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*Panel established pursuant to Article 6 of the Understanding on Rules and Procedures
Governing the Settlement of Disputes*

*Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken
Products*

(WT/DS484)

THIRD PARTY WRITTEN SUBMISSION OF NEW ZEALAND

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<i>Argentina - Import Measures</i>	Panel Reports, <i>Argentina - Measures Affecting the Importation of Goods</i> , WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R
<i>Brazil - Retreaded Tyres</i>	Panel Report, <i>Brazil - Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, p. 1649
<i>Canada - Autos</i>	Panel Report, <i>Canada - Certain Measures Affecting the Automotive Industry</i> , WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
<i>Canada - Wheat Exports and Grain Imports</i>	Panel Report, <i>Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, p. 2817
<i>Chile - Price Band System</i>	Appellate Body Report, <i>Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
<i>China - Auto Parts</i>	Panel Reports, <i>China - Measures Affecting Imports of Automobile Parts</i> , WT/DS339/R, Add.1 and Add.2 / WT/DS340/R, Add.1 and Add.2 / WT/DS342/R, Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, p. 119
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261

<i>Colombia - Ports of Entry</i>	Panel Report, <i>Colombia - Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
<i>India - Autos</i>	Panel Report, <i>India - Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
<i>India - Quantitative Restrictions</i>	Panel Report, <i>India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, p. 1799
<i>Korea - Various Measures on Beef</i>	Appellate Body Report, <i>Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
<i>Korea - Various Measures on Beef</i>	Panel Report, <i>Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, p. 59
<i>Peru - Agricultural Products</i>	Appellate Body Report, <i>Peru - Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R and Add.1, adopted 31 July 2015
<i>Thailand - Cigarettes (Philippines)</i>	Panel Report, <i>Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299
<i>Turkey -Rice</i>	Panel Report, <i>Turkey - Measures Affecting the Importation of Rice</i> , WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, p. 2151
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

INTRODUCTION

1. Since 2009, Indonesia has enacted a series of laws and regulations that prohibit and restrict imports of agricultural products when domestic production is deemed sufficient to satisfy domestic demand. These instruments result in complex import licensing regimes that underpin a publicised government strategy to reduce imports to encourage domestic agricultural production in the hope of achieving self-sufficiency in food.
2. Indonesia has historically been a key export destination for a range of agricultural products from New Zealand. Unfortunately, Indonesia's restrictions have severely impacted those exports. As a small country reliant on its agricultural sector, New Zealand exporters have suffered as a direct result of Indonesia's measures.
3. The impact of Indonesia's measures has been so severe that New Zealand, along with the United States, has taken separate WTO dispute settlement proceedings in respect of many of the measures challenged by Brazil in this dispute.¹ A panel was established to consider that dispute on 20 May 2015 and composed on 8 October 2015. The second hearing was held from 13-14 April 2016, and the parties are now waiting for the Panel's decision.²
4. In New Zealand's view, Indonesia's import regime is inconsistent with core WTO obligations. Specifically, as argued in *Indonesia — Importation of Horticultural Products, Animals and Animal Products* (DS477/DS478), New Zealand considers that several elements of Indonesia's import licensing regime for animal products (including chicken meat and chicken products) are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.
5. This submission is structured as follows:
 - (a) In Section I, New Zealand outlines the similarities between the measures at issue in this dispute and those at issue in the dispute settlement proceedings brought by New Zealand and the United States in *Indonesia — Importation of Horticultural Products, Animals and Animal Products* (DS 477/DS478);
 - (b) In Section II, New Zealand briefly outlines its views on the WTO-inconsistency of certain of the measures at issue in this dispute; and
 - (c) In Section III, New Zealand outlines its views on certain matters raised by Indonesia in its first written submission regarding the applicable legal standards in this dispute.

¹ See New Zealand's request for the establishment of a panel, WT/DS477/9, circulated 24 March 2015 and the United States' request for the establishment of a panel, WT/DS478/9, circulated 24 March 2015. Collectively referred to in this submission as "*Indonesia — Importation of Horticultural Products, Animals and Animal Products*, DS477/DS478".

² See, generally, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds477_e.htm and https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds478_e.htm.

I. RELATIONSHIP BETWEEN THIS DISPUTE AND DS477/DS478

6. As described above, there is substantial overlap between the measures at issue in this dispute and those challenged by New Zealand and the United States in DS477/DS478.³

7. Specifically, the disputes challenge Indonesia's:

- (a) "Positive list" prohibition on unlisted animal products. This prohibits importation of animal products that are not listed in the relevant regulations as they are not eligible for MOA Import Recommendations and MOT Import Approvals;⁴
- (b) Restrictions on use, sale and distribution of imported animal products (including chicken meat and chicken products), which prohibit all imported animal products from sale in traditional markets, and also prohibit certain animal products from sale in modern markets;⁵
- (c) Limited application windows and validity periods for MOA Import Recommendations and MOT Import Approvals. These provide that authorisation to import may only be applied for during limited application windows and is only valid for limited time periods;⁶
- (d) Fixed licence terms for MOA Import Recommendations and MOT Import Approvals, which together specify the type, quantity, country of origin and port of entry for products that an importer may import during the validity period. This prevents importers from importing, during a validity period, products of a different type, in a greater quantity, from another country, or through a different port than those specified in their MOA Import Recommendations and MOT Import Approvals;⁷ and
- (e) Indonesia's general prohibition on certain imports which consists of the combined interaction of several different restrictive measures which collectively prohibit or restrict imports of animal products, including chicken meat and chicken products. New Zealand also considers that the domestic insufficiency condition, which forms part of the Indonesian import regime challenged by Brazil, constitutes a standalone restriction on importation.⁸

³ See New Zealand's request for the establishment of a panel, WT/DS477/9, circulated 24 March 2015 and the United States request for the establishment of a panel, WT/DS478/9, circulated 24 March 2015.

