 174 and 175.*

<sup>48</sup> *Chile – Price Band System (AB)*, paras. 200-201.

<sup>49</sup> *See Korea – Beef (Panel)*, para. 762; *Chile – Price Band System (Panel)*, para. 7.30 (“In our view, the scope of footnote 1 to the Agreement on Agriculture certainly extends to measures within the scope of Article XI:1 of GATT 1994, but also extends to other measures than merely quantitative restrictions.”); *India – Quantitative Restrictions (Panel)*, paras. 5.241-242.

by “automatic,” it means that the agents implementing the regime do not “exercise discretion in the issuance of import licenses at any stage in the administrative process” and all “applications that fulfill[] all legal requirements” are accepted.<sup>50</sup> That is, Indonesia suggests that its licensing regimes can be considered automatic regardless of what legal requirements are imposed with respect to the application process or even upon importation itself, so long as the import licensing agents cannot exercise discretion and import licenses eventually are granted after all of these requirements are complied with.

48. Thus, Indonesia attempts to cast the substantive restrictions that are the crux of the co-complainants claims as permissible “legal requirements” in its assertion that its regime is “automatic.” But under this proposed definition, a country could impose *any* requirement – either on import licensing procedures or on importation itself, no matter how trade-restrictive – and, so long as all applications that met that requirement were ultimately granted, the regime would be considered “automatic.” This definition of “automatic import licensing” would undermine the prohibitions of Articles XI:1 and 4.2 because the requirements that Indonesia imposes are not mere approval procedures but rather substantive restrictions on the persons that import, the type and quantity of products that can be imported, and the times during which importation can occur.

49. Indonesia’s approach to “legal requirements” for importers and “automatic licensing” would extend those concepts beyond recognition. Under any reasonable definition, the “requirements” imposed by Indonesia impose limitations on who can import, what they can import, and when they can import. For example, under Indonesia’s import licensing regime, an importer seeking to import beef must apply for a Recommendation, wait to receive it, and then apply for an Import Approval. In this permit the importer must show, *inter alia*, that it imported 80 percent of the products on its Import Approval for the previous year, that it has purchased domestic beef in an amount equivalent to 3 percent of what it is applying to import, and that the beef will only be sold for designated purposes. Further, no importation will be allowed if the importer requests an unlisted type of beef product or if the market price of secondary cuts of beef is below the reference price. This importation procedure is in no sense “automatic.”

50. Indonesia’s assertion that its import licensing regimes are “transparent” is also incorrect. To the contrary, many aspects of Indonesia’s import licensing regime are non-transparent and unpredictable.

51. For example, under Indonesia’s import licensing regulations, the Minister of Agriculture has discretion to set the specific time periods when importation is permitted, based on the Indonesian harvest period for those products.<sup>51</sup> But it is not set out in the regulations (or elsewhere) how the Minister makes the determinations about what months are covered by the “harvest period” and whether or to what extent imports will be permitted during the (unspecified number of months) that are deemed not within the Indonesian harvest period. Further, it is not

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<sup>50</sup> Indonesia’s First Written Submission, para. 63 (emphasis added).

<sup>51</sup> MOA 86/2013, art. 5 (JE-15).

specified when the Minister will make these determinations about whether and what volume of imports will be permitted.<sup>52</sup>

52. Indonesia’s import licensing regime is also non-transparent and unpredictable with respect to when the application windows for Recommendations and Import Approvals will be open and when the Recommendations and Import Approvals for a particular import period will be issued. Application windows for Import Approvals are supposed to be open for the entire month preceding the start of the validity period, but in reality this is not the case, and it is not clear in advance when or for how long the window will be open.<sup>53</sup> Similarly, Import Approvals are supposed to be issued at “the start” of the import period, but in reality they may be issued well into the period.<sup>54</sup>

53. With respect to the Reference Price requirements, the Reference Prices for chilies and shallots are determined based on “the average national retail price for chilies and shallots, and taking into account the cost of production and distribution for domestic chili and shallots products, economic growth and market outlook and other variables,” according to Indonesia’s responses at a meeting of the Import Licensing Committee.<sup>55</sup> It is entirely unclear, how this would be done as a practical matter and, therefore, it is impossible to predict what the reference price for any given period might be. Further, the Horticultural Product Price Monitoring team can revise the Reference Prices at any time.<sup>56</sup> Similarly, MOT 46/2013 provides that the Reference Price for beef could be re-evaluated at any time by a Beef Price Monitoring Team within the Ministry of Trade.<sup>57</sup> The criteria or methodology that they would use to determine the new reference price is entirely unknown.

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<sup>52</sup> See John Hey, “Indonesia’s citrus imports under threat,” *Asiafruit*, May 27 2015 <http://www.fruitnet.com/asiafruit/article/165366/indonesias-citrus-imports-under-threat> (Exh. US-26).

<sup>53</sup> See Wright, *GAIN Report No. ID1457: Indonesia Issues New Beef Import Regulations for 2015*, Dec. 30, 2014 (Exh. US-36) (describing the Minister of Agriculture’s announcement on December 29 that the on-line application system for import recommendations for beef and cattle will be open from December 29 to 31); Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) to Cattle and Meat Importers, Dec. 9, 2014 (Exh. US-37) (announcing the closure of the application window for import recommendations); Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) to Cattle and Meat Importers, Dec. 29, 2014 (Exh. US-38) (announcing the opening of online application system for import recommendations from December 29-31).

<sup>54</sup> See Wright, *GAIN Report No. ID1457: Indonesia Issues New Beef Import Regulations for 2015* (Exh. US-36); Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) to Cattle and Meat Importers, Dec. 9, 2014 (Exh. US-37); Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) to Cattle and Meat Importers, Dec. 29, 2014 (Exh. US-38); see also Australia Third Participant Submission, para. 18 (showing that import permits for cattle for the first quarter of 2015 were issued on January 13).

<sup>55</sup> “Replies from Indonesia to Questions from Canada, the European Union, Japan, New Zealand and the United States (G/LIC/Q/IDN/30),” G/LIC/Q/IDN/32, WTO Committee on Import Licensing, at 15, May 21, 2014 (Exh. US-31).

<sup>56</sup> MOT 16/2013, as amended by MOT 47/2013, art. 14B(3) (JE-10).

<sup>57</sup> MOT 46/2013, as amended, art. 14(3) (JE-21).

54. Finally, there is no explanation in Indonesia’s laws or regulations how the government determines the sufficiency of domestic production or, where domestic production is deemed insufficient, the extent of the “shortfall,” and the volume of imports to be permitted. Yet Indonesia’s import licensing regimes are largely designed to implement these requirements.<sup>58</sup> Consequently, the domestic sufficiency provisions add a further element of unpredictability to Indonesia’s import licensing regimes overall, in that there is the ever-present possibility that Indonesia will establish new restrictions or change the enforcement of old ones in order to restrict imports in the face of what it considers to be sufficient domestic production.

**12. [Advanced question No 9] (To New Zealand and the United States) Please comment on Indonesia's statement in paragraph 52 of its first written submission that the alleged "measures" are "in fact the result of decisions of private actors".**

55. Indonesia’s assertion that the challenged “measures” are “the result of decisions of private actors” and, as a consequence, outside the scope of Article 4.2 of the Agriculture Agreement and Article XI:1 of the GATT 1994,<sup>59</sup> is legally and factually incorrect.

56. First, the legal premise on which Indonesia’s argument is based – that a “measure” that is “the result of the decisions of private actors” is outside the scope of Article XI:1 or Article 4.2 – is incorrect. The Appellate Body in *Korea – Beef* considered this argument in the context of Article III:4 of the GATT 1994 and found that “the intervention of some element of private choice does not relieve [a Member] of responsibility under the GATT 1994 for the resulting establishment of competitive competitions less favourable for the imported product than for the domestic product.”<sup>60</sup> Previous panels have found that this principle also applies to Article XI:1 of the GATT 1994.

57. The panel in *India – Autos*, for example, found that the challenged measure, a trade-balancing requirement, was inconsistent with Article XI:1 because, although it “does not set an absolute numerical limit on the amount of imports” it does “limit the value of imports that can be made to the value of exports that the signatory intends to make over the life of the MOU” because, “in reality . . . the limit on imports set by this condition is induced by the practical threshold that a signatory will impose on itself as a result of the obligation to satisfy a corresponding export commitment.”<sup>61</sup> Similarly, the panel in *Argentina – Import Measures* found that uncertainty generated by the “unwritten and discretionary nature of the requirements” had a limiting effect on imports because it meant that economic operators could not “count on a

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<sup>58</sup> U.S. First Written Submission, paras. 12-17, 82-85.

<sup>59</sup> *E.g.*, Indonesia’s First Written Submission, para. 58.

<sup>60</sup> *Korea – Various Measures on Beef (AB)*, para. 146.

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

stable environment in which to import and who accordingly reduce their expectations, as well as their planned imports into the Argentine market.<sup>62</sup>

58. This reasoning would apply equally to Article 4.2. First, as discussed in response to the previous question, the text of Article 4.2 covers “any measures of the kind which have been required to be converted into ordinary customs duties” and thus does not exclude measures that achieve a restrictive effect by compelling decisions by private actors.<sup>63</sup> Second, the connection between measures inconsistent with Article XI:1 and Article 4.2, as recognized by previous panels, confirms that the measures that are “restrictions” under Article XI:1 are not excluded from the scope of Article 4.2.<sup>64</sup>

59. Second, with respect to the factual aspect, Indonesia’s suggestions that the measures at issue in this dispute are “the result of decisions of private actors” is inaccurate. Indonesia makes this assertion with respect to several of the challenged measures – the application windows and validity periods, the fixed license terms, the storage capacity restriction for horticultural products, and the realization requirements. In all cases, Indonesia’s assertion is wrong because the supposed “choice” that importers are making is imposed by Indonesia’s measure.

60. With respect to the application windows and validity periods, Indonesia’s assertion that it does not “cut off imports at the beginning or end of the validity period” but that importers of their own accord decide not to ship is incorrect. Under Indonesia’s import licensing regulations, imported horticultural products or animals and animal products that arrive after the end of the period for which their import approval is valid will not be accepted into Indonesia, but, according to the regulations, will be re-exported (for processed horticultural products and animals and animal products) or destroyed (for fresh horticultural products).<sup>65</sup> Thus, exporters

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<sup>62</sup> *Argentina – Import Measures (Panel)*, para. 6.260; *see id.* para. 6.261 (“Furthermore, the TRRs may result in costs unrelated to the business activity of the particular operator. Extra costs as a general matter will discourage importation and, thus, will have an additional limiting effect on imports.”).

<sup>63</sup> *See Chile – Price Band System (AB)*, paras. 200-201 (stating that Article 4.2 was intended to address all border measures that “restrict the volume or distort the price of imports of agricultural products” by converting them into ordinary customs duties and was thus the “legal vehicle” for the conversion of all forms of border protection into ordinary customs duties).

<sup>64</sup> *See Korea – Beef (Panel)*, para. 762; *Chile – Price Band System (Panel)*, para. 7.30 (“In our view, the scope of footnote 1 to the Agreement on Agriculture certainly extends to measures within the scope of Article XI:1 of GATT 1994, but also extends to other measures than merely quantitative restrictions.”); *India – Quantitative Restrictions (Panel)*, paras. 5.241-242.

<sup>65</sup> *See* U.S. First Written Submission, paras. 156-157 (for horticultural products) and 112, 269 (for animals and animal products); MOT 16/2013, as amended by MOT 47/2013, art. 14 (JE-10) (establishing a 6-month validity period for Import Approvals); *id.* art. 30 (stating that if a horticultural product import “is not the [product] included in the Recognition of the PI-Horticultural Products and/or the Import Approval” it will be re-exported or destroyed); Ministry of Trade, Import Approval for Horticultural Products, June 30, 2014 (stating that it is valid “December 31, 2014 (thirty one December two thousand fourteen), as proven by the date of a customs registration notice, Manifest (BC 1.1) (Exh. US-19); MOT 46/2013, as amended, art. 12 (JE-21) (stating that an Import Approval “is valid for 3 (three) months commencing from the date of its issuance”); *id.* article 30(2) (stating that imports not in accordance with the provisions in this Ministerial Regulation will be re-exported); Ministry of Trade, Import Approval for Beef,



must stop shipping far enough before the end of the validity period for their goods to clear customs by the last day of the period, because goods that are shipped under an Import Approval for the previous period cannot be imported. For U.S. exporters, this is 4-6 weeks.<sup>66</sup>

61. Moreover, during this 4-6 week gap at the end of an Import Approval validity period, importers cannot start shipping for the next period because Import Approvals for that period have not yet been issued, and the customs formalities that Indonesia requires to be completed in the country of origin *require* the relevant Import Approval number. Specifically, animals and animal products imported into Indonesia are required to have a Certificate of Health from their country of origin.<sup>67</sup> This can only be issued after the Registered Importer has received the Import Approval for those products because the Import Approval number must be included on the Certificate of Health.<sup>68</sup> Without a proper Certificate of Health, animals and animal products cannot be imported. Similarly, horticultural products imported into Indonesia are required to undergo “verification and technical inquiry” in their country of origin, and they cannot apply for verification without the Import Approval number under which they will be shipped.<sup>69</sup>

62. Indonesia acknowledges that importers that do not cease ordering prior to the end of the validity period would be “importing goods without the appropriate license,” and running the risks that this entails.<sup>70</sup> Thus there is a period at the end of one validity period and the beginning of another when products cannot be shipped to Indonesia. This period is imposed by the structure and operation of Indonesia’s import licensing requirements; it is not the result of private choices.

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Sept. 25, 2014 (Exh. US-43) (stating that the import approval is valid for the last period of 2014 and that the date of the customs registration notice for the goods must be within the Import Approval’s validity period).

<sup>66</sup> U.S. First Written Submission, para. 113; Letter to Mr. Bob Macke, Acting Deputy Administrator of the Foreign Agriculture Service, U.S. Department of Agriculture, from Representatives of the American Meat Industry, at 1, Oct. 27, 2015 (“Meat Industry Letter”) (Exh. US-44); NHC Statements, at pp. 3, 5 (Exh. US-21); “Shipping Times to Jakarta from Various U.S. Ports,” <https://www.searates.com/reference/portdistance/> (accessed Oct. 29, 2015) (Exh. US-49).

<sup>67</sup> MOT 46/2-13, as amended, art. 15(1) (JE-21) (“A Certificate of Health from the country of origin of the Animals and/or Animal Products that are to be imported must be issued after a RI-Animals and Animal Products have received Import Approval”).

<sup>68</sup> MOT 46/2013, as amended, art. 15(2) (JE-21) (“The Import Approval Number must be included in the Certificate of Health, as described in paragraph (1).”); Import Approval for Beef, at 1 (Exh. US-43) (“The number and date of Import Approval for Fresh Animal Products must be written on the *Certificate of Health* issued by the product’s country of origin.”).

<sup>69</sup> MOT 16/2013, as amended by MOT 47/2013, art. 21, 22 (JE-10) (“Every shipment of imported horticultural products must undergo preshipment inspection at its port of origin, including verification of country of origin, product type and quantity, shipping timing, and port of destination.”); Import Approval for Horticultural Products, para. 1 (Exh. US-19) (“Imports of the aforementioned Horticultural Products must undergo verification or technical inquiry in the country of origin by... in a manner that is in accordance with customs procedures.”); KSO, SUCOFINDO, “Conditions for Verification of Import (VPTI) Commodity: Horticultural Products,” at 1 (stating that importers must apply for verification by attaching, *inter alia*, their PI or RI designation “and Import Approval (SPI) for Horticultural Products”).

<sup>70</sup> Indonesia’s First Written Submission, para. 68.

63. With respect to the fixed license terms measure, Indonesia is also incorrect that this measure is the result of private choices. First, Indonesia’s assertion that “The terms of import licenses . . . are at the complete discretion of the importers themselves”<sup>71</sup> is incorrect, as other restrictions imposed by Indonesia’s import licensing regime severely curtail the ability of importers to actually determine the terms of their Recommendations or RIPHs and Import Approvals.<sup>72</sup> Further, the measures that the co-complainants are challenging are not the specific terms of any or each importer’s license but, rather, the inability of importers, once an Import Approval validity period has begun, to import products of a different type, quantity, country of origin, or port of entry than those specified on their import permits. These requirements are maintained by Indonesia through its import licensing regulations.<sup>73</sup> Importers do not choose to be prohibited from amending the terms of their licenses or from applying for new licenses once a period have begun.

64. With respect to the realization requirement, Indonesia’s assertion that it is not a restriction because it is “a function of importers’ own estimates and because it can be changed by the importer at will from one validity period to the next” is incorrect.<sup>74</sup> Under the realization requirement, importers must realize 80 percent of the quantity of products on their Import Approval or lose eligibility to import at all.<sup>75</sup> The fear of becoming ineligible to apply for future permits causes importers to be conservative in the types and quantities of products that they apply to import.<sup>76</sup> As a consequence of these under-estimates, overall importation during any import period is reduced compared to the amount under unrestricted conditions. Thus, importers do not “choose” to have the threat of losing their eligibility to import revoked if they fail to import a set percentage of the products listed on their Import Approvals and, therefore, they do not “choose” to underestimate the quantity they apply for. It is a forced response to Indonesia’s measure.

65. Finally, Indonesia’s assertion with respect to the storage capacity requirement for horticultural products that “[a]ny limitations placed on an importer’s ability to import is self-imposed” is incorrect.<sup>77</sup> Under this requirement, importers seeking to import horticultural products for sale (RIs) are allowed to apply to import only quantities of products equal to the

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<sup>71</sup> Indonesia’s First Written Submission, paras. 74, 138.

