BEFORE THE APPELLATE BODY
OF THE WORLD TRADE ORGANIZATION

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

(AB–2017–2)

APPELLEE SUBMISSION OF NEW ZEALAND

7 March 2017

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Japan – Restrictions on Certain Agricultural Products (GATT Panel Report)	*Japan – Restrictions on Imports of Certain Agricultural Products*, adopted 22 March 1988, BISD 35S/163

I. INTRODUCTION

1. This dispute concerns prohibitions and restrictions imposed by Indonesia on imports of animals, animal products and horticultural products.

2. Indonesia has enacted a series of laws and implementing regulations which underpin the measures at issue in this dispute. These measures all have the common purpose of prohibiting agricultural imports when domestic production is deemed sufficient to satisfy domestic food demand.[1] This objective is expressly captured in the overarching *Food Law* which provides that "[i]mport of food can only be done if the domestic Food Production is insufficient".[2] Similar express provisions are found in Indonesian legislation governing importation of animal products, horticultural products, and the protection of farmers.[3]

3. As the evidence before the Panel demonstrates, the impact of these trade barriers on Indonesia's agricultural imports is well-documented and dramatic. Global imports of affected agricultural products, including beef, have declined significantly. As a small country heavily reliant on our agricultural export sector, the measures at issue have particularly impacted New Zealand exports. New Zealand is not a frequent user of the WTO dispute settlement system, and did not commence these proceedings lightly.

4. The Panel found that each of the 18 measures at issue constituted prohibitions or restrictions on importation inconsistent with the fundamental obligation in Article XI:1 of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) that are not justified under the exceptions in Article XX of the GATT 1994.

5. In reaching those conclusions, the Panel made clear factual findings regarding each of the measures at issue. Specifically, having considered in detail all of the facts on the record, the Panel concluded that:

a. each of the 18 measures at issue prohibits or restricts importation;[4] and

b. the "actual policy objective" behind each and every measure is to "achieve self-sufficiency through domestic production by way of restricting and, at times, prohibiting imports".[5]

6. On appeal, Indonesia does not challenge these substantive conclusions. Instead, Indonesia's appeal is limited to two erroneous propositions, that the Panel: (a) incorrectly sequenced the order of its analysis, and (b) misapplied the burden of proof.

[1] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.822.
[2] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.822 (referring to Article 36 of the *Food Law*).
[3] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.822 (referring to provisions of the *Animal Law, Animal Law Amendment, Horticulture Law* and *Farmers Law*).
[4] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.92, 7.112, 7.134, 7.156, 7.179, 7.200, 7.227, 7.243, 7.270, 7.299, 7.327, 7.349, 7.375, 7.398, 7.428, 7.451, 7.478 and 7.501.
[5] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.822.

Indonesia's grounds of appeal thus question the form, rather than the substance, of the Panel's assessment.

7. In reality, the Panel correctly assessed the measures at issue and exercised an appropriate margin of discretion in its sequence of analysis. Accordingly, New Zealand will demonstrate in this submission that each of Indonesia's grounds of appeal lacks merit.

8. Indonesia first argues that the Panel erred by commencing its analysis under Article XI:1 of the GATT 1994. However, as New Zealand demonstrates in Part II, Indonesia's argument that Article 4.2 of the Agreement on Agriculture applies "to the exclusion" of Article XI:1 of the GATT 1994 runs contrary to well-established WTO jurisprudence that provisions of the covered agreements that do not conflict apply cumulatively. Furthermore, a panel's sequence of analysis is within its "margin of discretion" provided it does not lead to independent errors in the substantive analysis. Indonesia's argument also runs counter to the fact that Article X1:1 deals specifically with quantitative restrictions and the practice of multiple panels that have analysed claims of inconsistency with Article XI:1 of the GATT 1994 before Article 4.2 of the Agreement on Agriculture.

9. Second, Indonesia argues that the burden of proof for an affirmative defence under Article XX of the GATT 1994 is *reversed* for agricultural quantitative restrictions. As demonstrated in Part III, this novel argument with fundamental systemic repercussions runs contrary to well-established jurisprudence that the burden of proving an Article XX defence falls on the defendant. Furthermore, this appeal point would not affect the outcome of this dispute as the complainants presented extensive evidence relevant to Indonesia's unsuccessful Article XX defences.

10. Third, Indonesia argues that the Panel failed to make an objective assessment of the matter under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). Despite well-established guidance from the Appellate Body that challenging the objectivity of a panel is "a very serious allegation" that must "stand by itself and be substantiated with specific arguments", Indonesia simply reiterates its erroneous first and second grounds of appeal in support of this argument. As demonstrated in Section IV, Indonesia's claim does not stand by itself and is insufficient to demonstrate that the Panel's assessment was not objective.

11. Fourth, Indonesia asks the Appellate Body to revisit the Panel's conclusion that Article XI:2(c) of the GATT 1994 is rendered inoperative with respect to agricultural products by virtue of the Article 4.2 of the Agreement on Agriculture. As detailed in Section V, Indonesia's argument is supported neither by the text of the relevant provisions nor Appellate Body jurisprudence. Moreover, this ground of appeal has no bearing on resolving this dispute as Indonesia failed to demonstrate that the elements of an Article XI:2(c)(ii) defence are satisfied in this instance.

12. Finally, Indonesia challenges the Panel's order of analysis for assessing Measures 9 to 17 under Article XX of the GATT 1994. Yet again, Indonesia's appeal focuses on the form, rather than the substance, of the Panel's assessment. Indeed, Indonesia does not identify any flaws in the Panel's analysis of the measures at issue under the Article XX *chapeau*, focusing simply on the sequence of the Panel's analysis in the abstract. In Section VI, New Zealand demonstrates that the Panel's order of analysis was permissible in the circumstances of this dispute, and did not impact on the Panel's legally correct assessment that none of the measures are applied in a manner consistent with the Article XX *chapeau*. Specifically, the Panel correctly assessed each of the measures at issue under the *chapeau* of Article XX in accordance with relevant jurisprudence, including the Appellate Body decision in *US - Shrimp*. In particular, the Panel examined each and every measure under the *chapeau* in light of the asserted policy objective under the subparagraphs of Article XX.

13. For these reasons, New Zealand submits that each of Indonesia's grounds of appeal is without merit and should be dismissed.

II. THE PANEL DID NOT ERR BY ANALYSING THE MEASURES AT ISSUE UNDER ARTICLE XI:1 OF THE GATT 1994

A. INDONESIA'S APPEAL

14. Indonesia argues that the Panel committed a legal error by commencing its analysis of the 18 measures at issue "under Article XI:1 of the GATT 1994, rather than Article 4.2 of the Agreement on Agriculture".[6] Indonesia claims that the reason for this error was that "the Panel erred in determining that the provision which dealt specifically with quantitative restrictions was Article XI:1 of the GATT 1994".[7]

15. In support of this argument, Indonesia contends that the application of Article 21.1 of the Agreement on Agriculture requires that the "Agreement on Agriculture would apply to the exclusion of the more general agreements, such as the GATT 1994, to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same matter."[8]

B. THE PANEL'S ANALYSIS

16. The Panel chose to commence its analysis of the measures at issue in this dispute with Article XI:1 of the GATT 1994. In selecting that order of analysis, the Panel relied on the Appellate Body's guidance that "[a]s a general principle, panels are free to structure the order of their analysis as they see fit. In so doing, panels may find it useful

[6] Indonesia's Appellant Submission, para. 39.
[7] Indonesia's Appellant Submission, para. 39.
[8] Indonesia's Appellant Submission, para. 53.

to take account of the manner in which a claim is presented to them by a complaining Member."[9]

17. In light of that guidance, the Panel then considered the manner in which the complainants had presented their claims.[10] It also considered the views of the parties and third parties.[11] It recalled that the complainants suggested the Panel commence its analysis with Article XI:1.[12] It then recalled that, while Indonesia initially suggested the Panel commence with Article 4.2, it then indicated at the first substantive meeting that the Panel could instead commence its analysis with Article XI:1.[13] Indonesia then altered its position again, suggesting that reasons of "efficiency and judicial economy" would favour the Panel commencing its analysis under Article 4.2 of the Agreement on Agriculture.[14]

18. The Panel also considered whether a particular order of analysis could lead it to commit a legal error, and what the impact of a selected order of analysis would be on the potential for the Panel to apply judicial economy.[15] Finally, the Panel considered which of Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture deals specifically with the measures at issue in the dispute, concluding that in its view Article XI:1 of the GATT 1994 "deals specifically, and in detail" with the measures at issue.[16]

19. Having taken into account those considerations, the Panel proceeded to analyse the measures at issue under Article XI:1 of the GATT 1994. Having found that each of the measures is inconsistent with Article XI:1 of the GATT 1994, and not justified by Article XX of the GATT 1994, the Panel found it unnecessary to make specific findings on the consistency of the measures at issue with Article 4.2 of the Agreement on Agriculture in order to ensure the effective resolution of this dispute.[17]

C. LEGAL ISSUE BEFORE THE APPELLATE BODY

20. The legal issue before the Appellate Body is whether the Panel committed a reversible error of law by assessing the measures at issue under Article XI:1 of the GATT 1994, rather than Article 4.2 of the Agreement on Agriculture.

[9] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.28 citing Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.
[10] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.28.
[11] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.28, 7.29, 7.30 and 7.32.
[12] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.28.
[13] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.30.
[14] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.30.
[15] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.31, citing Panel Report, *India – Autos*, paras. 7.154 and 7.161.
[16] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.31 – 7.32.
[17] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.833 citing Appellate Body Report, *Australia – Salmon*, para. 223.

21. Indonesia argues that Article 4.2 of the Agreement on Agriculture applies "to the exclusion of" Article XI:1 of the GATT 1994.[18] However, where there is no legal conflict between two provisions of the covered agreements, the Appellate Body has held that the relevant obligations are *cumulative* and apply concurrently.[19] Thus, where a provision of the GATT 1994 can be read harmoniously with the provisions of another covered agreement, a presumption against conflict applies and both obligations continue to apply.[20]

22. It is, therefore, only in circumstances where it is not possible to read two overlapping provisions harmoniously that a provision will apply to the *exclusion* of another. In the context of the Agreement on Agriculture, in those exceptional circumstances, a hierarchy is determined by Article 21.1, which provides that:

> The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.

23. Indonesia also argues that the Panel committed reversible legal error by commencing its analysis under Article XI:1 of the GATT 1994, as it alleges Article 4.2 of the Agreement on Agriculture is more specific.[21] However, WTO jurisprudence confirms that panels have a "margin of discretion" to "structure the order of their analysis as they see fit".[22] A particular order of analysis will only be inappropriate where it has "repercussions for the substance of the analysis itself" and leads to "flawed results".[23]

24. Of the five previous panels that have considered claims that measures are inconsistent with both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, four have commenced their analyses with Article XI:1 of the GATT 1994.[24] In two of those disputes, the panel also made consequential findings of inconsistency

[18] Indonesia's Appellant Submission, para. 53.
[19] See Appellate Body Reports, *US – Softwood Lumber IV*, para. 134; *US – Upland Cotton*, para. 549; *Chile – Price Band System,* para. 189; *EC – Bananas III,* paras. 157 and 158, 203 and 204*, Canada – Renewable Energy/Canada – Feed–in Tariff Program,* para. 5.5; Panel Report, *Indonesia – Autos*, para. 5.285.
[20] Appellate Body Reports, *Argentina – Footwear (EC)*, para. 81; *US – Upland Cotton*, para. 549; Panel Report, *Indonesia – Autos*, para. 14.28.
[21] Indonesia's Appellant Submission, para. 43.
[22] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126; Appellate Body Report, *Canada – Renewable Energy/Canada – Feed–in Tariff Program,* para. 5.8.
[23] Appellate Body Report, *Canada – Autos*, para. 151 citing Appellate Body Reports, *US – Shrimp*, para. 119 and *US – Gasoline*, p. 22; Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109. See also Indonesia's Appellant Submission, para. 103 citing Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109; Panel Report, *India – Autos*, para. 7.154.
[24] Commencing analysis with Article XI:1 of the GATT 1994: Panel Reports, *India – Quantitative Restrictions*, paras. 5.238 – 5.242; *Korea – Various Measures on Beef*, para. 768; *EC – Seal Products*, paras. 7.657 – 7.665; *US – Poultry (China)*, paras. 7.457 and 7.484 – 7.487; Commencing analysis with Article 4.2 of the Agreement on Agriculture: *Turkey – Rice*, paras. 7.48 and 7.141 – 7.142.

with Article 4.2 of the Agreement on Agriculture.[25] In *EC – Seal Products,* the panel made a consequential finding that a measure was not inconsistent with Article 4.2 (based on its finding that the measure was not inconsistent with Article XI:1).[26] In the remaining dispute, the panel exercised judicial economy with respect to the claims under Article 4.2 of the Agreement on Agriculture,[27] as did the Panel in the present dispute.

D. ARTICLE XI:1 OF THE GATT 1994 APPLIES TO THE MEASURES AT ISSUE

1. *Article 4.2 of the Agreement on Agriculture does not apply to the exclusion of Article XI:1 of the GATT 1994*

25. As outlined above, Indonesia argues that the "Agreement on Agriculture would apply to the exclusion of the more general agreements, such as the GATT 1994, to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same matter."[28]

26. This argument is fundamental to Indonesia's first ground of appeal. However, it is unsupported by WTO jurisprudence regarding the relationship between the covered agreements.

27. WTO jurisprudence is clear that the obligations under the covered agreements are "all necessary components of the 'same treaty' and they, together, form a single package of WTO rights and obligations".[29] Accordingly, it is clear that "a single measure may be subject, at the same time, to several WTO provisions imposing different disciplines".[30]

28. In the absence of a legal conflict between two provisions of the covered agreements, the Appellate Body has found that relevant provisions continue to apply *cumulatively*.[31] This is consistent with the principle that "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously".[32] The panel in *Indonesia – Autos* summarised this position, stating:

> In considering Indonesia's defence that there is a general conflict between the provisions of the SCM Agreement and those of Article III of GATT, and consequently that the SCM Agreement is the only applicable law, we recall first that in public international law there is a presumption against

[25] Panel Reports, *India – Quantitative Restrictions*, paras. 5.238 – 5.242; *Korea – Various Measures on Beef*, para. 768.
[26] Panel Report, *EC – Seal Products*, paras. 7.664 – 7.665.
[27] Panel Report, *US – Poultry (China)*, paras. 7.484 – 7.487.
[28] Indonesia's Appellant Submission, para. 53.
[29] Appellate Body Report, *China – Rare Earths*, para. 5.47; Appellate Body Report, *US – Upland Cotton*, para. 549.
[30] Panel Report, *China – Rare Earths*, para. 7.124.
[31] See Appellate Body Reports, *US – Softwood Lumber IV*, para. 134; *US – Upland Cotton*, para. 549; *Chile – Price Band System,* para. 189; *EC – Bananas III,* paras. 157 – 158 and 203 – 204*, Canada – Renewable Energy/Canada – Feed–in Tariff Program,* para. 5.5; Panel Report, *Indonesia – Autos*, para. 5.285.
[32] Appellate Body Report, *US – Upland Cotton*, para. 549 citing Appellate Body Report, *Argentina – Footwear (EC)*, para. 81 and footnote 72 (emphasis original).

> conflict. This presumption is especially relevant in the WTO context since all WTO agreements, including GATT 1994 which was modified by Understandings when judged necessary, were negotiated at the same time, by the same Members and in the same forum. In this context we recall the principle of effective interpretation pursuant to which all provisions of a treaty (and in the WTO system all agreements) must be given meaning, using the ordinary meaning of words.[33]

29. There is no conflict between Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994, as the terms of those provisions do not prevent a Member from complying with both obligations simultaneously. The provisions therefore both apply to measures affecting agricultural products.