⁴ See Brazil's first written submission, paras. 99-101 and 191-194.

⁵ See Brazil's first written submission, paras. 102-105 and 195-199.

⁶ See Brazil's first written submission, paras. 90-92 and 202-209.

⁷ See Brazil's first written submission, paras. 90-92 and 210-213.

⁸ See Brazil's first written submission, paras. 74-92 and 172-189. New Zealand notes that while the precise scope of the import regime challenged "as a whole" by New Zealand in DS477 differs from the "general prohibition on the importation of chicken meat and chicken products" described by Brazil in its first written submission, New Zealand agrees with the statement by Brazil in paragraph 74 of its first written submission that certain components of Indonesia's licensing regime "constitute an overarching measure that is on its own a violation of the Covered Agreements".

8. New Zealand considers that these measures constitute prohibitions and restrictions on importation inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

9. New Zealand further considers that a subset of these measures are also inconsistent with Article III:4 of the GATT 1994 and Article 3.2 of the Agreement on Import Licensing Procedures (ILA). Specifically:

(i) to the extent that this Panel finds that limited application windows and validity periods are import licensing procedures, New Zealand considers that they are non-automatic and inconsistent with Article 3.2 of the ILA;⁹ and

(ii) to the extent that this Panel finds that the use, sale and distribution restrictions on imported animal products, including chicken meat and chicken products, are internal measures, New Zealand considers that they are contrary to Article III:4 of the GATT 1994.¹⁰

10. As Brazil states in its first written submission, some of the regulations that give effect to certain measures at issue in this dispute have recently been replaced.¹¹ New Zealand notes that Indonesia's import regulations have changed frequently in recent years. However, many of the core trade-restrictive elements of its import regime, including those challenged by Brazil in this dispute, have not materially changed through these various iterations of the regulations.¹² In light of these frequent changes to the *instruments* through which the *measures* at issue are made effective, New Zealand considers that in order to "secure a positive solution to [the] dispute"¹³ it is important for this Panel to make rulings and recommendations on the *measures at issue*, irrespective of minor changes that may have been made to the *instruments* through which these measures are made effective.

II. PROHIBITIONS AND RESTRICTIONS ON THE IMPORTATION OF ANIMAL PRODUCTS INCLUDING CHICKEN MEAT AND CHICKEN PRODUCTS

11. In this section, New Zealand elaborates why it considers that certain of the measures at issue in this dispute are inconsistent with Indonesia's WTO obligations. New Zealand will only comment on those measures that it has also challenged in DS477.

12. In respect of the measures described in paragraph 7 above, New Zealand confirms that Brazil's factual description of these measures materially corresponds with New Zealand's understanding of how these measures operate.

⁹ See Brazil's first written submission, paras. 248-259.

¹⁰ See Brazil's first written submission, Section IV.B.2.2(a).

¹¹ Brazil's first written submission, paras. 57-58.

¹² For example, the measures outlined in this Section I were previously made effective through MOA 139/2014 (Exhibit BRA-34) and MOT 46/2013 (Exhibit BRA-42), which were replaced recently by MOA 58/2015 (Exhibit BRA-01) and MOT 5/2016 (Exhibit BRA-03). In New Zealand's view, these new regulations do not materially change the measures at issue in this dispute.

¹³ Article 3.7 of the DSU.

1. *Indonesia's framework legislation for imports of animal products*

13. As detailed in Brazil's first written submission, Indonesia has enacted an overarching framework of laws that underpin its import regimes for chicken and other animal products.¹⁴ In particular, Law 18/2009 as amended by Law 41/2014 (the Animal Law),¹⁵ Law 18/2012 (the Food Law),¹⁶ Law 7/2014 (the Trade Law)¹⁷ and Law 19/2013 (the Farmers Law)¹⁸ establish a framework through which imports of animal products are prohibited where domestic production is deemed sufficient to fulfil domestic demand.¹⁹

14. Pursuant to these laws, Indonesia has promulgated regulations through which additional prohibitions and restrictions on importation are made effective. In particular, regulations MOT 5/2016²⁰ and MOA 58/2015²¹ set out the key requirements that importers must satisfy in order to obtain MOA Import Recommendations and MOT Import Approvals. It is through the process of issuing these documents, and the requirements which must be satisfied by importers in order to obtain them, that Indonesia restricts imports of animals and animal products.