<sup>72</sup> See, e.g., U.S. First Written Submission, sections IV.B.3 and IV.D.4 (describing the realization requirement for importation of horticultural products and animals and animal products), IV.B.4 (describing the harvest period restrictions on importation of horticultural products), IV.B.5 (describing the restriction on horticultural product imports based on storage capacity), IV.B.6 and IV.D.5 (describing the use, sale, and transfer requirements for importation of horticultural products and animals and animal products), IV.B.8 (describing the six-month requirement for importation of horticultural products), IV.D.1 (describing the prohibition on unlisted animals and animal products), and IV.D.6 (describing the domestic purchase requirement for importation of beef).

<sup>73</sup> See U.S. First Written Submission, paras. 162-163 (for horticultural products), 276-277 (for animals and animal products).

<sup>74</sup> Indonesia’s First Written Submission, para. 107.

<sup>75</sup> See U.S. First Written Submission, paras. 170, 229, 284, 343.

<sup>76</sup> See ASEIBSSINDO Letter (Exh. US-28); NHC Statements, at 3, 5 (Exh. US-21).

<sup>77</sup> Indonesia’s First Written Submission, para. 86.

storage capacity of the facilities they own, on a 1:1 ratio.<sup>78</sup> This means that importers are required to *own* (not rent) enough storage capacity to hold all of the horticultural products that they will import for the entire six-month import period. Under normal market conditions, however, fresh fruits and vegetables inventory undergo multiple turnovers during a six month semester, such that importers would fill, empty, and refill their storage facilities multiple times in an import period.<sup>79</sup> They would also be able to rent, rather than own, storage.<sup>80</sup>

66. Consequently, this measure forces importers to self-restrict the quantity of products that they apply to import to the amount of storage capacity that they own or can buy without undermining their business.<sup>81</sup> This restriction is not a real “choice,” however; it is dictated by the requirements of Indonesia’s measure. Further, because importers’ owned storage capacity is inspected and verified when they apply for Import Approvals, the quantity of products they are permitted to import *would be restricted* to the quantity of the storage capacity they own even if they defied the regulation and applied for a greater quantity of products.

**13. [Advanced question No 10] (To New Zealand and the United States) In paragraph 55 (last line) of its first written submission, Indonesia contends that "it simply cannot be that a measure that has no impact on trade flows is a quantitative restriction". Please comment of this statement by Indonesia; in particular:**

- a. In your view, what is the weight that the Panel should give to available statistical evidence in assessing whether Indonesia's measures are "quantitative restrictions"?**
- b. Would your answer differ depending on whether the analysis is under Article XI:1 of the GATT 1994 or Article 4.2 of the AA?**

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<sup>78</sup> MOT 16/2013, arts. 8(1)(e) (stating that, to apply for an RI designation, and importer must submit “proof of ownership of storage facilities appropriate for the product’s characteristics”), 8(3) (stating that an Assessment Team will “check the veracity of the documents and conduct a field inspection”), 8(5) (“stating that the UPP Coordinator “will reject the application for Confirmation as a RI-Horticultural Products” if the inspection “determine[s] that the submitted information is incorrect”) (JE-10); MOA 86/2013, art. 8(2) (JE-15) (stating that RIPHs for fresh produce for consumption “must be accompanied with the following technical requirements: . . . (c) statement of ownership of storage and distribution facilities for horticultural products according to their characteristics and product type; (d) statement of suitability of storage capacity”); MOT 40/2015, art. I(2) (JE-40) (amending MOT 16/2013, article 13 to include a statement that “Issuance of an Import Approval . . . must take into consideration the capacity and appropriateness . . . of the storage facilities and means of transportation owned by the RI-Horticultural Products.”); ASEIBSSINDO Letter, at 1 (Exh. US-28).

<sup>79</sup> ASEIBSSINDO Letter (Exh. US-28) (stating that the storage capacity requirement is at odds with “the fact that fresh fruit and vegetables are almost always sold to customers shortly after they are imported – they do not sit in storage for the entire six month import period”).

<sup>80</sup> Importers applying to import horticultural products for products (PIs), for example, merely have to show “control” over appropriate storage facilities and thus are allowed to rent. *See* MOT 16/2013, art. 5(1)(e) (JE-10).

<sup>81</sup> ASEIBSSINDO Letter (Exh. US-28) (stating that the “ratio of one:one does not take into account the product turnover during a six month period that an importer would have in the course of normal business operations” and that importers “are therefore restricted in the amount they can order”).

67. The Panel should take statistical evidence into consideration where it is available and where the panel finds it to be relevant, but such evidence is neither necessary nor sufficient to show that a measure is inconsistent with Article XI:1 of the GATT 1994 or Article 4.2 of the Agriculture Agreement. First, the text of neither Article XI:1 nor Article 4.2 supports Indonesia’s argument that co-complainants must demonstrate trade effects as a necessary element of their claim against each challenged measure, as Indonesia asserts. Further, previous panel and Appellate Body reports have confirmed this interpretation

68. Article XI:1 of the GATT 1994 refers to “restrictions . . . on the importation” of products. Relying on the ordinary meaning of the term “restriction,” the Appellate Body has recognized that a “restriction’s” limiting effect on importation “need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.”<sup>82</sup> Thus complainants can demonstrate a measure’s inconsistency with Article XI:1 by showing that its design, structure, and operation, in themselves, impose limitations on importation (actual or potential). This interpretation is in accord with the Appellate Body’s interpretation of other provisions of the GATT 1994 that do not explicitly require a showing of trade effects.<sup>83</sup>

69. Like Article XI:1, the text of Article 4.2 of the Agriculture Agreement does not require a demonstration of trade effects. And as under Article XI:1, the Appellate Body, in analyzing measures falling under one of the measure types listed in footnote 1 to Article 4.2, has looked to the design, structure, and operation of the measure. The Appellate Body in *Peru – Agricultural Products* found that, in analyzing whether a measure falls under the scope of “similar border measures,” a panel “must analyse the design, structure, and operation of the measure at issue.”<sup>84</sup> Regarding trade data, the AB found that “where available,” panels should take such evidence “into consideration, along with along with information on the structure and design of the measure.”<sup>85</sup> Similarly, the panel in *Turkey – Rice* found that Turkey’s denial or refusal to grant permits to import rice outside of quota during certain periods was a quantitative import restriction under Article 4.2 based on the measure’s structure and operation.<sup>86</sup>

70. The Panel may similarly examine whether a measure is a restriction on importation, including a quantitative restriction, by looking to its design, structure, and operation. Where

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<sup>82</sup> *Argentina – Import Measures (AB)*, para. 5.217; see *China – Raw Materials (AB)*, para. 319.

<sup>83</sup> See, e.g., *EC – Seal Products (AB)*, para. 5.82 (on Articles I:1 and III:4); *US – Clove Cigarettes (AB)*, para. 176, *China – Audiovisual Products (AB)*, para. 305, *Thailand – Cigarettes (Philippines) (AB)*, para. 126 (on Article III:4); *Japan – Alcoholic Beverages II (AB)*, p. 16 (on Article I:1); *Brazil – Retreaded Tyres (AB)*, para. 229 (Article XX); *EC – Bananas III (Article 21.5 – Ecuador II) / (Article 21.5 – US) (AB)*, para. 469 (on Article III:2).

<sup>84</sup> *Peru – Agricultural Products (AB)*, para. 5.147.

<sup>85</sup> *Peru – Agricultural Products (AB)*, n.373.

<sup>86</sup> *Turkey – Rice*, paras. 7.120-121 (finding that, “Even without any systematic intention to restrict the importation of rice at a certain level, the lack of transparency and of predictability of Turkey’s issuance of Certificates of Control to import rice is similarly liable to restrict the volume of imports” and that therefore the challenged measure was inconsistent with Article 4.2).

available, the panel may look to relevant statistical data as additional evidence of the effects of a measure, but such evidence is neither necessary nor sufficient to establish a breach of Article XI:1 or 4.2. We note that, in addition to showing how the measures at issue breach those provisions based on their design, structure and operation, co-complainants have submitted a number of exhibits presenting relevant statistical evidence confirming our interpretation of some of the challenged measures, including in exhibits US-42, -51, and -52 and Figures 1-6 from New Zealand’s first written submission.<sup>87</sup>

71. Finally, we note that a suggestion that presenting statistical evidence of trade effects is a necessary element of Article XI:1 or Article 4.2 would mean that a complaining Party *could not prevail* if it did not export the product at issue. This would be at odds with the findings of many previous panels and the Appellate Body that Article XI:1, like other articles of the GATT 1994 (including Articles I, II, and III) “protects competitive opportunities of imported products, not trade flows.”<sup>88</sup>

***c. If importers are allowed to import any amount with no limit, can this be done on any day, at any moment and under any circumstance?***

72. As the co-complainants explained at length in their first written submissions, it is not the case that importers are allowed to import horticultural products or animals and animal products in any amount with no limit, and Indonesia imposes additional restrictions on the timing and circumstances of importation.

73. First, when importers are applying for their Import Approvals, they cannot apply for and receive permission to import products in “any amount with no limit.” Indonesia’s numerous import restrictions mean that, in reality, importers are severely constrained in the type and quantity of products that they can receive permission to import. Specifically:

- For horticultural product importers, seasonal restrictions based on the domestic Indonesian harvest period mean that importers will not be granted permission to import certain types of horticultural products during designated months of the year (or for the entire year).<sup>89</sup>

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<sup>87</sup> E.g., Query: Importation of Mangoes, from 2011-2015, Monthly,” *BPS – Statistics Indonesia* (accessed Oct. 22, 2015) (Exh. US-51), “Query: Import data for bananas, durians, melons, and pineapples, from 2011-2015,” *BPS – Statistics Indonesia* (accessed Oct. 22, 2015) (Exh. US-52), and “Query: Importation of Bovine Livers, Frozen, from 2011-2015, Monthly,” *BPS – Statistics Indonesia* (accessed Oct. 22, 2015) (Exh. US-42).

<sup>88</sup> *Argentina – Import Measures (Panel)*, para. 6.265; *China – Raw Materials (Panel)*, para. 7.1081; see *Argentina – Import Measures (AB)*, para. 5.217; *EC – Seal Products (AB)*, para. 5.82 (on Articles I:1 and III:4); *US – Clove Cigarettes (AB)*, para. 176, *China – Audiovisual Products (AB)*, para. 305, *Thailand – Cigarettes (Philippines) (AB)*, para. 126 (on Article III:4); *Japan – Alcoholic Beverages II (AB)*, p. 16) (on Article I:1); *Brazil – Retreaded Tyres (AB)*, para. 229 (Article XX); *EC – Bananas III (Article 21.5 – Ecuador II) / (Article 21.5 – US) (AB)*, para. 469 (on Article III:2).

<sup>89</sup> U.S. First Written Submission, sections IV.B.4, IV.C.4; MOA 86/2013, art. 5 (JE-15); Letter from Dr. Yul Sarry Bahar, Secretary to the Director General for Horticulture to the Secretary to the Director General of Processing and Marketing of Agricultural Products, May 6, 2015 (“May 6 Letter”) (Exh. US-25); John Hey,

- The storage capacity requirement further restricts the quantity of horticultural products that importers can bring into Indonesia by limiting the products any importer can import to the storage capacity owned by that importer, ignoring market realities such as: (1) high turnover in horticultural products such that importers normally would empty and refill a storage facility several times during a semester; and, (2) the common practice of renting, rather than owning, storage capacity.<sup>90</sup>
- The six-month requirement further restricts the quantity of products that importers can apply for and receive permission to import for seasonal produce (such as apples) that can be kept fresh for more than six months after harvest.<sup>91</sup>
- For horticultural products and beef products, the realization requirement, combined with the threat of losing eligibility to import if the requirement is not met, forces importers to underestimate the quantity of products they request permission to import, compared to what they might request under normal market conditions.<sup>92</sup>
- The sale, transfer, and end-use limitations for horticultural products and animal products also restrict the quantity of products that importers can bring in.<sup>93</sup> For horticultural products, the distributor requirement adds unnecessary steps and costs to importation.<sup>94</sup> For meat products, the prohibition on the sale of imported products in traditional markets

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“Indonesia's citrus imports under threat,” *Asiafruit*, May 27 2015 (Exh. US-26); Letter from Dr. Ir. Spudnik Sujono K. MM, Director General, Directorate of Horticulture, Ministry of Agriculture, to General Secretary of ASEIBSSINDO, Dec. 3, 2015 (Exh. US-70) (stating that domestic orange harvests would be sufficient for domestic consumption in January 2016); Letter from Dr. Ir. Spudnik Sujono K. MM, Director General, Directorate of Horticulture, Ministry of Agriculture, to General Secretary of ASEIBSSINDO, Dec. 21, 2015 (Exh. US-71) (confirming that oranges would not be allowed to be imported during January and lemons would not be allowed to be imported from January to March 2016).

<sup>90</sup> U.S. First Written Submission, sections IV.B.5, IV.C.5; MOT 16/2013, as amended by MOT 47/2013, art. 8 (JE-10); MOA 86/2013, art. 8(2) (JE-15); ASEIBSSINDO Letter (Exh. US-28); Letter from Ministry of Trade, Director of Import, to RIs Regarding the Audit of Storage Facility and Transportation Vehicles, Feb. 16, 2015 (Exh. US-29); Ministry of Trade, Notification Regarding the Results of Audit of RI's Storage Capacity (Exh. US-30); MOT 40/M-DAG/PER/6/2015, art. 1 (JE-11).

<sup>91</sup> U.S. First Written Submission, sections IV.B.8, IV.C.8; MOA 86/2013, art. 8 (JE-15); Controlled Atmospheric Storage, Washington Apple Commission, (Exh. US-34); *see also* Indonesia's First Written Submission, para. 87 (acknowledging that there are some “horticultural products that can be stored for more than six months, i.e. apples, when properly refrigerated”).

<sup>92</sup> U.S. First Written Submission, sections IV.B.3, IV.C.3, IV.D.4, IV.E.4; MOT 16/2013, as amended by MOT 47/2013, art. 14A (JE-10); NHC Statement, at 3, 5 (Exh. US-21); ASEIBSSINDO Letter (Exh. US-28); MOT 46/2013, as amended, art. 13 (JE-21).

<sup>93</sup> U.S. First Written Submission, sections IV.B.6, IV.C.6, IV.D.5, IV.E.5.

<sup>94</sup> U.S. First Written Submission, paras. 194-195; MOT 16/2013, as amended by MOT 47/2013, arts. 7, 8(1)(i), 15 (JE-10).

bars imports from the segment of the market where a *majority* of Indonesian consumers purchase meat.<sup>95</sup>

- For beef products, the domestic purchase requirement constrains the quantity of imports that importers can bring in by encouraging substitution of domestic products, imposing a significant and unnecessary additional cost on importation, and strictly limiting the quantity of possible imports based on the domestic beef available to satisfy the requirement.<sup>96</sup>
- Finally, the prohibition on the importation of animals and animal products not listed in the appendices of MOT 46/2013, as amended, and (for carcasses, meat, and offal) the appendices of MOA 139/2014, as amended, means that some products are not permitted to be imported at all.<sup>97</sup>

74. Therefore, even if importers were to request permission to import products in “any amount and without limit,” the numerous restrictions described above limit the amount for which they may receive approval to import.

75. Second, it also is inaccurate that importers can import “on any day.” Import Approvals have limited validity periods and are only issued “at the start” of the period. Imports can only be brought into Indonesia during the period for which their associated Import Approval is valid. As discussed in response to Question 12 above, this means that there is a period at the end of one validity period and the beginning of the next when exporters cannot ship products to Indonesia because those products would not reach Indonesia and clear customs prior to the end of the current validity period, but when Import Approvals have not been issued for the next validity period so exporters cannot start shipping for that period. By effectively limiting the times during which imported products may be shipped to Indonesia – up to 4 months out of each year for products from the United States – Indonesia further limits the quantities of products that ultimately may be imported.

76. Third, once an Import Approval has been received, importers cannot “import any amount with no limit.” Rather, importers may import only products of the type, quantity, and country of origin listed on their Import Approvals, and through the ports of entry listed on those Import

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<sup>95</sup> MOT 46/2013, as amended, art. 17 (JE-21); MOA 139/2014, as amended, art. 32(1) (JE-28); MOA 139/2014, as amended, art. 32(2) (JE-28); see Rohit Razdan et al., McKinsey & Co., *The Evolving Indonesian Consumer*, at 16 (Nov. 2013) (Exh. US-47); Arief Budiman et al., McKinsey & Co., *The New Indonesian Consumer*, at 11 (Dec. 2012) (Exh. US-48); Rahwani Y. Rangkuti & Thom Wright, U.S. Department of Agriculture Foreign Agriculture Service, *GAIN Report No. ID1450: Retail Foods 2014*, at 5-6, Dec. 19, 2014 (Exh. US-58).

<sup>96</sup> U.S. First Written Submission, sections IV.D.6, IV.E.6; MOA 139/2014, arts. 5, 24(1)(l), 26, 39(b)-(c) (JE-28); Wright, *GAIN Report ID1527: Beef and Horticultural Import License Update*, at 2 (Exh. US-40); Wright, *GAIN Report No. ID1527: Beef and Horticultural Import License Update*, at 2 (Exh. US-40).

<sup>97</sup> U.S. First Written Submission, sections IV.D.1, IV.E.1; MOT 46/2013, as amended, art. 2(2) (JE-21); *id.* Appendix I, Appendix II (JE-21); MOA 139/2014, as amended, art. 8 (JE-28); *id.* Appendix I, Appendix II.

