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

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

February 1, 2016

1. Good morning, Mr. Chairman and members of the Panel. We would like to begin by thanking the Panel for agreeing to assist the parties in resolving this dispute and the Secretariat staff for their assistance to you in this matter. We look forward to working with you, and with the delegations of Indonesia and New Zealand, as you carry out your work.

I. INTRODUCTION

2. Indonesia, through its import licensing regimes, has imposed numerous restrictions on the importation of horticultural products and animals and animal products. Pursuant to framework legislation, the purpose of these import licensing regimes is to "control the import and export" of products and give "priority to the selling of local . . . products"[1], and to allow importation only "if local production…is not sufficient to fulfill [Indonesian] consumption needs."[2] To carry out these laws, Indonesia has created and imposed import licensing regimes that limit the importation of covered products through numerous prohibitions and restrictions.

3. As we have described in our first written submission, these prohibitions and restrictions include: (1) strict application windows and validity periods on import permits that prevent importation for months out of the year; (2) limitations, established at the start of each six- or three-month import period, on what types of products can be imported, how much can be imported, where these products can come from, and through which Indonesian port they can enter; (3) seasonal bans on imports of horticultural products during the Indonesian harvest period; (4) restrictions allowing imports of covered products only for certain limited purposes; (5) prohibitions on the importation of certain products when their market prices fall below a certain government-set level; (6) a ban on the importation of animal products not listed in Indonesia's import licensing

[1] Law Number 13 of 2010 Concerning Horticulture, articles 90 and 92 (JE -1) ("Horticulture Law").
[2] Law Number 18 of 2009 on Animal Husbandry and Animal Health, article 36(4) (JE -4).

regulations; and (7) a requirement that importers purchase local products, as a condition of importation.

4. These and other restrictions were detailed in the co-complainants' first written submissions, which established *prima facie* breaches of Indonesia's obligations under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. With one exception, Indonesia does not contest the existence of the measures described by the co-complainants. For example, Indonesia does not deny that it imposes strict application windows and validity periods on import permits or that, once an import period has begun, imports are strictly limited to the type, quantity, country of origin, and the port of entry specified on the permits for that period. Indonesia does not contest that importers are required to realize a certain percent of the products listed on their import permits. Indonesia does not contest that importation of covered products is limited by the storage capacity owned by importers, by seasonal bans, and by requirements to purchase domestic products. Indonesia does not contest that covered products may not be imported for sale to retailers or that importation of certain products is suspended if their market price drops below a set level.

5. Instead, Indonesia attacks the complainants' claims based on arguments that either misinterpret the obligations and exceptions of GATT 1994 and the Agreement on Agriculture or mischaracterize the way the measures at issue operate, without refuting the evidence submitted by the co-complainants. Thus, in this oral statement, we will focus on responding to the various legal arguments raised by Indonesia in its first written submission to demonstrate the flaws in Indonesia's responses to the arguments of the co-complainants.

II. ORDER OF ANALYSIS

6. As a preliminary matter, we would like to comment on Indonesia's argument that the Panel

must begin its analysis with the claims under Article 4.2 of the Agreement on Agriculture rather than Article XI:1 of the GATT 1994. Indonesia asserts that the Panel must begin with Article 4.2 because the Agriculture Agreement 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.[3] In the context of the claims at issue in this dispute, however, the Agreement on Agriculture is not the more "specific" agreement.

7. The complainants' claims each relate to prohibitions or restrictions imposed by Indonesia on the importation of horticultural products and animals and animal products. Prohibitions and restrictions on importation are addressed specifically under Article XI:1 of the GATT 1994. Each measure of concern to the co-complainants is challenged under Article XI, and the basis for the challenge to each measure under Article 4.2 of the Agreement on Agriculture is identical to the basis advanced under Article XI:1. Therefore, the measures and claims at issue in this dispute are dealt with specifically under Article XI:1 and not dealt with more specifically under the Agreement on Agriculture.

8. Furthermore, Indonesia has defended the 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. 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," namely Article XX.[4]

[3] Indonesia' First Written Submission, paras. 43-44 (citing *EC – Bananas III(AB)*, para 204);*see also Chile – Price Band System (Panel)*, para. 7.12; *Chile – Price Band System (AB)*, para. 184.
[4] Indonesia's First Written Submission, para. 61.

