

**WORLD TRADE ORGANIZATION**

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

*Indonesia — Importation of Horticultural Products, Animals and Animal Products*

**(WT/DS477)**

**FIRST WRITTEN SUBMISSION OF NEW ZEALAND**

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Short Title	Full Case Title and Citation
<i>Argentina - Hides and Leather</i>	Panel Report, <i>Argentina - Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
<i>Argentina - Import Measures</i>	Appellate Body Reports, <i>Argentina - Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
<i>Argentina - Import Measures</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>	Appellate Body Report, <i>Canada - Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
<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>China - Auto Parts</i>	Appellate Body Reports, <i>China - Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3

<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>China - Raw Materials</i>	Appellate Body Reports, <i>China - Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>China - Raw Materials</i>	Panel Reports, <i>China - Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501
<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>Dominican Republic - Import and Sale of Cigarettes</i>	Panel Report, <i>Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, p. 7425
<i>EC - Bananas III</i>	Appellate Body Report, <i>European Communities - Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
<i>EC - Poultry</i>	Appellate Body Report, <i>European Communities - Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
<i>EC - Seal Products</i>	Appellate Body Reports, <i>European Communities - Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014



<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>	Appellate Body Report, <i>Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
<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

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Short Title	Full Case Title and Citation
<i>Canada - Provincial Liquor Boards (EEC) (GATT Panel Report)</i>	GATT Panel Report, <i>Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies</i> , L/6304, adopted 22 March 1988, BISD 35S/37
<i>Canada - FIRA (GATT Panel Report)</i>	GATT Panel Report, <i>Canada - Administration of the Foreign Investment Review Act</i> , L/5504, adopted 7 February 1984, BISD 30S/140
<i>EEC - Minimum Import Prices (GATT Panel Report)</i>	GATT Panel Report, <i>EEC - Programme of Minimum Import Prices, Licences, and Surety Deposits for Certain Processed Fruits and Vegetables</i> , BISD 25S/68, adopted 18 October 1978
<i>Japan - Leather II (US) (GATT Panel Report)</i>	GATT Panel Report, <i>Panel on Japanese Measures on Imports of Leather</i> , L/5623, adopted 15 May 1984, BISD 31S/94
<i>Japan - Semi-Conductors (GATT Panel Report)</i>	GATT Panel Report, <i>Japan - Trade in Semi-Conductors</i> , L/6309- 35S/116, adopted 4 May 1988

## TABLE OF ABBREVIATIONS

Abbreviation	Full name and reference (where applicable)
<i>DSU</i>	Understanding on Rules and Procedures Governing the Settlement of Disputes
<i>GATT 1994</i>	General Agreement on Tariffs and Trade 1994
<i>HS Code</i>	Harmonised System codes
<i>MOA</i>	Indonesian Minister of Agriculture
<i>MOT</i>	Indonesian Minister of Trade
<i>PI</i>	Producer Importer
<i>PSI Agreement</i>	Agreement on Preshipment Inspection
<i>RI</i>	Registered Importer
<i>RIPH</i>	Horticultural Product Import Recommendation from the Indonesian Ministry of Agriculture
<i>UPP Coordinator</i>	Indonesian Ministry of Trade's Coordinator and Implementer of the Trade Services Unit
<i>WTO</i>	World Trade Organisation
<i>WTO Agreement</i>	Marrakesh Agreement Establishing the World Trade Organization

## LIST OF EXHIBITS

Exhibit No.	Description	Short title
NZL-1	Ministry of Industry, "Minister of Agriculture: Agricultural Imports Will Be Tightened" <a href="http://www.kemenperin.go.id/artikel/1872/Mentan:-Impor-Daging-Akan-Diperketat">http://www.kemenperin.go.id/artikel/1872/Mentan:-Impor-Daging-Akan-Diperketat</a> (accessed 9 November 2015)	
NZL-2	"Indonesia aiming for food self-sufficiency in three years" <i>The Jakarta Post</i> , 31 January 2015 <a href="http://www.thejakartapost.com/news/2015/01/31/indonesia-aiming-food-self-sufficiency-three-years.html">http://www.thejakartapost.com/news/2015/01/31/indonesia-aiming-food-self-sufficiency-three-years.html</a> (accessed 16 September 2015)	"Indonesia aiming for food self-sufficiency in three years" <i>The Jakarta Post</i>
NZL-3	<i>Regulation of the Ministry of Agriculture No. 19/Permentan/OT.140/2/2010 Regarding General Guidelines For Self Sufficiency Program In Beef 2014</i>	<i>Ministry of Agriculture Beef Self-Sufficiency Roadmap</i>
NZL-4	"Indonesian Imports from all countries: Bi-annual series 2010-2015, HS Codes 020120, 020130, 020210, 020220, 020230, 020610, 020621, 020622 and 020629" <i>Statistics Indonesia</i> , via <i>Global Trade Atlas</i> , <a href="http://www.gtis.com/gta">http://www.gtis.com/gta</a> (accessed 12 November 2015)	"Indonesia Import Statistics From all countries 2010-2015" <i>Global Trade Atlas</i>
NZL-5	"New Zealand Exports to Indonesia: Bi-annual series 2010-2015, HS Codes 020120, 020130, 020210, 020220, 020230, 020610, 020621, 020622 and 020629" <i>Statistics New Zealand</i> , accessed via <i>Global Trade Atlas</i> , <a href="http://www.gtis.com/gta">http://www.gtis.com/gta</a> (12 November 2015)	"New Zealand Export Statistics to Indonesia 2010-2015" <i>Global Trade Atlas</i>
NZL-6	New Zealand's first request for consultations, WT/DS466/1, circulated on 9 September 2013	
NZL-7	United States' second request for consultations, WT/DS465/1, circulated on 9 September 2013	
NZL-8	United States' first request for consultations, WT/DS455/1, circulated 14 January 2013	
NZL-9	New Zealand's second request for consultations, WT/DS477/1, circulated 15 May 2014	
NZL-10	New Zealand's request for the establishment of a panel, WT/DS477/9, circulated 24 March 2015	
NZL-11	"Two types of beef are no longer allowed to be imported. Why?" <i>Bisnis Indonesia</i> , 10 February 2015, <a href="http://industri.bisnis.com/read/20150210/99/389184/dua-jenis-daging-sapi-ini-tak-boleh-diimpor-lagi.-mengapa">http://industri.bisnis.com/read/20150210/99/389184/dua-jenis-daging-sapi-ini-tak-boleh-diimpor-lagi.-mengapa</a> (accessed 17 September 2015)	"Two types of beef are no longer allowed to be imported. Why?" <i>Bisnis Indonesia</i>

NZL-12	Meat Industry Association (New Zealand), Statement in relation to Indonesia's beef import restrictions, 11 November 2015.	Meat Industry Association Statement
NZL-13	"Australia's beef export to Indonesia dropped by 31%" <i>Trobos</i> , 4 June 2014, <a href="http://www.trobos.com/detail_berita.php?sid=6062&amp;sid=55">http://www.trobos.com/detail_berita.php?sid=6062&amp;sid=55</a> (accessed 6 July 2015)	
NZL-14	"Ill-Advised Beef Self-Sufficiency Policies Have Depleted Indonesia Cattle Population by 30 Percent, Business Group Says" <i>Jakarta Globe</i> , 13 August 2015, <a href="http://jakartaglobe.beritasatu.com/business/ill-advised-beef-self-sufficiency-policies-depleted-indonesia-cattle-population-30-percent-business-group-says/">http://jakartaglobe.beritasatu.com/business/ill-advised-beef-self-sufficiency-policies-depleted-indonesia-cattle-population-30-percent-business-group-says/</a> (accessed 11 November 2015)	"Ill-Advised Beef Self-Sufficiency Policies Have Depleted Indonesia Cattle Population by 30 Percent, Business Group Says" <i>Jakarta Globe</i>
NZL-15	"Beef Self-Sufficiency Nowhere In Sight" <i>BMI Research</i> , 26 September 2013, <a href="http://www.bmi-research.com/news-and-views/beef-self-sufficiency-nowhere-in-sight#sthash.ByY2gSq7.dpuf">http://www.bmi-research.com/news-and-views/beef-self-sufficiency-nowhere-in-sight#sthash.ByY2gSq7.dpuf</a> (accessed 28 October 2015)	"Beef Self-Sufficiency Nowhere In Sight" <i>BMI Research</i>
NZL-16	"Market Fundamentals Force Government's Hand in Beef Brouhaha" <i>Jakarta Globe</i> , 10 August 2015, <a href="http://jakartaglobe.beritasatu.com/news/market-fundamentals-force-governments-hand-beef-brouhaha/">http://jakartaglobe.beritasatu.com/news/market-fundamentals-force-governments-hand-beef-brouhaha/</a> (accessed 3 November 2015)	
NZL-17	"Beef prices in Indonesia rising sharply as supply dwindles in the lead up to Ramadan" <i>ABC News</i> , 3 March 2015, <a href="http://www.abc.net.au/news/2015-03-03/beef-prices-in-indonesia-rising-sharply-concerns-for-ramadan/6273314">http://www.abc.net.au/news/2015-03-03/beef-prices-in-indonesia-rising-sharply-concerns-for-ramadan/6273314</a> (accessed 10 November 2015)	
NZL-18	"Rethinking Indonesia's beef self-sufficiency agenda" <i>Inside Indonesia</i> , Issue 114:Oct-Dec 2013, <a href="http://www.insideindonesia.org/rethinking-indonesia-s-beef-self-sufficiency-agenda-2">http://www.insideindonesia.org/rethinking-indonesia-s-beef-self-sufficiency-agenda-2</a> (accessed 15 July 2015)	
NZL-19	"Indonesia self-sufficiency push will drive up beef prices - industry" <i>Reuters</i> , 4 March 2015, <a href="http://www.reuters.com/article/2015/03/04/indonesia-beef-idUSL4N0W533G20150304">http://www.reuters.com/article/2015/03/04/indonesia-beef-idUSL4N0W533G20150304</a> (accessed 17 September 2015)	
NZL-20	Indonesian Retail Beef Prices, Monthly Average September 2015-August 2015	

NZL-21	Example of Beef Import Approval ( <i>Persetujuan Impor</i> ) issued by the Indonesian Ministry of Trade (importer information redacted for confidentiality purposes)	Beef Import Approval Example
NZL-22	Indicative list of bovine meat and offal products and their eligibility to obtain MOA Recommendations under <i>MOA 139/2014</i> and Import Approvals under <i>MOT 46/2013</i> .	List of bovine meat and offal products and their eligibility for importation into Indonesia
NZL-23	"Achieving self-sufficiency, government keep importing live cattle" <i>Lensa Indonesia</i> , 31 March 2015, <a href="http://www.lensaIndonesia.com/2015/03/31/swasembada-daging-pemerintah-terus-impor-sapi-bakalan.html">http://www.lensaIndonesia.com/2015/03/31/swasembada-daging-pemerintah-terus-impor-sapi-bakalan.html</a> (accessed 16 September 2015)	"Achieving self-sufficiency, government keep importing live cattle" <i>Lensa Indonesia</i>
NZL-24	"Indonesia imposes significant bans on beef, offal imports" <i>Beef Central</i> , 14 January 2015, <a href="http://www.beefcentral.com/trade/export/indonesia-imposes-significant-bans-on-beef-offal-imports/">http://www.beefcentral.com/trade/export/indonesia-imposes-significant-bans-on-beef-offal-imports/</a> (accessed 15 June 2015)	
NZL-25	"Australian Beef Intestines Are Off the Menu With Indonesian Ban" <i>Bloomberg Business</i> , 4 March 2015, <a href="http://www.bloomberg.com/news/articles/2015-03-03/aussie-beef-lung-off-the-menu-with-indonesia-ban-southeast-asia">http://www.bloomberg.com/news/articles/2015-03-03/aussie-beef-lung-off-the-menu-with-indonesia-ban-southeast-asia</a> (accessed 13 November 2015)	
NZL-26	"Ministry of Trade: Imports cannot yet be done" <i>Agro Indonesia</i> , 24 February 2015, <a href="http://agroIndonesia.co.id/index.php/2015/02/24/kemendag-impor-belum-bisa-dilakukan/">http://agroIndonesia.co.id/index.php/2015/02/24/kemendag-impor-belum-bisa-dilakukan/</a> (accessed 17 September 2015)	"Ministry of Trade: Imports cannot yet be done" <i>Agro Indonesia</i>
NZL-27	Directorate General of Livestock and Animal Health, MOA Recommendation Login Page: Sistem Informasi Rekomendasi Perijinan (SIMREK), <a href="http://ditjennak.pertanian.go.id/upr">http://ditjennak.pertanian.go.id/upr</a> (accessed 17 September 2015)	SIMREK MOA Application Login Page
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NZL-30	"Rumour of beef import quota arisen, importers are restless" <i>Detik</i> , 22 December 2014, <a href="http://finance.detik.com/read/2014/12/22/131849/2784231/4/da-isu-kuota-impor-daging-sapi-beku-dibatasi-importir-resah">http://finance.detik.com/read/2014/12/22/131849/2784231/4/da-isu-kuota-impor-daging-sapi-beku-dibatasi-importir-resah</a> (accessed 31 August 2015)	"Rumour of beef import quota arisen, importers are restless" <i>Detik</i>
NZL-31	"Self-sufficiency in target despite budget cut" <i>The Jakarta Post</i> , 4 June 2015, <a href="http://www.thejakartapost.com/news/2013/06/04/self-sufficiency-target-despite-budget-cut.html">http://www.thejakartapost.com/news/2013/06/04/self-sufficiency-target-despite-budget-cut.html</a> (accessed 16 September 2015)	"Self-sufficiency in target despite budget cut" <i>The Jakarta Post</i>
NZL-32	"Jokowi pledges to achieve self-sufficiency in meat" <i>The Jakarta Post</i> , 8 December 2014, <a href="http://www.thejakartapost.com/news/2014/12/08/jokowi-pledges-achieve-self-sufficiency-meat.html">http://www.thejakartapost.com/news/2014/12/08/jokowi-pledges-achieve-self-sufficiency-meat.html</a> (accessed 2 September 2015)	"Jokowi pledges to achieve self-sufficiency in meat" <i>The Jakarta Post</i>
NZL-33	"Indonesia's Modern Retail Sector: Interaction with Changing Food Consumption and Trade Patterns" <i>United States Department of Agriculture</i> , June 2012	USDA Modern Retail Study
NZL-34	Rohit Razdan et al., "The Evolving Indonesian Consumer" <i>McKinsey &amp; Company, Asia Consumer Insights Center</i> , November 2013	The Evolving Indonesian Consumer
NZL-35	Arief Budiman et al, "The New Indonesian Consumer" <i>McKinsey &amp; Company</i> , December 2012	
NZL-36	Suryadarma, D "Competition between traditional food traders and supermarkets in Indonesia" (paper presented to the Crawford Fund for international Agricultural Research Conference on The Supermarket Revolution in Food: Good, bad or ugly for the world's farmers, consumers and retailers) Canberra, August 2011	
NZL-37	Suryadarma, D et. al. "Impact of Supermarkets on Traditional Markets and retailers in Indonesia's Urban Centers" <i>SMERU Research Institute</i> , August 2007	
NZL-38	Indonesian Ministry of Agriculture - Directorate General of Animal Husbandry and Veterinary Public Health and Postharvest, "Evaluation on Local Beef Absorption as Requirement to the Request of technical Recommendation for Q4 Beef Importation in 2015 according to MOA Reg no 139/2014" presentation dated 25 August 2015	Ministry of Agriculture Absorption Presentation
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NZL-41	"Jokowi gives chili, shallot imports the green light" <i>The Jakarta Post</i> , 9 June 2015, <a href="http://www.thejakartapost.com/news/2015/06/04/jokowi-gives-chili-shallot-imports-green-light.html">http://www.thejakartapost.com/news/2015/06/04/jokowi-gives-chili-shallot-imports-green-light.html</a> (accessed 11 November 2015)	"Jokowi gives chili, shallot imports the green light" <i>The Jakarta Post</i>
NZL-42	"Chief economic minister defends ban on horticultural imports" <i>Antaranews</i> , 7 February 2013, <a href="http://www.antaranews.com/en/news/87288/chief-economic-minister-defends-ban-on-horticultural-imports">http://www.antaranews.com/en/news/87288/chief-economic-minister-defends-ban-on-horticultural-imports</a> (accessed 11 November 2015)	
NZL-43	"Jokowi promises rice, shallot self-sufficiency" <i>The Jakarta Post</i> , 28 June 2014, <a href="http://www.thejakartapost.com/news/2014/06/28/jokowi-promises-rice-shallot-self">http://www.thejakartapost.com/news/2014/06/28/jokowi-promises-rice-shallot-self</a> (accessed 13 November 2015)	"Jokowi promises rice, shallot self-sufficiency" <i>The Jakarta Post</i>
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NZL-59	Dr Reni Kustiari, "Horticultural Import Policy in Indonesia" <i>FFTC Paper</i> , 23 January 2014, <a href="http://ap.ffc.agnet.org/ap_db.php?id=288">http://ap.ffc.agnet.org/ap_db.php?id=288</a> (accessed 29 April 2015)	"Horticultural Import Policy in Indonesia" <i>FFTC Paper</i>
NZL-60	Blank statement letter form that importers must submit stating that their import products were harvested less than six months previously as part of their RIPH application	Six month harvest statement form
NZL-61	Tahlim Sudaryanto, "The Frame of Agricultural Policy and Recent Major Agricultural Policies in Indonesia" <i>FFTC Paper</i> , 2 July 2014, <a href="http://ap.ffc.agnet.org/ap_db.php?id=256">http://ap.ffc.agnet.org/ap_db.php?id=256</a> (accessed 12 November 2015)	"The Frame of Agricultural Policy and Recent Major Agricultural Policies in Indonesia" <i>FFTC Paper</i>
NZL-62	"Beef strike leaves businesses in limbo" <i>The Jakarta Post</i> , 11 August 2015, page 1	
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NZL-65	"Opting for Local Beef" <i>Tempo Magazine</i> , 12 July 2015, page 40	



NZL-66	"Questioned SOEs capacity in importation of secondary cut and offal" <i>Bisnis Indonesia</i> , 26 February 2015, <a href="http://industri.bisnis.com/read/20150226/12/407001/bumn-diragukan-mampu-impor-daging-secondary-cut-jeroan">http://industri.bisnis.com/read/20150226/12/407001/bumn-diragukan-mampu-impor-daging-secondary-cut-jeroan</a> (accessed 16 September 2015)	
NZL-67	"Beef imports need to be evaluated" <i>Harian Nasional</i> , 1 December 2014, <a href="http://www.harnas.co/2014/12/01/impor-sapi-perlu-dievaluasi">http://www.harnas.co/2014/12/01/impor-sapi-perlu-dievaluasi</a> (accessed 31 August 2015)	
NZL-68	"Beef importers must absorb local beef" <i>Gatra</i> , 16 February 2015, <a href="http://www.gatra.com/ekonomi-1/industri/134275-per-maret-2015,-importir-daging-sapi-wajib-serap-daging-sapi-lokal%E2%80%8F.html">http://www.gatra.com/ekonomi-1/industri/134275-per-maret-2015,-importir-daging-sapi-wajib-serap-daging-sapi-lokal%E2%80%8F.html</a> (accessed 16 September 2015)	
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NZL-72	"Chili, Onion Import Based on Reference Price" <i>Tempo.Co</i> , 3 September 2013, <a href="http://en.tempo.co/read/news/2013/09/04/056510223/Chili-Onion-Import-Based-on-Reference-Price">http://en.tempo.co/read/news/2013/09/04/056510223/Chili-Onion-Import-Based-on-Reference-Price</a> (accessed 9 November 2015)	
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NZL-74	"Indonesia's citrus importers under threat" <i>Asiafruit</i> , 27 May 2015, <a href="http://www.fruitnet.com/asiafruit/article/165366/indonesias-citrus-imports-under-threat">http://www.fruitnet.com/asiafruit/article/165366/indonesias-citrus-imports-under-threat</a> (accessed 11 November 2015)	

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NZL-77	"Minister Claimed that Control on Food Importation has Saved 50 Trillion Rupiah" <i>Kompas</i> , 24 September 2015, <a href="http://bisniskeuangan.kompas.com/read/2015/09/24/104534626/Mentan.Klaim.Hemat.Rp.50.Triliun.Berkat.Pengendalian.Impor.Pangan">http://bisniskeuangan.kompas.com/read/2015/09/24/104534626/Mentan.Klaim.Hemat.Rp.50.Triliun.Berkat.Pengendalian.Impor.Pangan</a> (accessed 13 November 2015)	"Minister Claimed that Control on Food Importation has Saved 50 Trillion Rupiah" <i>Kompas</i>
NZL-78	Arianto A. Patunru and Sjamsu Rahardja, "Trade protectionism in Indonesia; Bad times and bad policy" <i>Lowy Institute Analysis Paper</i> , July 2015	"Trade protectionism in Indonesia; Bad times and bad policy" <i>Lowy Institute Analysis Paper</i>
NZL-79	Iqbal Rafani, "Law No.13/2010 Governing Horticulture in Indonesia" <i>FFTC Paper</i> , 29 July 2014, <a href="http://ap.ffc.agnet.org/ap_db.php?id=278">http://ap.ffc.agnet.org/ap_db.php?id=278</a> (accessed 11 November 2015)	

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<b>JE-7</b>	Regulation of the Minister of Trade Number 60/M-DAG/PER/9/2012 Concerning Second Amendment of Regulation of the Minister of Trade Number 30/M-DAG/PER/5/2012, Sept. 21, 2012	<i>MOT 60/2012</i>
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<b>JE-18</b>	Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013 Concerning Provisions on the Import and Export of Animals and Animal Products Aug. 30, 2013	<i>MOT 46/2013</i>
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## I. INTRODUCTION

1. This dispute arises from Indonesia's prohibitions and restrictions on imports of animals, animal products and horticultural products.