Approvals.<sup>98</sup> They cannot import different products, greater quantities of products, or products from a different country based on current market considerations, and they cannot bring in products through a port of entry other than that listed on their Import Approvals.<sup>99</sup>

77. Finally, the reference price requirements further restrict the “circumstances” under which importation of certain products may be conducted. Specifically, importation of chilies and shallots is prohibited if the Indonesian price of these products falls below the government-determined reference price,<sup>100</sup> and importation of all beef products is prohibited if the Indonesian market price of secondary cuts of beef falls below the pre-determined level.<sup>101</sup> The Reference Prices for these products may be reevaluated at any time.<sup>102</sup>

78. Based on the foregoing, Indonesia’s claim that “[t]he government places no limits” on the products importers can bring in is supported neither by Indonesian law nor by any other facts on the record of this proceeding.<sup>103</sup>

**14. (To New Zealand and the United States) In paragraph 7 of its first written submission, Indonesia states the following: "The United States, for example, complains about 23 different measures related to the importation of horticultural products. In fact, the number is only 11. The other measures identified by the United States have either been revoked in their entirety or substantially amended". Please comment on this statement.**

79. Indonesia does not provide a citation to the paragraphs of the U.S. first written submission to which the quoted statement refers.<sup>104</sup> It seems likely, however, that Indonesia is referring to the sections of the U.S. written submission describing previous iterations of

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<sup>98</sup> See U.S. First Written Submission, sections IV.B.2, IV.C.2, IV.D.3, IV.E.3; MOT 16/2013, art. 30(2)-(4) (JE-10) (stating that “If a fresh horticultural Product import: (a) is not the Horticultural Product included in the . . . Import Approval . . . it will be destroyed” and “If a processed Horticultural Product import: (a) is not the Horticultural Product included in the . . . Import Approval . . . it will be re-exported” and that “The cost of destroying and re-exporting a Horticultural Product . . . is the responsibility of the importer”); MOA 139/2014, as amended, art. 33(b) (JE-28) (stating that importers are “prohibited from importing types/categories of carcasses, meat, and/or their processed products other than what is included in their Recommendation”); MOT 46/2013 as amended, art. 30(2)-(3) (JE-21) (stating that imports “whose quantity, type, business unit, and/or country or origin is not in accordance with their Import Approval . . . will be re-exported,” with the cost of re-export being borne by the importer).

<sup>99</sup> U.S. First Written Submission, sections IV.B.2, IV.C.2, IV.D.3, IV.E.3; MOT 16/2013, art. 26(b) (JE-10) (stating that recognition as a PI or RI of horticultural products “is revoked if a company . . . (b) is proven to have altered the information included in Horticultural Products import documents”); MOA 139/2014, art. 33(a) (JE-28) (prohibiting importer from requesting changes to the elements specified on their recommendations once recommendations have been issued).

<sup>100</sup> MOT 16/2013, as amended by MOT 47/2013, art. 14B (JE-10).

<sup>101</sup> MOT 46/2013, as amended, art. 14 (JE-21).

<sup>102</sup> MOT 16/2013, as amended by MOT 47/2013, art. 14B(3) (JE-10); MOT 46/2013, as amended, art. 14(3)-(4) (JE-21).

<sup>103</sup> Indonesia’s Opening Statement, para. 8.

<sup>104</sup> See Indonesia’s First Written Submission, para. 7.



Indonesia’s import licensing regime.<sup>105</sup> To the extent that this is the case, Indonesia is conflating the challenged measures at issue in this dispute with the legal instruments through which Indonesia has established and maintained its import licensing regimes over the last several years.

80. Indonesia has maintained licensing regimes for the importation of horticultural products and animals and animal products since 2012 and 2011, respectively. These regimes were established pursuant to framework legislation – Law 18/2009 on Animal Husbandry and Animal Health and Law 13/2010 Concerning Horticulture – and were implemented by Ministry of Agriculture and Ministry of Trade regulations, operating together, beginning in October 2011, for animals and animal products, and in September 2012, for horticultural products.<sup>106</sup> Since that time, Indonesia has amended, repealed, or replaced the regulations implementing both regimes numerous times – nine times for the horticultural product regulations and twelve times for the animals and animal products regulations.<sup>107</sup>

81. In sections III.A.1-2 and III.B.1-2 of the U.S. first written submission, the United States described the various iterations of Indonesia’s import licensing regulations as they have existed since 2011 in order to enhance the Panel’s understanding of the constantly changing regulatory context in which this dispute has proceeded. This description entailed referring to the legal instruments setting out previous iterations of the regime. These legal instruments do not necessarily correspond to different *measures* in the sense of the challenged measures at issue in this dispute, however. To the contrary, although Indonesia has made both minor and major changes to its import licensing regimes since 2011, many of the prohibitions and restrictions challenged by the co-complainants have persisted through multiple versions of the regulations.<sup>108</sup>

82. As discussed in the U.S. response to Questions 1(a) and 2(a) above, the United States is challenging certain measures – certain of these prohibitions and restrictions – *as they existed at the time of the Panel’s establishment*. Therefore, the United States does not challenge those measures that either were repealed prior to the Panel’s establishment or that were imposed thereafter. Rather, the challenged measures include those prohibitions or restrictions described by the United States in sections IV.B-IV.F of the U.S. first written submission. Discussion of previous iterations of Indonesia’s import licensing regimes in sections III.A.1-2 and III.B.1-2

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<sup>105</sup> See U.S. First Written Submission, sections III.A.1-2 and III.B.1-2.

<sup>106</sup> See Law 18/2009 on Animal Husbandry and Animal Health (JE-5); Law 13/2010 Concerning Horticulture (JE-1); MOT 24/2011 (JE-16); MOA 50/2011 (JE-23); MOT 30/2012 (JE-6); MOA 60/2012 (JE-13).

<sup>107</sup> See “Effective Dates of Indonesia’s Import Licensing Laws and Regulations” (Exh. US-73).

<sup>108</sup> See, e.g., U.S. First Written Submission, paras. 23 (describing the restrictions on sale and transfer on importation of horticultural products under the original import licensing regulations); 24 (describing the domestic harvest period restriction under the original import licensing regulations); 30-31 (describing the application window and validity period and fixed license term requirements for horticultural products under the second iteration of Indonesia’s import licensing regulations); 32 (describing the 6-month requirement for horticultural products under the second iteration of Indonesia’s import licensing regulations); 89 (describing the use restrictions on importation of animals and animal products under the original import licensing regulations); and 91 (describing the fixed license term restriction under the original import licensing regulations).

was included to provide the Panel with import context and background for understanding the import licensing regime as it existed at the time of panel establishment.

**15. In footnote 37 of its first written submission, Indonesia refers to Exhibit IDN-11 which contains a "complete list of the measures related to animals and animal products challenged by the Complaints and their status". Please comment on this list.**

83. Indonesia’s assertion in footnote 37 that Exhibit IDN-11 represents a complete list of the challenged “measures” related to animals and animal products and their status is incorrect in that it suggests that the co-complainants are challenging the legal instruments listed in Exhibit IDN-11, including those that expired prior to the Panel’s establishment.<sup>109</sup> As discussed in response to Questions 1, 2, and 14 above, this assertion is incorrect because it confuses the challenged measures at issue in this dispute with the legal instruments through which these measures have been established. The United States is not challenging the instruments set out in Exhibit IDN-11, as such. It is challenging certain of the prohibitions and restrictions as of the time of the Panel’s establishment as maintained through various legal instruments. (Indonesia’s analogous assertion in footnote 35 concerning Exhibit IDN-10 is incorrect for the same reason.<sup>110</sup>)

84. We would also note that Exhibit IDN-11 does not contain a “complete” list of the legal instruments related to animals and animal products that maintain the challenged measures (restrictions, prohibitions, and regime) concerning animals and animal products. First, it does not include the Food Law or the Farmers Law, which are two legal instruments through which Indonesia prohibits or restricts the importation of animal products when domestic production is deemed sufficient to fulfill domestic demand.<sup>111</sup> Second, it does not include the latest Ministry of Agriculture regulation, MOA 58/2015, which became effective on December 17, 2015, or the latest Ministry of Trade Regulation MOT 05/2016, which became effective on January 28, 2016.<sup>112</sup>

**16. (To all Parties) The Panel notes that the co-complainants and Indonesia have provided translations of the relevant legal instruments regarding Indonesia's import licensing regimes. The Panel also notes that Indonesia has not provided a translation of Regulation of the Minister of Trade Number 16/M-DAG/PER/4/2013 Concerning Provisions on the Import of Horticultural Products, of April 22 2013 (MOT 16/2013). The Panel observes that the translations are not identical and contain a number of differences. We also refer to paragraph 15 of New Zealand’s opening oral statement. The Panel seeks the Parties' view as to which translations should be used in its assessment.**

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<sup>109</sup> Indonesia’s First Written Submission, n.37.

<sup>110</sup> Indonesia’s First Written Submission, n.35.

<sup>111</sup> U.S. First Written Submission, section IV.F.

<sup>112</sup> See “Effective Dates of Indonesia’s Import Licensing Laws and Regulations” (Exh. US-73) (setting out a (currently) complete list of instruments that set out, or in the past set out, the challenged measures related to the importation of animals and animal products); MOA 58/2015 (Exh. AUS-1).

85. The translations submitted by the co-complainants were made by accredited translators based on the Bahasa versions of the relevant regulations published on the Indonesian Ministry of Trade and Ministry of Agriculture websites.<sup>113</sup> For all instruments in force at the time of the Panel’s establishment and certain past regulations that the co-complainants discussed, the co-complainants had English translations made by accredited professional translators. These translations were harmonized to ensure consistent translations of identical passages across regulations, and several translation checks were made to ensure accuracy. For other expired instruments, the co-complainants submitted translations made by the U.S. Department of Agriculture Foreign Agriculture Service in Indonesia.<sup>114</sup>

86. Further, the co-complainants submitted translations of all the regulations setting out the challenged measures within the Panel’s terms of reference. Indonesia did not submit a translation of MOT 16/2013, as the Panel noted, and also did not submit translations of MOT 47/2013 (amending MOT 16/2013), MOT 57/2013 (amending MOT 46/2013), or MOT 17/2014 (amending MOT 46/2013), all of which were in force at the time of the Panel’s establishment and which comprise part of some of the measures challenged by the co-complainants.<sup>115</sup> We also note that Indonesia has not challenged the accuracy of the co-complainants’ translations. Therefore, the United States considers that it would be appropriate to rely on the complete set of translations submitted by the co-complainants.

**26. (To New Zealand and the United States) In paragraph 20 of its opening oral statement, Indonesia indicates that “[t]he Complainants have not placed on the record any evidence that import volumes have decreased as a result of the application windows or validity periods for import licences, and Indonesia has been unable to discern any impact on total trade volumes”. Indonesia then proceeds to provide market shares concerning some horticultural products. Please comment.**

87. Indonesia’s assertion is based on a flawed legal premise. As discussed in response to Question 13 above, Indonesia’s assertion that, as a necessary element of their claims under Article XI:1 and Article 4.2, co-complainants must demonstrate a decrease in total import volumes due to each challenged measure is incorrect.<sup>116</sup>

88. Article XI:1 of the GATT 1994 refers to “restrictions . . . on the importation” of products. The Appellate Body has consistently found, based on the ordinary meaning of the term

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<sup>113</sup> See Ministry of Trade, Republic of Indonesia, “Regulations,” (accessed Feb. 16, 2016), <http://jdih.kemendag.go.id/id/regulations> (Exh. US-77); Ministry of Agriculture, Republic of Indonesia, “Regulations of the Ministry of Agriculture,” (accessed Feb. 16, 2016), [http://perundangan.pertanian.go.id/p\\_menteri.php](http://perundangan.pertanian.go.id/p_menteri.php) (Exh. US-78).

<sup>114</sup> For: Law 18/2013 Concerning Food (JE-2); MOT 60/3023 (JE-7); MOT 22/2013 (JE-17); MOA 63/2013 (JE-24); MOA 84/2013 (JE-25).

<sup>115</sup> See, e.g., U.S. First Written Submission, paras. 170-171 (describing the realization requirement for horticultural products and citing to article 14A, 26A, and 27A of MOT 16/2013, as amended, which were added by MOT 47/2013); *id.* paras. 199-200 (describing the reference price requirement for horticultural products and citing article 14B of MOT 16/2013, as amended, which was added by MOT 47/2013).

<sup>116</sup> Indonesia’s Opening Statement, para. 20; Indonesia’s First Written Submission, paras. 71, 78, 141, 161.

“restriction,” that Article XI:1 refers to measures with a “limiting effect” on importation.<sup>117</sup> The Appellate Body in *Argentina – Import Measures* explicitly found that such a limiting effect “need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.”<sup>118</sup> Thus complainants can demonstrate a measure’s inconsistency with Article XI:1 by showing that its design, structure, and operation have a limiting effect on importation.

89. Previous panel reports also support this interpretation. The *Argentina – Import Measures* panel, quoting the panel in *Argentina – Hides and Leather*, found that “Article XI:1, like Articles I, II, and III of the GATT 1994, protects competitive opportunities of imported products, not trade flows.”<sup>119</sup> On this basis, the panel rejected Argentina’s argument that complainants could not prevail without supporting their arguments with trade data and found that the challenged measure was a “restriction” under Article XI:1 based on aspects of its structure and operation.<sup>120</sup> The panels in *China – Raw Materials* and *Colombia – Ports of Entry* also found that showing an overall reduction in imports was not a necessary element of a claim under Article XI:1.<sup>121</sup>

90. The text of Article 4.2 also does not require a demonstration of trade effects, and in past disputes the Appellate Body similarly has looked to the design, structure, and operation of the measure in analyzing its consistency with Article 4.2. In *Chile – Price Band System*, for example, the Appellate Body found that Chile’s system of “variable import levies” was inconsistent with Article 4.2, reasoning that the operation of the levies was characterized by “a lack of transparency and a lack of predictability” and that the measures therefore were “liable to restrict the volume of imports.”<sup>122</sup> In, analyzing whether a similar price band measure fell under the scope of “similar border measures,” the Appellate Body in *Peru – Agricultural Products*

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<sup>117</sup> *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 319 (citing *Shorter Oxford English Dictionary*, p. 2553).

<sup>118</sup> *Argentina – Import Measures (AB)*, para. 5.217.

<sup>119</sup> *Argentina – Import Measures (Panel)*, para. 6.265.

<sup>120</sup> *Argentina – Import Measures (Panel)*, paras. 6.265-261 (finding that the measure was a “restriction” under Article XI:1 because: (1) due to conditions placed on importation, “importers are not free to import as much as they desire or need without regard to their export performance”; (2) the measure imposed “*per se* limitation[s] on imports”; (3) the measure was “designed to force substitution of imports” for domestic products; (4) the “uncertainty generated” by the measure’s “unwritten and discretionary nature” created “negative effects on imports” who could not count on a “stable environment” and “who accordingly reduce their expectations, as well as their planned imports”; and (5) that the measure “may result in costs unrelated to the business activity of the particular operator,” which “will discourage importation”).

<sup>121</sup> *China – Raw Materials (Panel)*, para. 7.1081 (finding that “[T]he very potential to limit trade is sufficient to constitute a ‘restriction[.]’ . . . within the meaning of Article XI:1 of the GATT 1994”); *Colombia – Ports of Entry (Panel)*, para. 7.240 (finding that “a number of GATT and WTO panels have recognized the applicability of Article XI:1 to measures which . . . restrict market access for imports or make importation prohibitively costly” and that the “findings in each of these cases were based on the design of the measure and its potential to adversely affect importation, as opposed to a standalone analysis of the actual impact of the measure on trade flows”).

<sup>122</sup> *Chile – Price Band System (AB)*, para. 234.

found that panels should focus on a measure’s “design, structure, and operation” and could take “evidence on the ‘observable effect of the measure’ . . . into consideration” “where available . . . along with information on the structure and design of the measure.”<sup>123</sup> Similarly, the panel in *Turkey – Rice* found that Turkey’s denial or refusal to grant permits to import rice outside of quota during certain periods was a quantitative import restriction under Article 4.2 based on the structure and operation of the measure.<sup>124</sup>

91. Thus, even if Indonesia were correct that the co-complainants failed to submit evidence of the effect of the measure on import volumes, the co-complainants description, based on the measure’s structure and operation, of the limiting effect on importation caused by the application windows and validity periods (a description that Indonesia does not contest) is sufficient to establish a *prima facie* case that the measure is inconsistent with Article XI:1 and Article 4.2.

92. As described in sections IV.B.1 and IV.D.2 of the U.S. first written submission, the application windows and validity periods impose a distinct limitation on importation into Indonesia. Under Indonesia’s regulations, products cannot be shipped to Indonesia until after an import period begins, and they must clear customs before that period ends.<sup>125</sup> This means that there is a gap at the end of each validity period, where exporters cannot ship to Indonesia because their goods would not arrive before the end of the current validity period and so would be re-exported or destroyed.<sup>126</sup> And importers cannot start shipping again until after Import Approvals are issued for the next period, which will be, at the earliest, “at the beginning” of the period and which, in reality, can be several weeks into the period.<sup>127</sup> The application windows and validity periods thus operate to stop products being shipped to Indonesia for importation for several months (two for horticultural products and four for animal products) out of every year. Even without any quantitative evidence of a negative impact on importation, this is sufficient to show that the measure has a “limiting effect” on importation.

93. Additionally, however, Indonesia’s statement is factually incorrect. There is evidence demonstrating the measures’ quantitative effects. First, the United States has presented statements by U.S. horticultural exporters attesting to the fact that the application windows and validity periods prevent their selling to Indonesia altogether for the last four to six weeks of a

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<sup>123</sup> *Peru – Agricultural Products (AB)*, para. 5.147, n.373; see *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 189 (adding that, where such evidence and is submitted, “the weight and significance to be accorded to such evidence will, as is the case with any evidence, depend on the circumstances of the case”).