9. 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 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. And the United States would note that, if the Panel were to commence its analysis with Article XI:1 and then examine Indonesia's 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 both efficiency and judicial economy in not reaching a legal issue unnecessarily would also counsel in favor of commencing the analysis under Article XI:1 of the GATT 1994.

10. We also note that panels that have analyzed measures under both Articles XI:1 and 4.2 have found that, if a measure is inconsistent with Article XI:1 (and not justified under any exception), it is likewise inconsistent with Article 4.2.[5] Indeed, the parties do not appear to disagree on this issue, as Indonesia too has advanced largely the same arguments under both provisions. 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. Further, in all previous disputes where the complainants have brought claims under Article XI:1 and Article 4.2 and the responding

[5] *See India – Quantitative Restrictions (Panel)*, para. 5.24; *Korea – Beef (Panel)*, para. 762; *EC – Seal Products (Panel)*, para. 7.665; *US – Poultry (China) (Panel)*, para. 7.486; *see also Chile – Price Band System (Panel)*, para. 7.30.

Member has raised a defense under the GATT 1994, the panel began its analysis with Article XI:1.[6]

III. INDONESIA'S ARGUMENTS UNDER ARTICLE XI:1 OF THE GATT 1994 AND ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE ARE BASED ON FLAWED INTERPRETATIONS

11. In its first written submission, Indonesia responded to the co-complainants' claims under Article XI:1 of the GATT 1994 with two principal arguments: (1) that complainants did not establish a *prima facie* case because they did not prove that the measures decreased trade flows; and (2) that the measures are not restrictions under Article XI:1 because their restrictive effect depends on the choices of private actors. These arguments rest on an incorrect interpretation of Article XI:1, as reflected in past panel and Appellate Body reports, and should be rejected on that basis. Furthermore, they are factually inaccurate, as trade impacts, while not necessary to establish a legal claim, are manifest in the trade data that the co-complainants have submitted.

A. Trade Effects Are Not Required To Demonstrate a Breach Under Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture

12. In its first written submission, Indonesia responds to many of the co-complainants' claims under Article XI:1 of the GATT 1994, as well as under Article 4.2 of the Agriculture Agreement, by asserting that the co-complainants had not established a *prima facie* case because they have not proven that the challenged measure, in fact, has an "impact on trade flows."[7] Indonesia advanced this argument in response to the claims against the application windows and validity periods,[8] realization requirements,[9] and use restrictions[10] imposed on importation of horticultural products

[6] *See India – Quantitative Restrictions (Panel)*, paras. 5.112-242; *Korea – Beef (Panel)*, paras. 747-769; *EC – Seal Products (Panel)*, paras. 7.652-665; *US – Poultry (China) (Panel)*, paras. 7.484-487.
[7] *See* Indonesia's First Written Submission, paras. 55, 68, 78, 141, 161.
[8] *See* Indonesia's First Written Submission, paras. 71, 163.
[9] *See* Indonesia's First Written Submission, paras. 78, 80, 143, 163.
[10] *See* Indonesia's First Written Submission, paras. 90, 156, 110.

and animals and animal products, as well as the seasonal restrictions,[11] the storage capacity restrictions,[12] and the 6-month requirement[13] imposed on importation of horticultural products.

13. Indonesia's argument is untenable. The co-complainants are not obligated to quantify the trade effects of a challenged measure in order to make a *prima facie* case under Article XI:1. The ordinary meaning of "restriction," as used in Article XI:1, is "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation."[14] The term "restrictions" under Article XI:1 thus refers to measures "that are limiting, that is, those that limit the importation or exportation of products."[15] The text of Article XI:1 does not suggest that a complaining Member must prove, in quantified terms, the effects of a challenged measure on trade flows.[16]

14. The Appellate Body confirmed this interpretation in *Argentina – Import Measures*, finding that a challenged measure's "limitation" 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."[17] Previous panels have found that Article XI:1 protects competitive opportunities of imports and that, therefore, proving trade effects is not necessary to establish that a challenged