2. Since 2009, Indonesia has enacted a series of laws and regulations that prohibit imports of agricultural products when domestic production is deemed sufficient to satisfy domestic food 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.<sup>1</sup>

3. The impact on agricultural imports has been dramatic. Since the introduction of the measures at issue in this dispute, imports of targeted agricultural products have declined significantly. For instance, the volume of beef imported from all countries in the first six months of 2015 was a mere 34 percent of the volume imported over the same period in 2010.<sup>2</sup> Similar global import volume declines have occurred across a range of animal and horticultural products.

4. New Zealand is a small country reliant on its agricultural sector. Indonesia has historically been a key export destination. Unfortunately, Indonesia's restrictions have severely impacted those agricultural exports. New Zealand's beef exports to Indonesia have declined by 84 percent since 2010, in what was then our second largest beef export market by volume.<sup>3</sup> A range of New Zealand's horticultural exports have also been held back since the imposition of these measures.

5. Food security is a legitimate policy objective and a World Trade Organization (WTO) Member has the right to establish import licensing regimes. Nonetheless, it must do so within the parameters of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). As a WTO Member, New Zealand has a right to ensure that such import regimes do not contravene the WTO Agreement.

6. Section III of this submission sets out the factual basis for New Zealand's legal claims. It describes Indonesia's restrictive import regimes for animals and animal products (Section III.A) and horticultural products (Section III.B). Both regimes share similar features, including overarching framework legislation limiting agricultural imports to situations where domestic food production is deemed insufficient. They also both include licensing regimes that prohibit and restrict imports through a series of discrete requirements and as a whole.

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<sup>1</sup> Ministry of Industry, "Minister of Agriculture: Agricultural Imports Will Be Tightened" <http://www.kemenperin.go.id/artikel/1872/Mentan:-Impor-Daging-Akan-Diperketat> (Exhibit NZL-1); "Indonesia aiming for food self-sufficiency in three years" *The Jakarta Post*, 31 January 2015, <http://www.thejakartapost.com/news/2015/01/31/indonesia-aiming-food-self-sufficiency-three-years.html> (Exhibit NZL-2); and *Regulation of the Ministry of Agriculture No. 19/Permentan/OT.140/2/2010 Regarding General Guidelines For Self Sufficiency Program In Beef 2014 (Ministry of Agriculture Beef Self -Sufficiency Roadmap)* (Exhibit NZL-3).

<sup>2</sup> "Indonesia Import Statistics From all countries 2010-2015" *Global Trade Atlas* (Exhibit NZL-4).

<sup>3</sup> "New Zealand Export Statistics to Indonesia 2010-2015" *Global Trade Atlas* (Exhibit NZL-5).



7. New Zealand's legal arguments are set out in Section IV. Section IV.A describes why Indonesia's import licensing regimes, both through their discrete requirements and as a whole, restrict trade in a manner inconsistent with Article XI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994). Section IV.A also explains why Indonesia's domestic insufficiency condition, as set out in its framework laws, is inconsistent with Article XI:1. Section IV.B elaborates why these same measures are inconsistent with Article 4.2 of the Agreement on Agriculture. Sections IV.C and IV.D are narrower in scope. Section IV.C is limited to claims that Indonesia's requirements that importers purchase domestic beef and that certain agricultural imports can only be used, sold and distributed in limited circumstances result in less favourable treatment for imports inconsistent with Article III:4 of the GATT 1994. Section IV.D focuses on the trade-restrictive, trade-distortive and burdensome aspects of licensing regimes' application windows and validity periods that are inconsistent with Article 3.2 of the Agreement on Import Licensing Procedures.

8. In Section V, New Zealand asks the Panel to find that Indonesia's measures restrict imports in a manner inconsistent with its WTO obligations and to recommend that Indonesia bring its measures into conformity with its WTO commitments.

## II. PROCEDURAL BACKGROUND

9. This is the second WTO dispute brought by New Zealand in respect of certain measures imposed by Indonesia on the importation of horticultural products and animals and animal products into Indonesia. On 9 September 2013 New Zealand first requested consultations with Indonesia pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), Article XXII of the *General Agreement on Tariffs and Trade* (GATT 1994), Article 19 of the *Agreement on Agriculture*, Article 6 of the *Agreement on Import Licensing Procedures*, and Articles 7 and 8 of the *Agreement on Preshipment Inspection* (PSI Agreement) concerning certain measures imposed by Indonesia on the importation of horticultural products and animals and animal products into Indonesia.<sup>4</sup> The United States also submitted a Request for Consultations with Indonesia on 9 September 2013.<sup>5</sup> This was the second request for consultations submitted by the United States regarding Indonesian restrictions on the importation of horticultural products and animals and animal products.<sup>6</sup>

10. At the same time as New Zealand and the United States submitted their Requests for Consultations in September 2013, Indonesia issued new regulations for the importation of animals, animal products and horticultural products. These new regulations ostensibly removed a WTO-inconsistent quota system that had been in place for certain agricultural products. However, Indonesia maintained its existing trade restrictive import licensing

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<sup>4</sup> New Zealand's first request for consultations, WT/DS466/1, circulated 9 September 2013 (Exhibit NZL-6).

<sup>5</sup> United States' second request for consultations, WT/DS465/1, circulated 9 September 2013 (Exhibit NZL-7).

<sup>6</sup> A first request for consultations was submitted by the United States on 14 January 2013: United States' first request for consultations, WT/DS455/1, circulated 14 January 2013 (Exhibit NZL-8). New Zealand reserved its third Party rights in that dispute.

requirements and also introduced new trade-restrictive measures. Consultations in respect of the first dispute were held in Jakarta, Indonesia on 23 September 2013. The dispute was inscribed in the WTO List of Cases but it has not progressed.

11. In light of Indonesia's measures introduced in September 2013, on 8 May 2014, New Zealand again requested consultations with Indonesia pursuant to Articles 1 and 4 of the DSU, Article XXII of the GATT 1994, Article 19 of the *Agreement on Agriculture*, Article 6 of the *Agreement on Import Licensing Procedures*, and Articles 7 and 8 of the PSI Agreement concerning certain measures imposed by Indonesia on the importation of horticultural products and animals and animal products into Indonesia.<sup>7</sup> Pursuant to this request, New Zealand, together with the United States, held consultations with Indonesia in Jakarta on 19 June 2014. However those consultations unfortunately did not resolve the dispute.

12. New Zealand requested the establishment of a panel on 18 March 2015, pursuant to Articles 6 and 7.1 of the DSU.<sup>8</sup> As the United States also requested the establishment of a panel related to the same matter, New Zealand further requested, pursuant to Article 9.1 of the DSU, that the Dispute Settlement Body establish a single panel to examine both complaints. The Dispute Settlement Body considered this request at its meeting of 22 April 2015 and deferred the request. At its meeting on 20 May 2015 the Dispute Settlement Body established a single Panel pursuant to Article 9.1 of the DSU to examine this dispute together with that initiated by the United States. On 28 September 2015, New Zealand and the United States requested the Director-General to compose the panel. On 8 October 2015, the Director-General composed the panel.

### III. FACTUAL BACKGROUND

13. Indonesia has enacted an overarching framework of laws that underpin its import regimes for animals and animal products and for horticultural products. These laws, and their subsidiary regulations, are based on the premise that imports of agricultural products should be prohibited or restricted where domestic production is deemed sufficient to fulfil domestic demand. This stated policy of the Indonesian Government, implemented through governmental measures, uses self-sufficiency as the justification for controlling imports of agricultural products.

14. This Section sets out the factual basis for New Zealand's legal claims. It describes Indonesia's restrictive import regimes for animals and animal products (Section III.A) and horticultural products (Section III.B). Each of these Sections commences by setting out the overarching framework legislation which limits agricultural imports to situations where domestic food production is deemed insufficient. These Sections then set out the import licensing regimes for animals and animal products and horticultural products, including a number of discrete requirements that prohibit and restrict imports. Finally, Section III.C describes how, independent of the import licensing regimes, Indonesia's overarching

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<sup>7</sup> New Zealand's second request for consultations, WT/DS477/1, circulated 15 May 2014 (Exhibit NZL-9).

<sup>8</sup> New Zealand's request for the establishment of a panel, WT/DS477/9, circulated 24 March 2015 (Exhibit NZL-10).

framework legislation imposes import restrictions based on the sufficiency of domestic production.

## A. IMPORT REGIME FOR ANIMALS AND ANIMAL PRODUCTS

### 1. Framework legislation for animals and animal products

15. In 2009, Indonesia enacted *Law of the Republic of Indonesia Number 18 of 2009 on Animal Husbandry and Animal Health Law (Animal Law)*.<sup>9</sup> In 2014, the Animal Law was amended by *Law of the Republic of Indonesia Number 41 of 2014 Concerning Amendment of Law Number 18 of 2009 (Animal Law Amendment)*.<sup>10</sup> The *Animal Law* and the *Animal Law Amendment* provide for the organisation of husbandry and animal health in Indonesia. With respect to imports, Article 36B(1) of the *Animal Law Amendment* provides that "Importation of Livestock and Animal Product from overseas into the Territory of the Republic of Indonesia can be perform if domestic production and supply of Livestock and Animal Product has not fulfil public consumption".<sup>11</sup>

16. In 2012, the *Animal Law* was supplemented with *Law of the Republic of Indonesia Number 18 of 2012 Concerning Food (Food Law)*.<sup>12</sup> The *Food Law* deals with the production and consumption of food<sup>13</sup> and sets out the principles and objectives of food management, including food security.<sup>14</sup> Article 14 addresses imports and requires that Indonesian "Food supply originates from domestic Food Production and the National Food Reserves" and that only if these sources are not sufficient can the food needs of the Indonesian people "be satisfied by Food Import, in accordance with needs". Article 36(1) provides that importation of food is only permissible "if the domestic Food Production is insufficient and/or cannot be produced domestically". This prohibition on imports when domestic production is sufficient is reinforced in Article 36(2) which provides that the "Import of Basic Food can only be done if domestic Food Production and the National Food Reserve is insufficient".<sup>15</sup> The *Food Law* stipulates that the "sufficiency" of domestic food is "determined by the minister or government agency tasked with carrying out government work in the field of food".<sup>16</sup>

17. The following year, in 2013, Indonesia enacted *Law of the Republic of Indonesia Number 19 of 2013 Concerning Protection and Empowerment of Farmers (Farmers Law)*,

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<sup>9</sup> *Law of the Republic of Indonesia Number 18 of 2009 on Animal Husbandry and Animal Health (Animal Law)* (Exhibit JE-4).

<sup>10</sup> *Law of the Republic of Indonesia Number 41 of 2014 Concerning Amendment of Law Number 18 of 2009 Concerning Husbandry and Animal Health (Animal Law Amendment)* (Exhibit JE-5).

<sup>11</sup> Article 36(B)(1), *Animal Law Amendment* (Exhibit JE-5).

<sup>12</sup> *Law of the Republic of Indonesia Number 18 of 2012 Concerning Food (Food Law)* (Exhibit JE-2).

<sup>13</sup> "Food" is defined in Article 1(1) of the *Food Law* as "everything originating from biological sources of agriculture, plantation, forestry, fishery, animal husbandry, the maritime, and inland water products, whether processed or not, which is intended to be food or drink for human consumption, including food additive materials, food raw materials and other materials used in the process of preparation, processing and/or the making of food or drink" (Exhibit JE-2).

<sup>14</sup> Articles 2 and 3, *Food Law* (Exhibit JE-2).

<sup>15</sup> "Basic food" is defined as the "main daily food". Article 1(15), *Food Law* (Exhibit JE-2).

<sup>16</sup> Article 36(3), *Food Law* (Exhibit JE-2).

which deals with the organisation of farming in Indonesia.<sup>17</sup> Article 30 of that law provides that "Every person is prohibited from importing Agricultural Commodities when the availability of domestic Agricultural Commodities is sufficient for consumption and/or Government food reserves".<sup>18</sup> It also imposes criminal penalties, including up to two years imprisonment, for importing agricultural commodities when the domestic supply is sufficient.<sup>19</sup>

18. The import licensing regime for animals and animal products is influenced by the Indonesian Government's self-sufficiency objectives in these laws. The[ ] has expressly cited Article 36B(1) of the *Animal Law Amendment* as providing the authority for Indonesia to ban imports of bovine secondary cuts and offal by not issuing MOA Recommendations and Import Approvals for these products.<sup>20</sup> The[ ] is reported as stating that imports of these products is prohibited because:

We are already able to meet the demand for secondary cuts and offal from domestic production, because all abattoirs in the country are already able to produce such products.<sup>21</sup>

## **2. Import licensing regime for animals and animal products**

19. The legislative provisions based on the sufficiency of domestic production set out in the *Animal Law*, *Animal Law Amendment*, *Food Law* and *Farmers Law* provide the basis and rationale for the import licensing restrictions on animals and animal products.<sup>22</sup>

20. The specific import licensing restrictions on animals and animal products are imposed through regulations *MOA 139/2014*<sup>23</sup> and *MOT 46/2013*.<sup>24</sup> The preamble to *MOA 139/2014*

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<sup>17</sup> *Law of the Republic of Indonesia Number 19 of 2013 Concerning Protection and Empowerment of Farmers (Farmers Law)* (Exhibit JE-3).

<sup>18</sup> "Agricultural Commodity" is defined in Article 1(5), *Farmers Law* as "a product from farm that can be traded, stored and/or exchanged" (Exhibit JE-3).

<sup>19</sup> Article 101, *Farmers Law* (Exhibit JE-3).

<sup>20</sup> "Two types of beef are no longer allowed to be imported. Why?" *Bisnis Indonesia*, 10 February 2015, <http://industri.bisnis.com/read/20150210/99/389184/dua-jenis-daging-sapi-ini-tak-boleh-diimpor-lagi.-mengapa> (Exhibit NZL-11).

<sup>21</sup> *Ibid.*

<sup>22</sup> Article 36B, *Animal Law Amendment* (Exhibit JE- 5); Article 99, *Farmers Law* (Exhibit JE-3); and Article 40, *Food Law* (Exhibit JE-2), provide for implementation of their provisions through regulations.

<sup>23</sup> *Regulation of the Minister of Agriculture Number 139/Permentan/PD.410/12/2014 Concerning Importation of Carcasses, Meats, and/or their Processed Products into the Territory of the Republic of Indonesia, Dec. 24, 2014 (MOA 139/2014)* (Exhibit JE-26) as amended by *Regulation of the Minister of Agriculture Number 02/Permentan/PD.410/1/2015 Concerning Amendment to Regulation of the Minister of Agriculture Number 139/Permentan/PD.410/12/2014, Jan. 22, 2015 (MOA 2/2015)* (Exhibit JE-27) (*MOA 139/2014 as amended*). A consolidated version of *MOT 139/2014 as amended* is set out in Exhibit JE-28.

<sup>24</sup> *Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013 Concerning Provisions on the Import and Export of Animals and Animal Products Aug. 30, 2013 (MOT 46/2013)* (Exhibit JE-18) as amended by *Regulation of the Minister of Trade No. 57/M-DAG/PER/9/2013 Concerning Amendment to Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013, Sept. 26, 2013 (MOT 57/2013)* (Exhibit JE-19), and

expressly refers to the *Animal Law*, *Animal Law Amendment* and the *Food Law* as forming part of the framework of legislation under which *MOA 139/2014* is made.<sup>25</sup> Similarly, *MOT 46/2013* expressly refers to the *Food Law* and the *Animal Law* as forming part of the framework of laws and regulations under which that regulation is made.<sup>26</sup>

21. In order to import animals and animal products<sup>27</sup> into Indonesia, importers are required to obtain a range of licences and approvals from various Indonesian government agencies. The specific licences and approvals vary depending on the animal or animal product to be imported and have the effect of prohibiting and restricting imports of these products.<sup>28</sup>

22. New Zealand's description of Indonesia's licensing regime for animals and animal products will focus on the licensing regime for, and specific restrictions applied to, bovine meat, offal and carcass.<sup>29</sup> However, many aspects of the licensing regime for animals and animal products that are challenged by New Zealand in this dispute also apply to the importation of a number of other animals and animal products. To the extent they do, New Zealand also challenges the regime as it applies to these other products.

23. The prohibitions and restrictions on the importation of animals and animal products reflect Indonesia's stated objective of prohibiting imports in circumstances where domestic supply is deemed to be sufficient to satisfy domestic demand.<sup>30</sup>

24. This overriding objective colours the design, structure and implementation of Indonesia's import licensing regime for these products, especially bovine meat and offal. In the case of beef and live cattle, for which Indonesia has a stated desire to reduce imports to 10% of total consumption,<sup>31</sup> Indonesia imposes a range of additional product specific measures<sup>32</sup> which are directed at limiting imports. The ultimate effect of Indonesia's restrictions on these products has been to reduce imports of bovine meat and offal. This is reflected in the fact that the quantity of bovine meat and offal imported into Indonesia from all countries in the first six months of 2015 represented only 34% of the quantity imported in the same period in 2010.<sup>33</sup> This reduction has also been reflected in New Zealand's bovine

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*Regulation of the Minister of Trade 17/M-DAG/PER/3/2014 Concerning Second Amendment to Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013, Mar. 27, 2014 (MOT 17/2014) (Exhibit JE-21) (MOT 46/2013 as amended).* A consolidated version of *MOT 46/2013 as amended* is set out in Exhibit JE-21.

<sup>25</sup> First Preamble (b), Second Preamble (5) and (6), *MOA 139/2014* (Exhibit JE-26).

<sup>26</sup> Second Preamble (9) and (10), *MOT 46/2013* (Exhibit JE-18).

<sup>27</sup> The relevant Indonesian regulations define animal products as "all materials originating from animals, fresh and/or processed, that are for consumption, pharmaceuticals, farming, and/or other purposes for fulfilling the needs and benefit of humans". Article 1(5), *MOT 46/2013* (Exhibit JE-18). This includes "carcasses, meats, and/or their processed products". *MOA 139/2014* (Exhibit JE-26).

<sup>28</sup> Article 4(1), *MOT 46/2013*. For example, Importer Designations are only required for importation of bovine animals and animal products (being those listed in Appendix I, *MOT 46/2013*), (Exhibit JE-18).

<sup>29</sup> Indonesia's import licensing regime for animals and animal products as addressed in this submissions applies, *inter alia*, to all products specified in HS Codes 02.01, 02.02, 02.06 and 02.10.

<sup>30</sup> See above Section III.A.1.

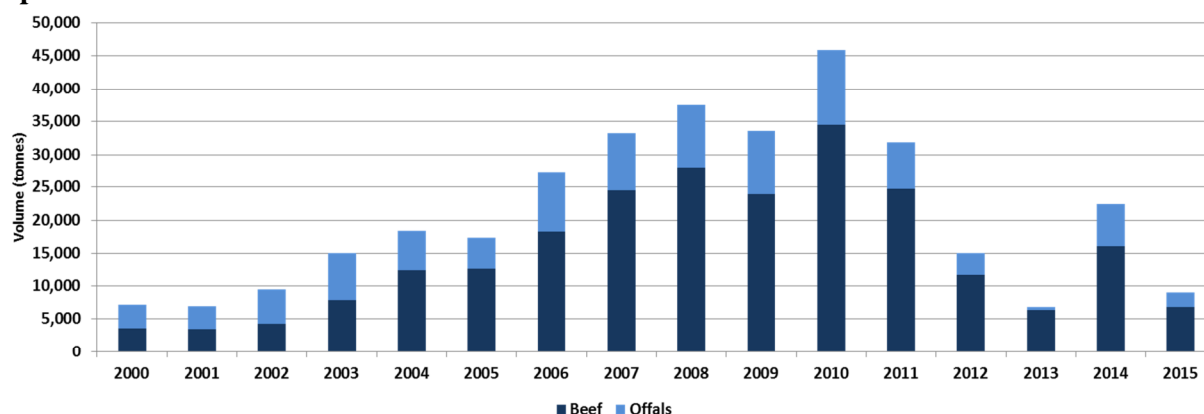
<sup>31</sup> Chapter II(c)(3), *Ministry of Agriculture Beef Self-Sufficiency Roadmap* (Exhibit NZL-3).

<sup>32</sup> For example, the Domestic Purchase Requirement, the requirement to obtain an Importer Designation, and the prohibitions and restrictions on the importation of bovine offals, certain forms of manufacturing meat, bovine carcass, and beef secondary cuts, apply only to imports of bovine products. See Section III.A.1 above.