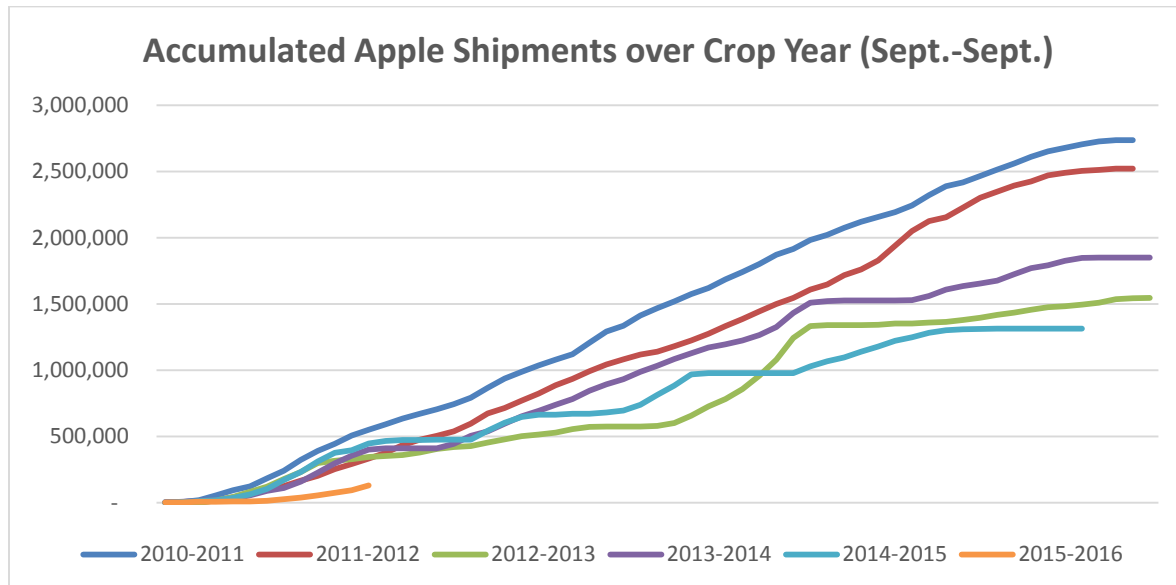
<sup>124</sup> *Turkey – Rice*, paras. 7.120-121.

<sup>125</sup> See *supra* paras. 60-61.

<sup>126</sup> See MOT 16/2013, as amended by MOT 47/2013, arts. 14 (setting out the 6-month validity period of Import Approvals), 30 (stating that if a horticultural product import “is not the [product] included in the Recognition of the PI-Horticultural Products and/or the Import Approval” it will be re-exported or destroyed) (JE-10); MOT 46/2013 arts. 12 (stating that Import Approvals are “valid for 3 (three) months commencing from the date of its issuance” and setting out the three validity periods), 30(2) (stating that imports “not in accordance with their Import Approval and/or not in accordance with the provisions in this Ministerial Regulation will be re-exported”) (JE-21).

<sup>127</sup> See *supra* para. 52; U.S. First Written Submission, para. 114 (showing that, for the first quarter of 2015, the Import Approvals were issued in January, after the period had started); Australia Third Participant Submission, para. 18 (showing that import approvals were issued two weeks into the first period of January 2015).

validity period and the beginning of the next.<sup>128</sup> The United States also presented statistical data showing that, beginning in 2013 and continuing through 2015, shipments of U.S. apples to Indonesia came to a halt towards the end of the first and second semesters, i.e., in December and June.<sup>129</sup> Broadening the lens to include data from before the import licensing regime was put in place and the most recent data from the 2015-2016 crop year confirms two things: (1) the gap in shipments did not occur prior to the 2012-2013 season, when the import licensing regulations became effective;<sup>130</sup> and (2) as shown in the table below, the total quantity of exports dropped significantly beginning in that season and has not recovered to 2010-2011/2011-2012 levels.<sup>131</sup>



Source: Northwest Horticultural Council, “Weekly Apple Shipments to Indonesia,” Nov. 11, 2015 (Exh. US-79).

94. New Zealand has presented similar evidence, submitting statements by exporters of onions and pip fruit attesting to the restrictive effect of the applications windows and validity

<sup>128</sup> U.S. First Written Submission, n.287 (citing NHC Statements, at pp. 7-8 (Exh. US-21), stating: “Even if permits are issued at the beginning of a validity period, it may take several weeks to complete all the paperwork, plus a month for transportation, so that the first fruit doesn’t reach Indonesia until about 6 weeks after the validity period begins. And on the other end, we have to stop selling to Indonesian importers about 6 weeks before the end of the validity period to ensure that the fruit arrives and clears customs by the last day of the period”).

<sup>129</sup> U.S. First Written Submission, n.290 (citing Northwest Horticultural Council, “U.S. Washington State Apple Exports to Indonesia, by Week,” Nov. 11, 2015 (Exh. US-50)).

<sup>130</sup> Northwest Horticultural Council, “Expanded U.S. Washington State Apple Exports to Indonesia, by Week,” Nov. 11, 2015, Tables 1(a), 1(b) (Exh. US-79).

<sup>131</sup> Northwest Horticultural Council, “Expanded U.S. Washington State Apple Exports to Indonesia, by Week,” Nov. 11, 2015, Table 2 (Exh. US-79) (showing that exports of the 2010/2011 and 2011/2012 apple crop years to Indonesia exceeded 2.5 million boxes but that exports of subsequent crop years were 1.5, 1.85, and 1.3 million boxes and that 2015-2016 on track to be the worst year yet).

periods,<sup>132</sup> and statistical data confirming that exports of onions and apples from New Zealand to Indonesia “dip significantly” at the end of the first and beginning of the second semester.<sup>133</sup>

**27. (To New Zealand and the United States) In the respective factual sections, the co-complainants appear to focus their description of the measures at issue on those applicable to fresh horticultural products for human consumption.<sup>134</sup> Please clarify whether the measures at issue also include those applicable to processed horticultural products.**

95. Most of the measures challenged in sections IV.C and IV.D of the U.S. First Written Submission apply to the importation of both fresh and processed horticultural products for consumption. The two exceptions are the six-month requirement, which applies only to fresh horticultural products,<sup>135</sup> and the Reference Price requirement, which applies only to fresh chilies and shallots.<sup>136</sup> Where the measures also apply to the importation of horticultural products for use as raw materials in the production process, that fact is noted in the U.S. first written submission.<sup>137</sup> With respect to the paragraphs of the U.S. first written submission cited by the Panel, the examples discussed therein were simply illustrative of how the challenged measures, which apply to both fresh and processed products, operate.

96. For example, in paragraphs 42-43 of its first written submission, the United States described the application process for the four different forms of RIPHs (RI importing fresh horticultural products, RI importing processed horticultural products, PI importing fresh horticultural products, and PI importing processed horticultural products) and explained that different administrative documents are required for each one.<sup>138</sup> The United States then explained, as an example, the documentary requirements for one of the four types, namely RIs importing fresh horticultural products. The documentary requirements for RIs importing fresh horticultural products applying for an RIPH are set out in MOA 86/2013, article 8(1)(c) and are as follows: (i) photo copy of the RI-Horticultural Product designation; (ii) an “importation approval letter form the Agency of Drug and Food Control”; and (iii) a photo copy of the RI’s general importer identification number (API-U).<sup>139</sup>

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<sup>132</sup> New Zealand First Written Submission, n.342 (citing Onions New Zealand Exporter Statement (Exhibit NZL-49) and Pip Fruit New Zealand Exporter Statement (Exhibit NZL-50)).

<sup>133</sup> New Zealand First Written Submission, para. 216, Annex 4, Annex 5.

<sup>134</sup> **Question FN: For instance, New Zealand’s first written submission, paras. 81 and 92; United States’ first written submission, paras. 43, 54 and 57.**

<sup>135</sup> MOT 86/2013, art. 8(1)(a) (JE-15) (stating that and RIPH is issued with the following requirements: “Fresh horticultural products for consumption shall include: . . . Statement of not importing horticultural products which exceed 6 (six) months after the harvest period”); see U.S. First Written Submission, paras. 205-207.

<sup>136</sup> See U.S. First Written Submission, paras. 199-200; MOT 16/2013, as amended by MOT 47/2013, art. 14B (JE-10).

<sup>137</sup> See U.S. First Written Submission section IV.C.6.a (describing how the use, sale, and transfer restrictions on the importation of horticultural products applies to importation by both RIs and PIs).

<sup>138</sup> U.S. First Written Submission, paras. 42-43.

<sup>139</sup> MOA 86/2013, art. 8(1)(c) (JE-15).

97. Similarly, when describing the fixed license term restriction on horticultural product imports, the United States explained that RIs must obtain an Import Approval from the Ministry of Trade and that, once issued, the Import Approval locks in the type, quantity, country of origin, and port of entry of the horticultural products allowed to be imported during the six month semester.<sup>140</sup> The United States then discussed an example of one Import Approval for horticultural products, which happened to be for fresh horticultural products.<sup>141</sup> As the United States explained, however, the fixed license terms requirement and the penalties for non-compliance apply to both fresh and processed horticultural products.<sup>142</sup> Similarly, sections IV.C.2 and IV.D.2, the descriptions of the Article XI:1 and Article 4.2 claims against the fixed license terms requirement, refer to horticultural products in general.<sup>143</sup>

98. The example discussed in paragraph 57 was also to illustrate how the realization requirement operates in practice and did not limit the claim to fresh horticultural products. As explained in paragraph 56, the import realization requirement applies to “each type of horticultural product listed on [an RI’s] Import Approval.”<sup>144</sup> Under MOT 16/2013, “horticultural products” covers both fresh and processed products.<sup>145</sup> Similarly, the import realization control card requirement and the penalty for not fulfilling the realization and reporting requirements apply generally to horticultural product importation by RIs.<sup>146</sup> Sections IV.C.3 and IV.D.3, which set out the U.S. claims against the realization requirement under Article XI:1 and Article 4.2, also describe the realization requirement as covering horticultural products imported by RIs generally.<sup>147</sup>

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<sup>140</sup> U.S. First Written Submission, paras. 53-54 (citing Ministry of Trade, Import Approval for Horticultural Products, June 30, 2014 (Exh. US-19); MOT 16/2013, as amended by MOT 47/2013, arts. 14, 30(2)-(3) (JE-10)).

<sup>141</sup> See U.S. First Written Submission, para. 54.

<sup>142</sup> U.S. First Written Submission, para. 55 (citing MOT 16/2013, as amended by MOT 47/2013, art. 30 (JE-10) and explaining that if imported fresh or processed horticultural products are “not in accordance with horticultural products included... [in] the Import Approval,” Indonesia will either destroy or re-export them).

<sup>143</sup> U.S. First Written Submission, sections IV.C.2, IV.D.2.

<sup>144</sup> U.S. First Written Submission, para. 56 (citing MOT 16/2013, as amended by MOT 47/2013, art. 14A (JE-10), providing that, “RI-Horticultural Products who have obtained Import Approval . . . are required to realize at least 80% (eighty percent) of imports of Horticultural Products as listed in its Import Approval for every period”).

<sup>145</sup> MOT 16/2013, as amended by MOT 47/2013, art. 1(2) (defining “Horticultural Products” as “all products derived from fresh or processed horticultural crops”).

<sup>146</sup> See MOT 16/2013, as amended by MOT 47/2013, arts. 24, 25A (JE-10).

<sup>147</sup> U.S. First Written Submission, paras. 170-175, 229-230.



99. The same applies to the U.S. claims against the other measures concerning importation of horticultural products – the application windows and validity periods<sup>148</sup> and the harvest period,<sup>149</sup> storage capacity,<sup>150</sup> and use, sale, and transfer restrictions<sup>151</sup> – all of which, on their face, apply generally to horticultural product imports, both fresh and processed, for human consumption.

**28. [Advanced question No 12] (To New Zealand and the United States) In its first written submissions, the co-complainants argue that horticultural products cannot be shipped from the country of origin until after the Import Approval for that period has been issued.<sup>152</sup> Is there any specific provision(s) within Indonesia’s legal system mandating this?**

100. As described in the U.S. First Written submission, article 21 of MOT 16/2013, as amended by MOT 47/2013, requires that all horticultural products imports into Indonesia undergo “verification or technical inquiry at [their] port of origin.”<sup>153</sup> This verification or technical inquiry must be carried out by a surveyor designated by the Minister of Trade,<sup>154</sup> and

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<sup>148</sup> U.S. First Written Submission, paras. 155-157; MOT 16/2013, as amended by MOT 47/2013, arts. 13A, 14 (JE-10); MOA 86/2013, art. 13 (JE-15). However, under MOT 40/2015, an amendment to MOT 16/2013 that became effective after the Panel’s establishment, as well as under the subsequent MOT 71/2015, the application window requirement does not apply to processed horticultural products. *See* MOT 41/2015, art. 13A(b) (JE-11); MOT 71/2015, art. 11(c) (JE-12). The validity period requirement remains in effect. MOT 41/2015, art. 9(1) (JE-12) (stating that “The validity period for an Import Approval for companies possessing and API-U” (a general importer number as opposed to a producer importer number) “will correspond with the validity period of a RIPH,” which, under MOA 86/2013 article 13(1), remains six months).

<sup>149</sup> U.S. First Written Submission, paras. 180-183; MOA 86/2013, art. 5 (stating that the Minister of Agriculture stipulates the “certain time period” within which “import of horticultural products can be conducted”). As described in the U.S. First Written Submission, this restriction is applied on a product-by-product basis, so while processed horticultural products *could* be restricted, they may not be at any given time. *See Id.*, paras. 180-182; *see also* Letter from Dr. Ir. Spudnik Sujono K. MM, Director General, Directorate of Horticulture, Ministry of Agriculture, to General Secretary of ASEIBSSINDO, Dec. 21, 2015 (Exh. US-71) (confirming that oranges cannot be imported during January 2016 and lemons cannot be imported at all from January to March 2016).

<sup>150</sup> U.S. First Written Submission, paras. 187-189; MOT 16/2013, arts. 8(1)(e), 8(3), 8(5) (JE-10) (setting out the requirement to demonstrate “proof of ownership of storage facilities appropriate for the product’s characteristics” to receive “Confirmation as a RI-Horticultural Products”); *see also* MOT 40/2015, art. 13(4) (JE-11) (stating that issuance of Import Approvals generally “must take into consideration the capacity and appropriateness, with regard to the characteristics of the Horticultural Product, of the storage facilities and means of transportation owned by the RI-Horticultural Products”); MOT 71/2015, arts. 7 (stating that, to obtain an Import Approval (unqualified), a company importing horticultural products for consumption must attach to its application, *inter alia*, “Proof of ownership of storage facilities appropriate for the product’s characteristics”) and 7(2) (stating that Import Approval issuance for companies importing horticultural products for consumption “must pay attention to the capability and appropriateness of the storage facilities and transportation”) (JE-12).

<sup>151</sup> U.S. First Written Submission, paras. 193-194; MOT 16/2013, as amended by MOT 47/2013, arts. 8(1), 15, 26(f) (all referring to “horticultural products” generally, for purposes of the use restrictions) (JE-10).

<sup>152</sup> **Question FN: New Zealand’s first written submission, para 88; United States’ first written submission, para. 47.**

<sup>153</sup> U.S. First Written Submission, para. 156; MOT 16/2013, as amended by MOT 47/2013, art. 21(1) (JE-10).

<sup>154</sup> MOT 16/2013, as amended by MOT 47/2013, art. 21(3) (JE-10). The entity that has been designated by the Minister of Trade to conduct pre-shipment verification of horticultural products is KSO SUCOFINDO, a joint

must include examining and verifying the country of origin, port of origin, type, volume, shipping time, port of destination, and various health and technical certificates of the prospective horticultural product imports.<sup>155</sup> The results of this inspection are incorporated into a Surveyor Report, which must be used in completing import customs.<sup>156</sup>

101. This required verification cannot be completed until after importers have obtained their RIPHs and Import Approvals for the relevant validity period, because importers must include in their verification application, *inter alia*, their RI or PI designation and their Import Approval for the products to be imported.<sup>157</sup> The application will not be accepted unless these documents are attached.<sup>158</sup> Therefore, in order to legally import products to Indonesia, an importer must: (1) obtain an RI or PI designation and an Import Approval (for which an RIPH is also required); (2) apply to KSO SUCOFINDO, the designated surveyor, for pre-shipment verification, including its designation and Import Approval; (3) such verification must be completed in the products’ country of origin; and, (4) the result of inspection must be included in the Surveyor Report.<sup>159</sup>

102. Thus, horticultural products cannot be shipped from their country of origin until after Import Approvals have been issued for an import period, because importers cannot even apply for pre-shipment inspection – which Indonesia requires be completed in the products’ country of origin – until the importer has received its Import Approval.

**29. [Advanced question No 13] (To all parties) Regarding the reference price system for chilli and shallots, please comment on the possible outcomes of the following hypothetical scenario: an importer wishes to import chillies and shallots into Indonesia and thus obtains a RIPH. At this time, the market prices for both these products are above their respective reference prices. Before the Import Approval is obtained, but after the RIPH was obtained, the market prices for both these products fall below their respective reference prices.**

**a. Will the importer be able to import those chillies and shallots?**

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operation between two Indonesian state-owned enterprises. KSO SUCOFINDO, “History in Brief,” [http://www.scisi.co.id/scisi/en/other/company\\_profile/sejarahsingkat](http://www.scisi.co.id/scisi/en/other/company_profile/sejarahsingkat) (accessed Jan. 31, 2016) (Exh. US-68).

<sup>155</sup> MOT 16/2013, as amended by MOT 47/2013, art. 22(1) (JE-10).