[11] *See* Indonesia's First Written Submission, para. 83.
[12] *See* Indonesia's First Written Submission, para.84.
[13] *See* Indonesia's First Written Submission, para. 89.
[14] *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 319 (citing *Shorter Oxford English Dictionary*, p. 2553).
[15] *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 319 (citing *Shorter Oxford English Dictionary*, p. 2553).
[16] *See Argentina – Import Measures (Panel)*, para. 6.256 (quoting the finding of the panel in *Argentina – Hides and Leather* that ""Article XI:1, like Articles I, II, and III of the GATT 1994, protects competitive opportunities of imported products, not trade flows" and on this basis rejecting the responding Member's arguments that the complainants' description of the facts could not be considered in determining the consistency of the challenged measure with Article XI:1 "because it is not supported by trade data").
[17] *Argentina – Import Measures (AB)*, para. 5.217.

measure is inconsistent with Article XI:1.[18] As the co-complainants demonstrated in their first written submissions, the limiting effect on importation of the challenged measures is evident from their design, architecture, and revealing structure.

15. A demonstration of actual trade effects is not required, but, contrary to Indonesia's assertions, the co-complainants have, in fact, presented evidence demonstrating the challenged measures' negative effects on trade flows. This evidence includes: trade data showing that U.S. exports to Indonesia cease toward the end of Import Approval validity periods;[19] statements from U.S. exporters and Indonesian importers attesting that the realization requirement limits the quantity of imports of covered products into Indonesia;[20] evidence that the Ministry of Agriculture's seasonal bans on the importation of horticultural products have caused Indonesia's imports of these products to fall dramatically;[21] evidence that the storage capacity restriction limits the quantity of imports;[22] evidence showing that Indonesia's positive list has dramatically reduced imports of animal products;[23] and evidence that animal product imports are denied access to the outlets where Indonesian consumers make 70 percent of their fresh meat purchases.[24] Therefore, Indonesia is mistaken both in arguing that evidence of trade effects is required for a finding of breach under

[18] *See China – Raw Materials (Panel)*, para. 7.1081; *Colombia – Ports of Entry*, para. 7.240.
[19] Northwest Horticultural Council, "U.S. Washington State Apple Exports to Indonesia, by Week," Nov. 11, 2015 ("NHC Statement") (Exh. US-50).
[20] NHC Statement, at 3; Letter from the Exporter-Importer of Fresh Fruit and Vegetable Indonesian Association (ASEIBSSINDO), Oct. 22, 2015 ("ASEIBSSINDO Letter") (Exh. US-28).
[21] *See* "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).
[22] ASEIBSSINDO Letter (Exh. US-28).
[23] *See* "Query: Importation of Bovine Livers, Frozen, from 2011-2015, Monthly," *BPS – Statistics Indonesia* (accessed Oct. 22, 2015) (Exh. US-42); Letter from the Directorate General to GM PT Multirasa Nasantara in Jakarta in Response to an Application on the Importation of Frozen Beef-Short Place, Feb. 4, 2015 ("MOA 139/2014 Letter") (Exh. US-41).
[24] *See* Rahwani Y. Rangkuti& Thom Wright, U.S. Department of Agriculture Foreign Agriculture Service, *GAIN Report No. ID1450: Retail Foods 2014*, at 5-6, Dec. 19, 2014 (Exh. US-58).

Article XI:1, and in claiming that its measures have no such effects.

B. Indonesia's Measures Also Breach to the Extent They Force Market Actors To Make Choices that Restrict Their Imports, and Indonesia Misstates the Content of Its Own Measures

16. The second argument Indonesia advances in response to many of the co-complainants' claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agriculture Agreement is that the measures cannot be challenged because they are not imposed by the Government of Indonesia, but are the result of choices by private actors.[25] This argument is factually and legally incorrect.