30. In support of its argument that Article 4.2 of the Agreement on Agriculture applies to the *exclusion* of Article XI:1 of the GATT 1994, Indonesia cites the Appellate Body's decision in *Chile – Price Band System*.[34] However, the Appellate Body in that case did not imply that Article 4.2 of the Agreement on Agriculture applied *to the exclusion* of Article II:1(b) of the GATT 1994. In fact, the Appellate Body considered that "the outcome of this case would be the same, whether we begin our analysis with an examination of the issues raised under Article 4.2 of the Agreement on Agriculture, or with those raised under Article II:1(b) of the GATT 1994".[35]

31. In *Peru – Agricultural Products*, the Appellate Body also confirmed the continuing application of Article II:1(b) of the GATT 1994 in circumstances where Article 4.2 of the Agreement on Agriculture applied to the same measure.[36] The Appellate Body first upheld the panel's finding that the measure at issue was not an "ordinary customs duty", and therefore inconsistent with Article 4.2 of the Agreement on Agriculture.[37] It then upheld the panel's finding that the measure at issue was inconsistent with Article II:1(b) of the GATT 1994.[38] That situation is analogous to the present dispute, where the complainants have argued that the measures at issue are inconsistent with the legal obligations imposed by both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. The fact that Article 4.2 of the Agreement on Agriculture also applies to the measures at issue does not exclude the applicability of Article XI:1 of the GATT 1994.

32. In *Canada – Renewable Energy/Canada – Feed–in Tariff Program*, the Appellate Body reached similar conclusions with regard to overlapping provisions of the GATT 1994, the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) and the

[33] Panel Report, *Indonesia – Autos*, para. 14.28 (internal footnotes omitted).
[34] Indonesia's Appellant Submission, paras. 56 and 57.
[35] Appellate Body Report, *Chile – Price Band System,* para. 189. See also, Appellate Body Report, *EC – Bananas III*, paras. 157 – 158 stating that the Agreement on Agriculture "does not permit [a Member] to act inconsistently with the requirements of Article XIII of the GATT 1994".
[36] Appellate Body Report, *Peru – Agricultural Products*, paras. 5.75, 5.120 – 5.121.
[37] Appellate Body Report, *Peru – Agricultural Products*, paras. 5.75, 5.120 – 5.121.
[38] Appellate Body Report, *Peru – Agricultural Products*, paras. 5.75, 5.120 – 5.121.

Agreement on Trade-Related Investment Measures (TRIMs Agreement).[39] The Appellate Body affirmed the continuing application of the provisions and held that "the decision in this case as to whether to commence the analysis with the claims under the SCM Agreement or those under the GATT 1994 and the TRIMs Agreement was within the Panel's margin of discretion".[40]

33. Further, in *Turkey – Rice*, the one dispute in which the panel considered claims under Article 4.2 of the Agreement on Agriculture prior to claims under Article XI:1 of the GATT 1994, the panel did not find that Article XI:1 was inapplicable to the measures at issue. Rather, the panel exercised its discretion to commence its analysis with Article 4.2 and would "turn to Article XI:1 of the GATT 1994 only as a second step".[41]

*2. **Article 21.1 of the Agreement on Agriculture does not render Article XI:1 inapplicable to the measures at issue***

34. Indonesia suggests that "Article 21.1 makes clear that the Agreement on Agriculture is *lex specialis* compared to the GATT 1994, in particular with respect to measures affecting trade *in agricultural goods*".[42] On this basis, Indonesia asserts that the "Agreement on Agriculture would apply to the exclusion of the more general agreements, such as the GATT 1994, to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same matter."[43]

35. New Zealand disagrees with this assertion. Article 21.1 of the Agreement on Agriculture does not disturb the fundamental principle that overlapping provisions of the covered agreements apply cumulatively and are to be read harmoniously wherever possible.[44] Rather, Article 21.1 of the Agreement on Agriculture is relevant for determining the hierarchy of agreements in those limited circumstances of conflict where it is not possible for both provisions to be read harmoniously. This understanding of Article 21.1 of the Agreement on Agriculture is supported by the decision in *EC — Export Subsidies on Sugar*, where the Appellate Body held that Article 21 of the Agreement on Agriculture reflected a recognition "that there may be conflicts between the *Agreement on Agriculture* and the GATT 1994, and explicitly provided, through Article 21, that the *Agreement on Agriculture* would prevail to the extent of such conflicts."[45]

36. Indeed, Article 21.1 of the Agreement on Agriculture expressly confirms that the provisions of the GATT 1994 (and the other covered agreements) "shall apply" to

[39] Appellate Body Report, *Canada – Renewable Energy/Canada – Feed–in Tariff Program*, paras. 5.5, 5.6 and 5.8.
[40] Appellate Body Report, *Canada – Renewable Energy/Canada – Feed–in Tariff Program*, para. 5.8.
[41] Panel Report, *Turkey – Rice*, para. 7.48.
[42] Indonesia's Appellant Submission, para. 49 (emphasis in original).
[43] Indonesia's Appellant Submission, para. 53.
[44] See Appellate Body Reports, *US – Softwood Lumber IV*, para. 134; *US – Upland Cotton*, para. 549; *Chile – Price Band System,* para. 189; *Canada – Renewable Energy/Canada – Feed–in Tariff Program*, para. 5.5; Panel Report, *Indonesia – Autos*, para. 5.285.
[45] Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 220–222. Compare Indonesia's Appellant Submission, para. 51.

agricultural products. In the present dispute, as Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture are not in conflict with each other, it is unnecessary for the Appellate Body to resort to Article 21.1 of the Agreement on Agriculture.

37. In support of its erroneous understanding of the relationship between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, Indonesia cites the interpretative approach of panels in *Indonesia – Autos* and *EC – Hormones*.[46] However, in neither of those cases did the panel find that a provision of one of the covered agreements applies to the exclusion of the other.

38. In *Indonesia – Autos*, contrary to Indonesia's submission, the panel *expressly rejected* Indonesia's contention that the "only applicable law to this dispute is the SCM Agreement".[47] The panel relevantly held that:

> We consider rather that the obligations contained in the WTO Agreement are generally cumulative, can be complied with simultaneously and that different aspects and sometimes the same aspects of a legislative act can be subject to various provisions of the WTO Agreement.[48]

39. In *EC – Hormones*, the panel reached a similar conclusion. While it elected to commence its analysis under the SPS Agreement, it expressly affirmed the continuing application of both the GATT 1994 and the SPS Agreement to the measures at issue.[49] Moreover, the panel's decision to commence its analysis with the SPS Agreement was not, as Indonesia suggests, solely because the SPS Agreement was the more specific obligation.[50] Rather, the panel concluded that if it commenced its analysis with the GATT 1994, it would still be required to consider the SPS Agreement in order to determine whether Article XX(b) could be invoked as a defence.[51] Accordingly, the panel considered a range of factors, including which order would allow it to conduct its consideration of the issues "in the most efficient manner".[52]

E. THE PANEL DID NOT ERR BY COMMENCING ITS ANALYSIS WITH ARTICLE XI:1 OF THE GATT 1994

1. The Panel was entitled to commence its analysis with Article XI:1 of the GATT 1994

40. Indonesia argues that the Panel committed reversible legal error by commencing its analysis under Article XI:1 of the GATT 1994. However, WTO jurisprudence is clear that panels have a "margin of discretion" to "structure the order of their analysis as they see

[46] Indonesia's Appellant Submission, para. 51.
[47] Panel Report, *Indonesia – Autos*, para. 14.56.
[48] Panel Report, *Indonesia – Autos*, para. 14.56.
[49] Panel Report, *EC – Hormones*, para. 8.40.
[50] Indonesia's Appellant Submission, para. 51.
[51] Panel Report, *EC – Hormones*, para. 8.42.
[52] Panel Report, *EC – Hormones*, para. 8.42.

fit" provided it does not have "repercussions for the substance of the analysis itself" and leads to "flawed results".[53]

41. Notwithstanding the discretion of panels to structure their order of analysis as they see fit, the Appellate Body cautioned in *Canada – Autos,* that "a panel may not ignore the 'fundamental structure and logic' of a provision in deciding the proper sequence of steps in its analysis, save at the peril of reaching flawed results."[54] The Appellate Body thus affirmed that a panel may order its analysis as it sees fit, provided its approach does not lead to a "flawed" substantive analysis.

42. The "fundamental structure and logic" of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture does not suggest, as a matter of law, that a panel *must* commence its analysis with one of the provisions and not the other.

43. New Zealand recalls that the Appellate Body has recognised that "in a series of previous disputes, issues concerning the sequence of analysis have been dealt with by seeking to identify the agreement that 'deals specifically, and in detail, with' the measures at issue."[55] However, it is important to note that this general approach does not, in itself, establish a mandatory order of analysis. Indeed, in *Canada – Renewable Energy/Canada – Feed–in Tariff Program*, before considering whether one agreement dealt more 'specifically' with the measures at issue, the Appellate Body confirmed that there was no obligatory sequence of analysis to be followed with respect to claims presented under overlapping obligations in the SCM Agreement, the GATT 1994 and the TRIMs Agreement.[56] It then confirmed that the order of analysis "was within the panel's margin of discretion."[57]

44. The situation in the present dispute is analogous to the situation in *Canada – Renewable Energy / Canada – Feed–in Tariff Program*, where the Appellate Body noted that while "[i]ssues of sequencing may become relevant to a logical consideration of claims under different agreements … no such issue arises in this case". There is nothing in the Panel's chosen order of analysis which prevented it undertaking a logical consideration of the claims presented to it. Accordingly, the Panel did not err by commencing its analysis with Article XI:1 of the GATT 1994.

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[53] Appellate Body Report, *Canada – Autos*, para. 151 citing Appellate Body Reports, *US – Shrimp*, para. 119 and *US – Gasoline*, p. 22; Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, paras. 109 and 126; Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed–in Tariff Program*, para. 5.8. See also Indonesia's Appellant Submission, para. 103 citing Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109; Panel Report, *India – Autos*, para. 7.154.
[54] Appellate Body Report, *Canada – Autos*, para. 151. (emphasis added).
[55] Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed–in Tariff Program*, paras. 5.5 and 5.6; *EC – Bananas III*, paras. 157 – 158 and 203 – 204.
[56] Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed–in Tariff Program*, paras. 5.5 and 5.6; *EC – Bananas III*, paras. 157 – 158 and 203 – 204.
[57] Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed–in Tariff Program*, para. 5.8.

45. Indeed, in selecting its chosen order of analysis for the present dispute, the Panel took into account a number of legitimate factors based on the practice of past panels and guidance from the Appellate Body, including the way in which the claims were presented, the ability to apply judicial economy, the views of the parties, and the specificity of the provisions with respect to the measures at issue.[58] The Panel's approach to its order of analysis was also consistent with that taken by the majority of panels which have considered the relationship between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. The panels in *Korea – Beef, India – Quantitative Restrictions*, *US – Poultry* and *EC – Seal Products*, all commenced their analysis of the quantitative restrictions at issue with Article XI:1 of the GATT 1994.[59] Only the panel in *Turkey – Rice* commenced its analysis with Article 4.2 of the Agreement on Agriculture.[60]

2. Article XI:1 of the GATT 1994 is more specific than Article 4.2 of the Agreement on Agriculture in the context of quantitative restrictions

46. For the reasons outlined above, New Zealand does not consider that the question whether Article XI:1 of the GATT 1994 is more specific than Article 4.2 of the Agreement on Agriculture in the context of quantitative restrictions is legally relevant for the purposes of resolving this appeal. There is no mandatory order of analysis between those provisions, and it could not have amounted to legal error for the Panel to have commenced its legal analysis under either Article XI:1 of the GATT 1994 *or* Article 4.2 of the Agreement on Agriculture. The Panel's decision to commence with Article XI:1 of the GATT 1994 was a legitimate exercise of its discretion.

47. Notwithstanding that view, New Zealand submits that the Panel was correct to conclude that Article XI:1 of the GATT 1994 is the provision which deals "specifically, and in detail" with the quantitative restrictions at issue.[61] New Zealand recalls that the text of Article XI:1 of the GATT 1994 provides:

> **Article XI*: General Elimination of Quantitative Restrictions**
>
> 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

[58] See Section II.B above. Panel Report, *Indonesia – Import Licensing Regimes,* paras. 7.27 – 7.36.
[59] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.33 and footnote 389 citing Panel Reports, *India – Quantitative Restrictions*, paras. 5.112–5.242; *Korea – Various Measures on Beef*, paras. 747–769; *EC – Seal Products*, paras. 7.652–7.665; *US – Poultry (China)*, paras. 7.484 – 7.487.
[60] Panel Report, *Turkey – Rice*, para. 7.48.
[61] Appellate Body Report, *EC – Bananas III*, paras. 203 and 204.

48. Article XI:1 deals exclusively and in detail with quantitative restrictions. In particular, the provision specifies what constitutes a quantitative restriction,[62] the exclusions from coverage,[63] and the form by which such restrictions are made effective.[64]

49. By contrast, Article 4.2 of the Agreement on Agriculture deals with a wide range of measures which affect "market access" for agricultural products. It disciplines not only quantitative import restrictions, but also a range of other measures, including minimum import prices, variable import levies, voluntary export restraints, and similar border measures other than ordinary customs duties. As the Appellate Body noted in *Chile – Price Band System*, the drafters of Article 4.2 "intended to cover a broad category of measures".[65] Quantitative import restrictions are one such measure, however the broad and general coverage of Article 4.2 means that it is not the more specific provision with respect to quantitative restrictions.

50. Indonesia disagrees, stating that "[t]he number of measures covered by a particular provision does not answer the question of which provision is more specific."[66] However, New Zealand does not argue that it is the "number of measures" covered by a provision which necessarily determines which is more specific. Rather, New Zealand submits that in determining which provision "deals specifically, and in detail" with a particular claim, the most important consideration is which provision deals specifically and in detail with the substantive nature of the obligation that a complainant claims is breached.[67] In the context of quantitative restrictions, it is Article XI:1 of the GATT 1994 which deals specifically and in detail with the obligation not to institute or maintain quantitative restrictions.

51. New Zealand does not suggest that the wide scope of measures covered by Article 4.2 of the Agreement on Agriculture means that Article 4.2 could never be the provision that deals "more specifically and in detail" with a particular obligation. For instance, Article II:1(b) of the GATT 1994, in contrast to Article 4.2 of the Agreement on Agriculture, does not contain a detailed substantive obligation with regard to "variable import levies". In contrast, Article XI:1 of the GATT 1994 does contain a more detailed and specific prohibition on quantitative restrictions than Article 4.2 of the Agreement on Agriculture. Accordingly, the circumstances of the present case differ from those before the panel and Appellate Body in *Chile – Price Band System.*[68]

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[62] Any "prohibitions or restrictions".
[63] "duties, taxes or other charges".
[64] "through quotas, import or export licences or other measures".
[65] Appellate Body Report, *Chile – Price Band System*, para. 208. Indonesia accepts the "broader scope of coverage" of Article 4.2, compared with Article XI:1: Indonesia's Appellant Submission, paras. 44–45.
[66] Indonesia's Appellant Submission, para. 44.
[67] See Appellate Body Report, *EC – Bananas III*, paras. 157 – 158 and 203 – 204.
[68] Accordingly, the circumstances of the present case differ from those before the panel and Appellate Body in *Chile – Price Band System.* See e.g., Appellate Body Report, *Chile – Price Band System*, para. 262.