2. *Certain individual measures affecting the importation of chicken meat and other animal products*

(a) The positive list prohibition on unlisted animal products

15. New Zealand agrees with Brazil's submission that animals and animal products that are not listed in the Appendices of MOA 58/2015 and MOT 5/2016 are prohibited from importation.²² In addition to the specific HS Codes identified by Brazil in its first written submission,²³ a number of other animal products are also prohibited from importation through this measure.²⁴ Indonesia's regulations are clear that the carcass, meat, offal and processed products that can be imported are limited to those that are listed in the relevant appendices to MOA 58/2015 and MOT 5/2016.²⁵ Products that are unlisted are ineligible to obtain MOA

¹⁴ Brazil's first written submission, Section III.E.

¹⁵ Exhibit BRA-30.

¹⁶ Exhibit BRA-31.

¹⁷ Exhibit BRA-32.

¹⁸ Exhibit BRA-33.

¹⁹ See for example, Article 36B of Law 18/2009 as amended by Law 41/2014 (Animal Law) (Exhibit BRA-30), Article 36 of Law 18/2012 (Exhibit BRA-31) and Article 30(1) of Law 19/2013 (Farmers Law) (Exhibit BRA-33).

²⁰ MOT 5/2016 (Exhibit BRA-03), which in January 2016 was replaced by MOT 46/2013 (Exhibit BRA-42).

²¹ MOA 58/2015 (Exhibit BRA-01), which in November 2015 was replaced by MOA 139/2014 (Exhibit BRA-34).

²² See Brazil's first written submission, paras. 99-103.

²³ See Brazil's first written submission, para. 78.

²⁴ New Zealand notes that Indonesia also prohibits a range of other animals and animal products including a significant number of beef and bovine offal products through the positive list mechanism.

²⁵ See Brazil's first written submission, para. 100 and Articles 7 and 8 of MOA 58/2015 (Exhibit BRA-01) and Article 7(2) of MOT 5/2016 (Exhibit BRA-03).

Import Recommendations and MOT Import Approvals, both of which are pre-requisites to importation.²⁶

16. This measure is of significant concern to New Zealand, and Brazil's description of this measure accurately reflects New Zealand's understanding of how the positive list operates to prohibit imports of unlisted products.

17. In its first written submission, Indonesia responds that the positive list requirement "no longer exists" as it was "removed by MOT Regulation 37/2016" and therefore "Indonesia does not impose any 'quantitative import restrictions on chicken cuts'".²⁷ New Zealand disagrees with these assertions.

18. New Zealand does not consider that the positive list prohibition challenged by Brazil has been removed by MOT 37/2016. Indeed, MOT 37/2016 expressly acknowledges that products that are not listed must still obtain both an MOT Import Approval and an MOA Import Recommendation.²⁸ However, unlike *listed* products, in respect of which the process for obtaining MOT Import Approvals and MOA Import Recommendations is set out in MOT 5/2016 and MOA 58/2015, there is no process by which MOT Import Approvals and MOA Import Recommendations for *unlisted products* can be obtained. This is because, based on New Zealand's understanding, MOA Import Recommendations and MOT Import Approvals cannot be obtained for such products.

19. Importantly, MOT 37/2016 does not amend MOA 58/2015, which is the regulation under which MOA Import Recommendations are issued. As Brazil states in its first written submission, the positive list prohibition is made effective through *both* MOT 5/2016 *and* MOA 58/2015.²⁹ Articles 7 and 8 of MOA 58/2015 clearly provide that the only products that are eligible to obtain MOA Import Recommendations are those specified in the Attachments to that regulation.³⁰ These provisions remain in force, and there is nothing in MOT 37/2016 that removes the requirement that importers of chicken and other animal products must obtain MOA Import Recommendations in accordance with MOA 58/2015. In fact, to the contrary, Article 29A of MOT 37/2016 expressly requires importers of unlisted products to obtain an MOA Import Recommendation (which, in accordance with the terms of MOA 58/2015, is not possible to do).

20. It follows that Indonesia has not removed the positive list requirement.

²⁶ See also Article 59(1) of Law 19/2009 as amended by Law 41/2014 (Exhibit BRA-30) stating that all importers of animals and animal products must obtain an MOT Import Approval and a MOA Import Recommendation.

²⁷ Indonesia's first written submission, para. 224.

²⁸ Indonesia's first written submission, para. 224 citing Article 29A, MOT 37/2016 stating "Animals and Animal Products *which are not included in the Appendix of this Ministerial Regulation can be imported only after acquiring Import Approval* from the Import Director by attaching Recommendation as referred to in Article 10 paragraph (2) letter e or letter f".

²⁹ Brazil's first written submission, paras. 99-101.

³⁰ Articles 7-8, MOA 58/2015 (Exhibit BRA-01).

(i) Article XI:1 of the GATT 1994

21. As a prohibition on unlisted products, the positive list is clearly inconsistent with Article XI:1 of the GATT 1994. In *Brazil - Retreaded Tyres*, the panel stated that the meaning of the term "prohibition" in Article XI:1 requires that "Members shall not forbid the importation of any product of any other Member into their markets".³¹ The panel in that dispute confirmed that a prohibition on the issuance of import licences necessary for the importation of retreaded tyres was inconsistent with Article XI:1.³² For similar reasons, Indonesia's ban on imports of unlisted animals and animal products is inconsistent with Article XI:1.³³

(ii) Article 4.2 of the Agreement on Agriculture

22. By prohibiting imports of unlisted products, and thereby limiting the quantity of these products that may be imported, the positive list is also a "quantitative import restriction" or "similar border measure" within the meaning of footnote 1 to Article 4.2. Accordingly, New Zealand agrees with Brazil that the positive list prohibition on unlisted products is also inconsistent with Article 4.2 of the Agreement on Agriculture.