17. First, Indonesia's argument rests on an incorrect interpretation of Article XI:1 and Article 4.2 that previous panels have rejected. The panel in *India – Autos*, considering a trade balancing requirement, 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."[26] The panel in *Argentina – Import Measures* also found that a trade balancing requirement had a negative effect on importation because its "unwritten and discretionary" nature meant that private actors "[could] not count on a stable environment in which to import and…accordingly reduce their expectations as well as their planned imports into the Argentine market."[27] As the panel in *Korea – Various Measures on Beef* explained in the Article III:4 context: the GATT 1994 "is concerned with state measures and not the behavior of economic actors," but a government regulation contravenes a Member's

[25] *See* Indonesia's First Written Submission, paras. 67, 134 (concerning the application windows and validity periods); 74, 104, 138 (concerning the fixed license terms measure);*id.* para. 86, 147 (concerning the storage capacity requirement); *id.* para. 107 (concerning the realization requirement).
[26] *India – Autos (Panel)*, para. 7.268.
[27] *See Argentina – Import Measures (Panel)*, para. 6.260.

obligations if "it *forces*" economic operators to make certain choices.[28]

18. To the extent that Indonesia's measures operate by influencing private choices, they force importers to self-restrict in the same way as the measures considered in these previous disputes. Further, Indonesia overstates the extent to which the challenged measures operate through the choices of private actors, rather than as direct restrictions on importation.

19. With respect to the fixed license terms measure, Indonesia's assertion that the license terms are at "the complete discretion of importers" and that the measure is therefore not "instituted or maintained by Indonesia" misstates the measure at issue.[29] Co-complainants are not challenging the terms of particular import permits *per se*. Rather, we are challenging the fact that Indonesia requires importers to choose the types and quantities of products they will import before an import period begins, and then *limits* imports during the import period to the products specified on the permits for that period, without allowing importers to alter the terms of these permits or to apply for new permits once the period begins.[30] Indonesia's import licensing regulations establish these restrictions; they are *not* the result of importers' choices.[31] Additionally, it is simply not correct that importers have "complete discretion" in setting the terms of their import permits even at the start of an import period. As described in the U.S. first written submission, the other restrictions of Indonesia's licensing regimes constrain the type and quantity of products for which importers can apply and receive permission to import.

20. Indonesia's assertion that the application windows and validity periods do not "cut off

[28] *See Korea – Various Measures on Beef (Panel)*, para. 635.
[29] *See* Indonesia's First Written Submission, paras. 74, 104, 138.
[30] U.S. First Written Submission, paras. 160-164, 225-226, 274-279, 339-340; *see also* Norway's Third Participant Submission, para. 6.
[31] *See* MOA 139/2014, as amended, articles 33(b), 39(e) (JE-28); MOT 46/2013 as amended, articles 12(1), 30 (JE-21); MOA 86/2013, article 13 (JE-15); MOT 16/2013 as amended by MOT 47/2013, article 30(2)-(4) (JE-10).

imports at the beginning or end of the validity period" but that importers simply *choose* to stop shipping is misleading.[32] As the co-complainants have shown, under Indonesia's import licensing regimes, imports that arrive after the end of the period for which their Import Approval is valid will not be accepted into Indonesia but will be re-exported or destroyed.[33] Thus, importers 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 – four to six weeks for U.S. exporters. During this same period, imports cannot be shipped for the next period because Import Approvals have not yet been issued, and Indonesia requires that documents completed in the country of origin contain the Import Approval number for the relevant period.[34] Thus, regardless of whether exporters "choose" to ship products before receiving their import approval, these products *could not* be imported into Indonesia. Indeed, Indonesia acknowledges that goods arriving after their Import Approval validity period are "without the appropriate license."[35]

21. Indonesia's assertion that the realization requirement 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" similarly misstates the challenged measure.[36] What the co-complainants are challenging is the requirement that importers realize 80 percent of the quantity of products on their Import Approval or lose eligibility to import at all for future periods.[37] This measure is not the result of choices of market actors. Part of the measure's restrictive effect is due

[32] Indonesia's First Written Submission, paras. 67, 134.
[33] *See* U.S. First Written Submission, paras. 156-157, 222 (for horticultural products) and 112, 269, 336 (for animals and animal products).
[34] MOT 16/2013, as amended by MOT 47/2013, art. 21, 22 (JE-10); MOT 46/2013, as amended, art. 15; Ministry of Trade, Import Approval for Beef, Sept. 25, 2014, at 1 (Exh. US-43).
[35] Indonesia's First Written Submission, para. 68.
[36] Indonesia's First Written Submission, para. 107.
[37] U.S. First Written Submission, paras. 170, 229, 284, 343.

to the fact that it causes private actors to be more conservative in the quantities of products that they apply to import than they would be if operating according to market considerations, thereby limiting overall importation during the following import period.[38] However, importers are forced to make this choice by the threat of ineligibility for future permits.