52. Indonesia also argues that Article 4.2 of the Agreement on Agriculture is more specific, purely because it "applies to a *narrower scope of products*", namely agricultural products, than Article XI:1 of the GATT 1994.[69]

53. New Zealand disagrees that the product coverage of an agreement automatically determines whether an agreement is more specific.[70] Indeed, in many cases there will be a range of factors which contribute to a determination of which (if any) of the applicable provisions "deals more specifically, and in detail" with the matter at issue, and there will not necessarily be one factor that is determinative. This is consistent with the approach taken by the Appellate Body in *Canada – Renewable Energy/Canada – Feed–in Tariff Program*. In that dispute, when confronted with overlapping provisions of the SCM Agreement, TRIMs Agreement and GATT 1994, the Appellate Body found it was "not persuaded" that one agreement could be described as regulating "'more specifically, and in detail,' the measures challenged in this dispute".[71]

F. THE PANEL'S FINDINGS ESTABLISH THAT THE MEASURES AT ISSUE ARE EACH INCONSISTENT WITH ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

54. New Zealand considers that the Panel's findings that the measures at issue are inconsistent with Article X1:1 of the GATT 1994 are sufficient to resolve the dispute. However, if the Appellate Body considers that it is necessary to complete the analysis of the complainants' claims under Article 4.2 of the Agreement on Agriculture, there are sufficient factual findings of the Panel and uncontested facts on the record for the Appellate Body to do so.[72]

55. Indonesia argues that New Zealand only "briefly addressed Article 4.2 of the Agreement on Agriculture" in its first written submission.[73] This is incorrect. Indeed, New Zealand comprehensively argued throughout the Panel proceedings that each of the measures at issue is inconsistent with Article 4.2.[74]

56. The Panel's findings with respect to the complainants' claims under Article XI:1 of the GATT 1994 establish that each of the 18 measures at issue in this dispute constitute "prohibitions" or "restrictions" on importation. These findings are also sufficient to establish that each and every one of the measures at issue are "measures of the kind which have been required to be converted into ordinary customs duties" within the meaning of Article 4.2 of the Agreement on Agriculture. Specifically, the Panel's findings demonstrate that the challenged measures are "quantitative import restrictions … or

[69] Indonesia's Appellant Submission, para. 45.
[70] Indonesia's Appellant Submission, paras. 46–47.
[71] Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed–in Tariff Program,* para. 5.6 citing Appellate Body Report, *EC – Bananas III*, para. 204.
[72] See Appellate Body Report, *Peru – Agricultural Products*, para. 5.157, citing *inter alia* Appellate Body Report, *US – Gasoline*, p. 19.
[73] Indonesia's Appellant Submission, para. 12.
[74] See New Zealand's first written submission, Section IV.B, paras. 299 – 380; New Zealand's second written submission, paras. 36, 51, 76, 96, 110, 111, 143, 160, 173, 183, 202, 210, 222 – 225, 236, 250, 267 – 269, 277, 285 and 296.

similar border measures" under footnote 1 of Article 4.2 of the Agreement on Agriculture.[75]

57. New Zealand notes that the panel in *Korea – Various Measures on Beef*, having established that a measure was inconsistent with Article XI:1, made a consequential finding that the measure was also inconsistent with Article 4.2 of the Agreement on Agriculture.[76] Similarly, the panel in *India – Quantitative Restrictions* found that the measures inconsistent with Article XI:1 were also, to the extent they applied to agricultural products, inconsistent with Article 4.2 of the Agreement on Agriculture.[77]

58. Accordingly, clear findings on the Panel's record would allow the Appellate Body to complete the analysis in respect of the complainants' claims under Article 4.2 of the Agreement on Agriculture, if it were necessary to do so.

G. CONCLUSION

59. For the reasons outlined above, New Zealand requests that the Appellate Body reject Indonesia's claim of error as set out in Section I of Indonesia's Notice of Appeal and Section II of Indonesia's Appellant Submission, and uphold the findings, conclusions and legal interpretations of the Panel.[78]

III. THE PANEL DID NOT ERR BY FINDING THAT INDONESIA BEARS THE BURDEN OF PROVING A DEFENCE UNDER ARTICLE XX OF THE GATT 1994

A. INDONESIA'S APPEAL

60. Indonesia submits that the Panel erred in finding that the respondent bears the burden of proof in relation to a defence under Article XX of the GATT 1994 with respect to a claim of inconsistency with Article 4.2 of the Agreement on Agriculture.[79] According to Indonesia, the second half of footnote 1 to Article 4.2 of the Agreement on Agriculture is a separate element of Article 4.2, rather than an exception.[80] On this basis, Indonesia suggests, for the first time in a WTO dispute, that in order for the Panel to find a measure inconsistent with Article 4.2 of the Agreement on Agriculture, a complainant must prove both that the challenged measure is of the type required to be converted to

[75] The Panel found that each of the measures at issue had a limiting effect on importation, and therefore constitutes a prohibition or restriction. See Panel Report, *Indonesia – Import Licensing Regimes,* paras. 7.77 – 7.92 (Measure 1); paras. 7.105 – 7.112 (Measure 2); paras. 7.126 – 7.134 (Measure 3); paras. 7.148 – 7.156 (Measure 4); paras. 7.170 – 7.179 (Measure 5); paras. 7.192–7.200 (Measure 6); paras. 7.214 – 7.227 (Measure 7); paras. 7.238–243 (Measure 8); paras. 7.260 – 7.270 (Measure 9); paras. 7.288 – 7.299 (Measure 10); paras. 7.314 – 7.327 (Measure 11); paras. 7.341 – 7.349 (Measure 12); paras. 7.367 – 7.375 (Measure 13); paras. 7.388–7.398 (Measure 14); paras. 7.419 – 7.428 (Measure 15); paras. 7.440 – 7.451 (Measure 16); paras. 7.468 – 7.478 (Measure 17); paras. 7.491 – 7.501 (Measure 18).
[76] Panel Report, *Korea – Various Measures on Beef*, para. 762.
[77] Panel Report, *India – Quantitative Restrictions*, paras. 5.238–5.242.
[78] Indonesia's Notice of Appeal Section I; Indonesia's Appellant Submission, paras. 63–64.
[79] Indonesia's Appellant Submission, para. 84.
[80] Indonesia's Appellant Submission, para. 85.

ordinary customs duties; and that it is not "maintained under, *inter alia*, any of the public policy exceptions set out in Article XX of the GATT 1994".[81]

61. Indonesia's claim is based on its assertion that if the drafters of Article 4.2 had "intended to create a general rule–exception relationship … they would have used different wording" and that in other covered agreements, the "drafters used special language when they intended to import *exceptions* from the GATT 1994 into other *covered agreements in Annex 1A*".[82]

B. THE PANEL'S ANALYSIS

62. The Panel rejected Indonesia's argument that the complainants were required to demonstrate that the challenged measures are not justified under Article XX of the GATT 1994.[83] The Panel noted that "it is well established in WTO jurisprudence following the Appellate Body decision in *US – Wool Shirts and Blouses* that the burden of identifying and establishing affirmative defences under Article XX rests on the Party asserting the defence."[84] Thus, the Panel found that it was for Indonesia, and not the complainants, to establish a defence under Article XX of the GATT 1994 in the context of a claim of violation of Article 4.2 of the Agreement on Agriculture.[85]

C. LEGAL ISSUE BEFORE THE APPELLATE BODY

63. The legal issue raised by Indonesia in its second ground of appeal is whether it is necessary for the complainants to prove that a challenged measure is not "maintained under, *inter alia*, any of the public policy exceptions set out in Article XX of the GATT 1994" in order for the Panel to find a measure inconsistent with Article 4.2 of the Agreement on Agriculture.

[81] Indonesia's Appellant Submission, para. 82.
[82] Indonesia's Appellant Submission, para. 86 (emphasis in original).
[83] Panel Report, *Indonesia – Import Licensing Regimes,* para. 7.34.
[84] Panel Report, *Indonesia – Import Licensing Regimes,* para. 7.34 citing Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[85] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.34.

64. New Zealand recalls Article 4.2 of the Agreement on Agriculture states:

> Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties[1], except as otherwise provided for in Article 5 and Annex 5.
>
> _____
>
> [1]These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non–tariff measures maintained through state–trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country–specific derogations from the provisions of GATT 1947, but not measures maintained under balance–of–payments provisions or under other general, non–agriculture–specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

D. THE BURDEN OF PROOF FOR AN ARTICLE XX DEFENCE DOES NOT REVERSE UNDER ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

65. Indonesia is seeking to introduce what it describes as a "second element" that a complainant must prove in order to establish a violation of Article 4.2 of the Agreement on Agriculture.[86] This represents a substantial departure from settled jurisprudence on the legal standard of Article 4.2 of the Agreement on Agriculture and would also fundamentally change, with respect to agricultural products, the well–established characterisation of Article XX of the GATT 1994 as an affirmative defence.[87]

66. The legal standard under Article 4.2 of the Agreement on Agriculture, including footnote 1, has been considered multiple times by panels and the Appellate Body.[88] In none of those disputes has a panel or the Appellate Body found that a complainant is required to prove that a measure "is not maintained under any of the public policy exceptions set out in Article XX of the GATT 1994" in order to establish a violation of Article 4.2 of the Agreement on Agriculture.[89] This includes a number of disputes where a

[86] Indonesia's Appellant Submission, para. 82.
[87] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[88] Appellate Body Report, *Chile – Price Band System*, para. 288; Panel Report, *Chile – Price Band System,* para. 7.102 and 8.1; Panel Report, *Peru – Agricultural Products,* para. 8.1; Appellate Body Report, *Peru – Agricultural Products,* para. 6.6; Panel Report, *Korea – Various Measures on Beef*, para. 768; Panel Report, *Turkey – Rice,* para. 8.1; Panel Report, *India – Quantitative Restrictions*, para. 6.1.
[89] Appellate Body Report, *Chile – Price Band System*, para. 254; Panel Report, *Chile – Price Band System,* para. 7.102; Panel Report, *Peru – Agricultural Products,* para. 8.1; Appellate Body Report, *Peru – Agricultural Products,* para. 6.6; Panel Report, *Korea – Various Measures on Beef*, para. 768; Panel Report, *Turkey – Rice,* para. 8.1; Panel Report, *India – Quantitative Restrictions*, para. 6.1.

panel has made findings of inconsistency with Article 4.2 and the Appellate Body has upheld these findings.[90]

67. In *Chile – Price Band System,* the Appellate Body stated that "[a] plain reading of Article 4.2 and footnote 1 makes clear that, if Chile's price band system falls within any *one* of the categories of measures listed in footnote 1, it is among the 'measures of the kind which have been required to be converted into ordinary customs duties'".[91] In upholding the panel's finding that Chile's measures were inconsistent with Article 4.2 of the Agreement on Agriculture, the Appellate Body did not require that the complainant demonstrate that the measure is not maintained under any of the public policy exceptions set out in Article XX of the GATT 1994.[92]

68. Similarly, in a finding upheld by the Appellate Body,[93] the panel in *Peru – Agricultural Products* did not find it necessary to consider whether the complainant had demonstrated that the measure was maintained under any of the public policy exceptions set out in Article XX of the GATT 1994 in order to find that the measures at issue were inconsistent with Peru's obligations under Article 4.2 of the Agreement on Agriculture.[94]

69. New Zealand considers, therefore, that Indonesia's contention that "only after the complainant has satisfied its burden of proof with respect to both elements of footnote 1, could a panel find an inconsistency with Article 4.2 of the Agreement on Agriculture "[95] is inconsistent with WTO jurisprudence.

70. In addition, New Zealand notes that the panel in *Turkey – Rice* specifically characterised the phrase "maintained under balance–of–payments provisions or under any other general, non–agriculture–specific, provision of GATT 1994 or other Multilateral Trade Agreements in Annex 1A to the WTO Agreement" as containing a list of "exceptions" to Article 4.2:

> We are aware that a measure enumerated in the list provided in footnote 1 to Article 4.2 of the Agreement on Agriculture may nevertheless not be considered to be a measure "of the kind which have been required to be converted into ordinary customs duties" if it falls *under the exceptions* contained in the same footnote (i.e., if it is a measure maintained under balance–of–payments provisions or under any other general, non–

[90] Appellate Body Report, *Chile – Price Band System*, para. 254; Panel Report, *Chile – Price Band System,* para. 7.102; Panel Report, *Peru – Agricultural Products,* para. 8.1; Appellate Body Report, *Peru – Agricultural Products,* para. 6.6; Panel Report, *Korea – Various Measures on Beef*, para. 768; Panel Report, *Turkey – Rice,* para. 8.1; Panel Report, *India – Quantitative Restrictions*, para. 6.1.
[91] Appellate Body Report, *Chile – Price Band System*, para. 221.
[92] Appellate Body Report, *Chile – Price Band System*, para. 280.
[93] Appellate Body Report, *Peru – Agricultural Products,* para. 6.6.
[94] Panel Report, *Peru – Agricultural Products,* paras. 7.372 and 8.1.
[95] Indonesia's Appellant Submission, para. 82.

> agriculture–specific, provision of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement) …[96]

71. Similarly, the panel in *India – Quantitative Restrictions* noted:

> We agree with India's claims that the question of the consistency of India's import restrictions with Article 4.2 depends on their consistency with Article XVIII:B. We therefore conclude that the Indian restrictions are not "measures maintained under balance–of–payments provisions" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture … Since *India does not invoke any of the other exceptions contained in the footnote to Article 4.2*, we find that the measures at issue violate Article 4.2 of the Agreement on Agriculture.[97]

72. Implicit in Indonesia's argument that Article XX is not an *exception* to Article 4.2 of the Agreement on Agriculture, but rather an *element* of the legal standard under that provision that must be proved by the co–complainants, is the proposition that Article 4.2 *changes the character of Article XX.* As the Panel in the present dispute rightly noted, Indonesia is asking the Appellate Body to "invert the burden of proof under Article XX of the GATT 1994"[98] insofar as it applies to measures challenged under Article 4.2 of the Agreement on Agriculture. This despite the fact that the purpose of the Agreement on Agriculture, as set out in the Preamble to the Agreement, is to strengthen GATT rules and disciplines with respect to agriculture.[99]

73. The characterisation of Article XX as an "exception" or "affirmative defence" is well settled in WTO jurisprudence.[100] In disputes which have considered whether a particular provision should be understood as an "exception", panels and the Appellate Body have focused on the nature or character of the provision under consideration.[101] In *EC – Tariff Preferences*, the panel (in reaching a finding which was affirmed by the Appellate Body) summarised the Appellate Body's guidance for determining whether a measure is appropriately characterised as an exception as follows:

> The Panel recalls the Appellate Body ruling in *US – Wool Shirts and Blouses*, where the Appellate Body stated that "Articles XX and XI:2(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves". To this Panel, it follows that the legal function of authorizing limited derogation from positive rules establishing obligations is what is decisive in making Articles XX and XI:2(c)(i) exceptions. In *US – Wool Shirts and Blouses*, the Appellate Body effectively established two criteria for determining whether a rule constitutes an "exception": first, it must not

[96] Panel Report, *Turkey – Rice*, para. 7.137 (emphasis added).
[97] Panel Report, *India – Quantitative Restrictions,* paras. 5.241–5.242 (emphasis added). The panel's findings on Article 4.2 of the Agreement on Agriculture were not appealed.
[98] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.34.
[99] Agreement on Agriculture, Preamble.
[100] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[101] Panel Report, *EC – Tariff Preferences*, para. 7.35. Appellate Body Report, *EC – Tariff Preferences*, paras. 99 and 190.