(b) Restrictions on use, sale and distribution of imported animal products

23. As detailed in Brazil's submission, Indonesia's regulations prohibit importation of animal products other than for use in "hotels, restaurants, caterings, industries, and other particular purposes".³⁴ The effect of this measure is that animal products are not permitted to be imported into Indonesia for any form of domestic use, or to be sold or distributed through consumer retail outlets. Importantly, it precludes certain imported animal products from being sold at modern markets such as supermarkets and hypermarkets as well as traditional retail outlets (such as wet markets, small stalls or shops, and street carts). This substantially reduces the opportunities for imported products to reach Indonesian consumers who buy their household food products at these locations, and effectively precludes importation of certain animal products for domestic consumption.

(i) Article XI:1 of the GATT 1994

24. The panel in *India - Quantitative Restrictions* concluded that a measure which prohibited imports of certain products other than where the imported product was for the importer's "own use" (rather than for on-sale) constituted a restriction on imports under Article XI:1.³⁵ That measure is analogous to the use, sale and distribution restrictions applied by Indonesia, in that both measures only permit importation for a narrow range of applications, thereby prohibiting importation of products for certain uses, or from being sold or distributed through certain channels. This has a limiting effect on the quantity or amount

³¹ Panel Report, *Brazil - Retreaded Tyres*, para. 7.11.

³² Panel Report, *Brazil - Retreaded Tyres*, para. 7.15.

³³ Panel Report, *Brazil - Retreaded Tyres*, para. 7.11.

³⁴ Article 31, MOA 58/2015 (Exhibit BRA-01); see also, in respect of bovine meat and offal, Article 20, MOT 5/2016 (Exhibit BRA-03).

³⁵ Panel Report, *India - Quantitative Restrictions*, paras. 5.142-5.143.

of product which can be imported and constitutes a "restriction" within the meaning of Article XI:1 of the GATT 1994.

(ii) Article 4.2 of the Agreement on Agriculture

25. As described above, New Zealand considers that Indonesia's restrictions on use, sale and distribution of animals and animal products have a limiting effect on imports. As the Appellate Body confirmed in *Chile - Price Band System*, the purpose of Article 4.2 of the Agreement on Agriculture is to "ensure enhanced market access for imports of agricultural products".³⁶ Prohibiting the importation of animal products for certain uses, and for sale and distribution through certain outlets, undermines market access for those products and limits the quantity of these products that may be imported. For these reasons, New Zealand considers this measure also constitutes a "quantitative import restriction" or "similar border measure" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture.

(iii) Article III:4 of the GATT 1994

26. New Zealand does not agree with Indonesia that Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture "do not apply to the intended use requirement".³⁷ As explained above, Indonesia's restrictions on use, sale and distribution of imports of animals and animal products are imposed as a condition of importation *at the border*. Therefore, in New Zealand's view, these are the appropriate provisions for the Panel to commence its analysis of the consistency of the use, sale and distribution restriction.

27. However, to the extent that the use, sale and distribution restriction is considered by the Panel to be an internal measure, New Zealand considers that it would be contrary to Article III:4 of the GATT 1994. This is consistent with New Zealand's submissions in respect of beef and offal in DS477. In that dispute, New Zealand submitted that Indonesia's use, sale and distribution restrictions for beef and offal satisfied the requirements under Article III:4.

28. New Zealand notes in this regard that in *Korea - Various Measures on Beef* the Appellate Body upheld the panel's finding that a dual retail system for imported and domestic beef products was inconsistent with Article III:4.³⁸ The Appellate Body did so on the basis that the dual retail system modified the conditions of competition for imported beef as the new system resulted in "the virtual exclusion of imported beef from retail distribution channels through which domestic beef (and, until then, imported beef) was distributed to Korean households and other consumers throughout the country".³⁹ Crucially, the effect of this, as the Appellate Body found, was the "imposition of a *drastic reduction of commercial opportunity* to reach, and hence to generate sales to, the same consumers served by traditional retail channels for domestic beef" (emphasis added).⁴⁰

³⁶ Appellate Body Report, *Chile - Price Band System*, para. 219.

³⁷ Indonesia's first written submission, para. 89.

³⁸ Appellate Body Report, *Korea - Various Measures on Beef*, para. 186(e).

³⁹ *Ibid.* para. 145.

⁴⁰ *Ibid.* para. 145.

29. By preventing certain imported animal products, including beef and offal, from sale in traditional and modern markets, Indonesia's regulations drastically reduce the "commercial opportunity to reach" consumers in an analogous fashion to the dual retail system in *Korea - Various Measures on Beef*. Indonesia's formally different treatment for like imported and domestic animals and animal products therefore affects the conditions of competition to the detriment of imported products and accords treatment that is "less favourable" to "like" imported animals and animal products.

30. New Zealand considers that, in principle, that the above analysis is equally applicable in the case of the chicken products at issue in this dispute. Accordingly, to the extent the Panel considers that the use, sale and distribution restriction to be an internal measure, it would be contrary to Article III:4 of the GATT 1994.