<sup>33</sup> "Indonesia Import Statistics From all countries 2010-2015" *Global Trade Atlas* (Exhibit NZL-4).

meat and offal exports to Indonesia, which have fallen by over 80% since 2010 (as demonstrated in Figure 1).<sup>34</sup> Unfortunately, Indonesia's self-sufficiency objectives have not been achieved as the Indonesian restrictions have simply reduced the population of Indonesian cattle through encouraging premature slaughter<sup>35</sup> and increased prices of these products for Indonesian consumers and businesses through lack of total supply.<sup>36</sup>

**Figure 1: New Zealand exports of beef and beef offal to Indonesia 2000-2015, year ended September**



**Source: Meat Industry Association (Compiled by Meat Industry Association from Statistics New Zealand overseas merchandise trade data) (Exhibit NZL-12)**

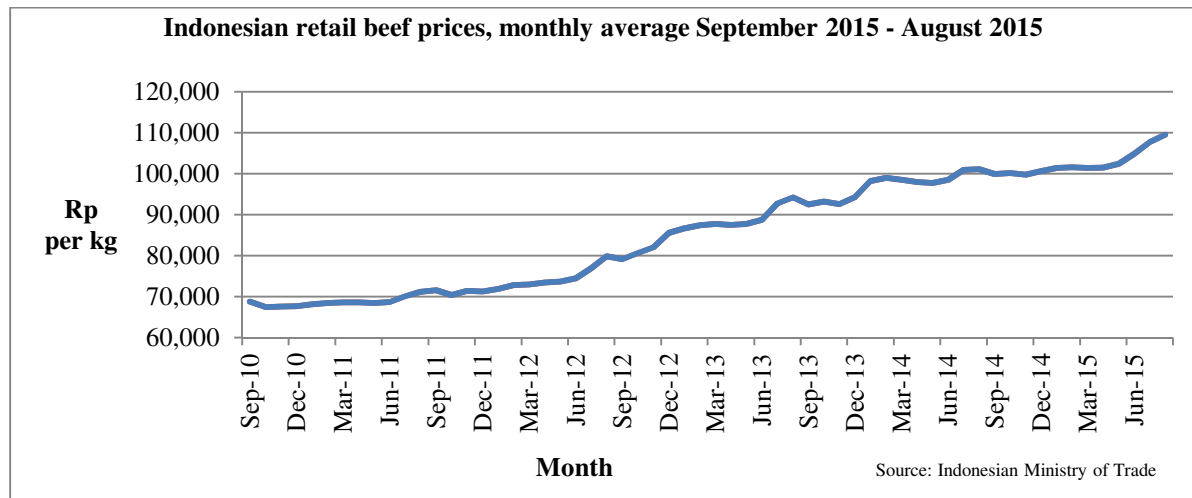
25. The effect of this substantial reduction in imports has been a severe reduction in beef supply within Indonesia and a corresponding increase in the Indonesian retail price of beef (as demonstrated in Figure 2).

<sup>34</sup> Meat Industry Association (New Zealand), Statement in relation to Indonesia's beef import restrictions, 11 November 2015 (Meat Industry Association Statement) (Exhibit NZL-12) and "Australia's beef export to Indonesia dropped by 31%" *Trobos*, 4 June 2014, [http://www.trobos.com/detail\\_berita.php?sid=6062&sir=55](http://www.trobos.com/detail_berita.php?sid=6062&sir=55) (Exhibit NZL-13).

<sup>35</sup> "Ill-Advised Beef Self-Sufficiency Policies Have Depleted Indonesia Cattle Population by 30 Percent, Business Group Says," *Jakarta Globe*, 13 August 2015, <http://jakartaglobe.beritasatu.com/business/ill-advised-beef-self-sufficiency-policies-depleted-indonesia-cattle-population-30-percent-business-group-says/> ("Ill-Advised Beef Self-Sufficiency Policies Have Depleted Indonesia Cattle Population by 30 Percent, Business Group Says" *Jakarta Globe*) (Exhibit NZL-14) and "Beef Self-Sufficiency Nowhere In Sight" *BMI Research*, 26 September 2013, <http://www.bmiresearch.com/news-and-views/beef-self-sufficiency-nowhere-in-sight#sthash.ByY2gSq7.dpuf> ("Beef Self-Sufficiency Nowhere In Sight" *BMI Research*) (Exhibit NZL-15).

<sup>36</sup> "Market Fundamentals Force Government's Hand in Beef Brouhaha" *Jakarta Globe*, 10 August 2015, <http://jakartaglobe.beritasatu.com/news/market-fundamentals-force-governments-hand-beef-brouhaha/> (Exhibit NZL-16); "Beef prices in Indonesia rising sharply as supply dwindles in the lead up to Ramadan" *ABC News*, 3 March 2015, <http://www.abc.net.au/news/2015-03-03/beef-prices-in-indonesia-rising-sharply-concerns-for-ramadan/6273314> (Exhibit NZL-17); "Rethinking Indonesia's beef self-sufficiency agenda" *Inside Indonesia*, Issue 114:Oct-Dec 2013 <http://www.insideindonesia.org/rethinking-indonesia-s-beef-self-sufficiency-agenda-2> (Exhibit NZL-18); and "Indonesia self-sufficiency push will drive up beef prices - industry" *Reuters*, 4 March 2015, <http://www.reuters.com/article/2015/03/04/indonesia-beef-idUSL4N0W533G20150304> (Exhibit NZL-19).

**Figure 2: Indonesian retail beef prices, monthly average September 2010 - August 2015**



Source: Indonesian Ministry of Trade Data, accessed at <http://www.kemendag.go.id/en/economic-profile/prices/national-price-table>, accessed 18 September 2015 (Exhibit NZL-20)

26. In order to import bovine meat, offal and carcass products into Indonesia,<sup>37</sup> an importer is required to obtain the following registrations and approvals:

- a. an "RI-Animal and Animal Product" designation from the Ministry of Trade in accordance with the criteria set out in *MOT 46/2013* (Importer Designation);<sup>38</sup>
- b. an Import Recommendation from the Ministry of Agriculture, in accordance with the criteria set out in *MOA 139/2014* (MOA Recommendation);<sup>39</sup> and
- c. an Import Approval from the Ministry of Trade in accordance with the criteria set out in *MOT 46/2013* (Import Approval).<sup>40</sup>

27. Importer Designations, MOA Recommendations and Import Approvals underpin the import licensing regime for animals and animal products challenged by New Zealand in this dispute. 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. Each of these documents is summarised below, and an overview of the application process for such approvals is included in Annex 1 of this submission.

<sup>37</sup> This includes the products listed in Appendix I, *MOT 46/2013* (Exhibit JE-18). Note that *MOA 139/2014* (Exhibit JE-26) applies only to "carcass, meat and derivate products" and does not specify the process for obtaining an MOA Recommendation for other animals and animal products.

<sup>38</sup> Article 4 and 5, *MOT 46/2013* (Exhibit JE-18).

<sup>39</sup> Article 10, *MOT 46/2013* (Exhibit JE-18).

<sup>40</sup> Articles 8 and 9, *MOT 46/2013* (Exhibit JE-18). In order to obtain an Import Approval for carcass, meat, offal and/or their processed products, a MOA Recommendation must be obtained from the Ministry of Agriculture in accordance with *MOA 139/2014* (Exhibit JE-26).

### **(a) Importer Designations**

28. In order to obtain an Importer Designation, an importer of bovine animal products must submit an application to the Indonesian Ministry of Trade.<sup>41</sup> This application includes various pieces of information about the importer<sup>42</sup> and, in the case of bovine meat and offal, proof of ownership of cold storage facility and refrigerated transportation for Animal Products.<sup>43</sup> An Importer Designation is valid for two years from the date of issue.<sup>44</sup>

29. It is possible for an Importer Designation to be suspended or revoked prior to expiry if the holder does not comply with the provisions of *MOA 139/2014* or *MOT 46/2013*.<sup>45</sup> If revoked, an importer is unable to reapply for an Importer Designation for a period of two years.<sup>46</sup>

### **(b) MOA Recommendations**

30. As a pre-requisite to obtaining an Import Approval for animal meat, offal, and carcass importers must obtain an "MOA Recommendation" from the Ministry of Agriculture.<sup>47</sup> In order to obtain an MOA Recommendation for a product, the relevant product must be listed in Appendix I of *MOA 139/2014* (in the case of bovine meat, offal and carcass) or Appendix II of *MOA 139/2014* (in the case of non-bovine meat, offal and carcass).<sup>48</sup> A number of bovine products are not listed in Appendix I of *MOA 139/2014* and are therefore prohibited from importation into Indonesia.<sup>49</sup>

31. In its application for an MOA Recommendation<sup>50</sup> an importer must provide evidence of at least 13 documents or registrations.<sup>51</sup> These include:

<sup>41</sup> Article 5(1), *MOT 46/2013* (Exhibit JE-18).

<sup>42</sup> This information includes: A certificate of business establishment, trading licence, company registration card and tax identification number. Article 5(1), *MOT 46/2013* (Exhibit JE-18).

<sup>43</sup> Article 5(1)(f), *MOT 46/2013* (Exhibit JE-18).

<sup>44</sup> Article 6, *MOT 46/2013* (Exhibit JE-18).

<sup>45</sup> Article 39, *MOA 139/2014* (Exhibit JE-26) and Articles 26 and 27, *MOT 46/2013* (Exhibit JE-18).

<sup>46</sup> Article 29, *MOT 46/2013* (Exhibit JE-18).

<sup>47</sup> Article 10, *MOT 46/2013* (Exhibit JE-18). See FORMAT-1, *MOA 139/2014* (Exhibit JE-26), which illustrates the terms of a MOA Recommendation.

<sup>48</sup> Article 2(2), *MOT 46/2013* (Exhibit JE-18) states that "The types of Animals and Animal Products that can be imported are included in Appendix I and Appendix II". Similarly Article 8, *MOA 139/2014* (Exhibit JE-26) states that the products "that can be imported" are those listed in Appendix I and Appendix II. Appendix I, *MOA 139/2014* is entitled "Bovine meat that can be imported into the territory of the Republic of Indonesia".

<sup>49</sup> See Subsection 3(a) below.

<sup>50</sup> Different MOA Recommendation application requirements apply for "Social Institution" or "Foreign Institution Representative" Articles 24(2) and (3), *MOA 139/2014* (Exhibit JE-26).

<sup>51</sup> Article 24, *MOA 139/2014* (Exhibit JE-26). An MOA Recommendation application submitted by a business operator, state-owned enterprise, or regional government-owned enterprise must include the following information and documentation: (a) identity card and/or identification as the head of the company; (b) tax identification number; (c) trade business licence; (d) registration certificate or business licence in the field of livestock and animal health; (e) a certificate of incorporation, with its most recent amendments; (f) veterinary control number; (g) confirmation as a RI of animal products; (h) a stamped letter attesting to ownership of cold storage and cold transportation facilities complete with supporting proof/documents; (i) a recommendation from



- a. evidence of the importer's Importer Designation;
- b. an importation realization report from the previous period;<sup>52</sup> and
- c. evidence from a provincial agency and/or regency/municipality that a sufficient quantity of beef ("large ruminant meat") derived from cattle raised and slaughtered in Indonesia has been purchased by the importer to satisfy the Domestic Purchase Requirement.<sup>53</sup>

32. MOA Recommendations are only issued four times per year, and may only be applied for during four limited application windows of less than one month.<sup>54</sup>

### (c) Import Approvals

33. Each time an importer wishes to import animals or animal products, it must obtain an Import Approval specifying the products which are to be imported.<sup>55</sup> This requirement applies to both imports of bovine animals and animal products<sup>56</sup> as well as imports of other animals and animal products.<sup>57</sup> In order to obtain an Import Approval for an animal or animal product, the relevant product must be listed in Appendix I of *MOT 46/2013* (in the case of bovine animals or animal products) or Appendix II of *MOT 46/2013* (in the case of non-bovine animals or animal products).<sup>58</sup>

34. In order to obtain an Import Approval for bovine animals and animal products, an importer must electronically submit an application accompanied by evidence of the appropriate MOA Recommendation and the importer's Importer Designation as described above.<sup>59</sup>

35. Import Approvals are only issued four times per year, and specify information including the quantity and type of products that are permitted to be imported, the country of origin of such products and the port of entry through which the products must be imported.<sup>60</sup>

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a provincial Agency; (j) a letter of appointment or work contract from the company head showing employment of a competent veterinarian; (k) import realisation report from the previous period; (l) for beef meat importers, proof of local beef absorption verified by the provincial agency and/or regency/municipality from which the local beef originates; and (m) a stamped letter attesting to the accuracy and validity of all documents submitted.

<sup>52</sup> This is one of the mechanisms by which the 80% Realisation Requirement described in Subsection 3(d) below is enforced.

<sup>53</sup> This is the mechanism by which the Domestic Purchase Requirement described in Subsection 3(f) below is enforced. See also Article 5, *MOA 139/2014* (Exhibit JE-26).

<sup>54</sup> Articles 23 and 29, *MOA 139/2014* (Exhibit JE-26).

<sup>55</sup> Articles 8(1) and 9(1), *MOT 46/2013* (Exhibit JE-18).

<sup>56</sup> Article 8, *MOT 46/2013* (Exhibit JE-18). Bovine products are those listed in Appendix I.

<sup>57</sup> Article 9, *MOT 46/2013* (Exhibit JE-18). Non-bovine animal products are those listed in Appendix II.

<sup>58</sup> Products that are not listed in Appendix I or Appendix II, *MOT 46/2013* (Exhibit JE-18) are ineligible to obtain an Import Approval and therefore prohibited from importation into Indonesia.

<sup>59</sup> Articles 10, 11(1)(a) and 11(1)(b), *MOT 46/2013* (Exhibit JE-18). In order to import non-bovine animals and animal products, an importer must obtain a Recommendation in accordance with Article 11(2), *MOT 46/2013* (Exhibit JE-18).

<sup>60</sup> Example of Import Approval (*Persetujuan Impor*) issued by the Indonesian Ministry of Trade (importer information redacted for confidentiality purposes) (Beef Import Approval Example) (Exhibit NZL-21).

Once granted, Import Approvals are only valid for the three month period immediately following issuance (a Quarter).<sup>61</sup>

***3. Prohibitions and restrictions imposed through Indonesia's import licensing regime for animals and animal products***

36. Importer Designations, MOA Recommendations and Import Approvals are the mechanism through which Indonesia imposes a number of prohibitions and restrictions on the importation of animals and animal products. In this section, New Zealand describes these prohibitions and restrictions as background for New Zealand's legal submission that these components of Indonesia's import licensing regime, both when viewed as distinct individual measures and as elements of a single overarching measure, are inconsistent with Indonesia's WTO obligations.

- a. Prohibitions of certain beef and offal imports: Indonesia prohibits the importation of bovine meat and offal products that are not listed in Appendix I, *MOA 139/2014* and Appendix II, *MOT 46/2013* including all bovine offal products (except some cuts of tongue and tail), certain forms of manufacturing meat and, except in certain exceptional circumstances, all bovine secondary cuts and carcass;
- b. Limited application windows and validity periods: MOA Recommendations and Import Approvals are valid for limited time periods, and may only be applied for during limited application windows;
- c. Fixed Licence Terms: MOA Recommendations and Import Approvals 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 Quarter, products of a different type, in a greater quantity, from another country, or through a different port than those specified in their MOA Recommendations and Import Approvals;
- d. 80% realisation requirement: Importers are required to import, on an annual basis, 80% of the quantity of each type of product specified in their Import Approvals;
- e. Restrictions on use, sale and distribution of imported bovine meat and offal: Bovine meat, carcass and offal is only permitted to be imported for use in hotels, restaurants, catering and industry and for a very limited range of other "special needs". Such products are therefore prohibited from being imported for certain uses and for sale through certain channels (including sale directly to consumers at modern and traditional markets, which are the primary consumer retail channels for bovine products in Indonesia);
- f. Domestic Purchase Requirement: Importation of bovine meat is only permitted on the condition that importing entities have purchased ("absorbed") designated quantities of beef raised and slaughtered in Indonesia; and

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<sup>61</sup> Articles 12(1) and 12(3), *MOT 46/2013* (Exhibit JE-18).

- g. Beef reference price: Importation of bovine animals and animal products is prohibited when the domestic market price of beef secondary falls below a specified reference price.

37. These measures are key components of the licensing regime for animals and animal products, and are explained in further detail in the following Subsections. Non-compliance with these requirements can result in severe sanctions, including the revocation of an importer's Importer Designation for at least two years.<sup>62</sup>

**(a) Prohibition of certain beef and offal imports**

38. *MOA 139/2014* and *MOT 46/2013* collectively prescribe a "positive list" of the bovine meat, offal and carcass products that are permitted to be imported into Indonesia.<sup>63</sup> Only those products listed in the relevant appendices to *both MOA 139/2014* and *MOT 46/2013* are eligible to obtain MOA Recommendations and Import Approvals.<sup>64</sup> A number of bovine products are not listed in these appendices and are accordingly prohibited from importation into Indonesia.<sup>65</sup> The specific products prohibited from importation into Indonesia are described further in this Subsection.

39. This positive list reflects Indonesia's stated policy of prohibiting the importation of bovine offal and "secondary cuts".<sup>66</sup> These bovine products are described in detail below:

<sup>62</sup> Article 39, *MOA 139/2014* (Exhibit JE-26) and Articles 26, 27 and 29, *MOT 46/2013* (Exhibit JE-18).

<sup>63</sup> Article 2(2), *MOT 46/2013* (Exhibit JE-18) states that "The types of Animals and Animal Products that can be imported are included in Appendix I and Appendix II". Similarly Article 8, *MOA 139/2014* (Exhibit JE-26) states that the products "that can be imported" are those listed in Appendix I and Appendix II. Appendix I, *MOA 139/2014* is entitled "Bovine meat that can be imported into the territory of the Republic of Indonesia".

<sup>64</sup> Any bovine animal products not listed in Appendix I, *MOA 139/2014* (Exhibit JE-26) are ineligible to obtain an MOA Recommendation and are therefore prohibited from importation into Indonesia.

<sup>65</sup> Article 26, *MOA 139/2014* (Exhibit JE-26) provides that an application for an MOA Recommendation will be rejected if it does not meet certain requirements, including the requirement in Article 8 that the products specified in the application be listed in Appendix I or Appendix II of the Regulation. Compare Appendix I, *MOA 139/2014*, which lists only "prime cuts", certain forms of manufacturing meat and tongue and tail, with Appendix I, *Regulation of the Minister of Agriculture Number 84/Permentan/PD.410/8/2013 Concerning Importation of Carcass, Meat, Offal and/or their Derivatives into the Territory of the Republic of Indonesia*, Aug. 30, 2013 (*MOA 84/2013*) (Exhibit JE-25), which includes a number of "secondary cuts" in addition to "prime cuts". A summary of the bovine secondary cuts, offal, and carcass that are unlisted in Appendix I, *MOA 139/2014* is set out in: List of bovine meat and offal products and their eligibility for importation into Indonesia (Exhibit NZL-22).

<sup>66</sup> "Achieving self-sufficiency, government keep importing live cattle" *Lensa Indonesia*, 31 March 2015, <http://www.lensaIndonesia.com/2015/03/31/swasembada-daging-pemerintah-terus-impor-sapi-bakalan.html> ("Achieving self-sufficiency, government keep importing live cattle" *Lensa Indonesia*) (Exhibit NZL-23). See also: "Indonesia imposes significant bans on beef, offal imports" *Beef Central*, 14 January 2015, <http://www.beefcentral.com/trade/export/indonesia-imposes-significant-bans-on-beef-offal-imports/> (Exhibit NZL-24) and "Australian Beef Intestines Are Off the Menu With Indonesian Ban" *Bloomberg Business*, 4 March 2015, <http://www.bloomberg.com/news/articles/2015-03-03/aussie-beef-lung-off-the-menu-with-indonesia-ban-southeast-asia> (Exhibit NZL-25). Specific definitions of the terms used by Indonesia to describe various beef and offal (including secondary cuts, offal, prime cuts etc.) are set out in Annex 2.

### *Offal Products*

40. All bovine offal products,<sup>67</sup> with the exception of certain cuts of tongue and tail, are ineligible to obtain an MOA Recommendation and are therefore prohibited from importation into Indonesia.<sup>68</sup> A list of the bovine offal products prohibited from importation into Indonesia is set out in Exhibit NZL-22, and includes, *inter alia*, heart, liver, lungs, lips, head meat, kidneys and tripe.<sup>69</sup>

### *Certain forms of manufacturing meat*

41. Certain varieties of bovine manufacturing meat are not listed in Appendix I of *MOA 139/2014* and are therefore prohibited from importation into Indonesia.<sup>70</sup> Manufacturing meat comprises all edible bovine meat products other than prime cuts, secondary cuts, offal and carcass (and includes, for example, beef trimmings).<sup>71</sup>

### *Bovine Carcass*

42. Bovine carcasses (being all products listed under HS Codes 020110 and 020210) are not listed in Appendix I of *MOA 139/2014*.<sup>72</sup> Accordingly, all bovine carcasses are prohibited from importation except in the exceptional emergency circumstances described below.

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<sup>67</sup> In this submission, references made to "bovine offal" or "offal" include all products included in the following HS Codes: 020610 (Offal Of Bovine Animals, Edible, Fresh Or Chilled), 020621 (Tongues Of Bovine Animals, Edible, Frozen), 020622 (Livers Of Bovine Animals, Edible, Frozen) and 020629 (Offal Of Bovine Animals, Edible, Nesoi, Frozen). In some regulations, Indonesia also uses the terms "variety meat" and "fancy meat" to refer to certain forms of bovine offal (including, for example, tongue, tail and lips). See for instance, Appendix I, *MOA 84/2013* (Exhibit JE-25), which classifies these products as "Fancy and variety boneless meat". A list of the bovine offal products (including those products referred to as "variety" or "fancy" cuts) which New Zealand submits are prohibited from importation is set out in: List of bovine meat and offal products and their eligibility for importation into Indonesia (Exhibit NZL-22).