<sup>156</sup> MOT 16/2013, as amended by MOT 47/2013, art. 22(2) (JE-10).

<sup>157</sup> KSO SUCOFINDO, “Conditions for Verification of Import (VPTI) Commodity: Horticultural Products,” [http://www.scisi.co.id/scisi/repository/upload/mod\\_commodity\\_files/1425444411pica539cd580a.pdf](http://www.scisi.co.id/scisi/repository/upload/mod_commodity_files/1425444411pica539cd580a.pdf) (Exh. US-69); SUCOFINDO, “Horticulture,” (updated Feb. 11, 2016), <http://www.scisi.co.id/scisi/en/comodities/20> (Exh. US-80).

<sup>158</sup> KSO, SUCOFINDO, “Conditions for Verification of Import (VPTI) Commodity: Horticultural Products,” at 1 (Exh. US-69).

<sup>159</sup> See Thom Wright, U.S. Dep’t of Agriculture, Foreign Agriculture Serv., *GAIN Report ID 1547: Indonesia: Food and Agricultural Import Regulations and Standards*, Dec. 24, 2015, at 28 (Exh. US-81) (stating that, as under MOT 16/2013, under MOT 71/2015, importation of horticultural into Indonesia must meet pre-shipment inspection requirements and that, to do so, importers had to, “upon acquiring a license,” apply to KSO SUCOFINDO “for import verification by filling out an on-line verification request,” the verification had to be conducted in the country of origin, and that the results had to be incorporated into the Surveyor Report).

103. Under this hypothetical, the importer will not be able to import chilies or shallots once their market prices fall below their respective Reference Prices, as set by the Horticultural Product Price Monitoring Team. Under MOT 16/2013, as amended by MOT 47/2013, an RI must obtain an Import Approval to import chilies or shallots for consumption.<sup>160</sup> RIs cannot import any horticultural products, including chilies and shallots, with only a RIPH.<sup>161</sup> Consequently, if the Import Approval has not been issued, the importer cannot import the products covered by its RIPH.

***b. Will the RIPH-authorized volume of imports be carried over to the next validity period?***

104. The RIPH does not specify the volume of horticultural products (including chilies or shallots) that a RI may import.<sup>162</sup> The volume is specified in the Import Approval that the RI must subsequently obtain.<sup>163</sup> Even if the Import Approval had been issued, MOT 16/2013, as amended by MOT 47/2013, still does not provide for carrying over any volume to the next validity period. In fact, if the RI failed to import more than 20 percent of the volume listed on its Import Approval, Indonesia would penalize the importer for failing to meet the 80 percent import realization requirement by suspending its recognition.<sup>164</sup>

***39. [Advanced question No 19] With reference to para 92 of Indonesia's submission, do you consider that the assessment of an additional duty on import shipments is a key, or typical, feature of minimum import price schemes, or of similar measures?***

105. Indonesia’s assertion that a measure *cannot* be a minimum import price, within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture, if it does not include an “additional duty that is levied on individual imports” is based on a flawed legal interpretation.<sup>165</sup>

106. First, the text of Article 4.2 does not support Indonesia’s proposed interpretation. The adjective “minimum” refers to something “[t]hat is a minimum; that is the lowest possible, usual, attainable, etc.”<sup>166</sup> such that the plain language meaning of the term “minimum import price” would be the “lowest possible” price for imports. Therefore, Article 4.2 does not require or even suggest that the incorporation of an additional duty is intrinsic to any “minimum import price.”

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<sup>160</sup> MOT 16/2013, as amended by MOT 47/2013, art. 11 (JE-10) (stating that an “RI-Horticultural Products that will import Horticultural Products, as described in Article 2, must receive Import Approval from the Minister”).

<sup>161</sup> MOT 16/2013, as amended by MOT 47/2013, art. 12 (JE-10) (stating that “RI – Horticultural Products can only import after receiving Import Approval”).

<sup>162</sup> MOA 86/2013, art. 6(3) and Attachment 1.

<sup>163</sup> MOT 16/2013, as amended by MOT 47/2013, art. 14A (JE-10); Ministry of Trade, Import Approval for Horticultural Products, p. 3 (Exh. US-19).

<sup>164</sup> MOT 16/2013, as amended by MOT 47/2013, arts. 14A(1) and (25A).

<sup>165</sup> Indonesia’ First Written Submission, para. 92.

<sup>166</sup> *The New Shorter Oxford English Dictionary* 4<sup>th</sup> edn., Lesley Brown et al. (eds.) (Oxford University Press, 1993), vol. 1, at 1782 (Exh. US-82).

Indeed, one could easily imagine a minimum import price scheme in which no imports are permitted below a designated price.

107. Further, the Appellate Body has disapproved the narrow interpretation of “minimum import price” that Indonesia has put forward. In *Chile – Price Band System* and *Peru – Agricultural Products*, the Appellate Body 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” but that “no definition has been provided by the drafters of the Agreement on Agriculture.”<sup>167</sup> The Appellate Body in *Peru – Agricultural Products* further found that, although “minimum import prices schemes ‘generally operate in relation to the actual transaction value of imports’ and involve the imposition of an additional charge if the price of an individual consignment is below the specified minimum import price, “there can be other examples of benchmarks for determining the lowest price at which imports may enter a market.”<sup>168</sup> The Appellate Body then stated that it “has not excluded the possibility that measures that define in a different manner “the lowest price at which imports may enter a market” (i.e., not on a transaction-by-transaction basis) “could nevertheless qualify as a ‘minimum import price’ scheme or as a ‘similar border measure.’”<sup>169</sup> Rather, a fact-specific assessment must be made of the design, structure and operation of the challenged measure.

108. Further, adopting this limited definition would mean that measures that imposed a minimum price for imports through the significantly more trade-restrictive means of a conditional import ban, such as the Indonesian measure at issue, would be excluded from this category of measure, while measures operating through a less trade-restrictive additional duty would be covered. This would be inconsistent with the aim of Article 4.2 to effect the conversion of all border measures that “restrict the volume or distort the price of imports of agricultural products” into ordinary customs duties.<sup>170</sup>

109. The Reference Prices for chili and shallots (as well as for beef) operate by setting the lowest market price at which Indonesia will allow importation of the covered products.<sup>171</sup> The Reference Price restrictions are more categorical than a transaction-based minimum import price, because, rather than just prohibiting imports below the minimum import price, they prohibit *all* imports of the covered products once the Reference Price has been reached. Thus the Reference Price requirements set the “lowest possible” price for imports and are, therefore, consistent with the ordinary meaning of the term “minimum import price.”

110. Further, because the Reference Price entirely prohibits imports if the Indonesian market price of chilies or shallots falls below the pre-determined point, in addition to being a “minimum

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<sup>167</sup> *Chile – Price Band System* (AB), para. 236; *Peru – Agricultural Products* (AB), para. 5.128; see *Chile – Price Band System* (Article 21.5 – Argentina) (AB), para. 152.

<sup>168</sup> *Peru – Agricultural Products* (AB), para. 5.129.

<sup>169</sup> *Peru – Agricultural Products* (AB), para. 5.129.

<sup>170</sup> *Chile – Price Band System*, paras. 200-201.

<sup>171</sup> MOT 16/2013, as amended by MOT 47/2013, art. 14B (JE-10); MOT 46/2013, as amended, art. 14 (JE-21).

import price” or “similar border measure,” the reference price requirement is *also* a “quantitative import restriction” under Article 4.2 of the Agreement on Agriculture. The Reference Price requirements limit the importation of covered products to periods when the market prices of chilies or shallots are above the pre-determined level, and prohibits importation of covered products when this is not the case. Additionally, the Reference Price has a limiting effect on importation at all times because the threat of such a broad restriction reduces the incentives for importation.<sup>172</sup> Importers cannot predict price fluctuations, and the risk of a ban on the covered products increases the risks associated with importation, and thereby increases the potential cost of contracting for these products. Previous panels and the Appellate Body have found that measures can fall into more than one category of measures listed in Footnote 1 to Article 4.2,<sup>173</sup> and the Reference Price requirements are an example of such measures.

**45. [Advanced question No 23] Concerning the scope of the product coverage, MOT 46/2013, as amended, and MOA 139/2014, as amended by MOA 2/2015, apply to the products listed in Appendices I and II to both regulations. The products listed in Appendix I and II of MOT 46/2013, as amended, are not necessarily identical to those listed in Appendices I and II of MOA 139/2014, as amended by MOA 2/2015. Please confirm the product coverage of these legal instruments. If different, which products are covered by the measures within our terms of reference?**

111. Indonesia’s Ministry of Trade regulation, MOT 46/2013, as amended, governs the importation of all animals and animal products. The title sets out the scope of the regulation as “Concerning Provisions on the Import and Export of Animals and Animal Products,” and this is confirmed by other articles, which refer to “Animals and Animal Products” in defining the imports subject to the regulation.<sup>174</sup> “Animals” are defined by MOT 46/2013 as “animals or wildlife that spend all or part of their life cycle on land, in water, and/or in air, whether domesticated or in their natural habitat.”<sup>175</sup> “Animal Products” are defined as “all materials originating from animals, fresh and/or processed, that are for consumption, pharmaceuticals, farming, and/or other purposes for fulfilling the needs and benefit of humans.”<sup>176</sup>

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<sup>172</sup> U.S. First Written Submission, paras. 314-315.

<sup>173</sup> See *Chile – Price Band System (AB)*, para. 262; *Turkey – Rice*, paras. 7.121, 7.134.

<sup>174</sup> E.g., MOT 46/2013, as amended, arts. 2, 4, 9 (JE-21).

<sup>175</sup> MOT 46/2013, as amended, art. 1(1) (JE-21).

<sup>176</sup> MOT 46/2013, as amended, art. 1(5) (JE-21). We understand, however, that fish and fishery products are governed by a separate regime implemented by the Ministry of Marine Affairs and Fisheries. See Thom Wright & Titi Rahayu, U.S. Dep’t of Agriculture, Foreign Agriculture Serv., *GAIN Report No. ID1501: Indonesia Revises Seafood Import Rules*, Jan. 13, 2015 (Exh. US-83); Wright, *GAIN Report ID 1547: Indonesia: Food and Agricultural Import Regulations and Standards*, at 34 (Exh. US-81).

112. Thus the scope of MOT 46/2013 covers all “animals” and “animal products,” both listed and unlisted, and all importation of such animals and animal products must be consistent with the requirements of this regulation.<sup>177</sup>

113. The Ministry of Agriculture Regulation, MOA 139/2014, as amended, covers a subset of the products covered by MOT 46/2013, namely carcasses, meats, offals, and processed meat products.<sup>178</sup> The title and the text of MOT 139/2014 confirm this as the scope of products subject to the regulation.<sup>179</sup> Under MOA 139/2014, as amended, “Carcasses” are defined as “body parts from healthy . . . animals that have been slaughtered in the proper way according to Islamic law” (for bovine and poultry carcasses) and “body parts from healthy pigs that have been slaughtered” (for swine).<sup>180</sup> “Meat” is defined as “part of the carcass’ skeletal muscle that consists of prime cut meat, variety/fancy meat, and manufacturing meat.”<sup>181</sup> “Variety/Fancy meat” includes all offal cuts eligible for importation.<sup>182</sup> “Processed meat” is defined as “meat that is processed in a specific manner or method, with or without additives.”<sup>183</sup>

114. The scope of MOA 139/2014 thus covers all carcasses, meat, offal, and processed meat, as defined by the regulation (whether listed or unlisted), and all importation of the covered products must meet the requirements of the regulation. Such importations must also, of course, meet the requirements of MOT 46/2013, since the products covered by MOA 139/2014 are a subset of the “animals and animal products” covered by the Ministry of Trade regulation.

115. As described in the U.S. first written submission, the challenged measures within the Panel’s terms of reference are imposed by MOT 46/2013, as amended, and MOA 139/2014, as amended, acting singly or in combination.<sup>184</sup> Thus all of the products covered by MOA

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<sup>177</sup> MOT 46/2013, as amended, art. 30(1) (JE-21) (“Importers or Exporters of Animals and/or Animal Products that are not in accordance with the provisions in this Ministerial Regulation will be punished in accordance with regulatory legislation”); *id.* arts. 30(2)-(3) (“Imports of Animals and/or Animal Products . . . not in accordance with the provisions in this Ministerial Regulation will be re-exported,” with the cost being born by the importer).

<sup>178</sup> MOA 139/2014, as amended, p. 1, 3 (JE-28). The Ministry of Agriculture regulation that MOA 139/2014 replaced, MOA 86/2013, explicitly included “offal” in its scope. *See* MOA 84/2013 (JE-25). Although MOA 139/2014 does not refer to offal in the title, it is clear from the text of the regulation that it still covers offal products (although it bans importation of nearly all such products). *See* MOA 139/2013, as amended, art. 30 (JE-28) (stating that Recommendations under article 28 must specify the “[t]ype/category of carcasses, meat, offals and/or their processed products”); *id.* Attachment 3 (referring to shipments of “carcass, meat, and edible offal”); *id.* Appendix I, items (5)-(7) (listing tongue and tail cuts).

<sup>179</sup> *See, e.g.*, art. 1(9) (JE-28) (defining “importation,” for purposes of the regulation as “the activity of importing carcasses, meats, and/or their processed products from other countries into the territory of the Republic of Indonesia”); *id.* arts. 17, 20, 21, 33, 34, 37.

<sup>180</sup> MOA 139/2014, as amended, arts. 1(1)-(3) (JE-28).

<sup>181</sup> MOA 139/2014, as amended, art. 1(4) (JE-28).

<sup>182</sup> MOA 139/2014, as amended, art. 1(6) (JE-28) (defining fancy meat as “a meat part other than prime cut meat, secondary meat, and manufacturing meat . . . and consisting of tail and tongue as well as types of these cuts”).

<sup>183</sup> MOA 139/2014, as amended, art. 1(8) (JE-28).

<sup>184</sup> *See* U.S. First Written Submission, paras. 97-132.

139/2014 – i.e., animal carcasses, meat, offal and processed meat – are potentially within the scope of all the challenged measures at issue in this dispute (although some of the measures, by their terms, apply to only a subset of these products).<sup>185</sup> These are the products that are the focus of the co-complainants’ claims, as described in the first written submissions.

116. In addition, however, the scope of the products covered by some of the measures within the Panel’s terms of reference is broader. This is the case because some of the challenged measures are imposed by MOT 46/2013, as amended, acting on its own. These measures are: (1) the ban on unlisted animals and animal products (although MOA 139/2014 expands the ban by not listing certain products falling within its scope); (2) the realization requirement for cattle and beef products; and (3) the Reference Price requirement for cattle and beef products.

117. With respect to the ban on unlisted animals and animal products, MOT 46/2013, as amended, establishes on an independent basis that an animal or animal product not listed in one of the two appendices to the regulation cannot be imported.<sup>186</sup> Article 2 states explicitly: “The types of Animals and Animal Products that can be imported are included in Appendix I and Appendix II, which is an integral part of this Ministerial Regulation.”<sup>187</sup> The titles of the two appendices confirm this, referring to “Types of Animals and Animal Products That Can Be Imported,” using an RI designation and an Import Approval and using only an Import Approval, respectively.<sup>188</sup> Thus this challenged measure applies more broadly than MOA 139/2014, and includes all “animals” and “animal products” not listed in the appendices to MOT 46/2013.

118. MOA 139/2014 does play a role with respect to products within its scope, namely extending the ban to products that are not *also* listed in one of the appendices to MOA 139/2014. Appendix I and II list the “Bovine Meat that Can Be Imported into . . . Indonesia” and the “Non-Bovine Carcasses and/or Meat as well as Processed Meat Products that Can Be Imported into . . . Indonesia.”<sup>189</sup> Article 8 confirms that the requirements for “bovine meats” and for “non-bovine carcasses and/or meats as well as their processed products that can be imported” set out in Appendix I and II “are an integral part of this Ministerial Regulation.”<sup>190</sup> Thus, for a product within the scope of MOA 139/2014 to be eligible for import, it must be listed in an appendix to both MOA 139/2014 and MOT 46/2013.<sup>191</sup> The scope of the ban, however, extends beyond products covered by MOA 139/2014, as described above.

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<sup>185</sup> As described in the U.S. First Written Submission and discussed further below, the realization requirement and Reference Price requirements apply only to cattle and beef products, and the domestic purchase requirement applies only to beef products. U.S. First Written Submission, paras. 284-285, 311, 300. Also, the end-use restrictions are different for beef and non-beef products. U.S. First Written Submission, para. 292.

<sup>186</sup> U.S. First Written Submission, para. 105.

<sup>187</sup> MOT 46/2013, as amended, art. 2(2) (JE-21).

<sup>188</sup> MOT 46/2013, as amended, Appendix I, Appendix II (JE-21).

<sup>189</sup> MOA 139/2014, as amended, Appendix I, Appendix II (JE-28)

<sup>190</sup> MOA 139/2014, as amended, art. 8 (JE-28).

<sup>191</sup> U.S. First Written Submission, paras. 105-110.

119. The realization requirement for Appendix I (cattle and beef) products is imposed solely by MOT 46/2013, as amended.<sup>192</sup> Article 13 requires RIs (importers of Appendix I products) “to realize at least 80% (eighty percent) of imports of Animals and Animal Products” listed on their Import Approvals for each year.<sup>193</sup> Other articles of MOT 46/2013 impose the monthly reporting requirement by which the requirement is monitored<sup>194</sup>, and provide for suspending an importer’s RI designation if it does not fulfill the reporting requirement three times<sup>195</sup> or does not meet the realization requirement by the end of the year.<sup>196</sup> Thus the scope of this measure extends to all MOT 46/2013 Appendix I products.