(c) Limited application windows and validity periods

31. The limited application windows and validity periods for MOA Import Recommendations and MOT Import Approvals described by Brazil restrict imports by limiting the time periods during which exports are able to access the Indonesian market.⁴¹ In addition, they require importers to determine well in advance, and then "lock in", the terms of importation (including the quantity, products, country of origin and port of entry), thereby further limiting market access for imports.

32. **Limited application windows** have a particularly restrictive effect on imports at the start of each validity period, as importers are effectively prevented from importing products in the first weeks of each validity period. This phenomenon occurs for the following reasons.

33. First, MOT Import Approvals are only granted at the commencement of the relevant period,⁴² and importers are only permitted to apply for MOA Import Recommendations (and, in the case of beef products, MOT Import Approvals) immediately prior to that validity period.⁴³

34. Second, import orders are *unable to be finalised and shipped* until after an MOT Import Approval is issued, as the health certificate issued by the exporting country is required to specify the number and date of issue of the MOT Import Approval.⁴⁴

35. Finally, once an MOT Import Approval is issued and an import order is finalised, it is necessary for exporters to prepare the product, package it specifically for the Indonesian market, and ship it to Indonesia. This process can take weeks.

36. Accordingly, the limited application windows mean that imports are effectively unable to enter Indonesia during the first weeks of each validity period, as they are unable to commence shipping until they have received their Import Approval at the start of the validity

⁴¹ See Brazil's first written submission, paras. 90-92 and 202-209.

⁴² Article 11(2), MOT 5/2016 (Exhibit BRA-03) stating that they "shall be issued in every early of quarter".

⁴³ Article 22(1), MOA 58/2015 (Exhibit BRA-01) and Article 11(1), MOT 5/2016 (Exhibit BRA-03).

⁴⁴ Article 19, MOT 5/2016 (Exhibit BRA-01).

period. This constitutes a severe limitation on the volume of imports which are able to be imported over the course of a year.

37. Further, the **limited validity period** of MOT Import Approvals and MOA Import Recommendations means that imports are also restricted at the end of each validity period. Because imported products must clear customs prior to the end of each validity period,⁴⁵ there is a period in the final weeks of each validity period when products are unable to be shipped, as they will not arrive in Indonesia prior to the end of the validity period.

38. The combination of the inability to import at the start of a validity period, along with the corresponding inability to export towards the end of a validity period means there is a "dead zone" during which products cannot be imported into Indonesia. The limited validity periods also create uncertainty and mean that importers are unable to enter into long-term contractual obligations with exporters, as importers cannot obtain the right to import product beyond the end of the upcoming validity period.

(i) Article XI:1 of the GATT 1994

39. For the reasons described above, New Zealand considers that limited application windows and validity periods have a limiting effect on the quantity of animal products that can be imported into Indonesia. As a consequence, the measure is contrary to Article XI:1 of the GATT 1994.

(ii) Article 4.2 of the Agreement on Agriculture.

40. New Zealand also considers that limited application windows and validity periods are inconsistent with Article 4.2 of the Agreement on Agriculture. The measure has a limiting effect on importation and constitutes a "quantitative import restriction" under footnote 1 of Article 4.2 of the Agreement on Agriculture.

41. Even if limited application windows and validity periods do not constitute a "quantitative import restriction" within the meaning of Article 4.2, the "likeness or resemblance" of the measure to a "quantitative import restriction" means that it is a similar border measure prohibited by Article 4.2.⁴⁶ The design, structure, and operation of the measure is similar to quantitative import restriction as, for the reasons outlined, the measure limits the quantity of animal products which are able to be imported into Indonesia.⁴⁷

(iii) Article 3.2 of the Agreement on Import Licensing Procedures

42. In addition, to the extent that the Panel finds that the limited application windows and validity periods are non-automatic licensing procedures, New Zealand submits that they are also inconsistent with Article 3.2 of the ILA.

⁴⁵ Articles 12 and 27(2), MOA 5/2016 (Exhibit BRA-03).

⁴⁶ Appellate Body Report, *Chile Price Band System*, para. 226.

⁴⁷ Appellate Body Report, *Peru - Agricultural Products*, para. 5.153.

43. Specifically, Indonesia's licensing regime is "non-automatic" under Article 3.1 of the ILA because, *inter alia*, it does not allow for applications to be "submitted on any working day prior to customs clearance", and therefore does not qualify as "automatic" under Articles 2.1 and 2.2 of that Agreement.⁴⁸ By issuing MOT Import Approvals and MOA Import Recommendations only three times per year, and only permitting them to be applied for in the month prior to issuance, the measure at issue clearly does not satisfy the requirements for an "automatic" import licensing procedure within the meaning of Article 2.1 of the ILA.⁴⁹

44. The first sentence of Article 3.2 provides that non-automatic licensing shall not have additional trade-restrictive or distortive effects beyond those caused by the imposition of the restriction. There is, however, no legitimate underlying measure implemented by Indonesia through the limited application windows and validity periods. Accordingly, the trade-restrictive and distortive effects that result from these requirements are inconsistent with Article 3.2 of the ILA. These trade-restrictive and distortive effects on imports have been described by New Zealand above.