> be a rule establishing legal obligations in itself; and second, it must have the function of authorizing a limited derogation from one or more positive rules laying down obligations.[102]

74. In applying this test, the panel in *EC – Tariff Preferences* noted that "Article I:1 of GATT 1994 is clearly a 'positive rule establishing obligations'…[while] [i]n contrast, it is well established that Article XX is not such a rule establishing positive obligations, nor is Article XI:(2)(c)(i)."[103] The Appellate Body has similarly found that it is clear that Article XX (and Article XI:2(c)) are "in the nature of affirmative defences".[104]

75. New Zealand submits that the nature of Article XX is no different when it is considered in the context of Article 4.2. Specifically, applying the two steps of the test laid out in *EC – Tariff Preferences* (following *US – Wool Shirts and Blouses*):

a. Article XX remains a provision which has the "function of authorizing a limited derogation from one or more positive rules laying down obligations", namely derogations from the obligation in Article 4.2 not to "maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties";[105] and

b. Article XX is not "a rule establishing legal obligations in itself".[106] Rather Article XX is a provision which *permits, but does not require,* Members to maintain measures which satisfy the requirements of Article XX.

76. This reasoning is further confirmed by the panel's approach to Article 4.2 in *India – Quantitative Restrictions.* In that dispute, the nature of Article XVIII:B of the GATT 1994 as an exception was not transformed simply by virtue of it being considered in the context of Article 4.2.[107] It is also clear that the panel considered that the onus was on India, as the respondent, to demonstrate that its measures fell within one of those exceptions: "[s]ince *India does not invoke* any of the other exceptions contained in the footnote to Article 4.2, we find that the measures at issue violate Article 4.2 of the Agreement on Agriculture."[108]

77. With respect to the burden of proof for Article XX specifically, WTO jurisprudence following the Appellate Body decision in *US – Wool Shirts and Blouses* makes clear that the burden of identifying and establishing defences under Article XX rests on the party asserting the defence:

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[102] Panel Report, *EC – Tariff Preferences*, para. 7.35.
[103] Panel Report, *EC – Tariff Preferences*, para. 7.37.
[104] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[105] Panel Report, *EC – Tariff Preferences*, para. 7.35 citing Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[106] Panel Report, *EC – Tariff Preferences*, para. 7.35 citing Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[107] Panel Report, *India – Quantitative Restrictions*, paras. 5.119, 5.239 and 5.242.
[108] Panel Report, *India – Quantitative Restrictions,* para. 5.242 (emphasis added).

> Articles XX and XI:(2)(c)(i) … are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it.[109]

78. Indonesia has not provided any compelling justification for diverging from this well–established principle in the present dispute. Instead, its argument is based on the mistaken proposition that Article XX is not an "exception" in the context of Article 4.2 of the Agreement on Agriculture,[110] and that it is "possible" for a WTO Member to obtain information about the policy objective of a measure.[111]

79. The foundation of Indonesia's argument that Article XX is not an exception when invoked with respect to Article 4.2 of the Agreement on Agriculture is that if the drafters of Article 4.2 "intended to create a general rule–exception relationship … they would have used different wording" and that, in other covered agreements, the "drafters used special language when they intended to import *exceptions* from the GATT 1994".[112] In New Zealand's view, the reverse is true. If the drafters of Article 4.2 of the Agreement on Agriculture had intended to modify the fundamental and well–understood character of Article XX (General Exceptions) as an exception, they would have done so clearly and expressly.

80. Indeed, as Indonesia notes, the drafters of other covered agreements, such as the *Agreement on Technical Barriers to Trade* (TBT Agreement), expressly chose to apply the burden of proof differently for certain provisions of a similar nature to Article XX.[113] However, they did so by using language that clearly reflected their intention to do so. Indeed, Article 2.2 of the TBT Agreement does not refer to Article XX of the GATT 1994 at all; instead, it establishes a *distinct legal standard* whereby a Member is prohibited from maintaining technical regulations that are more trade restrictive than necessary to fulfil a legitimate objective. Similarly, each of the other provisions cited by Indonesia[114] create distinct legal standards and do not make reference to Article XX of the GATT 1994. By contrast, the language of footnote 1 of Article 4.2 simply imports, without modification, the non–agriculture–specific provisions of GATT 1994, including the Article XX general exceptions and their well–understood character as an affirmative defence.

E. THE COMPLAINANTS HAVE DEMONSTRATED THAT THE MEASURES ARE NOT JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

81. Even if the Appellate Body were to find that the complainants bear a burden of proof under Article XX in the context of a claim of inconsistency with Article 4.2 of the

[109] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16 (emphasis added).
[110] Indonesia's Appellant Submission, para. 85.
[111] Indonesia's Appellant Submission, para. 90.
[112] Indonesia's Appellant Submission, para. 86.
[113] Indonesia's Appellant Submission, para. 88.
[114] Indonesia's Appellant Submission, para. 88. Note these are: Article 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measure*s (SPS Agreement), Article 2.4 of the TBT Agreement and Article 11.6(b) of the Agreement on Trade Facilitation.

Agreement on Agriculture, New Zealand submits that any such burden has been satisfied in the present dispute.

82. Indonesia states that it is not necessary for a complainant to "'anticipate' 'defences' the respondent would raise under non–agriculture–specific provisions of the GATT 1994, such as various sub–paragraphs of Article XX."[115] Rather, Indonesia asserts that a complainant is required to:

> assess the policy objective of the measure it challenges on the basis of the text of the relevant statutes, the legislative history and other evidence regarding the design, structure and operation of the measure. After such an assessment, the complainant would be in a position to assert that the challenged measure is not "maintained under [*inter alia*] … other general, non–agriculture–specific provisions of GATT 1994 [such as Article XX]" (second element).[116]

83. In the present dispute, the complainants have comfortably discharged that burden. In its first written submission before the Panel, New Zealand explained that the policy objective behind Indonesia's measures is to prohibit and restrict imports of agricultural products when domestic supply is deemed sufficient to satisfy domestic demand.[117] It based this assessment on the design, structure and operation of the measures at issue, along with the text of the relevant regulations and framework legislation upon which such measures were based.[118]

84. The Panel agreed with the complainants' assessment of the purpose of the measures at issue, relevantly noting:

> The co–complainants argued that the actual policy objective behind all these measures is to achieve self–sufficiency through domestic production by way of restricting and, at times, prohibiting imports. We concur … that the text, structure and history of the import licensing regulations and the framework legislation pursuant to which Indonesia's import licensing regimes were established, show that this is the case.[119]

85. In light of the Panel's factual findings regarding the purpose of the measures at issue, it is clear that not only did the complainants satisfy the burden of *asserting* that the purpose of the measures at issue is not one protected by the non–agriculture–specific provisions of GATT 1994 (*including* Article XX), but they demonstrated to the satisfaction of the Panel that their assessment was correct.

86. Furthermore, during the course of the panel proceedings, the complainants submitted extensive evidence and argumentation as to why each of the measures at

[115] Indonesia's Appellant Submission, para. 87.
[116] Indonesia's Appellant Submission, para. 87.
[117] New Zealand's first written submission, paras. 2, 13, 15 – 24, 64 – 66, 67 – 71, 113, 287 – 298 335 and 372.
[118] New Zealand's first written submission, paras. 2, 13, 15 – 24, 64– 66, 67 – 71, 113, 287 – 298, 335 and 372.
[119] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.822.

issue is not justified under the specific subparagraphs of Article XX of the GATT 1994 which Indonesia alleged to be applicable to individual measures:

- Measures 1 and 11: The limited application windows and validity periods for agricultural products are not maintained under Article XX(d) because: the objective of the measures is to restrict imports when domestic supply is deemed sufficient to satisfy domestic demand and not to enforce customs laws;[120] the measures are not necessary to achieve customs enforcement because on their face, they have nothing to do with customs laws and there are better ways to obtain information about imports;[121] and even if there were such a connection there are reasonably available less trade–restrictive alternatives.[122]

- Measures 2 and 12: The periodic and fixed import terms for agricultural products are not maintained under Article XX(d) because: the objective of the measures is to restrict imports when domestic supply is deemed sufficient to satisfy domestic demand and not to enforce customs laws;[123] the measures are not necessary to achieve customs enforcement because on their face, they have nothing to do with customs laws and there are better ways to obtain information about imports;[124] and even if there were such a connection there are reasonably available less trade–restrictive alternatives.[125]

- Measures 3 and 13: The 80 percent realization requirements for agricultural products are not maintained under Article XX(d) because: the objective of the measures is to restrict imports when domestic supply is deemed sufficient to satisfy domestic demand and not to enforce customs laws;[126] the measures are not necessary to achieve the objective of customs enforcement because on their face, they have nothing to do with customs laws and there is no evidence that the customs problem

[120] New Zealand's second written submission, paras. 52 – 59 and 184 – 187. New Zealand's second opening statement, paras. 43 – 45 and 62 – 63; New Zealand's first opening statement, paras. 57 – 62; New Zealand's first written submission, paras. 15 – 24, 64 – 66, 67 – 71 and 113.
[121] New Zealand's second written submission, paras. 60 – 62, 66 – 67 and 188 – 190; New Zealand's answers to the Panel's questions after the first substantive meeting, Question 75, para. 140; New Zealand's second opening statement, paras. 62–63; New Zealand's first opening statement, paras. 57 – 62.
[122] New Zealand's second written submission, paras. 63 – 65 and 191 – 192. New Zealand's second opening statement, para. 62.
[123] New Zealand's second written submission, paras. 77 – 83 and 203 – 204; New Zealand's second opening statement, paras. 43 – 45 and 64; New Zealand's first opening statement, paras. 57 – 62; New Zealand's first written submission, paras. 15 – 24, 64 – 66, 67 – 71 and 113.
[124] New Zealand's second written submission, paras. 84 and 205 – 206; New Zealand's answers to the Panel's questions after the first substantive meeting, Question 75, para. 140; New Zealand's second opening statement, para. 64; New Zealand's first opening statement, paras. 57 – 62.
[125] New Zealand's second written submission, paras. 85 and 207; New Zealand's second opening statement, para. 64.
[126] New Zealand's second written submission paras. 97 – 100 and 211 – 214; New Zealand's answers to the Panel's questions after the second substantive meeting, Question 97, paras 33 – 35; New Zealand's second opening statement, paras. 43 – 45; New Zealand's first opening statement, paras. 57 – 62; New Zealand's first written submission, paras. 15 – 24, 64 – 66, 67 – 71 and 113.

the requirement purports to address actually exists;[127] and even if there were such a connection there are reasonably available less trade–restrictive alternatives.[128]

- Measure 4: The harvest period restriction for horticultural products is not maintained under Article XX(b) because: the objective of the measure is to restrict imports when domestic supply is deemed sufficient to satisfy domestic demand and not to protect human health;[129] the measure is not necessary to protect human health because there is no evidence that the measure contributes to that objective (e.g. hazardous chemicals in food are separately regulated);[130] and even if there were such a connection there are reasonably available less trade–restrictive alternatives.[131]

- Measure 5: The storage ownership and capacity requirements for horticultural products are not maintained under Article XX(d) or Article XX(b) because: the objective of the measure is to restrict imports when domestic supply is deemed sufficient to satisfy domestic demand and not to enforce customs laws or protect human health;[132] the measures are not necessary to achieve the objective of customs enforcement or to protect human health because the requirement for importers to *own* storage facilities for horticultural products has no relevance to either of those objectives;[133] and even if there were such a connection there are reasonably available less trade–restrictive alternatives.[134]

- Measure 6: The use, sale and distribution requirements for horticultural products are not maintained under Article XX(a), Article XX(b) or Article XX(d) because: the objective of the measure is to restrict imports when domestic supply is deemed sufficient to satisfy domestic demand and not to protect public morals, protect human health or enforce food safety laws;[135] the measure is not necessary to protect public morals because there is no evidence that requiring importers to sell through a

[127] New Zealand's second written submission, paras. 101 and 215 – 216; New Zealand's answers to the Panel's questions after the first substantive meeting, Question 75, para. 140; New Zealand's first opening statement, paras. 57 – 62.
[128] New Zealand's second written submission, paras. 105 and 220.
[129] New Zealand's second written submission, paras. 226 – 228; New Zealand's first opening statement, paras. 54 – 56; New Zealand's first written submission, paras. 67 – 71 and 113.
[130] New Zealand's second written submission, paras. 229 – 231; New Zealand's second opening statement, para. 84; New Zealand's first opening statement, paras. 54 – 56.
[131] New Zealand's second written submission, para. 232.
[132] New Zealand's second written submission, paras. 237 – 239 and 241 – 242; New Zealand's answers to the Panel's questions after the first substantive meeting, Question 75, paras. 139–140; New Zealand's second opening statement, paras. 43 – 45 and 76 – 78; New Zealand's first opening statement, paras 52 – 62; New Zealand's first written submission, paras. 67 – 71 and 113.
[133] New Zealand's second written submission, paras. 240 and 243 – 246; New Zealand's first opening statement, paras. 52 – 62.
[134] New Zealand's second written submission, para. 247.
[135] New Zealand's second written submission, paras. 251 – 253, 257 and 260; New Zealand's second opening statement, paras. 29 – 31, 34 – 38 and 43 – 45; New Zealand's first opening statement, paras. 43 – 62; New Zealand's answers to the Panel's questions after the first substantive meeting, Question 75, para. 138; New Zealand's comments on Indonesia's response to Panel's Question 116 c., para. 12; New Zealand's first written submission, paras. 67 – 71 and 113.

distributor prevents consumer deception in relation to Halal requirements;[136] the measure is not necessary to enforce food safety laws or protect human health because adding an extra distribution layer makes the difficulty of tracing the origin of product more difficult, not less so;[137] and even if there were such a connection there are reasonably available less trade–restrictive alternatives.[138]

- Measures 7 and 16: The reference price requirements for agricultural products are not maintained under Article XX(b) because: the objective of the measure is to restrict imports when domestic supply is deemed sufficient to satisfy domestic demand and not to protect human health;[139] the measures are not necessary to protect human health because there is no evidence that the human health problem the requirement purports to address (i.e. oversupply of agricultural products) actually exists; [140] and even if there were such a connection there are reasonably available less trade–restrictive alternatives.[141]

- Measure 8: The six month harvest requirement for horticultural products is not maintained under Article XX(b) because: the objective of the measure is to restrict imports when domestic supply is deemed sufficient to satisfy domestic demand and not to protect human health;[142] the measure is not necessary to protect human health as there is no evidence that the measure ensures the safety of Indonesia's food supply given Indonesia already requires health and phytosanitary certificates for imports of horticultural products;[143] and even if there were such a connection there are reasonably available less trade–restrictive alternatives.[144]

- Measures 9 and 17: The import licensing regimes for agricultural products as a whole are not maintained under Article XX(d), Article XX(b) or Article XX(a) because the objective of the measures is to restrict imports when domestic supply is deemed sufficient to satisfy domestic demand;[145] and the measures are not necessary to

[136] New Zealand's second written submission, paras. 254 – 255.
[137] New Zealand's second written submission, paras. 258 and 260. New Zealand's second opening statement, paras. 77 – 78.
[138] New Zealand's second written submission, para. 261.
[139] New Zealand's second written submission, paras. 161 – 168, and 270 – 271; New Zealand's second opening statement, paras. 34 – 38; New Zealand's first opening statement, paras. 52 – 56; New Zealand's answers to the Panel's questions after the first substantive meeting, Question 57, paras. 98 – 104; New Zealand's first written submission, paras. 15 – 24, 64 – 66, 67 – 71 and 113.
[140] New Zealand's second written submission paras. 169 and 272 – 273; New Zealand's second opening statement, paras. 80 – 81.
[141] New Zealand's second written submission, paras. 170 and 274.
[142] New Zealand's second written submission, paras. 278 – 279; New Zealand's first opening statement, paras. 52 – 56; New Zealand's second opening statement, paras. 82 – 84; New Zealand's first written submission, paras. 167 – 171 and 113.
[143] New Zealand's second written submission, paras. 280 – 281.
[144] New Zealand's second written submission, para. 282.
[145] New Zealand's second written submission paras. 174 – 175 and 286 – 288; New Zealand's second opening statement, paras. 26–31, 34–38 and 43–47; New Zealand's first opening statement, paras. 43 – 62; New Zealand's first written submission, paras. 15 – 24, 64 – 66, 67 – 71,113, 335 and 372.