22. 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.[39] The challenged measure limits the total quantity of horticultural products that importers are eligible to import during a 6-month semester to the volume of storage facilities *owned* by the importer. It requires that each horticultural product importer *own* sufficient storage capacity to hold all the horticultural products it will import for an entire 6-month semester. This is notwithstanding the fact that fresh fruits and vegetables are sold quickly and inventory typically undergoes multiple turnovers during a 6-month semester (i.e., market actors would empty and re-fill a storage facility several times), and that renting storage space is a common market practice.[40] It is inaccurate, therefore, to assert that market actors are *choosing* to curtail their Import Approval applications; the "choice" is being forced upon them by Indonesia's measures.

V. INDONESIA HAS NOT ESTABLISHED THAT ANY OF THE CHALLENGED MEASURES ARE JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

23. Indonesia argues that if the challenged measures are inconsistent with Article XI:1 of the GATT 1994 (or Article 4.2 of the Agreement on Agriculture), they are justified under Article XX. In particular, Indonesia raises a defense under subparagraph (a), (b), or (d) of Article XX (sometimes

[38] *See* U.S. First Written Submission, paras. 174, 344-346; ASEIBSSINDO Letter (Exh. US-28); NHC Statements, at 3, 5 (Exh. US-21).
[39] Indonesia's First Written Submission, para. 86.
[40] U.S. First Written Submission, paras. 188-190; ASEIBSSINDO Letter (Exh. US-28).

multiple paragraphs) with respect to almost all of the co-complainants' claims.

24. The United States, of course, acknowledges that Members may derogate from their WTO obligations in certain circumstances, and that the protection of human health or public morals and securing enforcement with WTO-consistent rules and regulations are among the reasons for which they may do so. However, in order to satisfy the requirements of an exception under Article XX of the GATT 1994, Indonesia must show that: (1) the challenged measure is provisionally justified under one of the subparagraphs; and (2) that it is applied consistently with the Article XX chapeau.[41] Indonesia has failed to do either with respect to any of the challenged measures.

A. Indonesia Has Not Made a Prima Facie Case that Any of the Challenged Measures Are Justified Under Article XX(d) of the GATT 1994

25. Indonesia asserts a defense under Article XX(d) with respect to most of the claims advanced by the co-complainants. Specifically, Indonesia asserts that:

- the limited application windows and validity periods of import permits,
- the fixed license terms of the import permits,
- the 80 percent import realization requirement,
- the storage capacity restriction on importation of horticultural products,
- the prohibition on importation of covered products other than for certain limited uses, and
- the import licensing regime as a whole

are "necessary for Indonesia's customs enforcement" and therefore justified under Article XX(d).

26. In order to make out an Article XX(d) defense, Indonesia must establish two elements: (1) that the challenged measure is "designed to 'secure compliance' with laws or regulations that are not

[41] *EC – Seal Products (AB)*,para. 5.169; *Brazil – Retreaded Tyres (AB)*, para. 139; *Korea – Beef (AB)*, para. 157.

themselves inconsistent with some provision of the GATT 1994"; and, (2) that the measure is "necessary to secure such compliance."[42] Indonesia has not done either. First, Indonesia has not identified any "laws and regulations" with which the challenged measures are designed to secure compliance, as required by Article XX(d). Other than bare assertions of "customs enforcement," Indonesia provides no references to any customs law or regulation. Because Indonesia has not satisfied the first element, it is not possible to begin the analysis of whether the measure is "necessary to secure compliance" with another WTO-consistent law or regulation. Thus, Indonesia's Article XX(d) defenses necessarily fail.

B. Indonesia Has Not Made a Prima Facie Case that Any of the Challenged Measures Are Justified Under Article XX(b) of the GATT 1994

27. Indonesia also seeks to justify many of the import restrictions at issue under Article XX(b) of the GATT 1994 by arguing that they are necessary to protect human health. To succeed in such a defense, Indonesia must show: (1) that the challenged measure's objective is "to protect human, animal or plant life or health"; and (2) that the measure is "necessary" to the achievement of its objective.[43] With respect to the necessity analysis, Indonesia must show that the measure is "necessary" in light of its objective, its contribution to that objective, and its trade-restrictiveness.[44] Indonesia has not met this standard with respect to any of the challenged measures.