<sup>68</sup> Bovine tongue and tail are the only offal products specified in Appendix I, *MOA 139/2014* (Exhibit JE-26) and therefore the only offal products eligible to obtain an MOA Recommendation. See: List of bovine meat and offal products and their eligibility for importation into Indonesia (Exhibit NZL-22).

<sup>69</sup> List of bovine meat and offal products and their eligibility for importation into Indonesia (Exhibit NZL-22). New Zealand submits that any bovine products not listed in both *MOA 139/2014* (Exhibit JE-26) and *MOT 46/2013* (Exhibit JE-18) are prohibited from importation.

<sup>70</sup> Appendix I, *MOA 139/2014* (Exhibit JE-26) does not list the following products under the heading "manufacturing meat": trimmings with a "chemical lean" content of less than 65CL or greater than 95CL ("chemical lean" refers to the amount of lean red meat in proportion to fat in a sample), in addition to hindquarter meat (*Potongan bersih paha belakang campur*), hind quarter (*Potongan paha belakang campur*), forequarter meat (*Potongan bersih paha depan campur*), forequarter (*Potongan paha depan campur*), fore and hind meat (*Potongan paha depan dan paha belakang campur*), fore and hind (*Potongan bersih paha depan dan belakang campur*) and chuck meat (*Potongan daging sampiland*). Compare Appendix I, *MOA 84/2013* (Exhibit JE-25), which lists the additional manufacturing meat products described above, except trimmings of less than 65CL or greater than 95CL, with Appendix I, *MOA 139/2014* (Exhibit JE-26), which lists trimmings of 65-95CL, disnewed minced beef and diced/block beef as the only forms of manufacturing meat permitted for importation.

<sup>71</sup> Manufacturing meat is defined as: "A meat part other than prime cut meat, secondary meat, and variety/fancy meat, consisting of trimming that ranges from 65 CL up to 95 CL, minced meat, and diced meat for industrial purposes". Article 1(7), *MOA 139/2014* (Exhibit JE-26).

<sup>72</sup> HS Codes 020110 and 020210 cover fresh and chilled bovine carcass, and frozen bovine carcass, respectively.

### Beef Secondary Cuts

43. Indonesia categorises bovine meat cuts as either "prime" or "secondary". As explained, the only fresh and frozen beef products permitted for importation into Indonesia are those expressly listed in both Appendix I of *MOA 139/2014* and Appendix I of *MOT 46/2013*. Indonesia only permits imports of "prime cuts". "Secondary cuts" are prohibited from importation. Figure 3 illustrates the extent of this prohibition, as only those shaded sections of the carcass (classified by Indonesia as "prime cuts") are permitted for importation. A detailed breakdown of the prohibited secondary cuts is contained in Exhibit NZL-22.

**Figure 3: Indicative diagram of Beef Carcass Cuts**

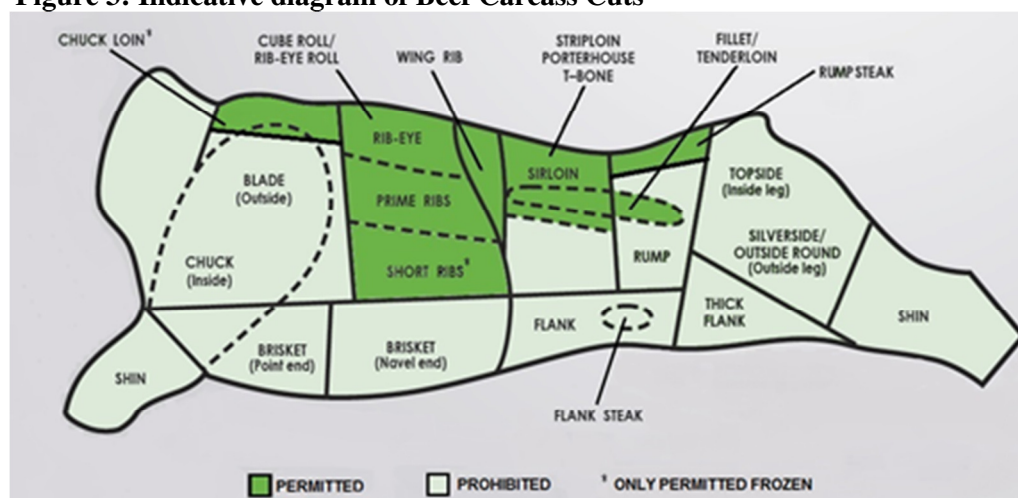


Diagram prepared based on cuts specified in Appendix I, *MOA 139/2014* (Exhibit JE-26). See also Exhibit NZL-22, which provides a list of the bovine carcass, meat and offal products prohibited from importation.

### Power to direct importation of bovine carcass and beef secondary cuts in emergency circumstances

44. In January 2015, the Indonesian Ministry of Agriculture promulgated *MOA 2/2015*, a regulation which amends *MOA 139/2014*.<sup>73</sup> *MOA 2/2015* provides that, in limited emergency circumstances where domestic supply is insufficient to meet domestic demand,<sup>74</sup> the

<sup>73</sup> Following the promulgation of *Regulation of the Minister of Agriculture Number 02/Permentan/PD.410/1/2015 Concerning Amendment to Regulation of the Minister of Agriculture Number 139/Permentan/PD.410/12/2014*, Jan. 22, 2015 (*MOA 2/2015*) (Exhibit JE-27), the Indonesian Ministry of Trade subsequently issued *Regulation of the Minister of Trade Number 41/M-DAG/PER/6/2015 Concerning Third Amendment to Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013*, June 10, 2015 (*MOT 41/2015*) (Exhibit JE-22). *MOT 41/2015* amended *MOT 46/2013* (Exhibit JE-18) to provide that the Indonesian Government can "assign SoEs to import Animals and animal products in order to ensure food security and price stability, as listed in Appendix I". Imports conducted in this way also require a MOA Recommendation from the Ministry of Agriculture and accordingly must satisfy the requirements of both *MOA 139/2014* (Exhibit JE-26) and *MOT 46/2013* (Exhibit JE-18) (see Article 18(2) of *MOT 46/2013* (Exhibit JE-18) and Article 18B of *MOT 41/2015* (Exhibit JE-22)).

<sup>74</sup> The [ ] has been reported as stating that imports of secondary cuts can be undertaken in exceptional circumstances, for example

Indonesian Government may direct State-Owned Enterprises to import bovine carcass and beef secondary cuts despite these products not being listed in Appendix I of *MOA 139/2014* (and therefore otherwise prohibited from importation).<sup>75</sup> Specifically, *MOA 2/2015* states:<sup>76</sup>

In order to address food availability and price volatility, and anticipate inflation and/or natural disasters, State-Owned Enterprises can be tasked by the Minister of State-Owned Enterprises to import carcasses and/or secondary cut meats.

45. This power applies only to bovine carcass and beef secondary cuts, and does not permit the importation of prohibited bovine offal or prohibited manufacturing meat.<sup>77</sup> These latter products are prohibited from importation in all circumstances.

**(b) Limited application windows and validity periods for MOA Recommendations and Import Approvals**

46. Indonesia limits the ability of importers to obtain MOA Recommendations and Import Approvals by prohibiting importers from applying for these documents outside four one-month periods, and specifying that Import Approvals are valid for only the three month duration of each Quarter.<sup>78</sup>

47. Furthermore, importers are only permitted to apply for MOA Recommendations and Import Approvals in the month immediately before the start of the relevant Quarter.<sup>79</sup> In practice, the period during which MOA Recommendations can be applied for is less than one month because (i) MOA Recommendations must be obtained before Import Approvals may be applied for;<sup>80</sup> and (ii) the application period for MOA Recommendations set by the Ministry of Agriculture is often shorter than one month.<sup>81</sup> For the January 2015 Quarter,

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natural disasters and so forth, stating "If this happens, then the government has the instruments for emergency matters. In addition we continue to rely on local supply". "Ministry of Trade: Imports cannot yet be done" *Agro Indonesia*, 24 February 2015, <http://agroindonesia.co.id/index.php/2015/02/24/kemendag-impor-belum-bisa-dilakukan/> (Exhibit NZL-26).

<sup>75</sup> Article 23(3), *MOA 139/2014* (Exhibit JE-26).

<sup>76</sup> Article 23, *MOA 139/2014*, as amended (Exhibit JE-28).

<sup>77</sup> Article 23(3), *MOA 139/2014* as amended (Exhibit JE-28) provides the ability for secondary cuts and carcass to be imported by State-Owned Enterprises when certain emergency conditions are met, but does not refer to offal or manufacturing meat of less than 65 CL.

<sup>78</sup> Articles 12(1) and 12(3), *MOT 46/2013* (Exhibit JE-18).

<sup>79</sup> Article 12(1), *MOT 46/2013* (Exhibit JE-18); and Articles 23(1) and 29, *MOA 139/2014* (Exhibit JE-26). Import Approvals for the January Quarter can only be applied for in December, MOA Recommendations and Import Approvals for the April Quarter can only be applied for in March, MOA Recommendations and Import Approvals for the July Quarter can only be applied for in June, and MOA Recommendations and Import Approvals for the October Quarter can only be applied for in September. A limited exception to this is set out in Article 23(2), *MOA 139/2014* (Exhibit JE-26), which provides that applications for MOA Recommendations may be made at any time by "Social Institutions" and "Foreign Representatives".

<sup>80</sup> Article 11(1)(b), *MOT 46/2013* (Exhibit JE-18).

<sup>81</sup> For the Fourth Quarter in 2015 (October - December), applications for MOA Recommendations were only permitted to be made during the period 1 - 10 September 2015. (Directorate General of Livestock and Animal Health, MOA Recommendation Login Page: Sistem Informasi Rekomendasi Perijinan (SIMREK), <http://ditjennak.pertanian.go.id/upr> (SIMREK MOA Application Login Page) (Exhibit NZL-27)).

applications for MOA Recommendations were only able to be applied for during 29 - 31 December 2014, meaning Import Approvals could not be obtained until January 2015.<sup>82</sup>

48. Import Approvals are then not issued until the commencement of each Quarter,<sup>83</sup> and imports cannot be shipped until an Import Approval has been granted.<sup>84</sup> Upon being issued, an Import Approval is valid only for the three month Quarter immediately following its issuance.<sup>85</sup> Accordingly, products are prohibited from being imported into Indonesia after the end of the Quarter to which the relevant Import Approval relates.

### (c) Fixed Licence Terms

49. Once granted, MOA Recommendations and Import Approvals include a number of terms which are "locked in" at the commencement of each Quarter. Collectively, MOA Recommendations and Import Approvals specify, *inter alia*, the following:

- the quantity of products permitted to be imported;<sup>86</sup>
- a description of the type, category, cut and HS Code for the products to be imported;<sup>87</sup>
- the country of origin of products permitted for importation;<sup>88</sup> and
- the port of entry into Indonesia through which products are permitted to be imported.<sup>89</sup>

These terms are referred to in this submission as the "Fixed Licence Terms".

50. Once MOA Recommendations and Import Approvals are issued, the Fixed Licence Terms cannot be changed and importers are unable to import products other than in

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<sup>82</sup> Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) announcing the closure of the application window for import recommendations, 9 December 2014 (Exhibit NZL-28) and Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) announcing the opening of the online application system for import recommendations from December 29-31, 29 December 2014 (Exhibit NZL-29). See also: "Rumour of beef import quota arisen, importers are restless" *Detik*, 22 December 2014, <http://finance.detik.com/read/2014/12/22/131849/2784231/4/ada-isu-kuota-impor-daging-sapi-beku-dibatasi-importir-resah> ("Rumour of beef import quota arisen, importers are restless" *Detik*) (Exhibit NZL-30).

<sup>83</sup> Article 12(2), *MOT 46/2013* (Exhibit JE-18) states that "Import Approval is issued at the beginning of each quarter".

<sup>84</sup> Article 15, *MOT 46/2013*. Import Approvals state that the number and date of the Import Approval must be specified on the health certificate issued by the exporting country. Accordingly, product cannot be exported until the Import Approval is issued, order finalised and health certificate issued in the exporting country (Beef Import Approval Example, para. 1 (Exhibit NZL-21)).

<sup>85</sup> Article 12, *MOT 46/2013* (Exhibit JE-18). An importer may apply for an extension to the validity period of an Import Approval of up to 30 days, provided that the date of the bill of lading in the country of origin is before the original expiry date of the Import Approval. The granting of any such extension is at the discretion of the Minister of Trade. However, there is no ability for an importer to extend the validity period of an Import Approval granted for the final Quarter of each year. See Article 12A(4), *MOT 46/2013, as amended* (Exhibit JE-21).

<sup>86</sup> Article 28, *MOA 139/2014* (Exhibit JE-26) and Beef Import Approval Example (Exhibit NZL-21).

<sup>87</sup> Article 30(f), *MOA 139/2014* (Exhibit JE-26) and Beef Import Approval Example (Exhibit NZL-21).

<sup>88</sup> Article 30(d) *MOA 139/2014* (Exhibit JE-26) and Beef Import Approval Example (Exhibit NZL-21).

<sup>89</sup> Article 30(h), *MOA 139/2014* (Exhibit JE-26) and Beef Import Approval Example (Exhibit NZL-21).

accordance with the Import Approval during the relevant Quarter.<sup>90</sup> In particular, *MOA 139/2014* expressly prohibits changes to the following terms of an MOA Recommendation:<sup>91</sup>

- the country of origin to which an MOA Recommendation relates;
- the type of carcass or meat product described in the MOA Recommendation; and
- the port of entry into Indonesia.

51. Furthermore, *MOT 46/2013* provides that any imported products which do not comply with the Fixed Licence Terms specified in the relevant Import Approval will be re-exported on arrival at the importer's expense.<sup>92</sup>

#### **(d) 80% realisation requirement**

52. Upon being granted an Import Approval for bovine animals or animal products, an importer must import no less than 80% (and no more than 100%) of the quantity of each of the products specified in the Import Approval.<sup>93</sup> *MOT 46/2013* provides that the requirement to import at least 80% of the quantity specified in an Import Approval is based on accumulated imports over a one year period.<sup>94</sup>

53. Compliance with the 80% realisation requirement is monitored and enforced by the Ministry of Agriculture and the Ministry of Trade using mechanisms in both MOA Recommendations and Import Approvals. In particular, importers are required to undertake the following steps to demonstrate compliance with the 80% realisation requirement:

- submit a monthly report detailing actual imports of products (along with evidence of such imports certified by a Customs and Excise Official) to the Ministry of Trade through the INATRADE website;<sup>95</sup> and
- submit a report detailing actual imports of products in each Quarter to the Ministry of Agriculture when applying for an MOA Recommendation.<sup>96</sup>

54. The 80% realisation requirement applies only to bovine animals and animal products, and not to other meat products.<sup>97</sup> This difference in treatment between bovine products and

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<sup>90</sup> Articles 30(2) and 30(3), *MOT 46/2013* (Exhibit JE-18) stating that any imports "whose quantity, type, business unit, and/or country of origin is not accordance with their Import Approval and/or not in accordance with the provisions in this Ministerial Regulation will be re-exported".

<sup>91</sup> Article 33(a)-(b), *MOA 139/2014* (Exhibit JE-26).

<sup>92</sup> Article 30(2) and 30(3), *MOT 46/2013* (Exhibit JE-18).

<sup>93</sup> Article 13, *MOT 46/2013* (Exhibit JE-18).

<sup>94</sup> Article 13, *MOT 46/2013* (Exhibit JE-18).

<sup>95</sup> Article 25, *MOT 46/2013*, (Exhibit JE-18). See also: Appendix IV, *MOT 46/2013*, (Exhibit JE-18) which shows the realisation report that importers are required to file to demonstrate compliance with the 80% realisation requirement.

<sup>96</sup> Article 33(d), *MOA 139/2014* (Exhibit JE-26).

<sup>97</sup> Article 13, *MOT 46/2013* (Exhibit JE-18).



other products is consistent with Indonesia's stated intention to achieve 90 percent self-sufficiency in beef.<sup>98</sup>

**(e) Prohibitions and restrictions on the use, sale and distribution of imported animals and animal products**

55. Indonesia prohibits the importation of animals and animal products for particular uses, and for sale and distribution through certain outlets. Specifically, bovine meat, permitted offal (i.e. tongue and tail) and carcass may only be imported into Indonesia for use by "industry, hotels, restaurant, catering, and/or other special needs", and may only be distributed or sold through these same channels.<sup>99</sup> Accordingly, these products are prohibited from being imported for sale through both modern and traditional retail channels.

56. In Indonesia, food can be purchased by consumers in "modern markets" (including hypermarkets, supermarkets and convenience stores) or traditional retail outlets (including *pasars* (traditional wet markets), *warungs* (small shops, often stalls), and *kaki limas* (street carts)).<sup>100</sup> Thus, even the limited imported bovine products, carcass, meat and offal (i.e. tongue and tail) that can enter Indonesia is not permitted to be sold in any of these outlets.

57. Traditional retail outlets make up a substantial proportion of food sales within Indonesia, and according to a 2011 report *warungs* and *pasars* still "dominate the retail landscape within Indonesia".<sup>101</sup> Modern markets also represent a significant and growing

<sup>98</sup> See Annex A, Chapter II (C)(3), *Ministry of Agriculture Beef Self-Sufficiency Roadmap* (Exhibit NZL-3) which provides "To achieve the target of decline of imports of feeder cattle and beef to only meet 10% of the community's consumption". See also: "Self-sufficiency in target despite budget cut" *The Jakarta Post*, 4 June 2015, <http://www.thejakartapost.com/news/2013/06/04/self-sufficiency-target-despite-budget-cut.html> ("Self-sufficiency in target despite budget cut" *The Jakarta Post*) (Exhibit NZL-31); and "Jokowi pledges to achieve self-sufficiency in meat," *The Jakarta Post*, 8 December 2014, ("Jokowi pledges to achieve self-sufficiency in meat" *The Jakarta Post*) <http://www.thejakartapost.com/news/2014/12/08/jokowi-pledges-achieve-self-sufficiency-meat.html> (Exhibit NZL-32).

<sup>99</sup> Article 17, *MOT 46/2013* (Exhibit JE-18); Article 32, *MOA 139/2014* (Exhibit JE-26). The term "special needs" is not defined in *MOT 46/2013*. However, the term "special needs" is defined narrowly in *MOA 139/2014* as including only "Gift or donation for religious purposes, social or natural disaster, Embassy/foreign mission consumption, Scientific research and development and Sample for exhibitions (not traded) less than 200 kg".

<sup>100</sup> "Indonesia's Modern Retail Sector: Interaction with Changing Food Consumption and Trade Patterns" *United States Department of Agriculture*, June 2012 (USDA Modern Retail Study), p. 10 (Exhibit NZL-33).

<sup>101</sup> Rohit Razdan et al., "The Evolving Indonesian Consumer" *McKinsey & Company, Asia Consumer Insights Center*, November 2013, p.16 (The Evolving Indonesian Consumer) (Exhibit NZL-34) states "traditional retail channels, including mom-and-pop stores (*warungs*) and wet markets, still dominate the retail landscape in Indonesia"; Arief Budiman et al, "The New Indonesian Consumer" *McKinsey & Company*, December 2012, p. 11 (Exhibit NZL-35) states that, as at 2011, "retail sales through traditional channels, including mom-and-pop and wet markets, account for an estimated 70 percent of the market" and that, "[f]or general food and beverage...the traditional channel remains important, with only about half of consumers preferring modern retail". See also: Suryadarma, D "Competition between traditional food traders and supermarkets in Indonesia" (paper presented to the Crawford Fund for international Agricultural Research Conference on The Supermarket Revolution in Food: Good, bad or ugly for the world's farmers, consumers and retailers) Canberra, August 2011, p. 51 (Exhibit NZL-36). This paper estimates that, as at 2006, traditional markets made up 50% of the total Indonesian food market.

share of retail food sales in Indonesia,<sup>102</sup> with estimates of their market share for food sales placed at between 11%<sup>103</sup> and 30%.<sup>104</sup>

58. Given the significant size of the traditional retail and modern market sectors, prohibiting the importation of bovine animal products other than for use in industry, hotel, catering and other narrow "special needs" (and thereby excluding sale through, *inter alia*, traditional retail channels and modern markets) constitutes a severe constraint on the ability to import these products into Indonesia.

**(f) Domestic purchase requirement**

59. Before being issued with an MOA Recommendation, an importer must demonstrate that it has purchase ("absorbed") a sufficient quantity of beef that has been raised and slaughtered in Indonesia.<sup>105</sup> This requirement is specified in Article 5 of *MOA 139/2014*, which provides:

- (1) Business Operators, State-Owned Enterprises, or Regional Government-Owned Enterprises, as described in Article 4, that import large ruminant meats must absorb local beef from slaughter houses that have a Veterinary Control Number.
- (2) The absorption of local beef, as described in paragraph (1), must be verified by the Provincial and/or Regency/Municipal Agency from which the local beef originates.

60. Article 5 of *MOA 139/2014* requires that all persons wishing to import beef ("large ruminant meat") must, as a condition of importation, purchase a specified quantity of beef that has been raised and slaughtered in Indonesia (the Domestic Purchase Requirement). Compliance with this requirement must be demonstrated in order to obtain an MOA Recommendation, which is in turn required in order to obtain an Import Approval.<sup>106</sup>

61. The quantity of Indonesian raised and slaughtered beef which must be purchased in order to obtain an MOA Recommendation is determined on a quarterly basis by the Indonesian Technical Ministries (Ministry of Agriculture and Ministry of Trade) together with the "Coordinating Ministry of Economy".<sup>107</sup> For the Quarter commencing July 2015, the quantity of Indonesian beef required to be purchased by importers was set as follows:<sup>108</sup>

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<sup>102</sup> The Evolving Indonesian Consumer, p. 10 (Exhibit NZL-34).

