As delivered

WORLD TRADE ORGANIZATION
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 ORAL STATEMENT OF NEW ZEALAND

14 July 2016

I. INTRODUCTION

1. Chair, Members of the Panel, thank you for the opportunity to present New Zealand's views in this dispute. New Zealand has a significant interest in the matters before this Panel, and is currently a complainant in separate WTO dispute settlement proceedings which concern a number of the measures challenged by Brazil in this dispute.[1]

2. New Zealand is a small country reliant on its agricultural sector, and Indonesia has historically been a key export destination for New Zealand's agricultural products. Unfortunately, Indonesia's import restrictions, including a number of the measures at issue in this dispute, have impacted those agricultural exports. In New Zealand's view, aspects of Indonesia's import regime are inconsistent with core WTO obligations under the GATT 1994 and the Agreement on Agriculture, and New Zealand welcomes the opportunity to present its views on these matters.

3. This statement builds upon New Zealand's third party written submission. Today, I will:

(a) First, briefly summarise New Zealand's views regarding the *prima facie* inconsistency of certain measures at issue with the GATT 1994 and the Agreement on Agriculture;

(b) Second, comment on certain aspects of the legal standard under Article XX of the GATT 1994; and

(c) Finally, explain why New Zealand considers that Indonesia has not demonstrated that certain of the measures at issue in this dispute are justified under Article XX of the GATT 1994.

II. INDONESIA'S IMPORT LICENSING REGIME FOR ANIMAL PRODUCTS

4. New Zealand outlined in its written submission why it considers that Indonesia's positive list prohibition, intended use requirement, limited application and validity periods

[1] See New Zealand's third party written submission, paras. 6 - 10.

and fixed licence terms are each inconsistent with both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.[2] For the reasons outlined in its submission, New Zealand considers that each of these measures have a limiting effect, or impose a limiting condition, on importation and are therefore properly characterised as quantitative import restrictions.[3]

5. In addition, Indonesia's import regime for animal products is maintained through a framework of laws which prohibit imports when domestic production is deemed sufficient to fulfil domestic demand.[4] New Zealand considers that these and other components of Indonesia's import regime work together in a co-ordinated way to restrict, and in some cases prohibit, imports of a range of animal products including chicken meat in order to contribute to Indonesia's stated objective of achieving "self-sufficiency" in various food products.[5]

III. ARTICLE XX OF THE GATT 1994

6. I turn now to address Article XX of the GATT 1994.

1. Legal standard under Article XX

7. As a threshold matter, New Zealand considers it clear that, as the party invoking a defence under Article XX of the GATT 1994, Indonesia bears the burden of demonstrating that the elements of Article XX are made out. This position has been well established in Appellate Body jurisprudence, including *US – Wool Shirts and Blouses*.[6]

8. Importantly, New Zealand does not consider that this fundamental and well-established characterisation of Article XX as an 'exception' is affected by whether a measure is being assessed under Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture. In this regard, New Zealand agrees with the European Union that if the negotiators of the Agreement on Agriculture had intended to reverse the fundamental

[2] See New Zealand's third party written submission, Section II.2.
[3] Ibid.
[4] 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).
[5] See for example Ministry of Industry, "Minister of Agriculture: Agricultural Imports Will Be Tightened," http://www.kemenperin.go.id/artikel/1872/Mentan:-Impor-Daging-Akan-Diperketat (Exhibit US-10).
[6] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.

relationship between obligations and exceptions under Article XX of the GATT 1994 they would have made this clear.[7]

9. New Zealand also emphasises, however, that if the Panel were to commence its analysis of the measures at issue under Article X1:1 of the GATT 1994, it would not be necessary for the Panel to consider the legal relationship between Article XX of the GATT 1994 and Article 4.2 of the Agreement on Agriculture in order to resolve the dispute.