secure compliance with any laws or regulations, to protect human health, or to protect a public moral.[146] Specifically, other arrangements are in place to ensure all relevant animal product exports to Indonesia are Halal and Indonesia's own laws imply horticultural products are inherently Halal;[147] the measures exacerbate food shortages rather than improve Indonesia's food security;[148] and on their face the measures are not connected to the enforcement of customs laws.[149] Further, even if there were such a connection there are reasonably available less trade–restrictive alternatives.[150]

- Measure 10: The import prohibition of certain bovine meat and offal products is not maintained under Article XX(b) because: the objective of the measure is to restrict imports when domestic supply is deemed sufficient to satisfy domestic demand and not to protect human health;[151] the measure is not necessary to protect human health because the measure applies to all unlisted products not just hormone-treated beef, e.g. NZ beef and offal products are prohibited even though they are not treated with hormones;[152] and even if there were such a connection there are reasonably available less trade–restrictive alternatives.[153]

- Measure 14: The use, sale, and transfer requirements for certain bovine meat and offal products are not maintained under Article XX(a) or Article XX(b) because: the objective of the measure is to restrict imports when domestic supply is deemed sufficient to satisfy domestic demand and not to protect a public moral or to protect human health.[154] Specifically, prohibiting certain points of sale for imported meat does not protect consumers from mistakenly purchasing non-Halal products because all imported products must be certified and labeled as Halal before their shipment to

[146] New Zealand's second written submission, paras. 174 – 175 and 287; New Zealand's response to panel question 75, para. 140; New Zealand's first opening statement, paras. 43 – 62; New Zealand's answers to the Panel's questions after the first substantive meeting, Question 73, paras. 131 – 132; New Zealand's comments on Indonesia's response to Panel's Question 116 c., para 12.
[147] New Zealand's second opening statement, paras. 30 – 31.
[148] New Zealand's second opening statement, paras. 36 – 38. New Zealand's answers to the Panel's questions after the second substantive meeting, Question 123.
[149] New Zealand's second opening statement, para. 43 – 45.
[150] New Zealand's second opening statement, paras. 39 and 46.
[151] New Zealand's second opening statement, paras. 57 – 60; New Zealand's first opening statement, para. 54; New Zealand's first written submission, paras. 15–24 and 64–66.
[152] New Zealand's second opening statement, paras. 59 – 60, New Zealand's answers to the Panel's questions after the second substantive meeting, Question 123, paras. 85 – 88; New Zealand's comments on Indonesia's response to Panel's Question 102, paras. 32 – 33; New Zealand's second written submission, paras. 37 – 43.
[153] New Zealand's second written submission, para. 43.
[154] New Zealand's second written submission, paras. 112 – 117 and 122 – 124; New Zealand's first opening statement, paras. 43 – 49; New Zealand's answers to the Panel's questions after the first substantive meeting, Question 73, paras. 131 – 132, and to Question 75, para. 138;
New Zealand's comments on Indonesia's response to Panel Question 113, para. 43; New Zealand's second opening statement, paras 66 and 70 – 73. New Zealand's first written submission, paras. 15 – 24 and 64 – 66.

Indonesia (and all New Zealand meat exported to Indonesia is Halal);[155] and there is no evidence imported meat poses any greater health risk than domestic meat.[156] Further, even if there were such a connection there are reasonably available less trade–restrictive alternatives.[157]

- Measure 15: The domestic purchase requirement for beef products is not maintained under Article XX(b) because the objective of the measure is to restrict imports when domestic supply is deemed sufficient to satisfy domestic demand and not to protect human health.[158] There is no evidence of any connection between the requirement for importers to purchase a specific quantity of domestic beef and human health.[159]

- Measure 18: The sufficiency of domestic supply requirement for agricultural products is not maintained under Article XX(b) because the objective of the measure is to restrict imports when domestic supply is deemed sufficient to satisfy domestic demand and not to protect human health.[160] There is no evidence of any connection between the measure and human health.[161]

87. Further, New Zealand also submitted additional evidence and argumentation demonstrating why the measures do not comply with the *chapeau* of Article XX.[162] Specifically, each of the measures is a disguised restriction on trade because their real purpose is to restrict imports of agricultural products where domestic production is deemed sufficient to fulfil domestic demand.[163] They are also applied in a manner that constitutes arbitrary and unjustifiable discrimination because none of the measures at

[155] New Zealand's second written submission, paras. 118 – 120; New Zealand's second opening statement, para. 72; New Zealand's answers to the Panel's questions after the first substantive meeting, Question 73, Question 75 paras. 138 and 141, Question 87 para. 25 (pp. 23 – 25) and Question 124; New Zealand's first opening statement, paras. 43 – 51.
[156] New Zealand's second written submission, paras. 125 – 126. New Zealand's second opening statement, paras. 68 – 71. New Zealand's answers to the Panel's questions after the first substantive meeting, Question 123 and Question 75, paras. 139 and 141; New Zealand's first opening statement, paras. 54 – 56.
[157] New Zealand's second written submission, paras. 120 – 121 and 127; New Zealand's first opening statement, para. 55.
[158] New Zealand's second written submission, paras. 144 – 151; New Zealand's first opening statement, para. 52; New Zealand's first written submission, paras. 15 – 24 and 64 – 66.
[159] New Zealand's second written submission, paras. 144 – 151; New Zealand's first opening statement, para. 52; New Zealand's first written submission, paras. 179 – 190.
[160] New Zealand's second written submission paras. 297 – 299; New Zealand's answers to the Panel's questions after the second substantive meeting, Question 112, para. 70; New Zealand's first opening statement, paras. 9 – 10.
[161] New Zealand's second written submission, paras. 297 – 299; New Zealand's first written submission, paras. 287 – 298.
[162] New Zealand's second written submission, paras. 300 – 310. New Zealand's second opening statement, paras. 48 – 52.
[163] New Zealand's second written submission, paras. 304 – 306.

issue apply in respect of domestic products;[164] and there is no rational basis for discriminating between domestic and local products.[165]

88. Accordingly, as demonstrated above, even though a complainant bears no burden under Article 4.2 of the Agreement on Agriculture to show that the challenged measures are not justified under Article XX of the GATT 1994, New Zealand has provided argumentation and evidence to that effect. As described by the panel in *US – Section 301 Trade Act*, the role of the panel is to balance all the evidence on the record and decide whether the party bearing the original burden of proof has convinced the panel of the validity of its claims.[166] In this dispute, the Panel considered the evidence put forward by the parties under Article XX, and ultimately determined that none of Indonesia's measures satisfies the requirements of Article XX.[167]

F. THE APPELLATE BODY NEED NOT MAKE FINDINGS ON THIS MATTER IN ORDER TO RESOLVE THE DISPUTE

89. As New Zealand explained in Section II above, the Panel did not commit a reversible legal error by analysing the measures at issue in this dispute under Article XI:1 of the GATT 1994 and exercising judicial economy with respect to the complainants' claims under Article 4.2 of the Agreement on Agriculture.

90. New Zealand submits that if the Appellate Body upholds the Panel's findings under Article XI:1 of the GATT 1994 in this appeal, it need not make any findings with respect to the Agreement on Agriculture, including in relation to the burden of proof under Article 4.2. Such findings would not be necessary to resolve the dispute.[168]

G. CONCLUSION

91. For the reasons outlined above, New Zealand requests that the Appellate Body reject Indonesia's claim of error as set out in Section II of Indonesia's Notice of Appeal and Section III of Indonesia's Appellant Submission, and uphold the findings, conclusions and legal interpretations of the Panel.[169]

[164] New Zealand's second written submission, para. 308.
[165] New Zealand's second written submission, para. 308.
[166] Panel Report, *US – Section 301 Trade Act*, para 7.14.
[167] Panel Report, *Indonesia – Import Licensing Regimes,* paras. 7.586, 7.595, 7.606, 7.616, 7.636, 7.661, 7.683, 7,721, 7.743, 7.751, 7.777, 7.828 and 7.830.
[168] Appellate Body Report, *US — Wool Shirts and Blouses*, p. 19.
[169] Indonesia's Notice of Appeal Section II, Indonesia's Appellant Submission, paras. 94 – 95.

IV. THE PANEL DID NOT FAIL TO MAKE AN OBJECTIVE ASSESSMENT UNDER ARTICLE 11 OF THE DSU WITH RESPECT TO THE APPLICABILITY OF ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

A. INDONESIA'S APPEAL

92. Indonesia claims that the Panel failed to comply with its obligation to conduct an objective assessment under Article 11 of the DSU because it did not examine the complainants' claims under Article 4.2 of the Agreement on Agriculture. Indonesia bases this allegation on two specific grounds, namely:

a. "By addressing Article XI:1 first and exercising judicial economy under the Agreement on Agriculture to avoid these 'novel and abstract legal issues', the Panel failed to conduct an objective assessment that Article 4.2 of the Agreement on Agriculture was the applicable agreement with respect to quantitative import restrictions on agricultural products";[170] and

b. "The Panel also did not conduct an objective assessment of which party bears the burden of proof with respect to the second element of footnote 1 to Article 4.2 of the Agreement on Agriculture."[171]

B. THE PANEL'S ANALYSIS

93. As set out in Section II.B above, in deciding the order of analysis of the complainants' claims in this dispute, the Panel started with the Appellate Body's guidance that "[a]s a general principle, panels are free to structure the order of their analysis as they see fit."[172] The Panel then considered various factors,[173] including whether a particular order of analysis could lead it to commit a legal error, and what the impact of a selected order of analysis would be on the potential for the Panel to apply judicial economy.[174] Finally, the Panel decided to begin its analysis with Article XI:1 of the GATT 1994, given it "deals specifically, and in detail" with the measures at issue.[175]

94. Later in its report, the Panel, recalling the statements by the Appellate Body in *Australia – Salmon* that a panel must address those claims on which a finding is necessary "in order to ensure effective resolution of disputes" concluded that it was not required to "continue its analysis and make specific findings on the consistency of these Measures with Article 4.2 of the Agreement on Agriculture" because its findings

[170] Indonesia's Appellant Submission, para. 105.
[171] Indonesia's Appellant Submission, para. 105.
[172] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.28 citing Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.
[173] Including the manner in which the complainants had presented their claims to the Panel, and the views of the parties and third parties. Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.28, 7.29, 7.30 and 7.32.
[174] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.31 citing Panel Report, *India – Autos*, paras. 7.154 and 7.161.
[175] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.31 – 7.33.

"pertaining to the inconsistency of Measures 1 through 18 with Article XI:1 of the GATT 1994 and the absence of a justification under Articles XX(a), XX(b) or XX(d) of the GATT 1994 ensures the effective resolution of this dispute."[176]

95. As set out in Section III above, the Panel also specifically considered, but ultimately rejected, Indonesia's argument that, because the complainants allegedly failed to provide evidence that the challenged measures are not justified under Article XX of the GATT 1994, the Panel could not, as a matter of law, rule in the complainants' favour under Article 4.2.[177]

C. LEGAL ISSUES BEFORE THE APPELLATE BODY

96. The legal issues before the Appellate Body are:

a. Whether Indonesia's appeal under Article 11 of the DSU stands by itself or is merely a subsidiary claim; and

b. Whether the Panel erred in its order of analysis, allocation of burden of proof and judicial economy.

97. Article 11 of the DSU provides that:

> … a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements … [178]

98. The Appellate Body has recently summarised the applicable jurisprudence on Article 11 in the following terms:

> In previous disputes, the Appellate Body has noted that a panel is required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence". Within these parameters, "it is generally within the discretion of the [p]anel to decide which evidence it chooses to utilize in making findings." A claim that a panel has failed to conduct an "objective assessment of the matter before it" is "a very serious allegation". An appellant may not effectively recast its arguments before the panel under the guise of an Article 11 claim, but must identify specific errors that are so material that, "taken together or singly", they undermine the objectivity of the panel's assessment of the matter before it.[179]

[176] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.833 citing Appellate Body Report, *Australia – Salmon*, para. 223.
[177] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.34.
[178] Dispute Settlement Understanding, Article 11.
[179] Appellate Body Report, *Peru – Agricultural Products*, para. 5.66 (internal footnotes omitted).

D. INDONESIA'S APPEAL UNDER ARTICLE 11 OF THE DSU DOES NOT "STAND BY ITSELF"

99. As set out above, the Appellate Body has confirmed on a number of occasions that a claim that a panel has failed to conduct an "objective assessment of the matter before it" is "a very serious allegation".[180] There is accordingly a high standard for an appellant to demonstrate that a panel did not satisfy the requirements of Article 11 of the DSU. In light of the seriousness of such a claim, "a challenge under Article 11 of the DSU must 'stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement.'"[181]

100. Despite this guidance, the grounds on which Indonesia claims the Panel has failed to conduct an "objective assessment of the matter before it" are based exclusively on Indonesia's first and second grounds of appeal: namely, that the Panel erred in law in finding that Article XI:1 of the GATT 1994 is more specific than Article 4.2 of the Agreement on Agriculture;[182] and, that the Panel erred in law by determining that Indonesia bore the burden of proving the second element of footnote 1 to Article 4.2 of the Agriculture Agreement with respect to its Article XX defences.[183]

101. Accordingly, as a threshold matter, Indonesia has failed to independently substantiate its claims under Article 11 of the DSU as distinct from its first and second claims of legal error. As was the case in *Peru – Agricultural Products*, Indonesia's challenge under Article 11 is based solely on Indonesia's challenge to the legal standards applied by the Panel, and Indonesia "has not explained the basis for requesting an *additional* examination of the Panel's assessment of the matter before it in the context of an Article 11 claim".[184] In *Peru – Agricultural Products* the Appellate Body rejected this ground of appeal.[185] Similarly, for the reasons set out above, Indonesia's claim under Article 11 of the DSU must fail.

E. THE PANEL DID NOT ERR IN ITS ORDER OF ANALYSIS OR EXERCISE OF JUDICIAL ECONOMY

102. For completeness, New Zealand notes that it has described in Section II above why the Panel's decision to commence its analysis of the measures at issue under Article

[180] Appellate Body Report, *Peru – Agricultural Products*, para. 5.66 citing as follows: "Appellate Body Report, *China – Rare Earths*, para. 5.227 (quoting Appellate Body Report, *EC – Poultry*, para. 133)."
[181] Appellate Body Report, *Peru – Agricultural Products*, para. 5.66 citing as follows: "Appellate Body Report, *US – Anti–Dumping and Countervailing Duties (China)*, para. 337 (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 498; *Australia – Apples*, para. 406). In case of similarly overlapping claims of error in the application of a legal standard to the relevant facts of a case and under Article 11 of the DSU, there is no basis to have a separate and additional examination of whether a panel has conducted an objective assessment of the facts under Article 11 of the DSU. (Appellate Body Report, *China – Rare Earths*, para. 5.174 (referring to Appellate Body Report, *China – GOES*, para. 184))."
[182] Indonesia's Appellant Submission, para. 63.
[183] Indonesia's Appellant Submission, para. 94.
[184] Appellate Body Report, *Peru – Agricultural Products*, para. 5.67 (emphasis in original).
[185] Appellate Body Report, *Peru – Agricultural Products*, para. 5.68.

XI:1 of the GATT 1994 was a matter which fell within the Panel's margin of discretion and did not result in legal error.

103. Similarly, as described in Section III above, New Zealand submits that the Panel properly allocated the burden of proof for Article XX defences under Article 4.2 of the Agreement on Agriculture.