<sup>103</sup> USDA Modern Retail Study, p. 11 and 12 (Exhibit NZL-33).

<sup>104</sup> Suryadarma, D et. al. "Impact of Supermarkets on Traditional Markets and retailers in Indonesia's Urban Centers" *SMERU Research Institute*, August 2007, p. 10 (Exhibit NZL-37).

<sup>105</sup> Article 5, *MOA 139/2014* (Exhibit JE-26); Indonesian Ministry of Agriculture - Directorate General of Livestock and Animal Health Services, "Evaluation on Local Beef Absorption as Requirement to the Request of technical Recommendation for Q4 Beef Importation in 2015 according to MOA 139/2014" presentation dated 25 August 2015 (Ministry of Agriculture Absorption Presentation), slide 4 (Exhibit NZL-38).

<sup>106</sup> Ministry of Agriculture Absorption Presentation, slides 3 and 4 (Exhibit NZL-38).

<sup>107</sup> Ibid. slide 4 (Exhibit NZL-38).

<sup>108</sup> Ibid. slide 4 (Exhibit NZL-38).

- an importer of beef (other than beef imported for input into a manufacturing process) must demonstrate that at least 3% of its total beef purchases (in tonnes) are from cattle raised and slaughtered in Indonesia; and
- an importer of beef for manufacturing purposes must demonstrate that at least 1.5% of its total beef purchases (in tonnes) are from cattle raised and slaughtered in Indonesia.

**(g) Reference price for beef**

62. Indonesia imposes a reference price system for bovine animals and animal products. *MOT 46/2013* provides that imports of bovine animals and animal products are suspended if the market price of beef secondary cuts in Indonesia falls below a specified "reference price".<sup>109</sup> The reference price for secondary cuts set out in the *MOT 46/2013* is 76,000 Rp per kilogram,<sup>110</sup> however this may be changed at any time by the Minister of Trade upon receiving advice from the Beef Price Monitoring Team.<sup>111</sup>

63. The effect of the beef reference price is to prohibit the importation of bovine animal and animal products at times when the domestic price of beef secondary cuts falls below a certain level. This protects domestic beef producers from competition from imported beef, and accordingly keeps the market price of beef artificially high.

**4. Conclusion**

64. The architecture of Indonesia's import licensing regime for animals and animal products has been constructed in a way which enables Indonesia to directly control and restrict imports of animals and animal products. For bovine products, the regime furthers the Indonesian Government's objective of achieving self-sufficiency in beef production.<sup>112</sup>

65. The essential objective of prohibiting imports when domestic supply is deemed sufficient to meet domestic demand, as set out in key Indonesian legislation, provides the foundation for a complex import licensing regime which is designed with the principal objective of restricting imports and substituting imported products with domestically equivalents.<sup>113</sup> As detailed above, each aspect of Indonesia's import licensing regime for animals and animal products has been designed with this self-sufficiency objective in mind, and all components of the regime operate together to limit imports.

66. While Indonesia's import licensing regime has been successful in restricting imports of beef, it has not been successful in furthering Indonesia's objective of achieving self-

<sup>109</sup> Article 14(1), *MOT 46/2013* (Exhibit JE-18). Note that the products specified in Appendix I, *MOT 46/2013* are all bovine animals and animal products.

<sup>110</sup> Article 14(2), *MOT 46/2013* (Exhibit JE-18).

<sup>111</sup> Article 14(3) and 14(4), *MOT 46/2013* (Exhibit JE-18).

<sup>112</sup> Annex A, Chapter II (C)(3), *Ministry of Agriculture Beef Self-Sufficiency Roadmap* (Exhibit NZL-3) which provides "To achieve the target of decline of imports of feeder cattle and beef to only meet 10% of the community's consumption". See also: "Self-sufficiency in target despite budget cut" *The Jakarta Post* (Exhibit NZL-31) and "Jokowi pledges to achieve self-sufficiency in meat" *The Jakarta Post* (Exhibit NZL-32).

<sup>113</sup> See Sections I and III.A.1 above.

sufficiency by promoting increased domestic production to compensate for reduced imports. Instead, BMI Research considers that Indonesia's goal of achieving self-sufficiency in beef production remains "overly optimistic".<sup>114</sup> Furthermore, these policies have in fact undermined Indonesia's self-sufficiency goals as they have incentivised excessive slaughter of domestic cattle<sup>115</sup> and caused substantial increases in the retail price of beef.<sup>116</sup>

## **B. IMPORT REGIME FOR HORTICULTURAL PRODUCTS**

### ***1. Framework legislation for horticultural products***

67. In 2010, Indonesia enacted *Law of the Republic of Indonesia Number 13 of 2010 Concerning Horticulture (Horticulture Law)*.<sup>117</sup> The law provides for the management and development of horticulture in Indonesia. Article 88 of the *Horticulture Law* provides that import of horticultural products must observe the "availability of domestic horticultural products" and the goal of "established production and consumption targets" for horticultural products.<sup>118</sup> Article 33(2) and (3) is explicit that only "in the event that domestic horticultural means are not sufficient or available, horticultural means originating from abroad may be used". Indeed, paragraph 1 of Article 33 instructs that "Horticultural business shall be carried out by giving priority to the use of domestic horticultural means" while paragraph 3(c) of Article 33 stipulates that Indonesia should "prioritize those that contain components from domestic production" when permitting imported products to enter Indonesia.

68. In 2012 Indonesia reinforced its self-sufficiency objectives through the *Food Law*. The *Food Law* only permits imports in limited circumstances "if the domestic Food Production is insufficient and/or cannot be produced domestically".<sup>119</sup> In addition, as noted in Section III.A.1, in 2013, Indonesia supplemented these laws with the *Farmers Law*.<sup>120</sup>

69. The implementation of the import licensing regimes for horticultural products is influenced by the Indonesian Government's self-sufficiency objectives in these laws. For instance, the Directorate General (Horticulture) in the Ministry of Agriculture has recommended the prohibition or restriction of imports of certain horticultural products in the period July-December 2015 as Indonesian production was deemed sufficient to meet demand.<sup>121</sup> Indonesian Ministers have been reported as stating that the importation of

<sup>114</sup> "Beef Self-Sufficiency Nowhere In Sight" *BMI Research* (Exhibit NZL-15).

<sup>115</sup> Ibid. See also: "Ill-Advised Beef Self-Sufficiency Policies Have Depleted Indonesia Cattle Population by 30 Percent, Business Group Says" *Jakarta Globe* (Exhibit NZL-14).

<sup>116</sup> See Figure 2 above.

<sup>117</sup> *Law of the Republic of Indonesia Number 13 of 2010 Concerning Horticulture (Horticulture Law)* (Exhibit JE-1).

<sup>118</sup> Articles 88(1)(b) and (c), *Law of the Republic of Indonesia Number 13 of 2010 Concerning Horticulture (Horticulture Law)* (Exhibit JE-1).

<sup>119</sup> Article 36(1), *Food Law*, (Exhibit JE-2). See para.16 above.

<sup>120</sup> See para. 17 above.

<sup>121</sup> Internal Letter within the Ministry of Agriculture recommending the prohibition or limitation of imports of certain horticultural products due to the domestic production of such products. (Prohibition/Limitation Letter from the Ministry of Agriculture) (Exhibit NZL-39). This letter from the Ministry of Agriculture Directorate General of Horticulture to the Ministry of Agriculture Directorate General of Processing and Marketing of Agricultural Products, recommends the prohibition or limitation of the issuance of import licences of certain

agricultural products is a "last option" only to be permitted when domestic supply is insufficient to meet domestic demand.<sup>122</sup> Similarly the then Coordinating Minister for Economic Affairs, Hatta Rajasa, defended an import ban on listed horticultural products in 2013 by explaining that the ban was designed to protect local producers.<sup>123</sup>

## 2. *Import licensing regime for horticultural products*

70. The legislative provisions based on sufficiency of domestic production, set out in the *Horticulture Law*, *Food Law* and *Farmers Law* provide the basis and rationale for the import licensing restrictions on horticultural products.<sup>124</sup>

71. The specific import licensing restrictions on horticultural products are imposed through regulations *MOA 86/2013*<sup>125</sup> and *MOT 16/2013*<sup>126</sup>. The preamble to *MOA 86/2013* expressly refers to the *Horticulture Law* and the *Food Law* as forming part of the framework of legislation under which *MOA 86/2013* is made.<sup>127</sup> Similarly *MOT 16/2013* (which has been partially amended by *MOT 47/2013*) refers to these laws as forming part of the framework of legislation under which the regulations are made.<sup>128</sup> It is clear that these horticultural regulations were promulgated in contemplation of the provisions which promote sufficiency of domestic production.<sup>129</sup>

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horticultural products due to the domestic production of such products. The products recommended in this letter for which imports should be limited include red onions, chili, potato, carrots, mango, banana, melon, papaya, pineapple, oranges and durian.

<sup>122</sup> See for instance, "Imports are last option for curbing food price increases" *The Jakarta Post*, 9 June 2015, p. 13 ("Imports are last option for curbing food price increases" *The Jakarta Post*) (Exhibit NZL-40) and "Jokowi gives chili, shallot imports the green light" *The Jakarta Post*, 9 June 2015, <http://www.thejakartapost.com/news/2015/06/04/jokowi-gives-chili-shallot-imports-green-light.html> ("Jokowi gives chili, shallot imports the green light" *The Jakarta Post*) (Exhibit NZL-41).

<sup>123</sup> "Chief economic minister defends ban on horticultural imports" *Antaranews*, 7 February 2013, <http://www.antaranews.com/en/news/87288/chief-economic-minister-defends-ban-on-horticultural-imports> (Exhibit NZL-42).

<sup>124</sup> Article 88, *Horticulture Law* (Exhibit JE-1); and Article 40, *Food Law* (Exhibit JE-2) provide for the implementation of the relevant provisions in those laws through implementing regulations.

<sup>125</sup> *Regulation of the Minister of Agriculture Number 86/Permentan/OT.140/8/2013 Concerning Import Recommendation of Horticulture Products*, Aug. 30, 2013 (*MOA 86/2013*) (Exhibit JE-15).

<sup>126</sup> *Regulation of the Minister of Trade Number 16/M-DAG/PER/4/2013 Concerning Provisions on the Import of Horticultural Products*, Apr. 22, 2013 (*MOT 16/2013*) (Exhibit JE-8) as amended by *Regulation of the Minister of Trade Number 47/M-DAG/PER/8/2013 Concerning Amendment of Regulation of the Minister of Trade Number 16/M-DAG/PER/4/2013*, Aug. 30, 2013 (*MOT 47/2013*) (Exhibit JE-9) (*MOT 16/2013, as amended by MOT 47/2013*). A consolidated version of *MOT 16/2013, as amended by MOT 47/2013* is set out in Exhibit JE-10.

<sup>127</sup> Second Preamble (4) and (5), *MOA 86/2013* (Exhibit JE-15) states that *MOA 86/2013* was promulgated by the Ministry of Agriculture "in view of" the *Horticulture Law* and the *Food Law*.

<sup>128</sup> Second Preamble (9) and (10), *MOT 16/2013* (Exhibit JE-8).

<sup>129</sup> See for example, "Jokowi promises rice, shallot self-sufficiency" *The Jakarta Post*, 28 June 2014, <http://www.thejakartapost.com/news/2014/06/28/jokowi-promises-rice-shallot-self-sufficiency.html#sthash.wHffQh7M.dpuf> ("Jokowi promises rice, shallot self-sufficiency" *The Jakarta Post*) (Exhibit NZL-43) and "Instead of Relying on Imported Fruits, It Is Better To Convert Thousand Hectares of Idle Land Owned By State-Owned Enterprises Into Fruit Estates" *Tribun News*, 2 February 2015, <http://www.tribunnews.com/bisnis/2015/02/04/daripada-tergantung-buah-impor-ribuan-hektar-lahan-tidur-milik-bumn-dikonversi-jadi-kebun> ("Instead of Relying on Imported Fruits, It Is Better To Convert Thousand Hectares of Idle Land Owned By State-Owned Enterprises Into Fruit Estate" *Tribun News*) (Exhibit NZL-44).

72. Importers who wish to import horticultural products into Indonesia are required to obtain licences and approvals from a number of Indonesian government agencies. The specific requirements that must be met differ depending on the type of horticultural product that an importer seeks to import. Import Approvals must be obtained for certain listed horticultural products, and two products - chili and shallots - are subject to a more restrictive system.

73. The licensing regime for horticultural products imposes import approval requirements on 22 fresh products and 17 processed products.<sup>130</sup> The listed fresh products subject to the regime include potatoes, onions, shallots, chili, apples, citrus fruits, mangos, pineapples and grapes. In general, the processed products covered by the import licensing regime are those processed from the fresh horticultural products subject to the regime. Those horticultural products which are not listed and therefore not subject to the import licensing regime are able to be imported.

74. In order to import the listed horticultural products, an importer is required to go through at least three distinct application and approval processes:<sup>131</sup>

- a designation from the Ministry of Trade as an importer in accordance with the criteria set out in *MOT 16/2013* as amended by *MOT 47/2013* (Import Designation);<sup>132</sup>
- a Horticultural Product Import Recommendation from the Ministry of Agriculture in accordance with the criteria set out in *MOA 86/2013* (RIPH);<sup>133</sup> and
- an Import Approval from the Ministry of Trade in accordance with the criteria set out in *MOT 16/2013* as amended by *MOT 47/2013* (Import Approval).<sup>134</sup>

75. These procedures differ, depending on whether the importer wishes to import horticultural products for consumption by consumers, or for industrial production processes. The Importer Designation, the RIPH and the Import Approval are central to the import licensing regime challenged by New Zealand in this dispute. It is through the process of obtaining these approvals that Indonesia restricts imports of listed horticultural products. Each of these approval processes is summarised below, and an overview of the application process for such approvals is included in Annex 3.

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<sup>130</sup> Products which are listed in Attachment II, *MOA 86/2013* (Exhibit JE-15) and Appendix I, *MOT 16/2013* (Exhibit JE-8).

<sup>131</sup> This submission describes the measures in effect when the Panel was established. *MOT 16/2013* (Exhibit JE-8) has been amended a number of times and will be replaced by *Regulation of the Minister of Trade 71//M-DAG/PER/9/2015 Concerning Provisions on the Import of Horticultural Products*, Sept. 28, 2015 (*MOT 71/2015*) (Exhibit JE-12), which comes into effect on 1 December 2015. This new Regulation has altered the way in which the importer designations are termed, but not the essential requirements with which importers must comply in order to import horticultural products into Indonesia.

<sup>132</sup> Articles 5 and 8, *MOT 16/2013* (Exhibit JE-8).

<sup>133</sup> Articles 8 and 9, *MOA 86/2013* (Exhibit JE-15).

<sup>134</sup> Articles 12 and 13, *MOT 16/2013* (Exhibit JE-8).

### (a) Importer Designations

76. An importer must receive a designation from the Ministry of Trade as an importer of horticultural products. Article 3 of *MOT 16/2013* provides:

Horticultural Products can only be imported by a company after it has received Recognition as a PI-Horticultural Products or Confirmation as a RI-Horticultural Products from the Minister.<sup>135</sup>

77. A Registered Importer (RI) is a company that imports horticultural products for consumption but is prohibited from trading or transferring products directly to consumers or retailers.<sup>136</sup> To gain recognition as RI, a company must apply electronically to the Ministry of Trade through the INATRADE website attaching certain documents.<sup>137</sup> These include:

- proof of ownership of storage facilities appropriate for the product's characteristics;
- proof of contracts with distributors;<sup>138</sup> and
- a statement agreeing not to sell horticultural products directly to consumers or retailers.<sup>139</sup>

78. Following the submission of the requisite documents, the Ministry of Trade's Coordinator and Implementer of the Trade Services Unit (UPP Coordinator) checks the application for completeness and an Assessment Team checks the veracity of the information and conducts a site inspection.<sup>140</sup> If the information is correct, a RI Importer Designation is issued. Designation as a RI is valid for two years from the date of issuance.<sup>141</sup>

79. A Producer Importer (PI) is a company that imports horticultural products as raw materials or auxiliary materials for its industrial production processes. To gain recognition as a PI, a company must apply electronically to the Ministry of Trade through the INATRADE website attaching certain documents. These include proof of control over storage facilities appropriate for the product's characteristics, and a RIPH from the Ministry of Agriculture.<sup>142</sup> This means that PIs must receive this approval from the Ministry of Agriculture before obtaining an Importer Designation from the Ministry of Trade.

80. As in the case of an application for a RI, the UPP Coordinator checks the application and its documents for completeness and an Assessment Team checks the veracity of the

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<sup>135</sup> *MOT 16/2013* (Exhibit JE-8).

<sup>136</sup> Article 15, *MOT 16/2013* (Exhibit JE-8).

<sup>137</sup> Article 8, *MOT 16/2013* (Exhibit JE-8).

<sup>138</sup> Specifically, Article 8(1)(g) and (h), *MOT 16/2013* (Exhibit JE-8) requires: "Proof of a contract of cooperation between the seller of the Horticultural Product and a minimum of three distributors for a minimum of 1 (one) year;" and "Proof of 1 (one) year experience as a Horticultural Product distributor".

<sup>139</sup> Article 8(1), *MOT 16/2013* (Exhibit JE-8).

<sup>140</sup> Articles 8 (2), (3) and (4), *MOT 16/2013* (Exhibit JE-8).

<sup>141</sup> Article 9, *MOT 16/2013* (Exhibit JE-8).

<sup>142</sup> Article 5(1), *MOT 16/2013* (Exhibit JE-8).

information and conducts a site inspection. If the information is correct, a PI Importer Designation is issued. Designation as a PI is valid for the period of validity of the RIPH.<sup>143</sup>

#### **(b) MOA Recommendations (RIPH)**

81. A RIPH is required for all horticultural products listed in Attachment II, *MOA 86/2013*.<sup>144</sup> Applications for RIPH must specify the product, the time of entry, the country of origin and the entry point into Indonesia.<sup>145</sup> An importer is required to submit a number of documents as part of the application process. The documentation required differs depending on whether the RIPH is sought by a RI or a PI, and whether it is for fresh or processed horticultural products. In the case of imports of fresh horticultural products for consumption, RIPH applications must include:<sup>146</sup>

- a statement that the importer is not importing horticultural products that were harvested more than six months previously;
- a statement of ownership of storage and distribution facilities that are appropriate to the horticulture product's type and characteristics;
- a statement that the storage facility is of suitable capacity; and
- a distribution plan specific to the time and region/municipality.

82. If the importer submits incorrect information in the application of documentation, the importer may be sanctioned by not being granted the RIPH for one year.<sup>147</sup> New Zealand's Exhibits NZL-45 and NZL-46 show an example of a RIPH application form as well as a RIPH approval.<sup>148</sup> After receiving the application, the documentation is checked and, if complete, the RIPH is issued or, if incomplete, the application is rejected.<sup>149</sup>

83. RIPH approvals specify the product and quantity that is to be imported, the country of origin, and the entry point in Indonesia.<sup>150</sup> RIPH approvals are issued two times a year with a validity period from January to June and from July to December.<sup>151</sup> However, these time periods are not applicable for fresh chili and shallot, for which RIPHs are issued for three month periods and on the basis of reference prices.<sup>152</sup>

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<sup>143</sup> Article 6, *MOT 16/2013* (Exhibit JE-8).

<sup>144</sup> Article 7(1) and Attachment II, *MOA 86/2013* (Exhibit JE-15).

<sup>145</sup> Article 9, *MOA 86/2013* (Exhibit JE-15).

<sup>146</sup> Article 8(1) and 8(2), *MOA 86/2013* (Exhibit JE-15).

<sup>147</sup> Article 14, *MOA 86/2013* (Exhibit JE-15).

<sup>148</sup> Example RIPH Application to the Ministry of Agriculture (importer information redacted for confidentiality purposes) (Example RIPH Application) (Exhibit NZL-45) and Example RIPH Approval from the Ministry of Agriculture (importer information redacted for confidentiality purposes) (Example RIPH Approval) (Exhibit NZL-45).

<sup>149</sup> Article 12, *MOA 86/2013* (Exhibit JE-15).

<sup>150</sup> Article 6(3), *MOA 86/2013* (Exhibit JE-15). See also Example RIPH Application (Exhibit NZL-45).

<sup>151</sup> Article 13(1), *MOA 86/2013* (Exhibit JE-15).

<sup>152</sup> Article 5(4), *MOA 86/2013* (Exhibit JE-15). RIPHs for chili and shallot are issued based on a reference price stipulated by the Minister of Trade.



### (c) Import Approvals

84. In addition to obtaining an RI Importer Designation and a RIPH, an RI may only import horticultural products that are listed in the Appendix I to *MOT 16/2013* if a further Import Approval is obtained from the Ministry of Trade.<sup>153</sup> The application for an Import Approval must include details of the products the importer wishes to import.<sup>154</sup> These include a description of the product, the volume that the importer wishes to import across the six month import period, the country of origin, and port of entry in Indonesia of the particular product.<sup>155</sup>

85. An application for an Import Approval must be submitted in December for the approval validity period January to June. For the approval validity period July to December, Import Approval applications must be submitted in June.<sup>156</sup> Import Approvals are issued at the beginning of the validity period for which they are valid.<sup>157</sup> Import Approvals are valid for six months from the date of issue, except for Import Approvals for chili and shallot which are valid for three months from the date of issue.<sup>158</sup> Exhibits NZL-47 and NZL-48 provide examples of Import Approvals for horticultural products.