10. In relation to the legal standard for a measure to be justified under Article XX, jurisprudence is clear that a respondent must demonstrate that a measure was designed to protect or secure compliance with an objective identified in the relevant paragraph of Article XX.[8]

11. If this first requirement is satisfied, for defences under Article XX(a), (b) and (d), a respondent must then demonstrate that the measure is "necessary" for the achievement of that objective. The standard for demonstrating that a measure is necessary under Article XX is a high one. As the Appellate Body affirmed in *Korea - Various Measures on Beef*, the standard for "necessity" is "located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'".[9] This necessity analysis involves a process of "weighing and balancing a series of factors"[10] including the importance of the objective, the contribution of the measure to that objective and the trade-restrictiveness of the measure.[11]

12. If both of these elements are satisfied, a respondent must then also demonstrate that the measure complies with the requirements of the Article XX chapeau.

13. In light of this legal standard, New Zealand will now outline why it considers that Indonesia has failed to demonstrate that measures at issue in this dispute are justified under Article XX of the GATT 1994.

[7] The European Union's third party written submission, para. 24.
[8] See Appellate Body Report, *Colombia - Textiles*, paras. 5.67 and 5.123, para 5.169; Panel Report *China – Rare Earths*, para. 7.145..
[9] Appellate Body Report, *Korea — Various Measures on Beef*, paras. 161-162 and 164.
[10] Appellate Body Report, *Korea - Various Measures on Beef*, para. 164.
[11] See Appellate Body Reports, *EC – Seal Products*, para. 5.169; *Korea – Various Measures on Beef*, para. 164; *US – Gambling*, para. 306; and *Brazil – Retreaded Tyres*, para. 182.

2. The positive list is not justified under Article XX of the GATT 1994

14. In respect of the positive list prohibition, New Zealand explained in its written submission why it is incorrect that the prohibition on unlisted products has been removed through MOT 37/2016, as Indonesia contends.[12] This is because the positive list prohibition is made effective through *both* MOT 5/2016 *and* MOA 58/2015.[13] 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.[14] 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 is not possible under Indonesia's regulations.[15] It follows that the positive list prohibits certain meat and offal products, including chicken and beef, and continues to do so despite the introduction of MOT 37/2016.

15. Indonesia also claims that the positive list is justified under Article XX(d) on the basis that it is necessary to secure compliance with "laws and regulations dealing with halal requirements … deceptive practices ... and customs enforcement relating to halal".[16] In New Zealand's view, the positive list prohibition fails to meet the legal standard required under Article XX(d). I will briefly outline today why New Zealand considers that the positive list prohibition fails to satisfy the necessity component of this test.

16. New Zealand respects Indonesia's commitment to protect the right of its people to consume halal food. New Zealand would like to emphasise, however, that the positive list does not determine an animal product's eligibility for importation based on its halal status. Rather, the positive list prohibits certain products irrespective of whether they conform to Indonesia's halal requirements. Accordingly, even if a product is certified as conforming to

[12] New Zealand's third party written submission, paras. 15 - 20.
[13] Brazil's first written submission, paras. 99-101.
[14] Articles 7-8, MOA 58/2015 (Exhibit BRA-01).
[15] Article I, inserting Article 29A, MOT 37/2016 (Exhibit IDN-67).
[16] Indonesia's first written submission, paras. 229 - 234.

Indonesia's halal requirements, if it is not listed in the appendices to both MOA 58/2015 and MOT 5/2016, it is prohibited from importation.[17]

17. New Zealand also emphasises the trade-restrictiveness of the measure - the positive list constitutes a complete prohibition on importation of certain products. There are clearly less trade restrictive measures available which would enable Indonesia's objectives to be satisfied, and indeed these are currently in place. For example, as Indonesia notes, its laws already require imports to have a "rightful certificate" that certifies that products meet its halal standards.[18] However, the positive list means that even products which possess such a certification are prohibited from importation.