104. Indonesia suggests that the Panel chose to address Article XI:1 first, and exercise judicial economy with respect to the Agreement on Agriculture, in order to avoid the need to address "novel and abstract legal issues" with respect to the allocation of the burden of proof under the second element of footnote 1 to Article 4.2 of the Agreement on Agriculture.[186] New Zealand does not agree that the Panel did any such thing. Rather, as described in Section III above, the Panel did address the question of burden of proof but did not agree with Indonesia that the burden of proof under Article XX of the GATT 1994 should be reversed in the context of Article 4.2 of the Agreement on Agriculture.[187]

105. Furthermore, it is well established that a panel is not required to address all claims raised in a dispute if it is not necessary to resolve the dispute. This principle is not in conflict with the more general proposition that a Panel has an obligation to make an "'objective assessment of the facts', of the 'applicability' of the covered agreements, and of the 'conformity' of the measure at stake with those covered agreements", as described by the Appellate Body in *US – Hot–Rolled Steel*.[188]

106. A panel's ability to exercise judicial economy is clearly expressed by the Appellate Body in *US — Wool Shirts and Blouses*:[189]

> Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. *A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.*

107. In *US – Upland Cotton*, the Appellate Body found that interpreting a particular phrase in the SCM Agreement was "unnecessary for purposes of resolving" that dispute.[190] In *India – Solar Cells* one member of the Appellate Body gave additional guidance on how the Appellate Body should consider each of the issues raised by the Parties:[191]

> In deciding *how* to "address" each of the issues raised by the parties, the Appellate Body is guided by certain overarching principles. First, the

[186] Indonesia's Appellant Submission, para. 105.
[187] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.34.
[188] Appellate Body Report, *US — Hot–Rolled Steel*, para. 54.
[189] Appellate Body Report, *US — Wool Shirts and Blouses*, p. 19 (emphasis added).
[190] Appellate Body Report, *US — Upland Cotton*, paras. 510–511.
[191] Appellate Body Report, *India – Solar Cells*, para. 5.158 (internal footnotes omitted, emphasis in original).

> Appellate Body, as a part of the WTO dispute settlement mechanism, contributes to the objectives of the "prompt settlement" of a dispute or "positive solution to a dispute", which are enunciated in the DSU. Thus, the Appellate Body may, for example, decline to make specific findings regarding an issue raised on appeal, and "address" the issue only to the extent necessary to ascertain that, in light of the other rulings under a different, but related, claim on appeal that resolve the dispute, there was no need to rule on that particular additional issue in question. Whether making such an additional finding would serve the goal of facilitating the prompt settlement and effective resolution of a dispute is a matter for the Appellate Body to decide in light of the particular circumstances of each case, including the nature of, and relationship between, the relevant claims on appeal, as well as their implications for implementation.

108. Accordingly, having found that all of Indonesia's measures were inconsistent with Article XI:1, and having found the absence of a justification under Article XX of the GATT 1994 for each of those measures, the Panel was entitled to exercise judicial economy with respect to the complainants' claims under Article 4.2 of the Agreement on Agriculture as additional findings under Article 4.2 were unnecessary to resolve the dispute.[192]

109. Indonesia argues that the Appellate Body Report in *Colombia – Textiles* supports its proposition that the Panel failed to conduct an objective assessment of the applicability of the relevant covered agreements in this dispute.[193] In that dispute, the Appellate Body considered the exercise of judicial economy by the panel was based on flawed reasoning that the particular finding was not necessary. The reasoning was flawed because the finding was, in the Appellate Body's view, necessary to determine the extent to which the measure was inconsistent with Colombia's WTO obligations. This would in turn have affected Colombia's obligations to implement the panel's findings.[194] As we have described above, this is not the case in the present dispute.

F. CONCLUSION

110. For the reasons outlined above, New Zealand requests that the Appellate Body reject Indonesia's claim of error as set out in Section III of Indonesia's Notice of Appeal and Section IV of Indonesia's Appellant Submission, and uphold the findings, conclusions and legal interpretations of the Panel.[195]

[192] Appellate Body Report, *US – Upland Cotton*, paras. 510–511.
[193] Indonesia's Appellant Submission, para. 103 citing Appellate Body Report, *Colombia – Textiles*, paras. 5.20.
[194] Appellate Body Report, *Colombia – Textiles*, paras. 5.26–5.28.
[195] Indonesia's Notice of Appeal, Section III, Indonesia's Appellant Submission, paras. 106 – 107.

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

A. INDONESIA'S APPEAL

111. On appeal, Indonesia argues the Panel erred in concluding that Article XI:2(c) of the GATT 1994 has been rendered inoperative by Article 4.2 of the Agreement on Agriculture. Indonesia contends that Article XI:2(c) is "a 'scope' provision and cannot be properly characterized as an 'exception' to the obligations under Article XI:1."[196] In reliance of this characterisation, Indonesia then argues that XI:2(c) "is not an exception captured by the second element of this footnote 1 to Article 4.2 of the Agreement on Agriculture…[but r]ather, Article XI:2(c) defines the term 'quantitative import restrictions' in the first element of footnote 1 to Article 4.2 of the Agreement on Agriculture."[197] Thus, Indonesia submits that measures maintained under Article XI:2(c) are neither a "restriction" under Article XI:1 of the GATT 1994 nor "quantitative import restrictions" under Article 4.2 of the Agreement on Agriculture.

B. THE PANEL'S ANALYSIS

112. The Panel found that Article XI:2(c) of the GATT 1994 has been rendered inoperative with respect to agricultural measures by Article 4.2 of the Agreement on Agriculture.[198] The Panel reached this conclusion on the basis that Article 4.2 of the Agreement on Agriculture prohibits Members from maintaining "measures of a kind required to be converted into ordinary customs duties" except for, *inter alia*, those maintained under the "general, non–agriculture–specific provisions" of the GATT 1994.[199] Accordingly, because Article XI:2(c) concerns agricultural products, the Panel considered that it is not one of the "general, non-agriculture-specific provisions" in footnote 1 of Article 4.2 of the Agreement on Agriculture.[200] The Panel considered that Article 21.1 of the Agreement on Agriculture confirmed that view.[201]

C. LEGAL ISSUE BEFORE THE APPELLATE BODY

113. The legal issue before the Appellate Body is whether the Panel was correct to find that Indonesia cannot rely on Article XI:2(c)(ii) of the GATT 1994 to exclude Measures 4, 7 and 16 from the scope of Article XI:1 of the GATT 1994 because Article XI:2(c) has been rendered inoperative for agricultural products by Article 4.2 of the Agreement on Agriculture.

[196] Indonesia's Appellant Submission, para. 116.
[197] Indonesia's Appellant Submission, para. 120.
[198] Panel report, *Indonesia – Import Licensing Regimes*, para. 7.60.
[199] Panel report, *Indonesia – Import Licensing Regimes*, para. 7.60.
[200] Panel report, *Indonesia – Import Licensing Regimes*, para. 7.60.
[201] Panel report, *Indonesia – Import Licensing Regimes*, para. 7.60.

D. ARTICLE XI:2(C) IS AN AFFIRMATIVE DEFENCE TO ARTICLE XI:1

114. GATT and WTO jurisprudence confirms that Article XI:2(c) of the GATT 1994 is an *exception* to the obligation in Article XI:1 of the GATT 1994. Thus, Article XI:2(c) does not define the scope of "quantitative import restriction" in Article 4.2 of the Agreement on Agriculture.

115. In *US – Wool Shirts and Blouses*, the Appellate Body confirmed that "Articles XX and XI:(2)(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences."[202] The Appellate Body's reasoning reflected a number of GATT panel decisions which confirmed the characterisation of Article XI:2(c) as an exception.[203]

116. Furthermore, subsequent to *US – Wool Shirts and Blouses*, multiple panels have also re–confirmed the character of Article XI:2(c) as an "exception". In *EC – Tariff Preferences*, the panel held that "it is well established that Article XX is not such a rule establishing positive obligations, nor is Article XI:(2)(c)(i)."[204] Similarly, the panel in *China – Raw Materials* confirmed that:

> The Appellate Body was clear in its statement on the operation of Article XI:2(c)(i), stating:
>
> > "Articles XX and XI:(2)(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves…"
>
> … The Panel sees no basis to conclude that the logic applicable to Article XI:2(c)(i) would not apply as well to the separate subparagraph, Article XI:2(a), which falls under the same chapeau paragraph.[205]

117. In support of its view that Article XI:2(c) is not in the nature of an exception, Indonesia cites statements of the Appellate Body in *China – Raw Materials* and *Argentina – Import Measure*s which it argues confirm that Article XI:2(c) is a "'scope' provision, which defines the circumstances under which WTO Members would have the right to apply quantitative restrictions.[206]

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[202] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[203] See for example: GATT Panel Report, *Japan – Restrictions on Imports of Certain Agricultural Products*, para. 5.1.3.7; GATT Panel Report, *EEC – Restrictions on Imports of Dessert Apples, Complaint by Chile*, para. 12:3; and GATT Panel Report, *Canada – Import Restrictions on Ice Cream and Yoghurt*, para. 59.
[204] Panel Report, *EC –Tariff Preferences*, para. 7.37 (emphasis added).
[205] Panel Report, *China – Raw Materials*, para. 7.211 citing Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16; see also GATT Panel Report, *EEC – Dessert Apples*, para. 12.3; GATT Panel Report, *Canada – Ice Cream and Yoghurt*, para. 59.
[206] Indonesia's Appellant Submission, paras. 116 and 122, citing Appellate Body Reports, *Argentina – Import Measures*, para. 5.219 and *China – Raw Materials*, para. 334.

118. However, in neither of those disputes was the Appellate Body opining on whether Article XI:2(c) constitutes an exception.

119. In *Argentina – Import Measures,* the Appellate Body was simply confirming that measures maintained under Article XI:2 of the GATT 1994 are not prohibited by Article XI:1 of the GATT 1994. The Appellate Body's reference to Article XI:2 was limited to providing context to its interpretation of the language in Article XI:1.[207] New Zealand notes that if (as Indonesia appears to suggest) the Appellate Body had intended in that dispute to deviate from established Appellate Body jurisprudence regarding the characterisation of Article XI:2(c) as an exception, it would have said so explicitly.

120. Similarly, in *China – Raw Materials*, the Appellate Body's reference to Article XI:2(c) was in the context of its examination of the relationship between Article XI:2(c) and Article XX of the GATT 1994.[208] The Appellate Body did not need to consider the characterisation of Article XI:2 in its own right, but rather indicated that if a measure could be justified under Article XI:2, there would be no need to resort further to the application of Article XX.[209] Further, the Appellate Body did not take issue with the panel's characterisation that the respondent in that dispute bore the burden of demonstrating that the measure at issue was justified under Article XI:2(a), consistent with the ordinary burden of proof for "exceptions" to positive obligations.[210]

121. Accordingly, Indonesia's view that Article XI:2(c) of the GATT 1994 is not in the nature of an "exception" runs contrary to WTO jurisprudence. It also appears to be contradicted by some of Indonesia's own statements, where it appears to acknowledge that "Article XI:2 lists a number of exceptions to the prohibitions restrictions [sic] on importation and exportation included in paragraph 1."[211]

E. ARTICLE XI:2(C) IS RENDERED INOPERATIVE BY ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

122. Furthermore, even if the Appellate Body were to depart from this established jurisprudence characterising Article XI:2(c) as an exception, the language of footnote 1 to Article 4.2 of the Agreement on Agriculture clearly renders Article XI:2(c) inapplicable to agricultural products covered by the Agreement on Agriculture.

123. Article XI:2(c), by its terms, applies specifically to measures maintained in respect of agricultural products. Measures falling within Article XI:2(c) are therefore not maintained under a "general, non–agriculture–specific provision" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture, and thus are not permitted to be maintained for agricultural products in light of the Agreement on Agriculture.

[207] Appellate Body Report, *Argentina – Import Measures*, paras. 5.214 – 5.221.
[208] See Appellate Body Report, *China – Raw Materials,* para. 329.
[209] See Appellate Body Report, *China – Raw Materials,* para. 309 summarising the Panel's findings that "China had failed to demonstrate" the necessary elements of Article XI:2(c) were satisfied.
[210] Appellate Body Report, *China – Raw Materials*, para. 334.
[211] Indonesia's second written submission, para. 253.

124. Indonesia also suggests that the Panel's findings with respect to Article XI:2(c) of the GATT 1994 do not comply with Article 3.2 of the DSU because they "[diminish] the rights of WTO Members under the GATT 1994".[212] However, the Panel's findings with respect to Article XI:2(c) simply reflect the legal status of that provision with respect to agricultural products, in light of Article 4.2 and Article 21.1 of the Agreement on Agriculture.

F. IN ANY EVENT, INDONESIA HAS NOT DEMONSTRATED THAT THE CONDITIONS OF ARTICLE XI:2(C) ARE SATISFIED

125. Even if the Appellate Body were to find that Article XI:2(c) of the GATT 1994 continued to apply to agricultural products covered by the Agreement on Agriculture, Indonesia has failed to meet the requirements of Article XI:2(c)(ii) in respect of the relevant measures at issue in this dispute.[213]

126. First, in order to demonstrate that a measure is justified under GATT Article XI:2(c)(ii), the import restriction must be necessary for the enforcement of "governmental measures which operated … to remove a temporary surplus".[214] No such measure has been identified by Indonesia. Second, Indonesia has not demonstrated that the reference price and domestic harvest period restrictions are "necessary" to the enforcement of such a measure. Third, Article XI:2(c)(ii) requires Indonesia to demonstrate that the governmental measure for which its measures are necessary to secure compliance provide for the surplus domestic product to be made "available to certain groups of consumers free of charge or at prices below the current market level". Indonesia has not provided any argumentation on this element of Article XI:2(c)(ii).

127. Further, even if Indonesia had satisfied these elements of Article XI:2(c)(ii), it has failed to provide any evidence to demonstrate that a temporary surplus, or indeed any surplus, has occurred or will occur.

128. Here again, Indonesia's appeal is not material to resolving the dispute as the essential requirements of an Article XI:2(c)(ii) of the GATT 1994 defence are not satisfied in respect of the relevant measures at issue.

G. CONCLUSION

129. For the reasons outlined above, New Zealand requests that the Appellate Body reject Indonesia's alternative claim of error as set out in Section IV of Indonesia's Notice

[212] Indonesia's Appellant Submission, para. 125.
[213] Indonesia relied upon Article XI:2(c)(ii) in respect of Measures 4, 7 and 16. See Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.58.
[214] GATT Panel Report, *European Community Programme of Minimum Import prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetable*, para. 4.13.

of Appeal and Section V of Indonesia's Appellant Submission, and uphold the findings, conclusions and legal interpretations of the Panel.[215]

VI. THE PANEL DID NOT ERR BY FINDING THAT MEASURES 9 THROUGH 17 ARE NOT JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

A. INDONESIA'S APPEAL

130. Indonesia seeks to reverse the Panel's findings that Indonesia failed to demonstrate that Measures 9–17 are justified under Article XX of the GATT 1994.[216] Indonesia argues that the Panel's decision to analyse Indonesia's Article XX defences for Measures 9–17 under the *chapeau* was a legal error. It argues that Panel deviated from an allegedly "mandatory sequence" for conducting an Article XX analysis.[217] Indonesia also suggests that the Panel's sequence of analysis had "repercussions for the substance" of the Panel's analysis under the *chapeau*.[218]

131. In support of its arguments, Indonesia relies heavily on the Appellate Body's decision in *US – Shrimp*.[219] However, as detailed in the following sections, Indonesia misinterprets the Appellate Body's findings in that dispute and fails to recognise why the panel's analysis under the Article XX *chapeau* in *US – Shrimp*, which constituted legal error, is distinguishable from the Panel's legitimate approach and analysis under the *chapeau* in the present dispute.