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<sup>153</sup> Article 12, *MOT 16/2013* (Exhibit JE-8) (Article 12A, of *Regulation of the Minister of Trade Number 40/M-DAG/PER/6/2015 Concerning Second Amendment to Regulation of the Minister of Trade Number 16/M-DAG/PER/4/2013, June 10, 2015 (MOT 40/2015)* (Exhibit JE-11) which further amends *MOT 16/2013* sets out the same requirement). Importers are required to submit copies of their RIPH and importer designation as part of the application process. This is set out in Article 13, *MOT 16/2013* (Exhibit JE-8). The requirement to obtain an Import Approval does not apply to importers with a PI designation.

<sup>154</sup> Article 22(1)(b), *MOT 16/2013* (Exhibit JE-8).

<sup>155</sup> Two Example Import Approvals from the Ministry of Trade (importer information redacted for confidentiality purposes) (Example Import Approval 1 and Example Import Approval 2) (Exhibits NZL-47 and NZL-48). Note that:

- Stipulation 3 states that the Import Approval must be shown to Customs and Excise officials at the point of import for the purpose of completing an importer's Import Realisation Card (which proves whether an Importer has fulfilled the 80% realisation requirement at the end of each semester).
- Stipulation 4 states that the importer must submit the Import Realisation Control Card signed and sealed by the Customs and Excise official by the 15th of every month to the Director General of International Trade at the Ministry of Trade.
- Stipulation 5 states that importers must realise 80% of the quantity set out in their Import Approval each semester.
- Stipulation 6 states that if importers violate any of these obligations they will be sanctioned in the form of suspension or revocation of their IP or RI designations.
- Note that an importer's RIPH number and RI Designation number is included on their Import Approval.

<sup>156</sup> Article 13A, *MOT 16/2013* as amended by *MOT 47/2013* (Exhibit JE-10). Article 13A, *MOT 40/2015* (Exhibit JE-11) which further amends *MOT 16/2013* sets out these same validity and application periods.

<sup>157</sup> Article 13A, *MOT 16/2013* as amended by *MOT 47/2013* (Exhibit JE-10). Approvals for chili, shallot and processed horticultural products are not subject to this application window and applications for Import Approvals for these products can be made at any time.

<sup>158</sup> Article 14, *MOT 16/2013* as amended by *MOT 47/2013* (Exhibit JE-10).

### ***3. Prohibitions and restrictions imposed through Indonesia's import licensing regime for horticultural products***

86. Indonesia imposes requirements on the import of horticultural products through its import licensing regime that operate to prohibit or restrict imports of horticultural products into Indonesia. This section describes the measures that New Zealand challenges in this dispute both when viewed as individual measures and when considered as part of a single overarching measure. New Zealand submits that the following prohibitions or requirements are inconsistent with Indonesia's WTO obligations:

- a. Limited application windows and validity periods: RIPH and Import Approvals may only be applied for during limited application windows and are valid for limited time periods;
- b. Fixed Licence Terms: RIPH and Import Approvals 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 products of a different type, in a greater quantity, from another country, or through a different port than those specified in their RIPH and Import Approvals;
- c. 80% Realisation Requirement: Importers are required to import 80 percent of the quantity of each product specified in their Import Approvals for the applicable six month period;
- d. Restrictions based on the Indonesian harvest period: Indonesia prohibits or restricts imports of certain horticultural products during Indonesian harvest periods;
- e. Restrictions on storage ownership and capacity: Importers are required to own storage facilities of appropriate capacity and may only import volumes commensurate with that storage capacity;
- f. Restrictions on use, sale and distribution: Importers are restricted in the use, sale and distribution of listed horticultural products. RI are prohibited from trading and/or transferring imported products directly to consumers or retailers. PI may only use imported products for processing and are prohibited from trading and/or transferring such products;
- g. Reference prices for chili and shallots: Importation of chili and shallots is prohibited when the domestic market price of the product falls below a specified reference price; and
- h. Six month harvesting requirement: Indonesia prohibits the importation listed fresh horticultural products harvested more than 6 months previously.

### **(a) Limited application windows and validity periods for RIPH and Import Approvals**

87. Importers have a limited time frame in which to apply for RIPH and Import Approvals. Importers may apply for RIPH for the period from January to June over 15 working days starting in early November of the previous year, and for the period from July to December over 15 working days starting in early May of that year.<sup>159</sup> In the case of Import Approvals, applications may be made in December for the period from January to June, and applications may be made in June for the period from July to December. In practice, Import Approvals are not issued until the beginning of each semester.<sup>160</sup>

88. The RIPH and Import Approvals for most listed horticultural products are valid for six months. Horticultural products covered by a RIPH and Import Approval and imported during a validity period cannot be shipped from the country of origin until after the Import Approval for that period has been issued.<sup>161</sup> The importation must be completed within the period of validity. All imported listed horticultural products must be shipped, arrive and clear customs within that period. If product arrives after the validity period it is either destroyed or re-exported. It is not permitted into Indonesia.<sup>162</sup>

### **(b) Fixed Licence Terms**

89. Once they have been issued, RIPHs and Import Approvals set out the terms of the import of horticultural products. The following terms are specified in these licences:

- the quantity of the products permitted to be imported;
- the specific type of products permitted to be imported;
- the country of origin of the products; and
- the Indonesian port of entry through which the products will enter.

90. These terms cannot be amended during the validity period of the RIPH or Import Approval. This means that imports are not permitted of products of a different type, in a greater quantity, from another country, or through a different port than is specified in the RIPHs and Import Approvals.

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<sup>159</sup> Article 13, *MOA 86/2013* (Exhibit JE-15).

<sup>160</sup> Onions New Zealand Exporter Statement (Exhibit NZL-49) and Pip Fruit New Zealand Export Statement (Exhibit NZL-50).

<sup>161</sup> Example Import Approval 1, para. 1 (Exhibit NZL-47). See also Article 22, *MOT 16/2013* (Exhibit JE-8) which sets out the pre shipment inspection (PSI) requirements that importers must comply with prior to shipping horticultural products to Indonesia. The information required by the PSI surveyor is the information contained in an importer's Import Approval meaning that an importer must obtain an Import Approval prior to PSI. Therefore, horticultural products cannot be shipped from their country of origin until after the Import Approvals for that period are issued.

<sup>162</sup> Article 30(3)(a) and 30(4), *MOT 16/2013* (Exhibit JE-8).

91. Penalties are imposed on RIs if they alter the terms of their Import Approvals.<sup>163</sup> If horticultural products are imported of a different type, in greater quantities, from a different country or through a different Indonesian port, the product must either be destroyed or re-exported at the importer's cost.<sup>164</sup>

**(c) 80% realisation requirement**

92. *MOT 16/2013* requires that RIs of fresh horticultural products must import 80% of the quantity of each type of product specified on their Import Approvals for each six-month licence validity period. This requirement applies regardless of the market conditions or other circumstances (e.g. natural disaster) in the exporting country or in Indonesia.<sup>165</sup> Recognition as a RI can be frozen for two semesters (i.e. one year) if the RI cannot meet the 80% realisation requirement.<sup>166</sup> This acts as an incentive to importers to request lower quantities to ensure they have certainty that they will satisfy the 80% realisation requirement in the applicable period.

93. Indonesia imposes a procedure to monitor compliance with the 80% realisation requirement. Importers are required to complete an Import Realisation Control Card which shows the amount of horticultural products that have been imported.<sup>167</sup> The Import Realisation Control Card has to be delivered every month through Indonesia's INATRADE website by the 15<sup>th</sup> day of the month following the importation.<sup>168</sup> Importers are required to submit a written report to the Ministry of Trade and Ministry of Agriculture on how much of the quantity set out on their import licences they have "realised" by scanning their "Import Realisation Control Card", signed and stamped by an Indonesian Custom and Excise Officer.<sup>169</sup>

94. Importer Designations can be revoked if a company does not submit its Realisation Report three times, regardless of whether it has or has not met the 80% realisation requirement.<sup>170</sup>

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<sup>163</sup> Article 26, *MOT 16/2013* (Exhibit JE-8).

<sup>164</sup> Article 30, *MOT 16/2013*, as amended by *MOT 47/2013* (Exhibit JE-10).

<sup>165</sup> Article 14A, *MOT 16/2013* as amended by *MOT 47/2013* (Exhibit JE-10). Article 14A, *MOT 40/2015* (Exhibit JE-11) which further amends *MOT 16/2013* sets out this same requirement.

<sup>166</sup> Article 25A, *MOT 16/2013* as amended by *MOT 47/2013* (Exhibit JE-10). Article 25A, *MOT 40/2015* (Exhibit JE-11) which further amends *MOT 16/2013* sets out this same requirement. See also; Ministry of Trade notification 2014-12-08 explaining the Import Approval application process (Import Approval Process Explanation) (Exhibit NZL-51). This notification contains an information note from the Trade Services Unit of the Ministry of Trade which sets out that "Appointment of RI of Horticulture Products will be frozen if the company cannot meet the obligation of minimum 80% realisation of Import Approval of every period".

<sup>167</sup> Article 24(4), *MOT 16/2013* (Exhibit JE-8).

<sup>168</sup> Article 24(2), *MOT 16/2013* (Exhibit JE-8).

<sup>169</sup> Article 24, *MOT 16/2013* (Exhibit JE-8).

<sup>170</sup> Article 26(a), *MOT 16/2013* as amended by *MOT 47/2013* (Exhibit JE-10).

#### **(d) Prohibitions and restrictions based on Indonesian harvest periods**

95. *MOA 86/2013* prohibits and restricts the importation of horticultural products based on the harvest season for the product in Indonesia. Article 5 provides:

- (1) Import of Horticulture Product can be conducted prior to harvest season, during harvest season and after harvest season within a certain time period.
- (2) Within a certain time period as intended in paragraph (1) is stipulated by the Minister of Agriculture and submitted to the Minister of Trade.<sup>171</sup>

96. Importers are required, as part of their application process for a RIPH, to submit a plan for the distribution of their products, and to indicate the time of entry of the products and the region/municipality where the products will be distributed.<sup>172</sup> The Ministry of Agriculture checks the distribution plan against the harvest period for the horticultural products and accordingly limits the quantities permitted to be imported.

97. This is illustrated in Exhibit NZL-39 which contains a memorandum dated 6 May 2015 from the Ministry of Agriculture Director General (Horticulture) to the Ministry of Agriculture Director General of Processing and Marketing which recommends limiting imports or no importation at all for semester II, 2015 for a number of horticultural products.<sup>173</sup> It suggests, *inter alia*:

- no shallot imports because of "big harvests" in the main Indonesian harvest areas;
- no chili imports because production is stable across the year;
- no mango imports because most areas are in the harvest season;
- no banana, melon, papaya and pineapple imports, as the production is stable throughout the year and able to meet domestic demand; and
- limits on the importation of oranges to October to December since the central production areas in Indonesia will be harvesting in July and August.

98. The recommendation outlined in the memorandum of 6 May 2015 was implemented. Exhibit NZL-52 shows a distribution plan from an importer in which the planned import of oranges and mandarin oranges is limited to the October to December period.

#### **(e) Storage ownership and capacity requirement**

99. Indonesia restricts imports through the requirement that importers must own their storage capacity. Renting is not permitted. Article 8(e) of *MOT 16/2013* requires that importers applying for designation as a RI are to provide "proof of ownership of storage

<sup>171</sup> Article 5, *MOA 86/2013* (Exhibit JE-15).

<sup>172</sup> Example importer distribution plan submitted as part of import approval application that correlates to the prohibitions and restrictions on import recommended in the internal MOA letter (importer identification information redacted) (Example Distribution Plan) (Exhibit NZL-52).

<sup>173</sup> Prohibition/Limitation Letter from the Ministry of Agriculture (Exhibit NZL-39).

facilities appropriate for the product's characteristics". This requirement is mirrored by the MOA regulations. Article 8(2)(c) of *MOA 86/2013* requires importers to include a "statement of ownership of storage and distribution facilities for horticulture products according to their characteristics and product type", as part of their RIPH applications.<sup>174</sup>

100. The Ministry of Trade then sets volume allocations in Import Approvals limited to the importer's verified cold-storage capacity. Volume allocations in Import Approvals do not allow for any turnover of product during the six-month Import Approval validity period.<sup>175</sup>

101. Indonesia's use of storage capacity to limit the quantity specified on an importer's Import Approval is confirmed by an amendment made to *MOT 16/2013* in 2015 (*MOT 40/2015*).<sup>176</sup> Article 13(4) of *MOT 40/2015* explains:

Issuance of an Import Approval, as described in paragraph (2), must take into consideration the capacity and appropriateness, with regard to the characteristics of the Horticultural Product, of the storage facilities and means of transportation owned by the RI-Horticultural Products.<sup>177</sup>

102. Exhibit NZL-55 provides information on how Indonesia assesses an importer's cold storage capacity in order to allocate volume on an importer's Import Approval. The Ministry of Trade informed all RIs on 16 February 2015 that the Ministry's inspection team would audit importers' storage capacity and their means of transport.<sup>178</sup> The letter from the Ministry of Trade outlines that these audits were to be conducted based on Article 34(3) of *MOT 16/2013* which states that "The Directorate General of Foreign Trade can at any time conduct a compliance assessment (post audit) of PI-Horticultural Products and RI-Horticulture Products.

103. The RIs were required by the Ministry of Trade to submit complete and correct data regarding their storage capacity as well as proof of ownership of that storage capacity no later than 9 May 2015. Officials then conducted audits or inspections based on the information provided by the importer.<sup>179</sup>

104. Following the conclusion of the audits or inspections, the inspection team from the Ministry of Trade informed RIs of the outcome of the audit. In the event that the importer did not agree with the inspection team data, the RI could apply for clarification of the result of the inspection no later than 19 June 2015. The inspection team would re-inspect the importer's

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<sup>174</sup> *MOT 16/2013* (Exhibit JE-8) and *MOA 86/2013* (Exhibit JE-15).

<sup>175</sup> Indonesian Horticultural Importers Association (ASEIBSSINDO) Statement (ASEIBSSINDO Statement) (Exhibit NZL-53).

<sup>176</sup> *MOT 40/2015* (Exhibit JE-11).

<sup>177</sup> Article 13(4), *MOT 40/2015* (Exhibit JE-11).

<sup>178</sup> Ministry of Trade letter to importers informing them that inspection teams will audit their storage capacity (Storage Capacity Audit Letter) (Exhibit NZL-54). This letter sets out that the inspection was to be conducted based on Article 34(3), *MOT 16/2013* (Exhibit JE-8) which states "The Directorate General of Foreign Trade can at any time perform post audit on Producer Importer and Registered Importer of Horticulture Products".

<sup>179</sup> INATRADE notification from the Ministry of Trade regarding the need for importers to submit their storage capacity information (Notification of Storage Capacity Audit) (Exhibit NZL-55).

storage capacity and compare the results with the previous Ministry of Trade findings. If the inspection team determined that the information submitted by the importer regarding the storage capacity was incorrect, the Ministry of Trade could revoke the importer's RI designation.<sup>180</sup>

105. The document set out in Exhibit NZL-57 provides an example of the application of this requirement where the specific numbers have been redacted in order for the importer's identity to remain confidential.<sup>181</sup> The RI reported a storage capacity of a certain tonnage of refrigerated storage. However, the Ministry of Trade determined, through the audit process that the importer's refrigerated and unrefrigerated storage capacity was different to that on the application. The Ministry then instructed the importer to reapply for registration based on the storage capacity as determined by the Ministry of Trade.<sup>182</sup>

**(f) Restrictions on use, sale and distribution of imported horticultural products**

106. Indonesia imposes prohibitions and restrictions on the importation of listed horticultural products that relate to their use, sale and distribution. Article 15 of *MOT 16/2013* provides that businesses that have received confirmation as a RI:

- a. can only trade and/or transfer imported Horticultural Products to a Distributor; and
- b. are forbidden from trading and/or transferring imported Horticultural Products directly to consumers or retailers.<sup>183</sup>

107. Likewise Article 7 of *MOT 16/2013* states:

Businesses that have received Recognition as a PI-Horticultural Products can only import Horticultural Products as raw materials or as supplementary materials for the needs of its industrial production process and are prohibited from trading and/or transferring these Horticultural Products.<sup>184</sup>

108. If importers fail to comply with these requirements, they are subject to sanction through revocation of their Importer Designations.<sup>185</sup> A company which has had its importer designation revoked cannot apply for a new designation for two years.<sup>186</sup>

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<sup>180</sup> Revocations are made under Article 26, *MOT 16/2013* (Exhibit JE-8). Also see INATRADE notification that import permit issuance will be based on the audited storage capacity of importers (Notification of import approvals being based on storage capacity) (Exhibit NZL-56).

<sup>181</sup> INATRADE notification regarding the result of an importer's storage capacity audit by the Ministry of Trade (importer information redacted for confidentiality purposes) (Notification of Incorrect Storage Capacity Declaration) (Exhibit NZL-57).

<sup>182</sup> Note that in order to receive an Import Approval an importer needs to be designated as a RI. The "before" and "after" capacity figure have been redacted on business confidentiality grounds.

<sup>183</sup> Article 15, *MOT 16/2013* (Exhibit JE-8).

<sup>184</sup> Article 7, *MOT 16/2013* (Exhibit JE-8)

<sup>185</sup> Article 26 (e) and (f), Article 27, *MOT 16/2013* (Exhibit JE-8).

<sup>186</sup> Article 27A, *MOT 16/2013* as amended by *MOT 47/2013* (Exhibit JE-10).

### **(g) Reference prices for chili and shallots**

109. Indonesia uses reference prices determined by the Ministry of Trade to prohibit and limit imports of certain horticultural products - currently chili and shallots - when the domestic price of the product falls below the reference price.<sup>187</sup> A RIPH is required for the import of these products and will not be issued if chili and shallot are being sold domestically below the set reference price.<sup>188</sup> Even where an importer has a RIPH, if the price of chili or shallots in the domestic market is below the stipulated reference price, the importation of chili and shallot is "postponed" until the market price reaches the reference price.<sup>189</sup>

110. The current reference prices for chili and shallots are set out in a decree from the Director General of Domestic Trade.<sup>190</sup> The reference price is monitored by the Horticulture Product Price Monitoring Team, established by the Trade Minister.<sup>191</sup> It is not clear how the reference price for chili and shallots is determined, or how it is adjusted in light of the domestic price for chili and shallots. This issue was analysed in a paper by [ ] at the Indonesian Centre for Agriculture Socioeconomic and Policy Studies.<sup>192</sup> [ ] concluded that there was no information on the procedure that the Horticulture Product Price Monitoring Team would use to determine a reference price.<sup>193</sup>

### **(h) Six month harvesting requirement**

111. The importation of listed horticultural products is conditioned on the requirement to obtain a RIPH.<sup>194</sup> As part of the RIPH application process, importers who wish to import listed fresh horticultural products for consumption must submit a statement that they will not import horticultural products that were harvested more than six months prior to importation.<sup>195</sup> A RIPH will not be issued unless this statement is included with the application.<sup>196</sup>

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<sup>187</sup> Article 5(4), of *MOA 86/2013* (Exhibit JE-15).

<sup>188</sup> Article 13(4), *MOA 86/2013* (Exhibit JE-15) states that RIPH service of 6 months is not applicable for chili and shallot and Article 5(4) states that issuance of RIPHs for chili and shallot is based on a determined reference price from the Minister of Trade.

<sup>189</sup> Article 14B(2), *MOT 16/2013* as amended by *MOT 47/2013* (Exhibit JE-10). Note that the validity periods of Import Approvals for Chili and Shallots is 3 months.

<sup>190</sup> Decree of the Director General of Domestic Trade as the Chairperson of the Technical Monitoring Team for Price of Horticultural Products Number 118/PDN/KEP/10/2013 Regarding Stipulation of Reference Price of Horticultural Products dated 3 October 2013 (Reference Price Government Decree) (Exhibit NZL-58).

<sup>191</sup> Article 14B(1), *MOT 16/2013* as amended by *MOT 47/2013* (Exhibit JE-10).

<sup>192</sup> [ ], "Horticultural Import Policy in Indonesia" *FFTC Paper*, 23 January 2014, [http://ap.ffa.agnet.org/ap\\_db.php?id=288](http://ap.ffa.agnet.org/ap_db.php?id=288) ("Horticultural Import Policy in Indonesia" *FFTC Paper*) (Exhibit NZL-59). The FFTC is the Food and Fertilizer Technology Center for the Asian and Pacific Region-Agricultural Policy Platform (FFTC-AP). The Indonesian Centre for Agriculture Socioeconomic and Policy Studies is a department within the Indonesian Ministry of Agriculture's Research and Development Agency.

<sup>193</sup> "Horticultural Import Policy in Indonesia" *FFTC Paper* (Exhibit NZL-59).

<sup>194</sup> Article 4, *MOA 86/2013* (Exhibit JE-15).

<sup>195</sup> Article 8(1) (a), *MOA 86/2013* (Exhibit JE-15).