3. The intended use requirement is not justified under Article XX of the GATT 1994

18. Indonesia also prohibits products being imported other than for certain uses, which, among other things, prohibits chicken and other animal products being imported for sale at traditional 'wet' markets, and prohibits the importation of beef for sale at supermarkets as well.[19] In respect of this intended use requirement, which Indonesia contends is justified under Articles XX(b) and (d) of the GATT 1994,[20] New Zealand wishes to make two comments.

19. First, in assessing Indonesia's defences under Articles XX(b) and (d), the substantial restrictiveness of the intended use requirement must be taken into account. As Indonesia's Exhibit IDN-48 notes, wet markets are estimated to make up 80% of retail grocery sales in Indonesia.[21] By prohibiting imported meat from accessing these markets, the intended use requirement is highly restrictive and prevents imports from reaching the majority of retail consumers in Indonesia.

20. Second, the intended use requirement prevents the sale of all imported meat products in traditional markets, but does not appear to impose any comparable restrictions on the sale of

[17] See Brazil's first written submission, paras. 99 - 101.
[18] Indonesia's first written submission, para. 230.
[19] New Zealand's third party written submission, para. 23.
[20] Indonesia's first written submission, paras. 179 - 217.
[21] Carrick Devine, M. Dikeman, Encyclopedia of Meat Sciences**,** (2nd ed. Elsevier, 2014), at 245 (Exhibit IDN-48).

domestically-produced products in these markets - irrespective of whether such domestic products are fresh, frozen or thawed.

21. In New Zealand's view, this discriminatory treatment supports a conclusion that the measure is both unnecessary to achieve the objective of protecting human life or health or to secure compliance with laws and regulations regarding public health, deceptive practices and customs enforcement. It is a disguised restriction on trade that has the objective of restricting imports consistent with Indonesia's policy of achieving self-sufficiency in food.

4. Limited application and validity periods and fixed licence terms are not justified under Article XX of the GATT 1994

22. In respect of limited application windows and validity periods, and fixed licence terms, Indonesia contends that these measures are justified under Article XX(d) on the basis that they are necessary for the enforcement of a range of laws and regulations, and customs enforcement.[22]

23. However, Indonesia has not shown why limited application and validity periods and fixed licence terms are necessary for these objectives. New Zealand agrees that Indonesia has the right to take measures necessary to secure compliance with halal, food safety and customs laws. New Zealand does not agree that limiting the periods during which import licences can be obtained, and limiting the validity period of such licences, contribute towards, or is necessary for, the achievement of those objectives.

24. Specifically, Indonesia states that these measures are necessary because they enable Indonesia to "monitor foreign trade".[23] However, Indonesia could easily obtain information on trade flows through other mechanisms, such as customs import declarations, or through an automatic licensing system that permitted importers to promptly obtain Import Approvals whenever they required, based on the actual quantities they were importing.

25. Similarly, Indonesia claims these measures allow it to ensure that products are "safe and halal".[24] However, Indonesia can, and indeed does, readily obtain these confirmations by

[22] Indonesia's first written submission, paras. 296 - 298.
[23] Indonesia's first written submission, paras. 299.
[24] Indonesia's first written submission, paras. 299.

requiring importers to provide health certificates and halal certifications. Such certifications do not rely on the use of limited application windows, validity periods or fixed licence terms.

26. New Zealand also reiterates that limited application windows and validity periods, and fixed licence terms are, by their design, highly restrictive. By only permitting applications during three one-month periods, importers are prohibited from obtaining Import Approvals and MOA Import Recommendations during nine months of each year.[25]

IV. CONCLUSION

27. In conclusion, New Zealand agrees with Brazil's arguments that a number of the Indonesian measures at issue in this dispute are inconsistent with both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. In light of these *prima facie* inconsistences, New Zealand considers that Indonesia bears the burden of demonstrating that such measures are justified under Article XX of the GATT 1994. In New Zealand's view, Indonesia has not done so.

28. New Zealand thanks the Panel for considering these views, and would welcome the opportunity to respond to any questions that the Panel may have.

[25] See Brazils' first written submission, paras. 121 - 123.