28. For example, to obtain an Import Approval, Indonesia requires that importers must own storage capacity sufficient to hold all the horticultural products they will import during an entire import period.[45] Indonesia claims that this measure is necessary because of its "equatorial climate"

[42] *Korea – Beef (AB)*, para. 157.
[43] *Brazil – Retreaded Tyres (AB)*, paras. 144-145.
[44] *EC – Seal Products (AB)*,para. 5.169; *Korea – Beef*, paras. 164-166; *US – Gambling (AB)*, paras. 306-307.
[45] *See* MOT 16/2013, as amended by MOT 47/2013, article 8(1)(e) (JE-21); ASEIBSSINDO Letter (Exh. US-28).

and its "limited capacity to store fresh horticultural products after their arrival but before they are transferred to distributors or to end users."[46] It is unclear how this restriction would contribute to Indonesia's stated objective of keeping horticultural products fresh. An importer's *ownership* of storage facilities has little relationship with the *sufficiency* of storage capacity. For example, if an importer could import and sell 10 tons of apples per month during a six-month semester, it would only need 10 tons of storage capacity to keep all its products fresh at all times. But Indonesia's storage ownership restriction would require this importer to own 60 tons of storage capacity to receive an Import Approval, even if the importer would never use all the capacity at one time. Furthermore, if the storage shortage is, as Indonesia has asserted, limited to the capacity to store products "after their arrival, but before they are transferred to the distributor," a readily available, less trade-restrictive measure would be to allow importers to *lease* storage capacity or simply allow importers to transfer the products directly to the distributor's warehouse. Thus, Indonesia has not even attempted to explain how the requirement to *own* storage capacity is necessary to protect human health and life from spoiled horticultural products.

29. With respect to the end-use restrictions on animals and animal products, Indonesia asserts that "[a]nimals and animal products are not permitted to be sold in traditional Indonesian markets because of the extremely high risk of unsafe food handling that would result."[47] However, Indonesia does not explain why the challenged measure would make a contribution to that objective, let alone meet the "necessary" standard. Indonesia prohibits the importation of non-beef animal products for sale in traditional markets and prohibits the importation of beef products for all retail

[46] Indonesia's First Written Submission, para 148.
[47] Indonesia's First Written Submission, para. 109.

sale.[48] Indonesia has offered no evidence to show that imported frozen or thawed meat in traditional markets poses any greater risks to human health than those associated with freshly slaughtered local meat under the same conditions. Indeed, the Indonesian government itself has demonstrated that frozen beef poses no particular food safety problem, as the Bureau of Logistics ("Bulog"), a state-owned enterprise, relieves domestic shortages *by selling imported frozen beef* in traditional markets.[49] Finally, to the extent that Indonesia is asserting a defense of the whole measure, its explanation relating to traditional markets would have no relevance to the prohibition on importation for all retail sale(including in modern markets) of beef products.

30. For reasons of time, we have not addressed all of the defenses under Article XX(b) that Indonesia has asserted, but each fails for similar reasons, as we will elaborate further in writing.

C. Indonesia's Restrictions on the Importation of Horticultural Products and Animals and Animal Products Other Than for Certain Limited Purposes Are Not Justified Under Article XX(a) of the GATT 1994

31. Indonesia asserts that the restrictions on the importation of horticultural products and animals and animal products to certain limited purposes is "necessary to protect public morals," specifically Islamic law concerning permissible ("halal") and impermissible ("haram") foods.[50] To make out a successful defense under Article XX(a), Indonesia must show (1) "that it has adopted or enforced [the] measure 'to protect public morals"; and, (2) "that the measure is 'necessary' to protect

[48] U.S. First Written Submission, para. 292.
[49] *See* Wiji Nurhayat, "BulogSells 8 tons of Cheap Imported Beef in 3 Markets of Jakarta Today," *detikfinance*, July 17, 2013, http://finance.detik.com/read/2013/07/17/121510/2305381/4/hari-ini-bulog-jual-8-ton-daging-impor-murah-di-3-pasar-jakarta (Exh. US-62).
[50] *See* Indonesia' First Written Submission, paras.158-159 (for horticultural products), 166 (for animals and animal products).