<sup>196</sup> Article 12(2) and (3), *MOA 86/2013* (Exhibit JE-15). Article 12(2) states that only if the document inspection result is declared complete, can a RIPH be issued. Article 12(3) states that if the document inspection result is declared incomplete the application is returned. See also Blank statement letter form that importers must submit



112. Where the information submitted by an importer as part of the RIPH application process (including the statement that a product will not be imported if it has been harvested more than six months previously) is found to be incorrect, the importer is liable to be sanctioned. The importer will not be granted a RIPH for a period of one year and will therefore be unable to import listed horticultural products into Indonesia for that year.<sup>197</sup>

#### 4. Conclusion

113. This section has described the framework of laws and regulations through which Indonesia prohibits or restricts the importation of listed horticultural products. These measures are part of a deliberate strategy to promote a shift to local production to achieve the goal of self-sufficiency in food production.<sup>198</sup>

114. To further these goals, Indonesia subjects a wide range of imported horticultural goods to trade restrictive requirements at issue in this dispute. These measures prohibit or restrict the importation of horticultural products. They do so as individual measures, and as components of a single overarching measure.

### C. IMPORT RESTRICTIONS BASED ON "SUFFICIENCY" OF DOMESTIC PRODUCTION

115. The previous Sections III.A and III.B have described the import licensing regimes for animals and animal products and horticultural products and the legislation which permits imports only when domestic production is deemed insufficient to meet domestic demand.

116. In addition to providing the legislative basis for the restrictive import licensing regimes for animals and animal products and horticultural products, the legislative provisions on the sufficiency of domestic production impose, in their own right, prohibitions and restrictions on the importation of certain products. These include express prohibitions on the importation of food,<sup>199</sup> agricultural commodities<sup>200</sup> and animals and animal products and horticultural products when domestic supply is deemed to be sufficient to meet domestic demand.<sup>201</sup>

117. These legislative provisions impose prohibitions and restrictions on imports independent of the import licensing regimes for animals and animal products and horticultural products. They articulate the Government's objectives to provide protection to farmers,<sup>202</sup> to

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stating that their import products were harvested less than six months previously as part of their RIPH application (Six month harvest statement form) (Exhibit NZL-60).

<sup>197</sup> Article 14, *MOA 86/2013* (Exhibit JE-15).

<sup>198</sup> See for instance; "Indonesia aiming for food self-sufficiency in three years" *The Jakarta Post*, (Exhibit NZL-2) and "Jokowi promises rice, shallot self-sufficiency" *The Jakarta Post* (Exhibit NZL-43).

<sup>199</sup> Articles 14 and 36, *Food Law* (Exhibit JE-2).

<sup>200</sup> Article 30, *Farmers Law* (Exhibit JE-3).

<sup>201</sup> Article 36B(1), *Animal Law Amendment* (Exhibit JE-5); Article 33 and 88 *Horticulture Law* (Exhibit JE-1).

<sup>202</sup> Article 3, *Horticulture Law* (Exhibit JE-1).

give priority to local production,<sup>203</sup> to give priority to local product sales,<sup>204</sup> and to control imports.<sup>205</sup> Through these laws the Indonesian Government pursues the goal of self-sufficiency by imposing restrictions on agricultural imports, including animals and animal products and horticultural products, as "counter measures" to trade liberalisation through the WTO.<sup>206</sup>

#### IV. LEGAL ANALYSIS

118. Section III described the import licensing regimes for animals and animal products and horticultural products and the manner in which they, and the overarching laws on sufficiency of domestic production, restrict imports through discrete requirements and as a whole. In this Legal Analysis Section, New Zealand explains how these prohibitions and restrictions are inconsistent with Indonesia's WTO obligations.

119. Section IV.A examines Article XI:1 of the GATT 1994. New Zealand demonstrates, in turn, that Indonesia's import licensing regime for animals and animal products (Section IV.A.2), Indonesia's import licensing regime for horticultural products (Section IV.A.3), and Indonesia's import restrictions based on "sufficiency" of domestic production (Section IV.A.4) are inconsistent with Article XI:1 of the GATT 1994, both as individual prohibitions and restrictions, and as a whole.

120. Section IV.B then addresses Article 4.2 of the Agreement on Agriculture. It mirrors the sequencing in the previous Section IV.A by demonstrating, in turn, that Indonesia's import licensing regimes for animals and animal products (Section IV.B.2), import licensing regime for horticultural products (Section IV.B.3), and Indonesia's import restrictions based on "sufficiency" of domestic production (Section IV.B.4) are also inconsistent with Article 4.2 of the Agreement on Agriculture, both as individual prohibitions and restrictions, and as a whole.

121. Next, Section IV.C addresses Article III:4 of the GATT 1994. To the extent that the Indonesian prohibitions and restrictions are considered internal measures within the scope of that obligation, Sections IV.C.2 to IV.C.4 demonstrate that the Domestic Purchase Requirement and certain restrictions on use, sale and distribution of imports are inconsistent with Article III:4 of the GATT 1994.

122. Finally, in Section IV.D, New Zealand submits that to the extent that they are considered non-automatic import licensing procedures, the limited application windows and validity periods under the licensing regimes are inconsistent with Article 3.2 of the Agreement on Import Licensing Procedures.

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<sup>203</sup> Article 76, *Animal Law* (Exhibit JE-4).

<sup>204</sup> Article 92(1), *Horticulture Law* (Exhibit JE-1).

<sup>205</sup> Article 90, *Horticulture Law* (Exhibit JE-1) and Article 56, *Food Law* (Exhibit JE-4).

<sup>206</sup> [ ], "The Frame of Agricultural Policy and Recent Major Agricultural Policies in Indonesia" *FFTC Paper*, 2 July 2014, [http://ap.fttc.agnet.org/ap\\_db.php?id=256](http://ap.fttc.agnet.org/ap_db.php?id=256) (Exhibit NZL-61). [ ] was the [ ] when this paper was written.

## A. ARTICLE XI:1 OF THE GATT 1994

### 1. *Obligation under Article XI:1*

123. Article XI:1 of the GATT 1994 provides:

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.

124. WTO panels have repeatedly emphasised the broad scope of Article XI:1.<sup>207</sup> Article XI:1 prohibits WTO Members from instituting or maintaining prohibitions or restrictions other than duties, taxes, or other charges, on the importation, exportation, or sale for export of any product destined for another WTO Member.<sup>208</sup> The scope of Article XI:1 includes measures through which a prohibition or restriction is produced or becomes operative.<sup>209</sup>

125. A "prohibition" has been defined by the Appellate Body as a "legal ban on the trade or importation of a specified commodity".<sup>210</sup> The panel in *Brazil - Retreaded Tyres* considered that the term "prohibition" in Article XI:1 meant that "members shall not forbid the importation of any products of any other Member into their markets".<sup>211</sup>

126. The Appellate Body considered the ordinary meaning of the term "restriction" as a thing which "restricts someone or something, a limitation on action, a limiting condition or regulation" and as generally something that has a limiting effect.<sup>212</sup> Burdens or conditions that *limit* the importation of products are inconsistent with Article XI:1 of the GATT 1994.<sup>213</sup> The Appellate Body went on to say:

Moreover, this limitation need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.<sup>214</sup>

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<sup>207</sup> Panel Reports, *Argentina - Import Measures*, para. 6.251; *Colombia - Ports of Entry*, para. 7.233; *India - Quantitative Restrictions*, para. 5.128; *India - Autos*, para. 7.264; and *Dominican Republic - Cigarettes*, para. 7.248.

<sup>208</sup> Appellate Body Report, *Argentina - Import Measures*, para. 5.216.

<sup>209</sup> Appellate Body Report, *Argentina - Import Measures*, para. 5.218.

<sup>210</sup> Appellate Body Reports, *China - Raw Materials*, para. 319; and *Argentina - Import Measures*, para. 5.217.

<sup>211</sup> Panel Report, *Brazil - Retreaded Tyres*, para. 7.11. This approach was adopted by the panel in *US - Poultry (China)*: Panel Report, *US - Poultry (China)*, para. 7.454.

<sup>212</sup> Appellate Body Reports, *China - Raw Materials*, para. 319; *Argentina - Import Measures*, para. 5.217.

<sup>213</sup> Appellate Body Report, *Argentina - Import Measures*, para. 5.217.

<sup>214</sup> Appellate Body Report, *Argentina - Import Measures*, para. 5.217.

127. Panels have considered in more detail the meaning of the term "restrictions" in Article XI:1. The panel in *Colombia - Ports of Entry* recognised the applicability of Article XI:1 to "measures which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly, all of which have implications on the competitive situation of an importer".<sup>215</sup> The panel in *Argentina - Import Measures* applied a framework for assessing consistency with Article XI:1 which was based on restrictions that had been found by past panels to be covered by Article XI:1.<sup>216</sup> It came to the conclusion that the measure at issue had a limiting effect on imports and constituted an import restriction because it (a) restricted market access; (b) created uncertainty as to an applicant's ability to import; (c) did not allow companies to import as much as they desire or need without regard to their export performance; and (d) imposed a significant burden on importers that is unrelated to their normal importing activity.<sup>217</sup> The panel's framework in that case was not questioned by the Appellate Body.<sup>218</sup>

128. In this submission New Zealand will assess the consistency of the measures described in Sections III.A, III.B and III.C with Article XI:1 of the GATT 1994 by examining the limiting effect that each measure has on imports as demonstrated by its design, architecture and revealing structure. The limiting effect of a measure will be analysed by looking at whether the measure restricts market access for imports, creates uncertainty as to an applicant's ability to import, or imposes significant burdens on importers unrelated to their normal importing activity.

## ***2. Indonesia's import licensing regime for animals and animal products is inconsistent with Article XI:1 of the GATT 1994***

129. New Zealand submits that each of individual components of Indonesia's import licensing regime for animals and animal products constitute "prohibitions" or "restrictions" that are inconsistent with Article XI:1 of the GATT. This import licensing regime, when viewed "as a whole", also constitutes a restriction maintained contrary to Article XI:1. As explained in the previous Subsection, for a measure to be inconsistent with Article XI:1 it must (i) constitute a "prohibition" or "restriction"; and (ii) be made effective through a "quotas, import or export licences or other measures".

130. In Subsections (a) - (i) below, New Zealand demonstrates how each of the components of Indonesia's import licensing regime for animals and animal products, and the regime as a whole, constitute a "prohibition" or "restriction" within the meaning of Article XI:1. This is followed by Subsection (j), which provides further detail on how each of these prohibitions and restrictions, and the import licensing regime as a whole, are made effective through "quotas, import or export licences or other measures".

<sup>215</sup> Panel Report *Columbia - Ports of Entry*, para. 7.240.

<sup>216</sup> Panel Report, *Argentina - Import Measures*, para. 6.454.

<sup>217</sup> Panel Report, *Argentina - Import Measures*, para. 6.474.

<sup>218</sup> Appellate Body Report, *Argentina - Import Measures*, paras. 5.287-5.288.

**(a) The prohibition on imports of certain animal products is inconsistent with Article XI:1**

131. Indonesia uses a "positive list" system to prohibit all imports of bovine offal and certain forms of manufacturing meat.<sup>219</sup> As explained in Section III.A.3(a) because these products are not listed in Appendix I of *MOA 139/2014*, they are ineligible to obtain an MOA Recommendation (and therefore an Import Approval, which requires an MOA Recommendation as a prerequisite).<sup>220</sup> As a consequence of being unable to obtain MOA Recommendations and Import Approvals, importers are prohibited from importing these products contrary to Article XI:1.<sup>221</sup>

132. In addition to the laws and regulations described above, the prohibition on imports of bovine offal and certain forms of manufacturing meat is confirmed in statements by Indonesian officials. The [ ] was reported as stating that "Only live cattle imports are limited by quota; the import of beef is still free. But import of secondary cuts and offal is banned starting from this year" and "[i]f there is demand for offal, we encourage to buy domestic offal. Termination of import permit for offal and secondary cuts is forever".<sup>222</sup>

133. In *Brazil - Retreaded Tyres*, the panel stated that the meaning of the term "prohibition" in Article XI:1 required that "Members shall not forbid the importation of any products of any other Member into their markets".<sup>223</sup> 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.<sup>224</sup> For similar reasons, Indonesia's ban on imports of bovine offal and certain forms of manufacturing meat is inconsistent with Article XI:1.<sup>225</sup>

134. While it is not necessary for New Zealand to demonstrate the existence of actual negative trade effects resulting from these measures,<sup>226</sup> New Zealand notes that the prohibition on importation of bovine offal (except tongue and tail) has severely limited

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<sup>219</sup> See paras. 38-45 above.

<sup>220</sup> Article 2(2), *MOT 46/2013* (Exhibit JE-18) states that "The types of Animals and Animal Products that can be imported are included in Appendix I and Appendix II". Similarly Article 8, *MOA 139/2014* (Exhibit JE-26) states that the products "that can be imported" are those listed in Appendix I and Appendix II. Appendix I, *MOA 139/2014* is entitled "Bovine meat that can be imported into the territory of the Republic of Indonesia". Compare Appendix I, *MOA 139/2014* (which lists only "prime cuts", certain forms of manufacturing meat and tongue and tail) with Appendix I, *MOA 84/2013* (Exhibit JE-25), (which includes a number "secondary cuts" in addition to "prime cuts"). See also: List of bovine meat and offal products and their eligibility for importation into Indonesia (Exhibit NZL-22). Certain products are also unlisted in Appendix I, *MOT 46/2013* and are therefore also ineligible to obtain an Import Approval.

<sup>221</sup> Article 8(1), *MOT 46/2013* (Exhibit JE-18) provides that an Import Approval is required for imports of bovine animals and animal products (being those products covered by Appendix I).

<sup>222</sup> "Achieving self-sufficiency, government keep importing live cattle" *Lensa Indonesia* (Exhibit NZL-23).

<sup>223</sup> Panel Report, *Brazil - Retreaded Tyres*, para. 7.11.

<sup>224</sup> Panel Report, *Brazil - Retreaded Tyres*, para. 7.15.

<sup>225</sup> Panel Report, *Brazil - Retreaded Tyres*, para. 7.11.

<sup>226</sup> Panel Report, *Argentina - Hides and Leather* paras. 11.20-11.21. In regards to Article XI:1 of the GATT 1994 the panel stated that the provision "protects competitive opportunities of imported products, not trade flows" and therefore a complainant "need not prove actual trade effects".

Indonesian imports of these products. Specifically, the quantity of edible bovine offal imported into Indonesia in the first six months of 2015 represented only 5 percent of the quantity imported in the same period in 2010.<sup>227</sup>

**(b) The prohibition on imports of certain animal products except in emergency circumstances is inconsistent with Article XI:1**

135. Indonesia also uses its "positive list" system to prohibit imports of bovine carcass and beef secondary cuts, except where certain emergency conditions exist.<sup>228</sup> As explained in Section III.A.3(a), because these products are not listed in Appendix I of *MOA 139/2014*, they are ineligible to obtain an MOA Recommendation (and therefore Import Approval, which requires an MOA Recommendation as a prerequisite).<sup>229</sup> As a consequence of being unable to apply for and obtain MOA Recommendations and Import Approvals, importers are prohibited from importing these products in breach of Article XI:1.

136. The measure is again similar to that considered in *Brazil - Retreaded Tyres*, where the panel confirmed that a prohibition on the issuance of import licences necessary for the importation of retreaded tyres was inconsistent with Article XI:1.<sup>230</sup>

137. As explained in Section III.A.3(a), the only circumstance where imports of bovine carcass and beef secondary cuts are permitted is when the Indonesian Government, acting through two Ministers, directs Indonesian State-Owned Enterprises to conduct importation of these products.<sup>231</sup> The relevant regulations from the Ministry of Trade and Ministry of Agriculture only permit directions to State-Owned Enterprises to import to be made by Indonesian Ministers where:

- a. certain emergency conditions exist (namely a lack of food availability or an animal disease outbreak, price volatility or inflation, or a natural disaster);<sup>232</sup>
- b. approval is obtained by a second Minister;<sup>233</sup> and
- c. MOA Recommendations and Import Approvals are issued to the State-Owned Enterprise which receives the Ministerial direction.<sup>234</sup>

138. These conditions are designed in a way which permits importation only in circumstances where there are shortages in domestic supply of these products, as evidenced

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<sup>227</sup> "Indonesia Import Statistics From all countries 2010-2015" *Global Trade Atlas* (Exhibit NZL-4).

<sup>228</sup> See description at paras. 30 - 35 and 38 - 45 above.

<sup>229</sup> Article 2(2), *MOT 46/2013* (Exhibit JE-18) states that "The types of Animals and Animal Products that can be imported are included in Appendix I and Appendix II". Similarly Article 8, *MOA 139/2014* (Exhibit JE-26) states that the products "that can be imported" are those listed in Appendix I and Appendix II. Appendix I, *MOA 139/2014* is entitled "Bovine meat that can be imported into the territory of the Republic of Indonesia".

<sup>230</sup> Panel Report, *Brazil - Retreaded Tyres*, para. 7.15.

<sup>231</sup> Articles 23(3) and (4), *MOA 139/2014*, as amended (Exhibit JE-28).

<sup>232</sup> Articles 23(3) and (4), *MOA 139/2014*, as amended (Exhibit JE-28). See in particular, paras. 44 - 45 above.

<sup>233</sup> Articles 23(3) and (4), *MOA 139/2014*, as amended (Exhibit JE-28).

<sup>234</sup> Article 18(2), *MOT 46/2013* (Exhibit JE-18). See also: Article 18B, *MOT 41/2015* (Exhibit JE-22).

through a lack of "food availability", high domestic prices for such products or disease outbreaks or natural disasters which affect levels of supply within Indonesia.<sup>235</sup>

139. Prohibiting imports except in these exceptional circumstances acts as a limitation on the opportunities for importation of bovine carcass and beef secondary cuts into Indonesia. Importers (including State-Owned Enterprises) may not even *apply for licences* for bovine carcass and beef secondary cuts of their own volition. The effect of this is that imports are not permitted at all in ordinary circumstances.

140. Even in circumstances where a direction is made for State-Owned Enterprises to import, the Indonesian government still has absolute control over the importation process and the ability to determine the type and quantity of beef products that Indonesian State-Owned Enterprises may import.<sup>236</sup> The volume of imports permitted in emergency circumstances is limited to the volume required to remedy the relevant emergency situation (as determined by the relevant Ministers based on proposals by Indonesian officials).<sup>237</sup>

141. Even if Indonesian Ministers, in exceptional circumstances, permit importation of bovine carcass and beef secondary cuts by State-Owned Enterprises, the measure still constitutes a violation of Article XI:1. As the panel noted in *China - Raw Materials*:

It makes no difference, in the panel's view, that discretion may be applied in a particular case such that a licence is authorized. The system offers no certainty that licences will be granted and hence it is not permissible.<sup>238</sup>

142. The restrictions imposed on the importation of bovine carcass and beef secondary cuts are analogous to those considered in *China - Raw Materials* in that there is no certainty that imports of bovine carcass and beef secondary cuts will be permitted by the Indonesian Government. Rather, the default position is that imports are prohibited in all circumstances contrary to Article XI:1 of the GATT 1994.

143. In *Argentina - Import Measures*, the panel confirmed the approach taken by panels in *Colombia - Ports of Entry* and *China - Raw Materials* that "uncertainty" created by a measure can constitute a restriction in violation of Article XI:1.<sup>239</sup> The panel noted, in respect of the uncertainty created by the Restrictive Trade Related Requirements imposed by Argentina, that:

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.<sup>240</sup>

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<sup>235</sup> Article 23(3), *MOA 139/2014* (Exhibit JE-26).

<sup>236</sup> Articles 23(3) and (5), *MOA 139/2014* as amended (Exhibit JE-28).

<sup>237</sup> Articles 23(5), *MOA 139/2014*, as amended (Exhibit JE-28).

<sup>238</sup> Panel Report, *China - Raw Materials*, at para. 7.921.

<sup>239</sup> Panel Reports, *Colombia - Ports of Entry*, para. 7.240; and *China - Raw Materials*, paras. 7.948 and 7.1081.

<sup>240</sup> Panel Report, *Argentina - Import Measures*, para. 6.260.

144. It is also clear that the "positive list" prohibition on bovine carcass and beef secondary cuts is designed with the objective of prohibiting imports of the bovine carcass and beef secondary cuts except where imports are absolutely necessary due to severe shortages of beef supply within Indonesia.<sup>241</sup> This is reflected in the statement by the [ ] in paragraph 132 above that imports of secondary cuts are banned permanently from the start of 2015.<sup>242</sup>

145. Indeed, the uncertainty created by the limited circumstances in which imports of bovine carcass and secondary cuts may be directed to be imported has a similar limiting effect to that described in *Argentina - Import Measures*. Exporters and other economic actors are unable to predict if, or when, they will be permitted to export bovine carcass and beef secondary cuts to Indonesia.<sup>243</sup> This leaves exporters unable to plan in advance, causing them to reduce their planned exports to Indonesia.<sup>244</sup> This is aggravated by the seasonality of beef production, which requires careful advance planning of the quantity and destination of exports.<sup>245</sup> Accordingly, even if State-Owned Enterprises are directed to import these products, the limited notice provided in advance of such directions make it likely that exporters will have insufficient time to allow their products to be processed and shipped to supply these orders.<sup>246</sup> These economic operators therefore do not have a stable environment for trade which allows them to reliably plan for exports of these products to Indonesia.

146. Accordingly, the prohibition on imports of secondary cuts except in exceptional emergency circumstances constitutes a prohibition or restriction in violation of Article XI:1.