B. THE PANEL'S ANALYSIS

132. The Panel commenced its analysis of Indonesia's claims under Article XX by recalling the "two–tiered" analysis set out by the Appellate Body in *US – Shrimp*.[220] The Panel then recalled the relevant legal requirements for conducting that two–tiered analysis.[221]

133. Cognisant of these legal requirements, the Panel proceeded to assess whether Indonesia had demonstrated that Measures 1–8 were justified under the relevant subparagraphs of Article XX.[222] It concluded that Indonesia had not demonstrated that any of those measures was provisionally justified under the subparagraphs.[223]

[215] Indonesia's Notice of Appeal Section IV; Indonesia's Appellant Submission, paras. 126 – 127.
[216] Indonesia's Appellant Submission, para. 160.
[217] Indonesia's Appellant Submission, paras. 142, 145, 151 and 152.
[218] Indonesia's Appellant Submission, para. 153.
[219] Indonesia's Appellant Submission, para. 151, 152 and 153.
[220] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.561.
[221] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.561–7.567.
[222] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.521–7.804.
[223] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.586, 7.595, 7.606, 7.636, 7.661, 7.683, 7.693, 7.721, 7.743, 7.751, 7.777 and 7.804.

134. In conducting its analysis under the *chapeau*, the Panel was aware of the correct legal standard, as elaborated by the Appellate Body, which it expressly applied.[224] In particular, the Panel expressly considered the policy objective with respect to which each measure was allegedly justified under the subparagraphs of Article XX, to the extent necessary to properly perform its *chapeau* analysis.[225] The Panel recognised that it was necessary to consider the policy objectives in two aspects of its *chapeau* analysis, namely:

a. to determine whether the discrimination identified can be "reconciled with" or is "rationally related" to the alleged policy objective being pursued;[226] and

b. to determine whether the "same conditions prevail" in light of the alleged policy objective being pursued.[227]

135. The Panel recalled that Indonesia's arguments under the *chapeau* of Article XX were made with respect to its "import licensing regimes for horticultural products and animal and animal products as a whole".[228] The Panel found that Indonesia's arguments were made "without making any relevant distinctions between the individual measures at issue and it conflated all three defences under subparagraphs (a), (b) and (d) of Article XX of the GATT 1994" in its *chapeau* argument.[229] The Panel then recalled that the "burden of demonstrating that the inconsistent measures … are consistent with the requirements of the *chapeau* rests with Indonesia".[230] It explained that "[g]iven the manner in which Indonesia formulated its defence, the Panel will examine whether Indonesia's import licensing regimes for horticultural products and animals and animal products as a whole, including the individual measures therein, are applied in a manner consistent with the *chapeau*, with respect to all three relevant subparagraphs of Article XX of the GATT 1994".[231]

136. Having undertaken this analysis, the Panel concluded that Indonesia had failed to demonstrate that any of the measures at issue are applied in a manner consistent with the *chapeau*.[232] The Panel found that because "compliance with the *chapeau* of Article XX is a necessary requirement in order for a measure to find justification under this

[224] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.565 – 7.568 and 7.805 – 7.827. See in particular, paras. 7.806 and 7.816 – 7.827; and 7.565 – 7.567.
[225] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.805 – 7.827 (see in particular paras. 7.813 – 7.825).
[226] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.817 – 7.824.
[227] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.825.
[228] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.805 and 7.569 (internal footnotes omitted), as accepted in Indonesia's Appellant Submission, para. 131.
[229] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.805 and 7.569 (internal footnotes omitted), as accepted in Indonesia's Appellant Submission, para. 131.
[230] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.805.
[231] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.805.
[232] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.826 and 7.829.

provision", it would "refrain from continuing its analysis of Indonesia's defences under Article XX(a), (b) or (d) of the GATT 1994 for Measures 9 through 17".[233]

C. LEGAL ISSUE BEFORE THE APPELLATE BODY

137. The legal issue before the Appellate Body is whether the Panel made a reversible legal error by commencing its analysis of measures 9–17 under the *chapeau* of Article XX of the GATT 1994, even though this approach had no repercussions for the substance of the Panel's *chapeau* analysis and did not lead to flawed results.

D. THE PANEL'S ORDER OF ANALYSIS UNDER ARTICLE XX FOR MEASURES 9–17 DOES NOT *PER SE* CONSTITUTE REVERSIBLE LEGAL ERROR

138. As New Zealand outlined in Section II above, the Appellate Body has found that panels have a "margin of discretion" to "structure the order of their analysis as they see fit".[234] A particular order of analysis will only be inappropriate where it has "repercussions for the substance of the analysis itself" and leads to "flawed results".[235]

139. Accordingly, to demonstrate the existence of an error of law, it is insufficient for Indonesia simply to contend that the Panel's order of analysis constituted an error of law "in the abstract".[236] The order of analysis must have had repercussions for the substance of the analysis itself leading to flawed results.[237]

140. In arguing that the Panel in the present dispute erred in law by commencing its Article XX analysis for Measures 9 – 17 with the *chapeau*, Indonesia relies heavily on *US – Shrimp*.[238] Indonesia implies that the Appellate Body in *US – Shrimp* found that the panel erred in law because it "deviated from the mandatory sequence of analysis under Article XX".[239] However, Indonesia's argument is based on a mischaracterisation of the Appellate Body's decision in that dispute.

141. In *US – Shrimp,* the Appellate Body found that the Panel erred in law because it *misapplied the legal standard under the chapeau* of Article XX.[240] The Appellate Body

[233] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.829.
[234] Appellate Body Report, *Canada – Renewable Energy/Canada – Feed–in Tariff Program*, para. 5.8; Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.
[235] Appellate Body Report, *Canada – Autos*, para. 151 citing Appellate Body Reports, *US – Shrimp*, para. 119 and *US – Gasoline*, p. 22; Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109. See also Indonesia's Appellant Submission, para. 103 citing Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109; Panel Report, *India – Autos*, para. 7.154.
[236] Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico),* para. 5.206.
[237] Appellate Body Report, *Canada – Autos*, para. 151 citing Appellate Body Reports, *US – Shrimp*, para. 119 and *US – Gasoline*, p. 22; Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109. See also Indonesia's Appellant Submission, para. 103 citing Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109; Panel Report, *India – Autos*, para. 7.154.
[238] Indonesia's Appellant Submission, paras. 139, 141, 142 and 151.
[239] Indonesia's Appellant Submission, para. 151.
[240] Appellate Body Report, *US – Shrimp*, paras. 121 and 122.

explained that by "formulat[ing] a broad standard and a test for appraising measures sought to be justified under the *chapeau* … [which] renders most, if not all, of the specific exceptions of Article XX inutile", the panel misinterpreted the legal standard under the *chapeau*, and thus committed legal error.[241] Accordingly, it was the panel's failure in *US – Shrimp* to properly formulate and apply the legal standard under the *chapeau*, rather than the order of analysis itself, that constituted a reversible error.

142. The Appellate Body explained that the reason for the panel formulating an overly broad standard for assessing measures under the *chapeau* was that it "failed to scrutinize the *immediate* context of the *chapeau*: i.e., paragraphs (a) to (j) of Article XX".[242] Importantly, it was the panel's failure to consider the context of the Article XX subparagraphs in *formulating the legal standard under the chapeau*, rather than its failure to consider whether a measure met the requirements for provisional justification under the subparagraphs before progressing to the *chapeau*, that caused the *US – Shrimp* panel's *chapeau* analysis to be flawed.

143. The Appellate Body in *US – Shrimp* confirmed that a proper analysis of the *chapeau* could not be conducted in isolation from the purported policy objective of a measure being considered. Having found that the panel in *US – Shrimp* failed to apply that standard by looking "into the object and purpose of the *whole of the GATT 1994 and the WTO Agreement*, which object and purpose it described in an overly broad manner", rather than the "immediate context" of the subparagraphs of Article XX, the Appellate Body found the panel erred in law and reversed its findings.[243] By contrast, as explained in Section VI.E below, the Panel in the present dispute expressly considered the purported objective(s) of each measure at issue under the *chapeau*, and thus did not err in its substantive analysis under the *chapeau*.

144. Subsequent jurisprudence has established two reasons why it is necessary for a panel to consider the policy objective with respect to which a measure is allegedly justified under the subparagraphs of Article XX as part of its *chapeau* analysis.[244] First, in determining whether the discriminatory application of a measure is "arbitrary or unjustifiable", a panel must consider "whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX."[245] Second, in assessing whether discrimination occurs between countries where the same conditions prevail, the "'conditions' relating to the particular policy objective under the applicable subparagraph" are relevant and provide "pertinent context".[246]

[241] Appellate Body Report, *US – Shrimp*, paras. 121 and 116.
[242] Appellate Body Report, *US – Shrimp*, paras. 116 and 122.
[243] Appellate Body Report, *US – Shrimp*, para. 116.
[244] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.565 citing Appellate Body Report, *EC – Seal Products*, para. 5.302 citing Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29.
[245] Appellate Body Report, *EC – Seal Products*, para. 5.306.
[246] Appellate Body Report, *EC – Seal Products*, para. 5.300.

145. Accordingly, while a panel cannot conduct a proper analysis of the *chapeau* without turning its mind to the purported objective of a measure, it does not follow that a panel must *determine whether a particular measure can be provisionally justified* under the subparagraph of Article XX of the GATT 1994 in order to perform a legally correct analysis of the *chapeau*. A failure to consider relevant factors in a *chapeau* analysis will constitute an error of law. However, provided those factors are properly considered, that analysis will not be legally flawed solely by virtue of a panel's selected order of analysis.

146. To be clear, New Zealand agrees with the Appellate Body's finding that the panel's analysis of the *chapeau* in *US – Shrimp* was substantively flawed and constituted a legal error. However, it was the *flawed chapeau analysis*, and not the panel's order of analysis, which constituted reversible legal error in that dispute.

147. New Zealand's interpretation of the Appellate Body's decision in *US – Shrimp* is supported by subsequent Appellate Body jurisprudence. In *Canada – Autos*, the Appellate Body clarified that the reason why a panel "may not ignore the 'fundamental structure and logic' of a provision in deciding the proper sequence of steps in its analysis" is because it risks the "peril of reaching flawed results".[247] The Appellate Body thus emphasised that it is the "flaws" in the substantive analysis which could constitute legal error, rather than the sequence of analysis *per se*.

148. Further, in *Canada – Wheat Exports and Grain Imports*, the Appellate Body held that the panel's decision to commence its analysis with subparagraph (b) of Article XVII:1 of the GATT 1994, rather than subparagraph (a), did not constitute an error of law.[248] The Appellate Body, citing *US – Shrimp* and *Canada – Autos*, acknowledged that "panels that ignore or jump over a prior logical step of the analysis run the risk of compromising or invalidating later findings", and even "express[ed] some concern about the manner in which the Panel conducted its analysis".[249] However, the Appellate Body ultimately determined that "in the particular circumstances" of the dispute the panel's order of analysis did not affect the panel's substantive application of the legal standard and was therefore "not fatal" to its legal analysis.[250] Again, the Appellate Body emphasised that it is the substance of the analysis, rather than its order *per se*, that is determinative in establishing whether an error of law has occurred.

149. Similarly, the Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)* considered whether the panel erred in its sequence of analysis under Article 2.2 of the TBT Agreement. The Appellate Body found that while "a certain sequence and order of analysis may logically flow from the nature of the examination under Article 2.2" that provision "does not explicitly prescribe, in rigid terms, the sequence and order of analysis in assessing whether the technical regulation at issue is 'more trade restrictive than

[247] Appellate Body Report, *Canada – Autos*, para. 151.
[248] Appellate Body Report, *Canada – Wheat Exports and Grain Imports,* para. 125.
[249] Appellate Body Report, *Canada – Wheat Exports and Grain Imports,* paras. 126 and 127.
[250] Appellate Body Report, *Canada – Wheat Exports and Grain Imports,* paras. 125 and 130.

necessary'".[251] The Appellate Body confirmed that panels "are afforded a certain degree of latitude to tailor the sequence and order of analysis in a given case when assessing the relevant factors and conducting the overall weighing and balancing under Article 2.2".[252] On that basis, the Appellate Body confirmed the principle that "[i]t is not sufficient for an appellant merely to claim that a panel erred by deviating from a certain sequence and order of analysis in the abstract."[253]

150. In light of that reasoning, the Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)* ultimately found that the appellants had not demonstrated "why, by following that particular sequence and order of analysis, a panel committed an error in the context of the case at hand" and accordingly dismissed the claim of error.[254]

151. This Appellate Body jurisprudence affirms New Zealand's view that the order of a panel's analysis does not, in the abstract, constitute an error of law. Simply because, in most cases, panels have commenced their analysis of Article XX with an assessment of the measure under the relevant subparagraph(s) before proceeding to the *chapeau*, it does not follow that such a sequence is essential in order to avoid legal error.

152. Indeed, as described in Section VI.E below, the Panel in this dispute correctly analysed each of the challenged measures under the *chapeau* in light of the policy objective with respect to which that measure was allegedly justified under the subparagraphs of Article XX. It therefore avoided legal error.

153. Moreover, in the present dispute, not only was the Panel's order of analysis legitimate but, in the particular circumstances, it enabled the Panel to make the findings necessary to resolve the dispute in an efficient manner.[255]

E. THE PANEL'S ANALYSIS OF MEASURES 9–17 UNDER THE ARTICLE XX *CHAPEAU* IS SUBSTANTIVELY CORRECT

154. Contrary to Indonesia's argument in this appeal, the sequence of analysis applied by the Panel in respect of Measures 9–17 under Article XX of the GATT 1994 did not have "repercussions for the substance of the analysis itself" that led to "flawed results".[256]

[251] Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico),* paras. 5.227 and 5.202.
[252] Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico),* para. 5.229.
[253] Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico),* para. 5.229.
[254] Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico),* paras. 5.229 and 5.236.
[255] As the Panel noted, "having found that *all* the relevant measures at issue are not applied in a manner consistent with the *chapeau* of Article XX of the GATT 1994, continuing the analysis would be unwarranted." This is because "compliance with the *chapeau* of Article XX is a necessary requirement in order for a measure to find justification under this provision. Therefore, even if the measures were found to be "necessary" under subparagraphs (a), (b) and/or (d) of Article XX, Indonesia would not be able to rely upon these defences because the measures are not applied in a manner consistent with the *chapeau*." Panel Report, *Indonesia – Import Licensing Regimes*, para. 6.47.

155. The Panel correctly set out the *chapeau*'s elements in respect of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", as follows:

> a. the application of the measure results in discrimination;
>
> b. the discrimination is arbitrary or unjustifiable; and
>
> c. the discrimination occurs between countries where the same conditions prevail.[257]

156. As demonstrated below, the Panel correctly analysed these three elements in its *chapeau* analysis.

1. ***Application of each of the measures results in discrimination***

157. Indonesia maintained there is no discrimination between imported and domestic products in its import licensing regimes.[258] In Indonesia's view, it was unnecessary for the Panel to further determine if the discrimination is unjustifiable or arbitrary, or if it takes place between countries in which like conditions prevail.[259]

158. The Panel, however, came to a different conclusion. It found that the application of each of the measures at issue resulted in discrimination within the meaning of the *chapeau*.

159. In relation to the measures which Indonesia sought to justify under Article XX(a), Indonesia argued that domestic products were also required to have a Halal label. The Panel rejected Indonesia's argument because "compliance with Halal labelling or other requirements is not at issue in this dispute and … [t]herefore the fact that domestic

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[256] Appellate Body Report, *Canada – Autos*, para. 151 citing Appellate Body Reports, *US – Shrimp*, para. 119 and *US – Gasoline*, p. 22; Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109. See also Indonesia's Appellant Submission, para. 103 citing Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109; Panel Report, *India – Autos*, para. 7.154.