120. Similarly, the Reference Price requirement is also imposed only by MOT 46/2013, as amended, and applies to all Appendix I products.<sup>197</sup> Article 14 provides that if the market price of secondary cuts of beef falls below a Reference Price set by the Minister of Trade, all imports of Appendix I products (i.e., cattle and beef products) are prohibited until the market price again rises to the Reference Price.<sup>198</sup> Thus the scope of this measure also covers all MOT 46/2013 Appendix I products, including cattle as well as bovine meat and offal.

121. In sum, all of the measures within the Panel’s terms of reference apply to the products within the scope of MOA 139/2014 (i.e., carcasses, meat, offal, and processed meat), as these products are covered by both MOA 139/2014 and MOT 46/2013. And to the extent that the challenged measures are imposed independently by MOT 46/2013 alone, the scope of products covered may be broader. Specifically, the ban on unlisted animals and animal products applies to all unlisted products within the scope of MOT 46/2013. And the realization and Reference Price requirements apply to all animals and animal products listed in Appendix I.

122. It is important to emphasize, however, that the United States is challenging the measures as such, and not as applied to any particular products. We therefore ask the Panel to make findings on the measures themselves, i.e., the prohibitions or restrictions as set out in the complainants’ panel request and described in their first written submissions, rather than on the application of the measures to particular animals or animal products.

**47. *[Advanced question No 24] (To Indonesia) In paragraphs 96 to 99 of its first written submission, Indonesia affirms that the animals and animal products that are not listed in Appendix I or Appendix II of MOT 46/2013 are allowed to be imported into Indonesia:***

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<sup>192</sup> See U.S. First Written Submission, section IV.D.4.

<sup>193</sup> MOT 46/2013, as amended, art. 13 (JE-21).

<sup>194</sup> MOT 46/2013, Appendix IV (JE-21).

<sup>195</sup> MOT 46/2013, as amended, art. 26 (JE-21).

<sup>196</sup> MOT 46/2013, as amended, arts. 26, 27(a), 29 (JE-21); see U.S. First Written Submission, para. 284.

<sup>197</sup> See U.S. First Written Submission, section IV.D.7.

<sup>198</sup> MOT 46/2013, as amended, art. 14 (JE-21).



- a. ***Please clarify whether all animal and animal products (i.e. not only the live bovine cattle items cited in paragraph 98) that are specified in Indonesia's WTO Schedule are eligible for importation into its customs territory;***
- b. ***Please identify the Indonesian import regulations applying to those animal and animal products that are neither listed in Appendix I nor Appendix II of MOT 46/2013***

123. As discussed in response to Question 45 above (*inter alia*), importation of animals and animal products not listed in Appendix I and II to MOT 46/2013 is prohibited. Indonesia has not submitted any legal instruments that allow the importation of products falling within the scope of MOT 46/2013 (including products also within the scope of MOA 139/2014) that are not listed in the appendices to that regulation (as well as the appendices to MOA 139/2014, if relevant). Further, they do not address the *prima facie* case made by co-complainants, based on the text of Indonesia’s regulations, that importation of animals and animal products not listed in Indonesia’s import licensing regulations is prohibited.

124. Rather, Indonesia’s assertion that it does not ban unlisted products is based solely on data showing that live bovine animals classified under two tariff headings were in fact imported into Indonesia.<sup>199</sup> Indonesia also asserts that these two tariff headings (0102.29.10.90 and 0102.29.90.00) are “not included in Appendix I or II” to MOT 46/2013.<sup>200</sup> To support this assertion, Indonesia cites to Exhibit IDN-14, which appears to be an English translation of MOT 46/2013. It is accurate that these two tariff codes do not appear in this version of MOT 46/2013.<sup>201</sup>

125. However, these two tariff codes *are* included in MOT 46/2013 as presented in JE-18, which includes the original Bahasa version with an official signature page.<sup>202</sup> As described in response to Question 16 above, the United States obtained the Bahasa version of MOT 46/2013 from the official Ministry of Trade website. And indeed, the version set out in JE-18, including the relevant tariff classifications is the version currently published on that website.<sup>203</sup>

126. Further inspection of the two versions confirms that live cattle of the type Indonesia discusses in paragraph 98 of its First Written Submission are in fact listed products permitted for import. First, we note that page 21 of IDN-14 and page 14 of JE-18 use the same descriptor, namely “feeder cattle” with a maximum weight of 350 kg, to describe the animals that can be imported.<sup>204</sup> This description refers to male and female cattle other than purebreds, and

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<sup>199</sup> See Indonesia’s First Written Submission, paras. 96-99.

<sup>200</sup> Indonesia’s First Written Submission, para. 98.

<sup>201</sup> See IDN-14, at 21.

<sup>202</sup> MOT 46/2013, as amended, at 16-17 (JE18).

<sup>203</sup> Ministry of Trade, “Regulations: Ketentuan Impor Dan Ekspor Hewan Dan Produk Hewan,” <http://jdih.kemendag.go.id/id/news/2013/09/30/ketentuan-impor-dan-ekspor-hewan-dan-produk-hewan>, (accessed Feb. 14, 2016) (Exh. US-84).

<sup>204</sup> See JE-18, p. 14; IDN-14, p. 21.

generally refers to the tariff codes listed on JE-18 and presented in paragraph 98 of Indonesia’s First Written submission. “Oxen” is the designation more commonly associated with the code listed in IDN-14 (0102.29.10.10). Indonesia’s other international agreements listing these three tariff codes confirm that this is the case.<sup>205</sup>

127. Further, as Australia demonstrated in its third participant submission, MOA 108/2014 and its successor MOA 48/2015, which provide for the issuing of Ministry of Agriculture Recommendations for imports of live cattle (as MOA 139/2014, as amended, does for animal products), both list the two tariff codes listed in JE-18.<sup>206</sup> Thus it seems clear that feeder cattle under 350 kg (tariff codes 0102.29.10.90 and 0102.29.90.00) are listed in the Appendices to MOT 46/2013 and, as such, are permitted to be imported. Consequently, the data concerning imports of such cattle submitted by Indonesia does not undermine in any way the *prima facie* case presented by the co-complainants.

**49. [Advanced question No 25] Article 12A of MOT 46/2013 as amended, foresees the possibility to extend the validity periods by up to 30 days for certain shipments. To your knowledge, to which extent this flexibility has been used by importers?**

128. To the best of our knowledge, the Indonesian government has not issued any guidelines or application procedures implementing this extension. Therefore, it is not clear whether or how importers could in fact take advantage of the extension.

129. Further, under article 12A(5) of MOT 46/2013, as amended, an application for extension of an Import Approval validity period is not granted automatically but based on a “stamped statement letter from the importer regarding the reason for submitting the application for an extension of the Import Approval validity period along with sufficient supporting evidence.”<sup>207</sup> The regulation does not indicate what reasons might justify an extension of the validity period, or what kind of evidence would be sufficient to support those reasons. Consequently, importers in the United States would be running a great risk shipping in the last four to six weeks of a validity period on the *chance* that, through opaque procedures and based on an evaluation of the “reasons” given and the sufficiency of “supporting evidence,” the application for extension would be granted.

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<sup>205</sup> E.g., ASEAN-Australia-New Zealand FTA, Annex 1 – Schedules of Tariff Commitments – Indonesia, 2013, p. 6, <http://dfat.gov.au/trade/agreements/aanzfta/official-documents/Pages/annex-1-schedules-of-tariff-commitments.aspx> (Exh. US-85); ASEAN Trade in Goods Agreement, Annex 2 – Indonesia, 2012, p. 1 [http://www.aseansme.org/dbfile/fta/afta/2.2.3\\_Annex\\_2\\_Tariff\\_Schedules\\_Indonesia\\_\(AHTN\\_2012\).pdf](http://www.aseansme.org/dbfile/fta/afta/2.2.3_Annex_2_Tariff_Schedules_Indonesia_(AHTN_2012).pdf) (Exh. US-86).

<sup>206</sup> See Australia’s Third Participant Submission, para. 14; Regulation of the Ministry of Agriculture Number 48/Permentan/PK.440/8/2015 Regarding Importation of Feeder Cattle and Production Heifer into the Territory of the Republic of Indonesia, Appendix, Sept. 2, 2015 (Exh. AUS-2) (“MOT 48/2014”); Regulation of the Ministry of Agriculture Number 108/Permentan/PD.410/9/2014 Regarding Importation of Feeder Cattle, Production Heifer, and Ready to Slaughter Cattle into the Territory of the Republic of Indonesia, Appendix, Sept. 9, 2014 (Exh. AUS-3) (“MOT 108/2014”).

<sup>207</sup> MOT 46/2013, as amended, art. 12A(5)(b) (JE-21).

130. Additionally, the extension of the validity period is for a maximum of 30 days.<sup>208</sup> Consequently, even if the applications *were* granted, exporters in the United States, for whom shipping products to Indonesia takes at least four to six weeks,<sup>209</sup> would still be running a risk, if they shipped in the last two weeks of a validity period, that their goods would arrive after the end of the extension and thus would not be accepted into Indonesia.

131. Finally, from the text of MOT 46/2013, it seems that importers could apply for an extension only once per validity period and that an extension is not available for Import Approvals for the fourth quarter of a given year.<sup>210</sup> Therefore, the restriction on importation in the last four to six weeks of each import period would be only partly alleviated for importers that have multiple Import Approvals for a given period (even if applications were granted quickly and automatically), and the restriction on importation in the last four to six weeks of the year is unaffected by the possibility of extending the validity of an Import Approval.

**51. *[Advanced question No 26] In paragraph 107 of its first written submission, Indonesia submits that the "realization requirement operates in the same manner for all import licences – regardless of whether they are for horticultural or animal products". Please comment on this assertion.***

132. It is generally true that the Indonesia's realization requirements operate in much the same way for all the products to which such requirements apply. However, as described in paragraph 122 of the U.S. First Written Submission, for animals and animal products, the realization requirement applies only to the products listed in Appendix I of MOT 46/2013 (i.e., cattle and beef products that are permitted for importation),<sup>211</sup> whereas for horticultural products it applies to all products listed on an importer's Import Approval.<sup>212</sup> Additionally, for horticultural products, the realization requirement applies on a semester basis, whereas for Appendix I animals and animal products, it applies on a yearly basis.<sup>213</sup>

**57. *[Advanced question No 29] In paragraph 167 of its first written submission, Indonesia mentions that the [beef reference price] measure "is necessary for the protection of human, plant, or animal life or health within the meaning of Article XX(b) of the GATT 1994" and that "it is an integral part of Indonesia's food safety and security plan." Please comment.***

133. To establish that the Reference Price requirement for cattle and beef, as listed in Appendix I to MOT 46/2013 is preliminarily justified under Article XX(b) of the GATT 1994, Indonesia must show: (1) that “the objective pursued by” the measure is “to protect human,

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<sup>208</sup> MOT 46/2013, as amended, art. 12A(1) (JE-21).

<sup>209</sup> See U.S. First Written Submission, paras. 156, 268.

<sup>210</sup> MOT 46/2013, as amended, art. 12A(3)-(4).

<sup>211</sup> U.S. First Written Submission, para. 122.

<sup>212</sup> MOT 16/2013, as amended by MOT 47/2013, art. 14A (JE-21).

<sup>213</sup> See U.S. First Written Submission, paras. 56 (for horticultural products), 122 (for animals and animal products).

animal or plant life or health”; and, (2) that the measure is “necessary” to the achievement of its objective.<sup>214</sup>

134. With respect to the first element, the Appellate Body recognized in *EC – Seal Products* in the context of Article XX(a) that a panel considering a Member’s assertion that a measure falls within an Article XX subparagraph should consider the Member’s characterization of the measure’s objective, but it is not bound by such characterization.<sup>215</sup> Rather, a panel should make an objective assessment of the measure, based on the evidence before it, including the measure’s text, history, structure, and operation.<sup>216</sup> The *EC – Seal Products* panel, for example, determined the “primary objective” of the measure at issue based on an “examination of the text and legislative history of the [measure], as well as other evidence pertaining to its design, structure and operation.”<sup>217</sup> The Appellate Body confirmed the panel’s analysis.<sup>218</sup>

135. Indonesia has not referred to anything in the text, legislative history, or structure of the Reference Price requirement for Appendix I products, or presented any official statements, reports, or other evidence concerning the measure that suggests that it is “part of Indonesia’s food safety and security plan.” Consequently, it is difficult even to begin the analysis of the second element of Article XX(b), namely, whether the measure is “necessary” to the covered objective.

136. It is possible to say, however, that to show that the Reference Price is “necessary” to its purported objective, Indonesia must show that the measure makes a contribution to that objective, i.e., that there is “a genuine relationship of ends and means between the objective pursued and the measure at issue.”<sup>219</sup> And Indonesia must show that the level of contribution is such that the measure is “necessary” to achieve that objective. In terms of the level of contribution required, the Appellate Body has recognized 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].”<sup>220</sup> The Panel should also analyze the “trade-restrictiveness of the measure,” balanced against the measure’s contribution to its objective.<sup>221</sup>

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<sup>214</sup> *Brazil – Retreaded Tyres (AB)*, paras. 144-145; see also *EC – Seal Products (AB)*, para. 5.169 (finding that, to make out a defense under Article XX(a), the responding Member had to show: (1) “that it has adopted or enforced a measure ‘to protect public morals;’” and, (2) that the measure is “‘necessary’ to protect such public morals”).

<sup>215</sup> *EC – Seal Products (AB)*, para. 5.144 (citing *US – Tuna II (Mexico) (AB)*, para. 314).

<sup>216</sup> *EC – Seal Products (AB)*, para. 5.144.

<sup>217</sup> *EC – Seal Products (AB)*, paras. 5.32 n.913 (citing *EC – Seal Products (Panel)*, para. 7.410).

<sup>218</sup> *EC – Seal Products (AB)*, para. 5.167.

<sup>219</sup> *Brazil – Retreaded Tyres (AB)*, para. 210; *EC – Seal Products (AB)*, para. 5.180 (citing *EC – Seal Products (Panel)*, para. 7.633).

<sup>220</sup> See *Korea – Various Measures on Beef (AB)*, para. 161; *Brazil – Retreaded Tyres (AB)*, para. 141.

<sup>221</sup> *EC – Seal Products (AB)*, para. 5.169.

137. In this light, we note that the Reference Price is an extremely trade-restrictive measure, providing for a complete ban on the importation of all beef meat and beef offals if the Indonesian market price of secondary cuts of beef falls below the designated level. A measure would have to make a significant contribution to the objective of human health in order to justify this level of trade-restrictiveness.

**58. [Advanced question No 30] (To New Zealand and the United States) In paragraph 119 of its first written submission, Indonesia states that "[m]easures are 'instituted or maintained' by a Member when they are the direct result of government action, and not dictated by the actions of private parties." Please comment.**

138. As a preliminary matter, we reiterate that the co-complainants are challenging certain measures that are instituted and maintained by Indonesia through framework legislation and regulations promulgated by the Ministry of Agriculture and the Ministry of Trade. We are not challenging the decisions of private actors that are compelled by these measures, although, as discussed above in response to Question 12, in some instances, the aspects of Indonesia’s measures that require traders to make these so-called “choices” are part of the restrictive effect of the challenged measure at issue.<sup>222</sup>

139. There is no support in the text or previous interpretation of Article XI:1 for Indonesia’s assertion that measures that operate, in part, by compelling private actors to make choices are outside the scope of the provision. To the contrary, the text of Article XI:1 refers generally to “restrictions . . . on importation.” In accordance with the ordinary meaning of “restriction” the Appellate Body has found that Article XI:1 encompasses measures that have a “limiting effect” on importation, confirming that it is the restrictive effect of the measure, not the form that such restrictive effect takes, that is decisive for purposes of Article XI:1.<sup>223</sup>

140. Further, previous panels’ interpretations of Article XI:1 refute Indonesia’s proposed interpretation. The panel in *India – Autos* considered a trade balancing requirement placed on importers of auto kits and components and found that, although the requirement did not set an “absolute numerical limit,” it was a “restriction” under Article XI:1 because it “induced [an importer] . . . to limit its imports of the relevant products” in relation to its “concern[] about its ability to export profitably.”<sup>224</sup> Consequently, “a manufacturer [was] in no instance free to import, without commercial constraint, as many kits and components as it wishes without regard to its export opportunities and obligations.”<sup>225</sup>

141. The panel in *Argentina – Import Measures*, considering a requirement that did not allow companies to import unless they achieved a trade balance or an export surplus, made a similar

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<sup>222</sup> See *supra* U.S. Response to Panel Question No. 12.

<sup>223</sup> *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 319.

<sup>224</sup> *India – Autos*, para. 7.268.

<sup>225</sup> *India – Autos*, para. 7.277.

finding.<sup>226</sup> The panel found that the measure had a negative effect on the importation of goods into Argentina because the “unwritten and discretionary nature of the requirement” negatively impacted “business plans of economic operators who [could] not count on a stable environment in which to import and who accordingly reduce[d] their expectations as well as their planned imports into the Argentine market.”<sup>227</sup> The panel also emphasized that the extra costs imposed by the measure would “discourage importation and, thus, will have an additional limiting effect on imports.”<sup>228</sup>

142. These interpretations are consistent with reports of previous panel and the Appellate Body under other provisions of the GATT 1994. The panel in *Korea – Various Measures on Beef* explained in the context of Article III:4 that: the GATT 1994 “is concerned with state measures and not with the autonomous behavior of economic actors,” but a government regulation contravenes a Member’s obligations if “it *forces*” economic operators to make certain choices.<sup>229</sup> The Appellate Body agreed, finding that “the intervention of some element of private choice does not relieve [a Member] of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product.”<sup>230</sup> The Appellate Body in *US – COOL* reached a similar conclusion in analyzing a claim under Article 2.1 of the TBT Agreement, finding that, “where private actors are induced or encouraged to take certain decisions *because of the incentives created by a measure*, those decisions are not ‘independent’ of that measure.”<sup>231</sup>

143. Thus, where a Member establishes legal requirements that effectively compel certain choices by private actors, the Member is not relieved of responsibility for the effect of those choices for purposes of Article XI:1 of the GATT 1994. Indonesia’s assertions to the contrary are in error.