(d) Fixed licence terms

45. New Zealand agrees with Brazil's submission that the "fixed licence terms" constitute a restriction on importation inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Fixed licence terms require importers to specify, in advance of each validity period, key terms of importation, including the quantity, type, country of origin and port of entry of the products that each importer may import during the relevant validity period.⁵⁰ Once MOT Import Approvals are issued, these fixed licence terms are "locked in" for the validity period of the MOA Import Recommendation and MOT Import Approval.⁵¹

46. The fixed licence terms restrict imports by imposing quantitative limits on the amount of product that may be imported into Indonesia during each validity period. These restrictions are imposed through MOT Import Approvals, which specify the maximum quantity of products that may be imported during each validity period.⁵²

47. In addition to MOT Import Approvals specifying the quantity of each product which may be imported during a validity period, MOA Import Recommendations and MOT Import Approvals collectively require importers to also specify the type, country of origin and port of entry of the products that each importer may import during the relevant validity period. These terms are "locked in" at the commencement of the relevant validity period, with the effect that importers are not able to import products of a different type, from another country, or through a different port during the validity period.

⁴⁸ Articles 3.1, 2.1 and 2.2(a), Agreement on Import Licensing Procedures.

⁴⁹ Articles 3.1, 2.1 and 2.2(a), Agreement on Import Licensing Procedures.

⁵⁰ See for example Article 32(a), MOA 58/2015 (Exhibit BRA-01) and Articles 11 - 12, MOT 5/2016 (Exhibit BRA-03).

⁵¹ *Ibid.*

⁵² See for example Article 27(2), MOT 5/2016 (Exhibit BRA-03) stating "The Animal and/or Animal Product imported of which the quantity, type, business unit, and/or country of origin are not in accordance with the Approval to Import and/or not in accordance with the provisions herein shall be re-exported."

(i) Article XI:1 of the GATT 1994

48. The fixed licence terms impose a limitation on the quantity of products that are able to be imported that is inconsistent with Article XI:1 of the GATT 1994. The fixed licence terms impose a quota on the quantity of product that the importer may import during that validity period by prohibiting imports in excess of the quantity specified in an MOT Import Approval. They also remove importers' flexibility to respond to changes in market conditions by importing different products, into different ports or from different countries of origin than those specified in the relevant MOT Import Approval and MOA Import Recommendations, thereby imposing a further limitation on importation.⁵³

(ii) Article 4.2 of the Agreement on Agriculture

49. By expressly prohibiting imports in excess of the quantity specified in an MOT Import Approval, and limiting other variables, the fixed licence terms also constitute a "quantitative import restriction" or "similar border measure" within the meaning of footnote 1 to Article 4.2.

50. Specifically, Indonesia's fixed licence terms restrict imports by prohibiting importation other than on the terms specified in MOA Import Recommendations and MOT Import Approvals, which are fixed for the duration of each validity period. This means that, during each validity period, importers are prohibited from importing products of a different type, in a greater quantity, from another country or through a different port of entry than that specified in their MOA Import Recommendations and MOT Import Approvals. This limits the quantity that importers are able to import during a period and constitutes a "quantitative import restriction" or "similar border measure" inconsistent with Article 4.2.

3. Indonesia's general prohibition on the importation of animals and animal products including the domestic insufficiency requirement

51. In this section, New Zealand provides its views on the general prohibition on certain imports as described by Brazil in its first written submission.⁵⁴ New Zealand addressed the operation of a number of specific elements of this measure in section II.2 of this submission, and does not repeat that analysis. Rather, in this section, New Zealand provides its views on (a) the existence of an overarching measure; and (b) the existence of the domestic insufficiency condition.

(a) The existence of an overarching measure, or "general prohibition" on imports

52. New Zealand agrees with Brazil's statement that the "combined interaction of several different individual measures challenged in the present dispute constitute an overarching measure that is on its own a violation of the Covered Agreements".⁵⁵ In New Zealand's view, each of the individual trade-restrictive components of Indonesia's import licensing regime for animals and animal products constitutes an independent restriction on imports in violation of

⁵³ Article 29, MOA 58/2015 (Exhibit BRA-01) and Article 27(2), MOT 5/2016 (Exhibit BRA-03).

⁵⁴ Brazil's first written submission, Section IV.A.2.

⁵⁵ Brazil's first written submission, para. 74.

Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. However, these individual restrictions and prohibitions do not exist in a vacuum. Rather, each element of Indonesia's import licensing regime for animals and animal products operates in conjunction to form an overarching trade-restrictive measure inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

53. New Zealand also agrees with Brazil's contention that "the individual measures at stake in the current dispute were conceived to implement an official trade policy based on the overriding objective of restricting imports to protect domestic production".⁵⁶ This underlying objective is reflected in multiple Indonesian laws,⁵⁷ and permeates each individual component of Indonesia's import licensing regime. Indonesia's laws are explicit that imports of a range of products are prohibited when domestic production is deemed sufficient to meet domestic demand.⁵⁸

54. New Zealand therefore considers that it is necessary for the Panel to assess *both* the restrictive nature of the individual components of Indonesia's import licensing regime *and* the measure as a whole. It is only when viewed as a collective whole, in light of its underlying objective, that the true extent of the regime's restrictiveness becomes apparent.