[257] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.566 citing Appellate Body Report, *US – Shrimp*, para. 150. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Appellate Body set out the "same conditions" element before the "arbitrary or unjustifiable" element, stating, at para. 7.301 of its report, that an assessment of whether there is discrimination between countries where the conditions prevailing are "the same" is both a predicate for, and necessarily informs, a panel's examination as to whether such discrimination is "arbitrary or unjustifiable" citing Appellate Body Report, *EC – Seal Products*, para. 5.317. In the present dispute, it would not have mattered if the Panel had considered the elements in that order.

[258] The Panel noted that "with reference to these elements, Indonesia argued there is no discrimination between imported and domestic products." Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.807 and 7.812.

[259] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.540 and 7.807 citing Indonesia's second written submission, para. 151.

products are also subject to Halal requirements is not of relevance for our analysis of discrimination in the sense of the *chapeau*."[260]

160. The Panel assessed whether the measures for which Indonesia invoked subparagraph (a) (Measures 5, 6, 9, 14 and 17), considered in light of their asserted objective of the protection of Halal as a public moral, resulted in discrimination for the purposes of the *chapeau*. It found that "these measures and, in particular, the restrictions that they impose are not equally applicable to domestic products",[261] noting that the regulations implementing these measures specifically apply to importation.[262] The Panel also noted that Indonesia did not provide the Panel with evidence showing that "similar or equivalent" measures are applied to domestic products.[263]

161. The Panel recalled its findings that each of those measures "affect the competitive opportunities of importers and imported goods".[264] By way of example, the Panel referred to Measure 14, according to which "domestically produced goods may be sold directly in traditional markets where Indonesian consumers carry out an important proportion of their purchases. However, imported products must go through a distributor, i.e. importers cannot sell imported goods directly in traditional markets, thus affecting the competitive opportunities of imported goods and importers."[265] The Panel concluded that each and every measure for which Indonesia asserted an Article XX(a) defence discriminated "between domestic and imported goods in the sense of that prohibited by the *chapeau* of Article XX."[266]

162. The Panel then turned to the measures which Indonesia sought to justify under Article XX(b) (Measures 4, 5, 6, 7, 8, 9, 10, 14, 15, 16 and 17). It considered whether those measures resulted in discrimination in terms of the *chapeau*, in light of the objective Indonesia asserted that they promoted – the protection of human health. The Panel rejected as inapt Indonesia's sole argument that a quarantine regulation applied to all imports, exports and domestic transportation as none of the measures at issue relates to quarantine of imports.[267]

163. Instead, the Panel recalled its findings that "these measures affect the competitive relationship between imported and local products" and that "the measures affect the competitive opportunities of importers and imported goods".[268] By way of example, the Panel noted its understanding that no domestic distributor and market participant other than importers appears to be subject to the requirement to purchase a certain amount of

[260] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.812.
[261] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.813.
[262] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.813.
[263] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.813.
[264] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.813.
[265] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.813.
[266] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.813.
[267] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.814.
[268] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.814.

local beef in order to be able to conduct its business.[269] In the absence of evidence of similar restrictions for domestic products to those contained in the various measures, the Panel concluded that discrimination exists between domestic and imported goods.[270] The Panel concluded that each and every measure for which Indonesia asserted an Article XX(b) defence discriminated between domestic and imported products within the meaning of the *chapeau*.[271]

164. The Panel then considered the measures which Indonesia sought to justify under Article XX(d) (Measures 1, 2, 3, 5, 6, 9, 11, 12, 13 and 17). In respect of these measures, the Panel examined Indonesia's stated policy objective to secure compliance with laws relating to customs enforcement, and Indonesia's argument that its import licensing regime is "applied invariably between all importing countries".[272] The Panel concluded that Indonesia's argument did not address the relevant "discrimination against imported products vis–à–vis domestic products".[273] It considered these measures, and particularly the restrictions they impose, are not equally applicable to domestic products.[274] Thus, the Panel found that each and every measure for which Indonesia asserted an Article XX(d) defence discriminated in the sense of the *chapeau*.[275]

165. Accordingly, the Panel concluded, based on a consideration of the design, structure and expected operation of the measures, as well as the evidence made available to the Panel, that discrimination exists between domestic and imported goods with respect to the import licensing regimes as a whole, and all the individual measures therein, in the sense of the Article XX *chapeau*.[276]

*2. **The discrimination is arbitrary and unjustifiable***

166. The Panel then proceeded to consider whether the discrimination which the Panel had found to exist in respect of each and every measure is "arbitrary or unjustifiable".[277]

167. In assessing whether the discrimination found to exist is arbitrary or unjustifiable, the Panel recalled the Appellate Body's guidance that the analysis "should focus on the cause of the discrimination, or the rationale put forward to explain its existence".[278] One of the most important factors in an assessment of arbitrary or unjustifiable discrimination

[269] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.814, referring to Measure 15.
[270] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.814.
[271] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.814.
[272] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.815.
[273] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.815.
[274] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.815.
[275] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.815 – 7.816.
[276] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.816.
[277] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.817.
[278] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.566 citing Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226 citing Appellate Body Reports, *US – Gasoline*; *US – Shrimp*; and *US – Shrimp (Article 21.5 – Malaysia*).

is whether the discrimination can be reconciled with, or is rationally related to, the policy objective of the measure covered by the relevant Article XX subparagraph.[279]

168. In respect of the measures which Indonesia sought to justify under Article XX(a), the Panel noted that "Indonesia maintained that these measures are necessary to protect the public moral of Halal, but did not explain how the discrimination arising from these measures can be reconciled with, or is rationally related to, protecting the public moral of Halal."[280] The Panel recorded its understanding of the evidence that relevant imported agricultural goods can only come into Indonesia if accompanied by the necessary Halal certifications, and that, in the case of fresh horticultural products, there are no halal requirements.[281] The Panel found that protection of Halal requirements is "already ensured" through a different set of regulations.[282] The Panel therefore concluded that "[b]earing in mind that both imported and domestic products are subject to Halal regulations, we do not understand how the resulting discrimination can be reconciled with, or is rationally related to, protecting halal regulations".[283]

169. The Panel then considered whether the discrimination arising from the measures which Indonesia sought to justify under Article XX(b) could be reconciled with or is rationally related to protecting human life or health.[284]

170. The Panel again referred to Indonesia's argument that a quarantine regulation was applied to all imports, exports and domestic transportation. The Panel found that this did not persuade it that a requisite relationship exists to life or health objectives, because none of the measures at issue relates to quarantine of imports.[285] The Panel consequently found that the discrimination between imported and domestic products arising from the relevant measures bore "no relationship to the protection of human life or health and Indonesia does not suggest one."[286]

171. Then, in relation to the measures which Indonesia sought to justify under Article XX(d), the Panel noted that Indonesia did not explain how the discrimination arising from those measures could be reconciled with or was rationally related to securing compliance with Indonesia's customs laws.[287] It rejected Indonesia's argument that no discrimination exists between importing countries as the import licensing regime is

[279] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.817 citing Appellate Body Reports, *US – Shrimp*, para. 165; *Brazil – Retreaded Tyres*, paras. 227, 228, and 232; *EC – Seal Products*, para. 5.306.
[280] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.819.
[281] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.819.
[282] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.819.
[283] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.819.
[284] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.820.
[285] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.820 and 7.814.
[286] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.820.
[287] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.821.

applied invariably between all importing countries as relevant, because Indonesia did not address the discrimination against imported products vis–à–vis domestic products.[288]

172. The Panel was not persuaded that the discrimination arising from the measures can be reconciled with, or is rationally related to, the objective of securing compliance with Indonesia's customs laws.[289] Indeed, the Panel concluded, "enforcing customs can be achieved … irrespective of the … measures at issue."[290]

173. Thus, contrary to Indonesia's argument on appeal, the Panel did not fail to "examine the objectives that Measures 9–17 pursued".[291] Rather, for the purposes of its *chapeau* analysis, the Panel evaluated the objectives asserted by Indonesia for each and every measure, whether it be protecting the public moral of Halal (under Article XX(a)), protecting human life or health (under Article XX(b)), or securing compliance with laws relating to customs enforcement (under Article XX(d)). It then assessed whether the discrimination could be reconciled with, or is rationally related to, that policy objective.[292]

174. Furthermore, the Panel found that the text, structure and history of the import licensing regulations and the framework legislation pursuant to which Indonesia's import licensing regimes and measures therein were established, show that the actual purpose of the challenged measures is to restrict imports of agricultural products when domestic production is deemed sufficient.[293]

175. The Panel referred to provisions in Indonesia's framework legislation explicitly providing that agricultural imports are made contingent on the availability of sufficient domestic supply to satisfy domestic food demand.[294] The Panel recalled that the overarching laws are implemented through the regulations issued by the Ministry of Trade and the Ministry of Agriculture regulating Indonesia's import licensing regimes.[295] The Panel found, by reference to the text of the regulations and the evidence on the record, that these implementing regulations carry out the task of, among other things, ensuring sufficiency of domestic production by means of a series of import restrictions and prohibitions.[296] One example, cited by the Panel, was a report of the Minister of

[288] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.815.
[289] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.821.
[290] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.821.
[291] Indonesia's Appellant Submission, para. 153.
[292] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.817–7.821.
[293] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.822 citing New Zealand's second written submission, para. 303, (referring to New Zealand's first written submission, paras. 2, 15–18, 67–71). Panel Report, *Indonesia – Import Licensing Regimes*, paras. 2.4–2.7, setting out the overarching legislative framework for the importation of horticultural products, animals and animal products.
[294] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.822 citing Article 36 of the Food Law (Exhibit JE–2), Article 30 of the Farmers Law (Exhibit JE–3), Article 36B(1) of the Animal Law Amendment (Exhibit JE–5), Article 88 of the Horticultural Law (Exhibit JE–1).
[295] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.822.
[296] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.822.

Agriculture stating that "[i]mports are only for covering domestic shortfalls" and that "meat imports will be gradually reduced and import restrictions will be tightened".[297]

176. Like the Appellate Body in *Brazil – Retreaded Tyres*, the Panel had "difficulty understanding how discrimination might be viewed as complying with the *chapeau* of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX."[298] Rather, such discrimination serves Indonesia's objective to prohibit and restrict agricultural imports when domestic production is deemed sufficient to satisfy domestic demand, to which the Article XX defence does not apply.

177. Thus, the Panel found that each of the "individual measures" as well as the "import licensing regimes … as a whole" are applied "contrary to the requirements of the *chapeau* of Article XX of the GATT 1994, given the absence of a rational connection between the discrimination and the policy objectives protected under subparagraphs (a), (b) and (d) of Article XX of the GATT 1994".[299]

*3. **The discrimination occurs between countries where the same conditions prevail***

178. The Panel found that Indonesia "did not provide any relevant argumentation" in support of its contention that different conditions applied between relevant countries, in the sense intended by the *chapeau*.[300] Indonesia relied solely on its argument that there is no discrimination between imported and domestic products and did not provide any argumentation as to which countries and which different conditions it wished the Panel to examine.[301] Therefore, the Panel found that Indonesia failed to meet its burden of proving that its measures are applied in a manner that does not constitute a means of arbitrary or unjustifiable discrimination *between countries where the same conditions prevail*.[302]

179. The Panel recalled that it is the "conditions" relating to the particular policy objective under the applicable subparagraph of Article XX of the GATT 1994 that are relevant for the analysis under the *chapeau*.[303] The respondent bears the burden of proving that prevailing conditions are not "the same" in relevant respects.[304]

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[297] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.822 citing in footnote 2324, Exhibits NZ–1, USA–10 and USA–11.
[298] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.823 citing Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.
[299] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.824.
[300] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.825 and see also para. 7.540.
[301] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.825.
[302] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.825 and 7.826.
[303] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.825 citing Appellate Body Report, *EC – Seal Products*, para. 5.300.
[304] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.825. Also, Appellate Body Report, *EC – Seal Products*, para. 5.301.

180. The Panel also pointed out that while Indonesia did not explicitly suggest that its equatorial climate resulted in different prevailing conditions between itself and the complainants, had it done so, the climatic conditions of New Zealand and the United States "are irrelevant to the application of these measures".[305] That is because the same climatic conditions prevail for domestic as well as imported products, once they are in Indonesia.[306]

181. Based on this comprehensive analysis, the Panel correctly concluded that Indonesia failed to demonstrate that Measures 9–17 are applied in a manner consistent with the *chapeau* of Article XX.[307] No repercussions for the substance of the analysis and no flawed results flowed from the Panel's Article XX order of analysis.

F. THE PANEL DID NOT FAIL TO APPLY THE PRINCIPLE OF *JURA NOVIT CURIA*

182. Indonesia also claims that the Panel was induced into committing a legal error by choosing to reflect the approach taken by Indonesia in respect of the presentation of its defences under the *chapeau* of Article XX. Indonesia argues that by examining whether Indonesia's import licensing regimes for horticultural products and animals and animal products and as a whole, including the individual measures therein, were applied in a manner consistent with the *chapeau*,[308] the Panel did not follow the principle of *jura novit curia*.[309]

183. New Zealand does not disagree with Indonesia that the principle of *jura novit curia* applies to a panel; it is the duty of a panel to know and apply the law. Nor do we disagree with Indonesia that a panel is free to develop its own legal reasoning to support its findings in the matter under consideration.[310] However, New Zealand does not agree that the Panel's analysis in this dispute conflicts with these principles.

184. The reason that the Panel approached its analysis in this way is because Indonesia's arguments under the *chapeau* of Article XX were made with respect to its "import licensing regimes for horticultural products and animal and animal products as a whole" and it did so "without making any relevant distinctions between the individual measures at issue and it conflated all three defences under subparagraphs (a), (b) and (d) of Article XX of the GATT 1994" in its *chapeau* argument.[311]

185. The Panel's approach was, in fact, generous to Indonesia considering that the Appellate Body has stated that the function of the *chapeau* of Article XX of the GATT 1994 "is to prevent the abuse or misuse of a Member's right to invoke the exceptions

[305] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.825 referring to Measures 5 and 8.
[306] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.825.
[307] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.829.
[308] Indonesia's Appellant Submission, paras. 156 and 157 citing Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.569, 7.805 and 7.806.
[309] Indonesia's Appellant Submission, para. 158.
[310] Indonesia's Appellant Submission, paras. 146–149.
[311] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.805 and 7.569 (internal footnotes omitted). As accepted in Indonesia's Appellant Submission, para. 131.

contained in the subparagraphs of that Article".[312] The burden of demonstrating that a measure does not constitute an abuse of such an exception under the *chapeau* rests with the party invoking the exception.[313] It is a "heavier task than that involved in showing that an exception … encompasses the measure at issue."[314]

186. For these reasons, we do not agree that the Panel committed an error of law by examining the consistency of each and every one of Indonesia's measures with the *chapeau* of Article XX based on the evidence it had before it.

G. CONCLUSION

187. For the reasons outlined above, New Zealand requests that the Appellate Body reject Indonesia's claim of error as set out in Section V of Indonesia's Notice of Appeal and Section VI of Indonesia's Appellant Submission, and uphold the findings, conclusions and legal interpretations of the Panel.[315]

VII. CONCLUSION

For the reasons outlined above, New Zealand respectfully requests that the Appellate Body reject each of Indonesia's claims of error and uphold the Panel's findings, conclusions and legal interpretations.

[312] Appellate Body Report, *EC – Seal Products*, para. 5.296 citing Appellate Body Report, *US – Gasoline*, p. 22.
[313] Appellate Body Report, *EC – Seal Products*, para. 5.297 citing Appellate Body Report, *US – Gasoline*, pp. 22–23.
[314] Appellate Body Report, *EC – Seal Products*, para. 5.297 citing Appellate Body Report, *US – Gasoline*, p. 23.
[315] Indonesia's Notice of Appeal, Section V; Indonesia's Appellant Submission, para. 160.