**59. [Advanced question No 31] (To the United States and Indonesia) In paragraph 280 of its first written submission, New Zealand states that “Indonesia’s Importer Designations, RIPHs and Import Approvals, all fall within the ordinary meaning of the term ‘import licence’. Please comment.**

144. The United States agrees with New Zealand that, together, Indonesia’s “importer designations, RIPHs, and Import Approvals” fall within the ordinary meaning of import license. The ordinary meaning of “license” is a “[f]ormal, usu[ally] printed or written, permission from an authority to do something . . . or to own something . . . ; a document giving such permission;

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<sup>226</sup> *Argentina – Import Measures (Panel)*, para. 6.255.

<sup>227</sup> *Argentina – Import Measures (Panel)*, paras. 6.260, 6.265.

<sup>228</sup> *Argentina – Import Measures (Panel)*, para. 6.261.

<sup>229</sup> *Korea – Various Measures on Beef (Panel)*, para. 635.

<sup>230</sup> *Korea – Various Measures on Beef (AB)*, para. 146.

<sup>231</sup> *US – COOL (AB)*, para. 291.

a permit.”<sup>232</sup> Thus, an import license refers to permission granted by a competent authority to import products of one Member into another.

145. Under Indonesia’s import licensing regimes, Indonesia’s Ministry of Trade importer designations, Ministry of Agriculture RIPHs or Recommendations, and Ministry of Trade Import Approvals together constitute permission from the competent authorities to import products. An importer must apply for and obtain an RI or PI designation, an RIPH, and an Import Approval (for an RI) as prior conditions for importing covered horticultural products into Indonesia.<sup>233</sup> These documents are formal written permissions from the Ministries of Trade and Agriculture to import the covered horticultural products. Importers must follow the terms of their RIPHs and Import Approvals during the course of importation, and may be sanctioned for violations by becoming ineligible for future RIPH and Import Approvals. Together, therefore, these three permits constitute an “import licensing,” within the ordinary meaning of the term.

**60. [Advanced question No 32] (To all parties) Please comment on the European Union's argumentation in paragraphs 29 and 35 of its third-party submission with respect to the panel report in Colombia – Ports of Entry as follows:**

***29. It seems slightly unclear precisely where this panel draws the line between measures that limit the amount of imports or prevent the importation of products, and those that merely have any negative impact on imports. In the view of the European Union, such a distinction matters. Although the impact "need not be demonstrated by quantifying the effects of the measure at issue", as the Appellate Body found, the "design, architecture, and revealing structure ... considered in its relevant context" should in the view of the European Union reveal a discernible quantitative dimension of the measure, in the form of a limiting effect on the quantity or value of a product being imported/exported. This is supported by the title of Article XI which reads "General Elimination of Quantitative Restrictions" (and not "General Elimination of Any Measures that Could Negatively Affect Imports").***

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***35. In applying Article XI:1 of the GATT 1994, the European Union would expect the Panel to be careful in drawing a line between those measures which have a limiting effect on the quantity or amount of importation itself, and those measures which just have a negative impact on imports in any ways.***

146. As the Appellate Body recognized in *Argentina – Import Measures* and *China – Raw Materials*, the meaning of the term “restrictions . . . on importation,” as used in Article XI:1, refers to “a limitation on action, a limiting condition or regulation’ and, thus, generally, as

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<sup>232</sup> *Turkey – Rice*, para. 7.123 (quoting *The New Shorter Oxford English Dictionary* at 1578 (1993)). The *Turkey – Rice* panel referred to Article 1.1 of the Import Licensing Agreement and the ordinary meaning of “import licenses” to understand the meaning of that term.

<sup>233</sup> MOT 16/2013, as amended by MOT 47/2013 arts. 2, 3, 5, 11, 12 (JE-10); MOA 86/2013, art. 6 (JE-15).

something that has a limiting effect.”<sup>234</sup> Applying this standard, the Appellate Body in *Argentina – Import Measures* recognized that, “not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products.”<sup>235</sup> However, the Appellate Body was also clear that this “limitation” or “limiting effect” “need not be demonstrated by quantifying the effects of the measure at issue” but “can be demonstrated through the design, architecture, and revealing structure of the measure at issue, considered in its relevant context.”<sup>236</sup>

147. Thus a “restriction . . . on importation” refers to a measure that has a limiting condition or limiting effect on the *importation* of products. It does not refer only to (or require a showing of) any reduction on the “level of imports” *per se*. For example, like many other provisions of the GATT 1994, Article XI:1 protects potential trade, and, therefore, a “restriction” on importation can exist even in the absence of imports.<sup>237</sup> Thus, to the extent that the quoted paragraphs of the European Union’s third participant submission suggest that a claim could be brought under Article XI:1 only if the complaining member could show a reduction in the level of actual imports of the relevant products, that proposition is incorrect.<sup>238</sup>

148. However, the United States agrees with the Appellate Body’s statement in *Argentina – Import Measures* that “not every condition or burden placed on importation . . . will be inconsistent with Article XI.”<sup>239</sup> Indeed, there are many conditions that may be imposed on imports that may not constitute “restrictions” under Article XI:1. A few conditions that Indonesia imposes that the United States has not challenged, for example, are the requirements that, as a condition of importation, importers obtain: (1) a registered importer designation; (2) a business license; (3) a certificate of company registration; (4) a tax identification number; and (5) a general importer identification number.<sup>240</sup> These formal requirements do not impose a limitation on the action of importation or a limiting condition on importation, as they seem to be

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<sup>234</sup> *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 319.

<sup>235</sup> *Argentina – Import Measures (AB)*, para. 5.217.

<sup>236</sup> *Argentina – Import Measures (AB)*, para. 5.217.

<sup>237</sup> See *Argentina – Import Measures (Panel)*, paras. 6.264-265; *Colombia – Ports of Entry (Panel)*, paras. 7.240, 7.252; *China – Raw Materials*, para. (7.1081); *Argentina – Hides and Leather (Panel)*, para. 11.20; see also, e.g., *EC – Seal Products (AB)*, para. 5.82 (on Articles I:1 and III:4); *US – Clove Cigarettes (AB)*, para. 176, *China – Audiovisual Products (AB)*, para. 305, *Thailand – Cigarettes (Philippines) (AB)*, para. 126 (on Article III:4); *Japan – Alcoholic Beverages II (AB)*, p. 16 (on Article I:1); *Brazil – Retreaded Tyres (AB)*, para. 229 (Article XX); *EC – Bananas III (Article 21.5 – Ecuador) / (Article 21.5 – US) (AB)*, para. 469 (on Article III:2).

<sup>238</sup> But see European Union’s Third Party Oral Statement, para. 7 (stating that, “The European Union agrees with the Panels in *Colombia – Ports of Entry* and *Argentina – Import Measures* that ‘to the extent that a complainant is able to demonstrate a violation of Article XI:1 based on the measure’s design, structure, and architecture, it would not be necessary to consider trade volumes or a causal link between the measure and its effects on trade volumes’”).

<sup>239</sup> *Argentina – Import Measures (AB)*, para. 5.127.

<sup>240</sup> See MOT 16/2013, as amended by MOT 47/2013, art. 8(1) (JE-10); MOT 46/2013, as amended, art. 5(1) (JE-21).



ordinary businesses requirements. Thus, without more, they would appear to have no “limiting effect” on importation nor constitute “restrictions” under Article XI:1.

149. The challenged measures in this dispute, however, are not similar to these formal business requirements. The challenged measures, *inter alia*, (1) prevent imports of covered products for several months out of the year; (2) restrict imports during each semester to the products specified on previously issued permits (which *cannot* be modified); (3) impose absolute and seasonal prohibitions or restrictions on the importation of certain products; (4) restrict the purposes for which products can be imported; (5) restrict the quantity of imports based on the storage owned by importers; (6) require the purchase of local products as a condition of importation; and, (7) prohibit imports of certain products if the market price of these products falls below a set level.

150. These measures set out requirements or conditions for importation and thus impose a limitation on the action of importation or a limiting condition or regulation on importation. Indeed, although a limiting effect on the quantity of imports is not a necessary element of Article XI:1 in all circumstances, in this dispute, all of the challenged measures do, in fact, have a limiting effect on the quantity or amount of imports of covered products, as demonstrated by the co-complainants’ first written submissions. Therefore, in making its findings in this dispute, the Panel need not reach the abstract issue raised by the European Union regarding where the line should be drawn between measure having a limiting effect and those having only a negative impact on importation. The restrictions challenged by the co-complainants fall well within the bounds of Article XI:1.

**61. [Advanced question No 33] (To New Zealand and the United States) In paragraphs 92 and 93 of its first written submission, Indonesia refers to "the essential attributes" of minimum import price schemes. In this perspective,**

- a. Should (i) the assessment of an additional duty, and (ii) the insulation of the domestic market from world market prices, be considered "essential" features compared to other attributes of minimum price schemes?**

151. Neither the ordinary meaning of “minimum import price” nor the Appellate Body’s interpretation of the term supports Indonesia’s assertion that either of the attributes noted in the Panel’s question is an essential feature of a minimum import price scheme.

152. As discussed in response to Question 39 above, text of Article 4.2 does not support Indonesia’s proposed interpretation of “minimum import price” as *requiring*, as a necessary element, the imposition of an “additional duty . . . levied on individual imports to prevent their entry below a given price.”<sup>241</sup> The ordinary meaning of “minimum” suggests that the ordinary meaning of “minimum import price” is simply the “lowest possible” price for imports.<sup>242</sup> There

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<sup>241</sup> See *supra* U.S. Response to Panel Question No. 39.

<sup>242</sup> The ordinary meaning of “minimum” (*adj*) is “That is a minimum; that is the lowest possible, usual, attainable, etc.” *Shorter Oxford English Dictionary*, vol. 1, at 178.

is no requirement or even suggestion in the text of Article 4.2 that an additional duty is intrinsic to a “minimum import price.”

153. Further, the Appellate Body has disapproved the narrow interpretation of the term urged by Indonesia. In *Chile – Price Band System* and *Peru – Agricultural Products*, the Appellate Body explained that “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” but that “no definition has been provided by the drafters of the Agreement on Agriculture.”<sup>243</sup> The Appellate Body in *Peru – Agricultural Products* further found that, although “minimum import prices schemes generally operate in relation to the actual transaction value of imports” and involve the imposition of an additional charge if the price of an individual consignment is below the specified minimum import price, “there can be other examples of benchmarks for determining the lowest price at which imports may enter a market.”<sup>244</sup> Consequently, a panel must make a fact-specific assessment of the operation, design, and structure of the challenged measure

154. With respect to “the insulation of the domestic market from world market prices,” the ordinary meaning of the terms does not support this being a necessary element of a minimum import price scheme. Nor does the Appellate Body’s report in *Chile – Price Bands* support a contrary conclusion. There, the Appellate Body noted that the measures listed in footnote 1 “have in common that they restrict the volume or distort the price of imports of agricultural products,” and “disconnect domestic prices from international price developments.”<sup>245</sup> In its analysis of whether the challenged measure constituted a “variable import levy” or a “minimum import price,” however, the Appellate Body did not consider this as an independent element of the test for whether a challenged measure fell within one of the scope of one of the types of measures listed in footnote 1 or was a “similar border measure.”<sup>246</sup>

155. The Appellate Body in *Peru – Agricultural Products* made a similar finding when considering whether the challenged measure was a variable import levy or similar measure. In that dispute, the Appellate Body focused on the meaning of the terms of Article 4.2 and stated that, although variable import levies “may also have additional features that compromise the objective of the Agreement on Agriculture,” including “a lack of transparency, and a lack of predictability,” “[t]hese additional features are *not* independent or absolute characteristics that a measure must display in order to be considered a ‘variable import levy.’”<sup>247</sup>

156. Although insulation from world market prices is not a necessary element of a minimum import price scheme, as a factual matter, Indonesia’s Reference Price requirements *do* “disconnect domestic prices from international price developments.”<sup>248</sup> Specifically, the

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<sup>243</sup> *Chile – Price Band System (AB)*, para. 236; *Peru – Agricultural Products (AB)*, para. 5.128.

<sup>244</sup> *Peru – Agricultural Products (AB)*, para. 5.129.

<sup>245</sup> *Chile – Price Band System (AB)*, para. 227.

<sup>246</sup> *Chile – Price Band System (AB)*, paras. 235-252.

<sup>247</sup> *Peru – Agricultural Products (AB)*, para. 5.41.

<sup>248</sup> *Chile – Price Band System (AB)*, para. 227.

Reference Price requirement cuts off imports *entirely* if the market price of the covered products falls below the relevant Reference Price. This restricts the volume of imports and distorts prices by cutting Indonesia off from downward pressure on the prices of the covered products coming from international markets. If the international price of secondary cuts of beef is near the Reference Price and imports begin to exert downward pressure on the market price of beef in Indonesia, that pressure will be stopped altogether as soon as the Indonesian market price reaches the Reference Price. In short, because of the operation of the reference price, it is not possible to transmit to Indonesia international market prices below that price.

***b. Should some attributes be prioritized when considering the overall architecture of minimum import price schemes?***

157. Consistent with the Appellate Body reports in *Chile – Price Band System* and *Peru – Agricultural Products*, the Panel should focus its analysis on whether a challenged measure falls within the meaning of the term “minimum import price.” That is, the Panel should focus on whether the measure is one that sets the “lowest possible” price of or for imports, or, as the Appellate Body described, sets “the lowest price at which imports of a certain product may enter a Member’s domestic market.”<sup>249</sup> The Appellate Body in *Peru – Agricultural Products* stated explicitly that the Panel’s analysis under Article 4.2 involves an evaluation of “the design and structure of the measure itself, as well as its operation, in light of the relevant language in Article 4.2 and footnote 1.”<sup>250</sup>

158. The Panel should also consider whether the challenged measure is sufficiently similar to such a measure as to be “of the same nature or kind,” and, in doing so, should take the same approach. The Appellate Body report in *Chile – Price Band System* confirmed this, finding that, in its analysis of whether the challenged measure was a “similar border measure,” the panel had erred “in focusing on the degree to which two measures share characteristics of a ‘fundamental’ nature.”<sup>251</sup> Instead, the panel should have asked whether the measure had “likeness or resemblance sufficient to be similar” to the measure type listed in the footnote.<sup>252</sup>

***62. [Advanced question No 34] (To New Zealand and the United States) In several instances (see for example paragraphs 78 and 138 (for horticultural products) and paragraph 104 (for animal and animal products) of its first written submission, Indonesia refers to the notions of "self-selection" or "self-imposition" to support its view that certain alleged measures (for example, the 80% realization requirement or the fixed licence terms) are outside the scope of Article 4.2 because they are adopted by private entities rather than by a WTO Member. Please comment.***

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<sup>249</sup> *Chile – Price Band System (AB)*, para. 236.

<sup>250</sup> *Peru – Agricultural Products (AB)*, para. 5.39.

<sup>251</sup> *Chile – Price Band System (AB)*, para. 226.

<sup>252</sup> *Chile – Price Band System (AB)*, para. 226.

159. As described above in response to Questions 12 and 58, Indonesia’s argument is both factually and legally incorrect.<sup>253</sup>

160. With respect to the factual aspects, in several instances, Indonesia’s arguments misstate the measure that the co-complainants are challenging. With respect to the “fixed license terms” claim, for example, Indonesia asserts that “the terms of importation listed on import license applications are not measures that are ‘instituted or maintained’ by Indonesia.”<sup>254</sup> But the co-complainants are not challenging the terms of the licenses themselves, but importers’ inability to alter these terms or to apply for new permits once the period has begun. And Indonesia acknowledges that, pursuant to its import licensing regimes, the terms of licenses are “static” for the duration of an import period.<sup>255</sup>

161. Further, to the extent that the choices of private actors are involved in the restrictive effect of the challenged measures, it is through false choices, forced on them by the measures. With respect to the realization requirement, Indonesia’s assertion that it is not a restriction because it is “a function of importers’ own estimates” is wrong.<sup>256</sup> Under this requirement, importers must realize 80 percent of the quantity of products on their Import Approval or loose eligibility to import for at least two years.<sup>257</sup> The threat of becoming ineligible for future permits creates an incentive for importers to be conservative in the types and quantities of products that they apply to import.<sup>258</sup> As a consequence of these under-estimates, overall importation during an import period is reduced compared to what it would be under normal market conditions. However, importers do not “choose” to lose eligibility to import if they fail to import at least 80 percent of the products for which they previously applied. Consequently, to the extent that they “choose” to underestimate the quantity they apply for, it is a response compelled by the requirements of Indonesia’s measure.

162. With respect to Indonesia’s legal argument, it is incorrect that measures that operate by requiring private actors to make non-commercial “choices” are outside the scope of Article 4.2. As described in response to question 58 above, previous panels have been very clear that a measure that operates by compelling market actors to make certain choices, including to “self-restrict” importation, are inconsistent with Article XI:1 of the GATT 1994.<sup>259</sup> These interpretations are consistent with reports of previous panels and the Appellate Body under other

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<sup>253</sup> See *supra* U.S. Response to Questions 9, 58.

<sup>254</sup> Indonesia’s First Written Submission, para. 138.