(b) Domestic insufficiency requirement

55. New Zealand agrees with Brazil's description of Indonesia's domestic insufficiency requirement, through which imports of animal products and food products are prohibited in circumstances where domestic supply is deemed sufficient to meet domestic demand.⁵⁹ This measure, contained in a number of Indonesian laws, is a fundamental element of Indonesia's trade restrictive regime.

56. In response to Brazil's submissions, Indonesia claims in its first written submission that the domestic insufficiency requirement, or principle of "self sufficiency", reflects a "general principle described in some provisions of some of Indonesia's laws, and is commonly understood to relate to food security".⁶⁰ New Zealand disagrees with Indonesia's characterisation of this requirement on three grounds.

57. First, the provisions of Indonesia's laws that restrict importation based on the sufficiency of domestic production are much more than a "general principle". In reality, the provisions create mandatory and enforceable obligations which: (a) directly prohibit certain products in certain circumstances; and (b) restrict imports by creating uncertainty for importers as to when imports will be permitted. In the case of Law 19/2013 (the Farmers Law), criminal penalties (including potential imprisonment) exist for non-compliance with the

⁵⁶ Brazil's first written submission, para. 75.

⁵⁷ See Section II.1 above and Article 36B, Law 18/2009 as amended by Law 41/2014(Animal Law) (Exhibit BRA-30), Articles 14 and 36, Law 18/2012 (Food Law) (Exhibit BRA-31) and Article 30, Law 19/2013 (Farmers Law) (Exhibit BRA-33).

⁵⁸ Ibid.

⁵⁹ Brazil's first written submission, paras. 80-83.

⁶⁰ Indonesia's first written submission, para. 92.

domestic insufficiency requirement.⁶¹ The existence of such severe penalties is not consistent with Indonesia's contention that such provisions represent only a "general principle". The provisions of Indonesia's laws are binding legal obligations that limit importation.

58. Second, New Zealand notes that "self sufficiency" is not the same as "food security". There are fundamental differences between these concepts.⁶² Indeed, as Indonesia's own exhibit states: "It is important to note that food self-sufficiency is not an expression of food security...[t]he concept of food security does not include a consideration of the origin of food or a country's capacity to produce it, so long as it is available, accessible, nutritious, and stable across the preceding three elements."⁶³ New Zealand considers that international trade and imports can form an important part of a WTO Member's food security policy. In fact, by prohibiting and restricting imports of certain food products, Indonesia's regime ultimately has the effect of decreasing supply and increasing the domestic price of these products, thus reducing their availability for Indonesian consumers.

59. Finally, the constant uncertainty created for importers as to when imports will be permitted or prohibited means that importers are unable to plan for and invest in imports. Importers are constantly at risk that the importation of particular products will be prevented based on domestic supply, thus creating an unstable environment for trade. Uncertainty of this kind has been held by a number of panels to constitute a restriction on importation that is inconsistent with Article XI:1 of the GATT 1994. This was summarised by the panel in *Argentina - Import Measures* which noted:

This uncertainty creates additional negative effects on imports, for it negatively impacts business plans of economic operators who cannot count on a stable environment in which to import and who accordingly reduce their expectations as well as their planned imports into the Argentine market.⁶⁴

60. For these reasons, in New Zealand's view, the domestic insufficiency requirement is inconsistent with Indonesia's obligations under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

4. Article XX of the GATT 1994

61. Indonesia has sought to justify a number of its measures under Articles XX(a), (b) and (d) of the GATT 1994.⁶⁵ New Zealand will not address each of these defences in this submission, however it notes that does not consider that any of the measures described in this submission can be justified under these exceptions. In particular, New Zealand does not consider that Indonesia has demonstrated that the measures at issue are "necessary" to achieve

⁶¹ Article 101, *Farmers Law* (Exhibit JE-3) (stating that "Every Person importing Agricultural Commodities during the availability of sufficient domestic Agricultural Commodities for consumption and/or Government food reserves as intended in Article 30 paragraph (1) shall be punished with imprisonment of at most 2 (two) years and a fine of at most Rp 2.000.000.000,00 (two billion rupiah)").

⁶² Indonesia's first written submission, para. 92.

⁶³ J. Clapp, "Food self-sufficiency and international trade: a false dichotomy?", *FAO: The State of Agricultural and Commodity Markets*, (2015-2016), Exhibit IDN-7, p. 3.

⁶⁴ Panel Report, *Argentina – Import Measures*, para. 6.260.

⁶⁵ See Indonesia's first written submission, Sections III.D.6, III.E.4 and III.F.5.

the objectives specified by Indonesia in accordance with the relevant legal standards.⁶⁶ New Zealand also considers that Indonesia has failed to demonstrate that its measures satisfy the chapeau to Article XX.

III. LEGAL ISSUES RAISED IN INDONESIA'S FIRST WRITTEN SUBMISSION

62. In this section, New Zealand comments on two relevant legal issues raised by Indonesia in its first written submission.

1. *Relationship between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture*

63. In its first written submission, Indonesia contends that there is a "conflict" between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture which renders Article XI:1 "not applicable law in the present dispute".⁶⁷ New Zealand disagrees with this proposition.