such public morals."[51]

32. The United States has great respect for the beliefs and practices of Indonesian Muslims and for the Indonesian government's right to protect these beliefs and practices, and U.S. exporters therefore go to great lengths to comply with Indonesia's numerous and detailed Halal rules and requirements for animals and animal products. In fact, U.S. exporters sell only halal animal products into Indonesia. The United States is not aware of any Indonesian halal requirements for fresh horticultural products and was therefore, surprised to see Indonesia's assertions on this issue.

33. With respect to horticultural products, Indonesia asserts that its "end use limitations . . . [are] necessary to protect public morals; i.e. to protect the people of Indonesia from horticultural products that do not conform to the religious beliefs of the vast majority of its population."[52]Given that the instruments through which Indonesia imposes end-use, sale, and transfer restrictions do not refer to halal standards[53], and that Indonesia has not identified any related halal standard that might inform the purposes behind these measures, it is difficult to see how these measures might be said to be necessary to protect the population from non-halal foods. Indeed, Indonesia acknowledges that its halal standards generally apply only to animals and animal products.[54] And, indeed, were the measures directed to safeguard important public morals, one would expect Indonesia to be clear both to its citizens and its trading partners on the requirements to be met to protect those interests.

34. Even were the panel able to discern from the text, design, structure, or operation of Indonesia's import licensing regime for horticultural products that the measures at issue are directed at and contribute to the stated objective, it is not clear that any such contribution would warrant the

[51] *EC – Seal Products (AB)*,para. 5.169.
[52] Indonesia's First Written Submission, para. 158.
[53] *See* MOT 16/2013, as amended by MOT 47/2013 (JE-10); MOA 86/2013 (JE-15); Horticulture Law (JE-1).
[54] Indonesia's First Written submission, para. 158.

high degree of trade-restrictiveness imposed by Indonesia's requirements. As noted in the U.S. first written submission, Indonesia prohibits importers of fresh horticultural products from selling directly to consumers or retailers; such products may only be sold to distributors. Producer importers of horticultural products face more stringent restrictions, as they are only permitted to import products for their own use and are prohibited from selling or transferring those products to another entity.[55]In defending these measures, Indonesia claims that consumers assume that all products sold in traditional markets comply with halal standards, and that implementing a labelling system to warn consumers about non-halal products "would be logistically impossible to monitor or enforce."[56] To resolve this concern, Indonesia states that it "limit[s] imported horticultural products to uses that naturally require some degree of labelling (e.g. listing food items on restaurant menus)."[57]

35. However, as described above, the measures at issue limit the *persons* to whom imported horticultural products can be sold, not the products' ultimate destination. That is, importers must sell the imported horticultural products to a distributor and are prohibited from selling the products directly to consumers or retailers, but distributors are not prohibited from doing so.[58] Therefore, imported fresh horticultural products can, and presumably are, sold in traditional and other markets in Indonesia. This being the case, Indonesia must explain how and why the requirement to sell imported fresh horticultural products *through a distributor* (and the prohibition on the sale or transfer of imported processed horticultural products) is necessary to protect the Indonesian population from non-halal products. It has not done so.

[55] U.S. First Written Submission, para. 193.
[56] Indonesia's First Written Submission, para. 159.
[57] Indonesia's First Written Submission, para. 159.
[58] U.S. First Written Submission, paras. 193-195.

36. With respect to animals and animal products, Indonesia asserts that its end-use restrictions on importation are "necessary to protect public morals . . . because it prevents consumers from mistakenly purchasing animals or animal products that do not conform to Halal requirements," due to the absence of a "widely-used product labelling system in place in traditional, open air market[s] in Indonesia."[59] But this argument ignores the fact that, with the exception of pork products, all the animal products imported into Indonesia must conform to Indonesia's Halal standards and must be labeled as such.