<sup>255</sup> Indonesia’s First Written Submission, paras. 75 (stating that “importers are free to alter their terms of importation from one license application to the next” and that “the ‘terms’ are only static for one validity period at a time”); *id.* para. 105 (stating that “the ‘terms’ of import licenses for animals and animal products are only static for the length of one validity period (i.e. three months)”; *id.* para. 139.

<sup>256</sup> Indonesia’s First Written Submission, para. 107.

<sup>257</sup> U.S. First Written Submission, paras. 170, 229, 284, 343.

<sup>258</sup> See ASEIBSSINDO Letter (Exh. US-28); NHC Statements, at 3, 5 (Exh. US-21).

<sup>259</sup> See *supra* U.S. Response to Panel Question No. 58; *India – Autos (Panel)*, para. 7.268; *Argentina – Import Measures (Panel)*, para. 6.260-261.

provisions of the GATT 1994.<sup>260</sup> This reasoning would apply equally to Article 4.2 of the Agreement on Agriculture.

163. First, the scope of Article 4.2 is broad, covering “any measures of the kind which have been required to be converted into ordinary customs duties.” The Appellate Body has found that this provision was intended to be the “legal vehicle” for the conversion of all forms of border protection into ordinary customs duties.<sup>261</sup> To exclude from the scope of this provision measures that achieve a trade-restrictive effect by forcing certain decisions on private actors has no basis in the text of Article 4.2 and would undermine this goal.

164. Second, as described above in response to Questions 3 and 11, previous panels and the Appellate Body have confirmed that measures that are inconsistent with Article XI:1 of the GATT 1994 are also inconsistent with Article 4.2 of the Agriculture Agreement.<sup>262</sup> Consequently, since Article XI:1 covers measures that effect a “restriction” (or “limiting effect”) on importation by compelling private actors to make trade-restrictive choices, such measures would also be inconsistent with Article 4.2.

**72. (To New Zealand and the United States) Please comment on the following statement contained in paragraph 61 of Indonesia's first written submission:**

***As the panel confirmed in Chile – Price Band System, Article 4.2 of the Agriculture Agreement is interpreted in conjunction with the market access provisions of the GATT 1994, including the exceptions to those provisions found in Article XX. The panel in that dispute noted that a treaty interpreter must "read footnote 1 as excluding from the scope of Article 4.2 those measures which Members are allowed to maintain in accordance with the provisions in GATT 1994 laying down exceptions to the general obligations of GATT 1994". This is confirmed by the preparatory work to the Agreement on Agriculture. (footnotes omitted)***

165. In this dispute, the co-complainants have brought claims under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. In fact, each of the measures of concern to the co-complainants is challenged under both Article XI:1 and Article 4.2, and the basis for the challenge to each measure is identical under the two provisions. Similarly, Indonesia has defended the challenged measures under Article XX of the GATT 1994, and Indonesia’s defenses with respect to each measure are the same with respect to the co-complainants claims under Article XI:1 and Article 4.2. Consequently, the Panel can address the

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<sup>260</sup> See, e.g., *Korea – Various Measures on Beef (AB)*, para. 146 (finding that “the intervention of some element of private choice does not relieve [a Member] of responsibility under the GATT 1994 for the resulting establishment of competitive competitions less favourable for the imported product than for the domestic product”).

<sup>261</sup> *Chile – Price Band System (AB)*, paras. 200-201.

<sup>262</sup> See *supra* U.S. Response to Panel Questions No. 3, 11; *Korea – Beef (Panel)*, para. 762; *Chile – Price Band System (Panel)*, para. 7.30 (“In our view, the scope of footnote 1 to the Agreement on Agriculture certainly extends to measures within the scope of Article XI:1 of GATT 1994, but also extends to other measures than merely quantitative restrictions.”); *India – Quantitative Restrictions (Panel)*, paras. 5.241-242.

co-complainants claims and Indonesia’s defenses without interpreting, in the abstract, the relationship between Article 4.2 and Article XX, as set out in footnote 1 to Article 4.2.

166. Indonesia’s position is that the challenged measures do not breach Article 4.2 because they are “maintained” under Article XX, within the meaning of footnote 1 to Article 4.2. Footnote 1 states that the measures covered by Article 4.2 “include” the various listed types of measures, “but not measures maintained under balance-of-payment provisions or under other general, non-agricultural-specific provisions of the GATT 1994.” Therefore, the applicability of Article 4.2 in this dispute would turn on whether each measure is justified under the GATT 1994. If the Panel commences its analysis with Article XI:1 of the GATT 1994 and then examines Indonesia’s defenses under Article XX, and if the Panel agrees with the co-complainants that each measure breaches Article XI:1 and is not justified under Article XX, then the Panel would not need to reach the issue raised by Indonesia under footnote 1 to Article 4.2 at all, because again, that provision would not apply.

167. Even if the Panel began its analysis with Article 4.2 and then proceeded to the GATT Article XI:1 claims and then to Indonesia’s defenses under Article XX, whether a measure justified under the GATT 1994 would still be decisive of the applicability of Article 4.2 to any of the challenged measures. Consequently, if it agrees with the co-complainants that Indonesia has not made out an Article XX defense with respect to any measure, the Panel would simply not need to make findings under Article 4.2. Even if the Panel found that Indonesia had raised successful Article XX defenses, this would further confirm it would not be necessary to address the relevant measures under Article 4.2 as no claim could be sustained under that provision.

168. Therefore, reasons of efficiency and judicial economy in not reaching a legal issue unnecessarily counsel in favor of commencing the Panel’s analysis under Article XI:1 of the GATT 1994. But even if the Panel started with Article 4.2 of the Agreement on Agriculture, the structure of the claims in this dispute is such that the consistency of each of the challenged measures with the GATT 1994 as a whole will be decisive of the applicability of Article 4.2 to that measure.

**73. [Advanced Question 37] (To New Zealand and the United States) In paragraph 12 of its oral statement, Indonesia refers to its "offers to certify producers in the United States and New Zealand as 'Halal-compliant' have been repeatedly rebuffed". Please comment.**

169. As the United States described in its opening statement at the Panel meeting, Halal certification of animal products are made on a shipment-by-shipment basis.<sup>263</sup> That is, all animal products (other than swine products) that are exported to Indonesia must be certified as Halal by a Halal Certification Agency recognized by the Indonesian Islamic Authority (Indonesia Council of Ulama (“MUI”)) and must be labeled as such.<sup>264</sup> There are six bodies in the United States that MUI has authorized to certify to Indonesia’s Halal standards, and all animal products exported to Indonesia (other than pork) must obtain a Certificate of Islamic Slaughter from one of these

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<sup>263</sup> U.S. Opening Statement, paras. 37-38.

<sup>264</sup> MOA 139/2014, as amended, arts. 7, 13 (JE-28).

bodies and must be labelled according to Indonesia’s Halal labelling requirements.<sup>265</sup> Given these facts, the United States is not aware of any basis for Indonesia’s statement.

**74. (To New Zealand and the United States) Indonesia has invoked Article XX of the GATT 1994 as a defence in case that the Panel finds a violation of Article 4.2 of the Agreement on Agriculture. The Panel would like to have your views on this.**

170. As described in response to Question 73 above, the Panel in this dispute can address all of the co-complainants claims and all of Indonesia’s defenses without engaging in an abstract interpretation of the relationship between Article XX of the GATT 1994 and Article 4.2 of the Agriculture Agreement. In this dispute, each of the co-complainants claims are raised under both Article XI:1 and Article 4.2, and Indonesia has similarly advanced the same defenses with respect to the claims under both provisions. Consequently, if the Panel begins its analysis with co-complainants’ claims under Article XI:1 of the GATT 1994 and then evaluates Indonesia’s defenses under Article XX of the GATT 1994, its analysis effectively would be complete, because both the applicability of Article 4.2 and the measures’ consistency with that provision in this dispute turn on whether each measure is justified under the GATT 1994.

**75. (To New Zealand and the United States) In paragraph 55 of its opening oral statement, New Zealand refers to less trade-restrictive measures as alternatives to "an absolute ban on sales in traditional markets". Please elaborate on possible alternative less trade-restrictive measures for the other measures at issue in this dispute.**

171. Please refer to the U.S. response to Question 76 below.

**76. (To New Zealand and the United States) In paragraph 28 of its opening oral statement, the United States indicates "a readily available, less trade-restrictive measure" for storage ownership requirement "would be to allow importers to lease storage capacity or simply allow importers to transfer the products directly to the distributor's warehouse." Please elaborate on possible alternative less trade-restrictive measures for the other measures at issue in this dispute.**

172. To establish a successful defense under Article XX of the GATT 1994, Indonesia must show: (1) that the challenged measure is provisionally justified under one of the subparagraphs; and (2) that it is applied consistently with the Article XX chapeau.<sup>266</sup> The subparagraphs under which Indonesia has raised defenses, paragraphs (a), (b), and (d) each similarly incorporate two elements: (1) whether the challenged measure was “adopted or enforced” to pursue the objective

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<sup>265</sup> U.S. Dep’t of Agriculture, Food Safety & Inspection Serv., “Export Requirements for Indonesia” (Aug. 5, 2015), <http://www.fsis.usda.gov/wps/portal/fsis/topics/international-affairs/exporting-products/export-library-requirements-by-country/Indonesia> (Exh. US-67).

<sup>266</sup> *EC – Seal Products (AB)*, para. 5.169; *Brazil – Retreaded Tyres (AB)*, para. 139; *Korea – Beef (AB)*, para. 157.

covered by the relevant subparagraphs; and, (2) whether the measure is “necessary” to the achievement of that objective.<sup>267</sup>

173. With respect to the “necessary” analysis, Indonesia must show that a challenged measure makes a contribution to the objective covered by the relevant Article XX subparagraph (i.e. that there is “a genuine relationship of ends and means between the objective pursued and the measure at issue”<sup>268</sup>) and that this contribution is such that the measure is “necessary” to the achievement of that objective.<sup>269</sup> As part of this analysis, a panel should also analyze the “trade-restrictiveness of the measure,” balanced against the measure’s contribution to its objective.<sup>270</sup>

174. In evaluating the necessity of a measure, a panel may also consider – though it is not required to do so – any less trade-restrictive alternative measures proposed by the complaining Member.<sup>271</sup> In order to qualify as an alternative measure, “a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also preserve for the responding member its right to achieve its desired level of protection with respect to the objective pursued.”<sup>272</sup> Thus a less trade-restrictive alternative measure is closely connected with the objective of the challenged measure and the challenged measure’s level of contribution to that objective.

175. In this dispute, Indonesia has asserted Article XX defenses with respect to many of the challenged measures (sometimes defenses under multiple subparagraphs for a single measure).<sup>273</sup> With respect to many of these defenses, however, Indonesia has not satisfied the first element showing that the challenged measure is “adopted or enforced” in pursuit of the covered objective. For all of its Article XX(d) defenses, for example, Indonesia has failed to identify any “laws and regulations” with which the challenged measures are designed to secure compliance, as required by that subparagraph.<sup>274</sup> Similarly, for several of its Article XX(b) defenses, Indonesia simply asserts that the measure is necessary for food safety without providing any explanation or evidence to demonstrate that this is the case.<sup>275</sup>

176. Thus, based on the arguments Indonesia has advanced up to this point, in most cases we do not have sufficient information regarding either the level of protection or the level of

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<sup>267</sup> *EC – Seal Products (AB)*, para. 5.169; *Brazil – Retreaded Tyres (AB)*, paras. 144-145; *Korea – Beef (AB)*, para. 157.

<sup>268</sup> *Brazil – Retreaded Tyres (AB)*, para. 210; *EC – Seal Products (AB)*, para. 5.180 (citing *EC – Seal Products (Panel)*, para. 7.633).

<sup>269</sup> See *Korea – Various Measures on Beef (AB)*, para. 161; *Brazil – Retreaded Tyres (AB)*, para. 141.

<sup>270</sup> *EC – Seal Products (AB)*, para. 5.169; *Korea – Various Measures on Beef (AB)*, para. 163.

<sup>271</sup> *Brazil – Retreaded Tyres (AB)*, para. 156.

<sup>272</sup> *EC – Seal Products (AB)*, para. 5.261 (internal quotation omitted); *Brazil – Retreaded Tyres (AB)*, para. 156; *US – Gambling (AB)*, para. 308.

<sup>273</sup> See U.S. Opening Statement, paras. 25, 28-29, 31.

<sup>274</sup> See Indonesia’s First Written Submission, paras. 136, 140, 145, 149, 160, 162, 179.

<sup>275</sup> Indonesia’s First Written Submission, paras. 153, 154, 160, 161, 162, 167, 169, 170.



contribution to be in a position to suggest an appropriate alternative measure. For the same reason, it may prove difficult for the Panel to begin an analysis of each measure’s necessity, let alone progress to evaluating any less trade-restrictive alternatives.

177. That said, as the Panel has indicated in its question, the United States has attempted to identify a reasonably available alternative measure with respect to Indonesia’s storage ownership requirements, as Indonesia provided more explanation in this context than in most others.<sup>276</sup> Similarly, we have responded at greater length to those of Indonesia’s defenses under Article XX with respect to which Indonesia has provided some (limited) explanation.

178. Concerning Indonesia’s defense under Article XX(a) regarding the protection of consumers from non-halal animal products, we have noted that, under Indonesian law, *all* animal products entering Indonesia (other than pork) must comply with Indonesia’s Halal requirements and bear labels indicating as much.<sup>277</sup> Therefore, not only do Indonesia’s use restrictions on animal products appear in fact not to be aimed at Halal, they would seem not to be necessary for achieving the objective of protecting consumers from non-Halal products because those products separately are prohibited from entry into Indonesia; thus, there is no risk of confusion.<sup>278</sup> For the same reason, a reasonably available alternative measure exists. That is, in order to protect consumers from non-Halal foods, Indonesia could rely on its existing Halal rules and requirements. These requirements obviously are available to Indonesia, as they currently are in place. They also are much less trade-restrictive than the imposition of both halal requirements *and* use restrictions, and lead to the same level of Halal protection, as the use restrictions add nothing to the protection maintained by the Halal requirements.

179. With respect to Indonesia’s defense under Article XX(a) concerning protection from supposedly non-Halal horticultural products, we have explained that the instruments through which Indonesia imposes end-use, sale, and transfer restrictions do not refer to halal standards, and that Indonesia has not identified any related halal standard that might inform the purpose behind these measures.<sup>279</sup> Further, Indonesia’s defense of the measure concerns the absence of labeling in traditional markets, but the restriction does not address the end-use of imported products *at all*; it simply requires the products to be sold to distributors.<sup>280</sup> Consequently, Indonesia’s restrictions on horticultural products appear not to be aimed at Halal at all and not to make any contribution to achieving that objective. For the same reason, a reasonably available

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<sup>276</sup> Indonesia’s First Written Submission, para. 148.

<sup>277</sup> U.S. Opening Statement, paras. 37-39; MOA 139/2014, as amended, arts. 7, 13 (JE-28) (stating that to ship animal products to Indonesia, companies must comply with Indonesia’s Halal requirements); *id.* art. 15 (stating that, to be confirmed as an “importing business unit” companies must undergo an audit of their “animal product safety and halal assurance system”); MOA 139/2014, arts. 17, 19, Attachment 1, Format 1, 2, 3 (requiring that all products other than swine meat bear a “Halal logo”).

<sup>278</sup> U.S. Opening Statement, paras. 36, 39.

<sup>279</sup> U.S. Opening Statement, para. 33; *see* MOT 16/2013, as amended by MOT 47/2013 (JE-10); MOA 86/2013 (JE-15); Horticulture Law (JE-1).

<sup>280</sup> U.S. Opening Statement, paras. 34-35.

alternative measure would be simply not to impose the requirement, which would make an equivalent contribution to public morals and would be significantly less trade-restrictive.

180. With respect to the seasonal restrictions on horticultural product imports, Indonesia argues these are necessary to protect the population from the dangers of oversupply of horticultural products by “ensuring that imports are directed elsewhere in Indonesia” during domestic harvest periods in different regions.<sup>281</sup> Indonesia again appears to be justifying the wrong measure, however, as the Ministry of Agriculture has (and exercises) authority to prohibit completely into all regions of Indonesia importation of horticultural products, based on their harvest period.<sup>282</sup> Thus one possible less trade-restrictive alternative would be to confine harvest period restrictions to those regions in which the harvest was occurring. Even more to the point, Indonesia has not presented any evidence suggesting that any oversupply that existed would not be solved by the operation of market forces. Importers would not want to import products into an over-supplied region where they could not be sold. Consequently, another even less trade-restrictive alternative would be to allow market forces to resolve any oversupply problem by removing any requirements (such as the 80 percent realization requirement) that would compel importers to import when it did not make economic sense to do so.

181. Finally, we note that the Panel has directed several questions to Indonesia regarding its various Article XX defenses. The responses to these questions should provide additional evidence and explanation with respect to both the objectives of the challenged measures and the measures’ contribution to those objectives. Based on those responses, we would be able to address Indonesia’s defenses at greater length in our second written submission, including by providing reasonably available alternative measure where appropriate.

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<sup>281</sup> Indonesia’s First Written Submission, para. 155.

<sup>282</sup> See U.S. First Written Submission, paras. 180-181; MOA 86/2013, art. 5 (JE-15); Letter from Dr. Ir. Spudnik Sujono K. MM, Director General, Directorate of Horticulture, Ministry of Agriculture, to General Secretary of ASEIBSSINDO, Dec. 3, 2015 (Exh. US-70); Letter from Dr. Ir. Spudnik Sujono K. MM, Director General, Directorate of Horticulture, Ministry of Agriculture, to General Secretary of ASEIBSSINDO, Dec. 21, 2015 (Exh. US-71) (stating that oranges could not be imported during January and lemons could not be imported from January to March 2016).