64. First, New Zealand notes that a number of disputes have considered claims made by Members under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. In none of those disputes have panels found a conflict between these two articles. Indeed, in *Korea - Beef* and *India - Quantitative Restrictions*, the panel found certain measures breached *both* Article XI:1 of the GATT 1994 and 4.2 of the Agreement on Agriculture.⁶⁸ Similarly, in *US – Poultry (China)*, the panel found that measures relating to agricultural products that were challenged under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture were inconsistent with Article XI:1 of the GATT 1994 (and used judicial economy in relation to the claims under Article 4.2 of the Agreement on Agriculture).⁶⁹ New Zealand considers Indonesia's suggestion of a conflict between these provisions an untenable interpretation that is not supported by the text of the provisions or extensive WTO jurisprudence.

65. Second, there is no "conflict" as, for the reasons described in Section III:2 below, New Zealand disagrees with Indonesia's contention that the legal standard under Article 4.2 of the Agreement on Agriculture places the burden on a complainant to establish that a measure is not "maintained under ... general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement".

66. Furthermore, simply because the Agreement on Agriculture applies only to agricultural products and the GATT 1994 applies to all products (including agricultural products), does not automatically render Article 4.2 of the Agreement on Agriculture the more specific provision in respect of import restrictions. The measures in this dispute which have been challenged by Brazil under Article XI:1 of the GATT 1994 and Article 4.2 are quantitative restrictions. Accordingly, because Article XI:1 of the GATT 1994 deals

⁶⁶ See for example, Appellate Body Report, *Korea — Various Measures on Beef*, paras. 161-162 and 164.

⁶⁷ Indonesia's first written submission, para. 74.

⁶⁸ Panel Report, *Korea- Various Measures on Beef*, paras. 762 and 768. Panel Report, *India - Quantitative Restrictions*, para. 5.242.

⁶⁹ Panel Report, *US - Poultry (China)*, paras. 7.484 - 7.487.

exclusively, and in detail, with quantitative restrictions, it is the more specific provision in respect of these measures. In contrast, Article 4.2 of the Agreement on Agriculture deals not only with quantitative restrictions, but also a range of other measures, including minimum import prices, variable import levies, voluntary export restraints, and other similar border measures other than ordinary customs duties. The broad and general coverage of Article 4.2 of the Agreement on Agriculture means that it is not the more specific agreement in this instance.

2. Relationship between Article 4.2 of the Agreement on Agriculture and Article XX of the GATT 1994

67. Indonesia submits in its first written submission that, in order to establish a breach of Article 4.2 of the Agreement on Agriculture, a complainant has the burden of establishing that the measure is not "maintained under ... general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement".⁷⁰

68. Indonesia's interpretation appears to be that, in order to establish a breach of Article 4.2 of the Agreement on Agriculture, a complainant must demonstrate that the measure is not permitted to be maintained under *any* of the non-agriculture specific provisions of the WTO agreements. In the present dispute, however, Indonesia focuses on claiming that Brazil has the burden of demonstrating that Article XX does not apply in respect of the measures challenged under Article 4.2 of the Agreement on Agriculture.

69. New Zealand considers that this novel argument is flawed. According to Indonesia, in order to demonstrate a violation of Article 4.2 of the Agreement on Agriculture, a complainant would not only have to demonstrate a *prima facie* violation of Article 4.2, but it would also have to posit and rebut possible defences under Article XX that a respondent might raise.

70. At the same time, Indonesia accepts that Article XX is an exception to Article XI:1 of the GATT 1994 and that ordinarily the burden is on the respondent to demonstrate that the exception applies.⁷¹ However, Indonesia contends that in the case of a claim of violation of Article 4.2 of the Agreement on Agriculture, the burden of proof is reversed.⁷² Indonesia seeks to turn the usual burden of proof in relation to Article XX on its head, contrary to the well-established principle that the burden of identifying and establishing affirmative defences under Article XX rests on the party asserting that defence.⁷³ There is no justification for shifting the normal burden of proof in this way. It would be contradictory if the same provision were an exception to Article XI:1 of the GATT 1994 and not an exception to the obligation under Article 4.2 of the Agreement on Agriculture. The character of the Article XX defences is as an exception and such character should be maintained.

⁷⁰ Indonesia's first written submission, paras. 72 and 112-116.

⁷¹ Indonesia's first written submission, para 69.

⁷² Indonesia's first written submission, paras. 72 and 112-116.

⁷³ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.

71. In any case, New Zealand notes that the Panel does not need to address this novel legal issue if it follows an order of analysis which commences with Article XI:1 of the GATT 1994. If this Panel commences its analysis of the measures at issue under Article XI:1, as have previous panels, followed by an analysis of the affirmative defences raised by Indonesia under Article XX, it would not be necessary for this Panel to opine on which party bears the burden of demonstrating whether the measures at issue are maintained under the "other general, non-agricultural-specific provisions of the GATT 1994" specified in footnote 1 of Article 4.2 of the Agreement on Agriculture.

CONCLUSION

72. In this submission, New Zealand has outlined why it agrees with Brazil's arguments and considers that a number of Indonesia's measures are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. New Zealand has also explained the inconsistency of certain measures with Article III:4 of the GATT 1994 and Article 3.2 of the ILA.

73. New Zealand thanks the Panel for considering these views, and would welcome the opportunity to respond to any questions, or provide any further information, that would assist the Panel in its deliberations.