37. To be eligible to ship animal products to Indonesia, companies must comply with Indonesia's Halal requirements, including being supervised by a Halal Certification Agency recognized by the Indonesian Halal Authority.[60] And before being confirmed as an "importing business unit" companies must undergo an audit of their "animal product safety and halal assurance system."[61] All animal products other than swine meat must bear a "Halal logo,"[62] and imported Halal and non-Halal products are prohibited from being transported in the same container.[63]

38. Indonesia's Halal requirements are established by the Indonesian Islamic Authority (Indonesia Council of Ulama ("MUI")), which also administers and enforces the Halal regime.[64] MUI only recognizes Halal certificates issued by approved Halal certification bodies in exporting countries. There are currently six bodies in the United States that are authorized by MUI to certify

[59] Indonesia's First Written Submission, para. 166.
[60] MOA 139/2014, as amended, articles 7, 13 (JE-28).
[61] MOA 139/2014, as amended, article 15 (JE-28).
[62] MOA 139/2014, articles 17, 19, Attachment 1, Format 1 (stating that that any shipment of poultry carcasses or poultry meat from overseas must be in accordance with Halal requirements and accompanied by a halal certificate); Attachment 1, Format 2 (same requirement for processed meat), Attachment 1, Format 3 (same requirement for beef meat).
[63] MOA 139/2014, as amended, article 21 (JE-28).
[64] *See* Majelis Ulama Indonesia, "Halal Certification Requirements" (accessed Jan. 26, 2016), http://www.halalmui.org/newMUI/index.php/main/go_to_section/39/1329/page/2 (Exh. US-63).

to Indonesia's Halal Standards,[65] and all animal products exported to Indonesia (other than pork) must obtain a Certificate of Islamic Slaughter from one of these bodies and must comply with Indonesia's halal labelling requirements.[66]

39. Thus, Indonesia's end-use restrictions on the importation of animal products are not "necessary" to protect public morals in the form of Halal standards because, with the exception of pork, all imports of animal products into Indonesia *already meet Indonesia's Halal standards*. Further, to the extent that Indonesia seeks to justify the entire challenged measure under Article XX(a), its statements concerning traditional markets would not address the prohibition on all retail sale (including in modern markets) with respect to Appendix I (beef) products.

VII. CONCLUSION

40. For the reasons we have explained today, Indonesia has failed to rebut the *prima facie* case presented by the United States and New Zealand in their first written submissions. Accordingly, we respectfully request the Panel to find that Indonesia's measures at issue breach its WTO commitments. We thank the Panel for its attention and look forward to answering its questions.

[65] *See* Letter from Ir. Lukmanul Hakim, M.Si., Director, Indonesian Council of Ulama, to Mr. Ali Abdi, Agriculture Counselor, U.S. Embassy, Jakarta, Feb. 6, 2014 (Exh. US-64); MajelisUlama Indonesia, "List of Approved Foreign Halal Certification Bodies," (January 2016) (Exh. US-65); U.S. Dep't of Agriculture, Foreign Agriculture Serv., *GAIN Report ID9028: Newest List of Approved Halal Certification Bodies*, Oct. 28, 2009 (Exh. US-66).

[66] 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).

Table of Exhibits

Exhibit No.	Description
US-62	Wiji Nurhayat, "Bulog Sells 8 tons of Cheap Imported Beef in 3 Markets of Jakarta Today," *detikfinance*, July 17, 2013, http://finance.detik.com/read/2013/07/17/121510/2305381/4/hari-ini-bulog-jual-8-ton-daging-impor-murah-di-3-pasar-jakarta
US-63	Majelis Ulama Indonesia, "Halal Certification Requirements" (accessed Jan. 26, 2016), http://www.halalmui.org/newMUI/index.php/main/go_to_section/39/1329/page/2
US-64	Letter from Ir. Lukmanul Hakim, M.Si., Director, Indonesian Council of Ulama, to Mr. Ali Abdi, Agriculture Counselor, U.S. Embassy, Jakarta, Feb. 6, 2014
US-65	Indonesian Council of Ulama, "List of Approved Foreign Halal Certification Bodies," (January 2016) (Exh. US-65)
US-66	U.S. Dep't of Agriculture, Foreign Agriculture Serv., *GAIN Report ID9028: Newest List of Approved Halal Certification Bodies*, Oct. 28, 2009
US-67	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