**(c) Limited application windows and validity periods are inconsistent with Article XI:1**

147. The limited application windows and validity periods for MOA Recommendations and Import Approvals restrict trade in a manner inconsistent with Article XI:1 of the GATT 1994. As explained in Section III.A.3.(b), importers are only permitted to apply for MOA Recommendations and Import Approvals in the month immediately before the start of the relevant Quarter.<sup>247</sup> In practice, the period during which MOA Recommendations can be

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<sup>241</sup> Beef shortages have occurred persistently during 2015, with beef sellers striking due to limited supply and extremely high beef prices. See, "Beef strike leaves businesses in limbo" *The Jakarta Post*, 11 August 2015 p. 1 (Exhibit NZL-62); "Workers laid off as beef price rises steeply" *The Jakarta Post*, 12 August 2015, p. 1 (Exhibit NZL-63); and "RI needs long-term policy to cope with beef shortage" *The Jakarta Post*, 13 August 2015, p. 13 (Exhibit NZL-64). "Opting for Local Beef" *Tempo Magazine*, 12 July 2015, page 40 (Exhibit NZL-65);

<sup>242</sup> "Achieving self-sufficiency, government keep importing live cattle" *Lensa Indonesia* (Exhibit NZL-23).

<sup>243</sup> Meat Industry Association Statement, p. 7 (Exhibit NZL-12) and "Questioned SOEs capacity in importation of secondary cut and offal" *Bisnis Indonesia*, 26 February 2015, <http://industri.bisnis.com/read/20150226/12/407001/bumn-diragukan-mampu-impor-daging-secondary-cut-jeroan> (Exhibit NZL-66).

<sup>244</sup> Meat Industry Association Statement, p. 7 (Exhibit NZL-12).

<sup>245</sup> Ibid. pp. 1 - 2 and 7.

<sup>246</sup> Ibid. p. 7.

<sup>247</sup> Article 12(1), *MOT 46/2013* (Exhibit JE-18); and Articles 23(1) and 29, *MOA 139/2014* (Exhibit JE-26). Import Approvals for the January Quarter can only be applied for in December, MOA Recommendations and Import Approvals for the April Quarter can only be applied for in March, MOA Recommendations and Import Approvals for the July Quarter can only be applied for in June, and MOA Recommendations and Import



applied for is less than one month because (i) MOA Recommendations must be obtained before Import Approvals may be applied for;<sup>248</sup> and (ii) the application period for MOA Recommendations set by the Ministry of Agriculture is often shorter than one month.<sup>249</sup> For the January 2015 Quarter, applications for MOA Recommendations were only able to be applied for during 29 - 31 December 2014, meaning Import Approvals could not be obtained until January 2015.<sup>250</sup> Similarly, for the fourth Quarter of 2015, which commenced 1 October 2015, importers were only permitted to apply for MOA Recommendations in the period from 1 - 10 September.<sup>251</sup> These limited application windows mean that importers are only able to apply for permission to import animals and animal products four times during each year, and prohibit approvals being obtained outside of these limited time periods.

148. These limited application windows restrict imports by limiting the time periods during which exporters are able to access the Indonesian market.<sup>252</sup> In addition, the limited application windows require importers to determine well in advance the terms of importation (including the quantity, products, country of origin and port of entry), thereby limiting market access for imports and thus detrimentally affecting the "competitive situation" of importers.<sup>253</sup>

149. The limited application windows have a particularly restrictive effect on imports at the start of each Quarter. Because the application periods for MOA Recommendations and Import Approvals are immediately prior to the start of each Quarter, Import Approvals are only granted at the commencement of the relevant Quarter<sup>254</sup> (or in some case after the commencement of the Quarter).<sup>255</sup> Import orders are *unable to be finalised and shipped* until after an 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 Import Approval.<sup>256</sup> Once an Import

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Approvals for the October Quarter can only be applied for in September. A limited exception to this is set out in Article 23(2), *MOA 139/2014* (Exhibit JE-26), which provides that applications for MOA Recommendations may be made at any time by "Social Institutions" and "Foreign Representatives".

<sup>248</sup> Article 11(1)(b), *MOT 46/2013* (Exhibit JE-18).

<sup>249</sup> For the Fourth Quarter in 2015 (October - December), applications for MOA Recommendations were only permitted to be made during the period 1 - 10 September 2015 (SIMREK MOA Application Login Page (Exhibit NZL-27)).

<sup>250</sup> Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) announcing the closure of the application window for import recommendations, 9 December 2014 (Exhibit NZL-28) and Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) announcing the opening of online application system for import recommendations from December 29-31, 29 December 2014 (Exhibit NZL-29). See also: "Rumour of beef import quota arisen, importers are restless" *Detik* (Exhibit NZL-30).

<sup>251</sup> SIMREK MOA Application Login Page (Exhibit NZL-27).

<sup>252</sup> Meat Industry Association Statement, pp. 7 - 8. (Exhibit NZL-12).

<sup>253</sup> Panel Report, *Colombia - Ports of Entry*, para. 7.240.

<sup>254</sup> Article 12(2), *MOT 46/2013* (Exhibit JE-18) states that "Import Approval is issued at the beginning of each quarter". Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) announcing the closure of the application window for import recommendations, 9 December 2014 (Exhibit NZL-28) and Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) announcing the opening of online application system for import recommendations from December 29-31, 29 December 2014 (Exhibit NZL-29). See also: "Rumour of beef import quota arisen, importers are restless" *Detik* (Exhibit NZL-30).

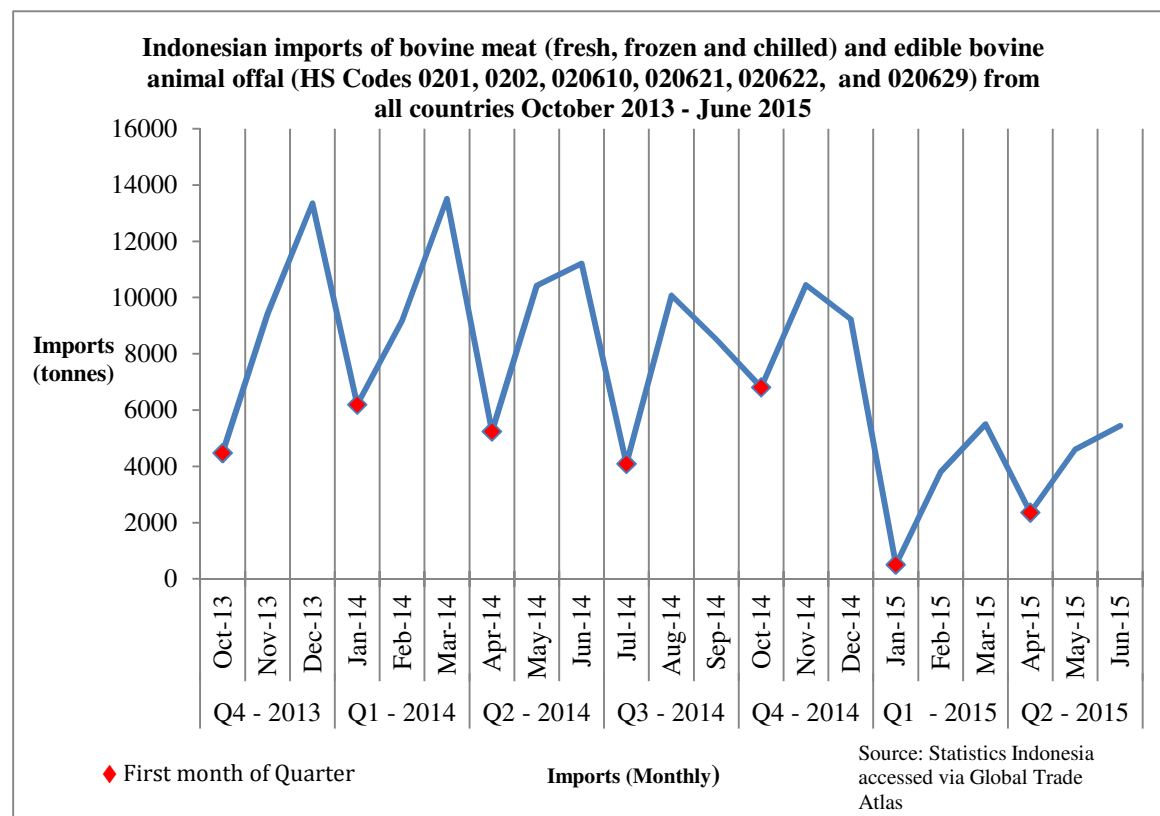
<sup>255</sup> See paras. 47 and 147 above, stating that, for the Quarter commencing January 2015, applications for MOA Recommendations were only open during the period 29-31 December 2014. This meant that Import Approvals could not be applied for until after the commencement of the January 2015 Quarter.

<sup>256</sup> Import Approvals state that the number and date of the Import Approval must be specified on the health certificate issued by the exporting country. Accordingly, product cannot be exported until the Import Approval is

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, and as a consequence, importers are effectively unable to arrange for product to arrive in Indonesia during the first month of each Quarter.<sup>257</sup> This constitutes a severe limitation on the volume of imports which are able to be imported over the course of a year.

150. This effect is illustrated in Figure 4, which shows a distinct drop in imports of bovine meat and offal in the first month of each Quarter since the introduction of quarterly licensing in the October-December 2013 Quarter.<sup>258</sup> Figure 4 illustrates Indonesian imports of bovine meat and edible offal products between October 2013 and April 2015, and illustrates that imports drop substantially in the first month of each Quarter.

**Figure 4: Indonesian imports of bovine meat (fresh, frozen and chilled) and edible bovine animal offal (HS Codes 0201, 0202, 020610, 020621, 020622, and 020629) from all countries October 2013 - June 2015**



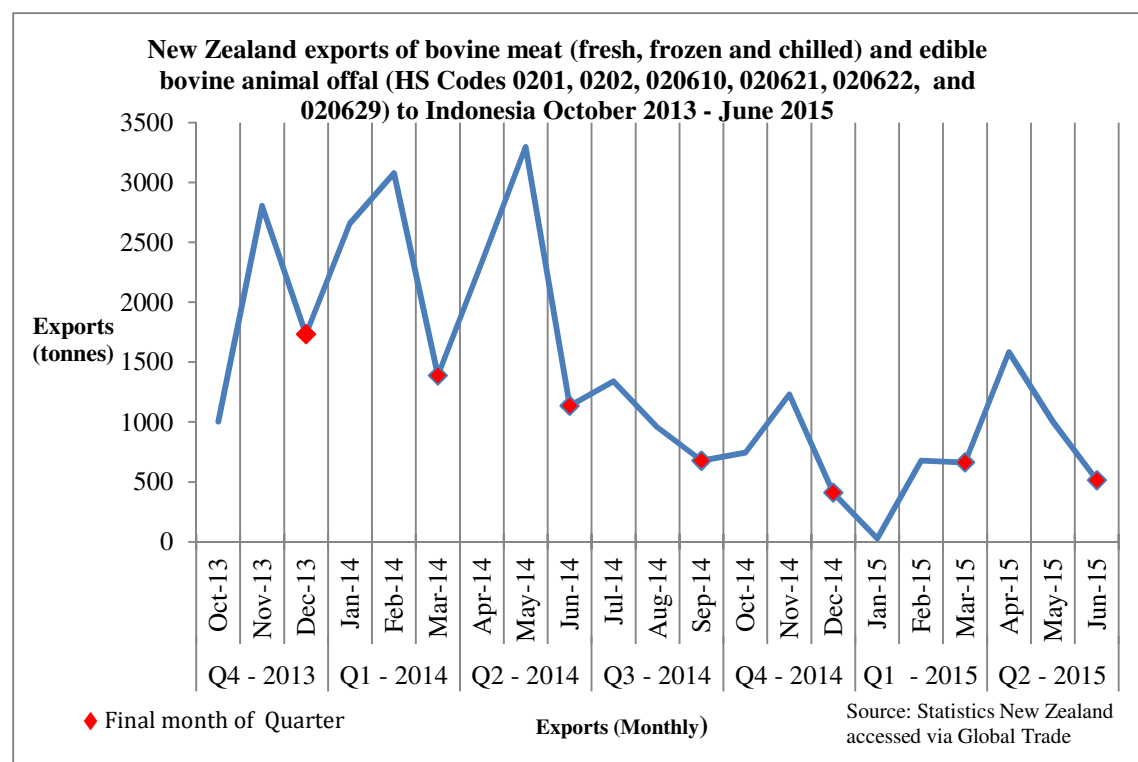
issued, order finalised and health certificate issued in the exporting country). See Beef Import Approval Example, para. 1 (Exhibit NZL-21).

<sup>257</sup> Meat Industry Association Statement, pp. 7 - 8 (Exhibit NZL-12).

<sup>258</sup> MOT 46/2013 (Exhibit JE-18) introduced quarterly licensing for bovine animal products. Article 39 provides that this regulation came into force on 2 September 2013, and accordingly, the first Quarter subject to quarterly licensing was the Quarter commencing October 2013.

151. Once issued at the commencement of a Quarter, Import Approvals are valid for only a three month period.<sup>259</sup> This limited validity period means that imports are also restricted at the end of each Quarter. Import Approvals specify that imports must clear customs prior to the end of each Quarter.<sup>260</sup> Accordingly, there is a period during the final weeks of each Quarter when products are unable to be shipped, as they will not arrive in Indonesia prior to the end of the Quarter.<sup>261</sup> Products arriving after this date will be refused entry into Indonesia and re-exported.<sup>262</sup> This phenomenon is demonstrated in Figure 5, which shows a distinct drop in New Zealand's exports of bovine meat and offal to Indonesia in the final month of each Quarter since the introduction of the current quarterly licensing in the October-December 2013 Quarter.<sup>263</sup>

**Figure 5: New Zealand exports of bovine meat (fresh, frozen and chilled) and edible bovine animal offal (HS Codes 0201, 0202, 020610, 020621, 020622, and 020629) to Indonesia October 2013 - June 2015**



<sup>259</sup> Article 12(3), *MOT 46/2013* (Exhibit JE-18). An importer may apply for an extension to the validity period of an Import Approval of up to 30 days, provided that the date of the bill of lading in the country of origin is before the original expiry date of the Import Approval. The granting of any such extension is at the discretion of the Minister of Trade. However, there is no ability for an importer to extend the validity period for longer than this 30 day period or to extend an Import Approval granted for the final Quarter of each year. See Article 12A(4), *MOT 46/2013*, as amended (Exhibit JE-21). Article 31, *MOA 139/2014* (Exhibit JE-26) provides that an MOA Recommendation is valid, at most, from the date of its issuance until the end of the year to which it relates.

<sup>260</sup> Beef Import Approval Example, para. 9 (Exhibit NZL-21).

<sup>261</sup> Meat Industry Association Statement, p. 7 (Exhibit NZL-12).

<sup>262</sup> Article 30(2), *MOT 46/2013* (Exhibit JE-18) and Beef Import Approval Example, para. 9 (Exhibit NZL-21).

<sup>263</sup> *MOT 46/2013* (Exhibit JE-18) introduced quarterly licensing for bovine animal products. Article 39 provides that this regulation came into force on 2 September 2013, and accordingly, the first Quarter subject to quarterly licensing was the Quarter commencing October 2013.

152. The combination of the inability to import at the start of a Quarter, along with the corresponding inability to export towards the end of a Quarter means there is a "dead zone" during which products cannot be imported into Indonesia. The limited validity periods also 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 Quarter.<sup>264</sup>

153. As elaborated further in Subsection (d) below, the limited application windows and validity periods, combined with the Fixed Licence Terms, collectively require importers to estimate well in advance the products they wish to import during a Quarter, and mean that importers have no flexibility to respond to changes in circumstances which occur during that Quarter.<sup>265</sup> This lack of flexibility further restricts imports by preventing importers and exporters from being able to plan in advance, and from establishing long-term supply arrangements with exporters, as frequently occurs in the meat industry.<sup>266</sup>

154. Measures such as this which restrict "market access" or "create uncertainty and affect investment plans" have been held by a number of panels to constitute restrictions in violation of Article XI:1.<sup>267</sup> For the reasons described above, the limited application windows and validity periods similarly restrict Indonesian market access and create uncertainty for imported animals and animal products, thereby limiting imports contrary to Article XI:1 of the GATT 1994.

**(d) The Fixed Licence Terms are inconsistent with Article XI:1**

155. MOA Recommendations and Import Approvals collectively specify a number of terms that importers must comply with during a Quarter.<sup>268</sup> As explained in Section III.A.3(b), these Fixed Licence Terms include:

- the quantity of products permitted to be imported during the Quarter;<sup>269</sup>
- a description of the type, category, cut and HS Code for the product to be imported during the Quarter;<sup>270</sup>
- the country of origin of products permitted for importation during the Quarter;<sup>271</sup> and
- the port of entry into Indonesia to which products are permitted to be imported during the Quarter.<sup>272</sup>

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<sup>264</sup> Meat Industry Association Statement, p. 8 (Exhibit NZL-12).

<sup>265</sup> Ibid. p. 8.

<sup>266</sup> Ibid. pp 2 and 8.

<sup>267</sup> Panel Reports, *Colombia - Ports of Entry*, para. 7.240; *China - Raw Materials*, para. 7.1081; *US - Poultry (China)*, para. 7.454.

<sup>268</sup> Article 30, *MOA 139/2014* (Exhibit JE-26) and Beef Import Approval Example (Exhibit NZL-21). See above, paras. 49-51.

<sup>269</sup> Article 28, *MOA 139/2014* (Exhibit JE-26) and Beef Import Approval Example (Exhibit NZL-21).

<sup>270</sup> Article 30(f), *MOA 139/2014* (Exhibit JE-26) and Beef Import Approval Example (Exhibit NZL-21).

<sup>271</sup> Article 30(d), *MOA 139/2014* (Exhibit JE-26) and Beef Import Approval Example (Exhibit NZL-21).

<sup>272</sup> Article 30(h), *MOA 139/2014* (Exhibit JE-26) and Beef Import Approval Example (Exhibit NZL-21).

156. Once Import Approvals are issued, these Fixed Licence Terms are "locked in" for the validity period of the MOA Recommendation and Import Approval.<sup>273</sup>

157. The Fixed Licence Terms restrict imports by imposing quarterly quantitative limits on bovine animals and animal products that may be imported into Indonesia. These restrictions are imposed through Import Approvals, which specify the maximum quantity of products that may be imported by an importer during each Quarter.<sup>274</sup>

158. Importers must specify, when applying for Import Approvals, the quantity of each product they wish to import during the Quarter to which that Import Approval relates.<sup>275</sup> This quantity is then reflected in the Import Approval and represents the maximum quantity that may be imported by the importer during that Quarter. As a result, importers are prohibited from importing more during the Quarter than the quantity specified in the relevant Import Approval.<sup>276</sup>

159. The specification of maximum permitted import quantities in Import Approvals effectively imposes a quota on imports of particular products for the duration of each Quarter. This restricts imports and eliminates importers' ability to respond to changes in domestic and international market conditions during that Quarter.<sup>277</sup>

160. The incentive for importers to ensure they do not overestimate their required quantity is very strong, since an overestimation of quantity required will result in an importer failing to satisfy the 80% realisation requirement (as described in the following Sub-section). This, in turn, may result in the importer having its existing MOA Recommendations, Import Approvals and Importer Designation revoked, and having future applications for MOA Recommendations and Import Approvals declined. Furthermore, if an importer underestimates the import quantity that it requests in an Import Approval, any additional products will be refused entry into Indonesia and re-exported.<sup>278</sup>

161. In addition to specifying the quantity of each product which may be imported during a Quarter, MOA Recommendations and Import Approvals also require importers to specify the type, country of origin and port of entry of the products that each importer may import during the relevant Quarter. These terms are "locked in" at the commencement of the relevant Quarter, with the effect that, during that Quarter, importers are not able to import products of a different type, from another country, or through a different port than is specified in their Import Approval.<sup>279</sup>

162. The inherent difficulty that exists in determining these variables prior to the commencement of a Quarter (when importers must finalise their applications for MOA Recommendations and Import Approvals) creates uncertainty for importers and affects their

<sup>273</sup> Article 33(a) and (b), *MOA 139/2014* (Exhibit JE-26).

<sup>274</sup> See para. 35 above and Beef Import Approval Example (Exhibit NZL-21).

<sup>275</sup> Beef Import Approval Example (Exhibit NZL-21).

<sup>276</sup> Article 30(2), *MOT 46/2013* (Exhibit JE-18) and Beef Import Approval Example (Exhibit NZL-21).

<sup>277</sup> Meat Industry Association Statement, p. 8. (Exhibit NZL-12).

<sup>278</sup> Article 30(2), *MOT 46/2013* (Exhibit JE-18).

<sup>279</sup> See Section III.A(3)(c) above.

ability to plan and respond to market fluctuations during the course of each Quarter.<sup>280</sup> These restrictions eliminate importers' flexibility to respond to changes in external factors that occur during a Quarter, and therefore limit an importer's ability to alter its import quantities during that period, in violation of Article XI:1.

163. The panel in *Colombia - Ports of Entry* confirmed that restrictions on the ports into which goods may be imported constituted a restriction on imports in violation of Article XI:1.<sup>281</sup> Similarly, in the present dispute, the Fixed Licence Terms in MOA Recommendations and Import Approvals result in importers have fewer opportunities to import products into Indonesia. This has a limiting effect on imports contrary to Article XI:1.

**(e) The 80% realisation requirement is inconsistent with Article XI:1**

164. As explained in Section III.A.3(d), the 80% realisation requirement requires importers to import no less than 80% of the quantity of animals and animal products specified in their Import Approvals over a 12 month period.<sup>282</sup> This constitutes a "restriction" on imports within the meaning of Article XI:1, both as a discrete measure and in particular when viewed in conjunction with the Fixed Licence Terms described in the previous Subsection.

165. The effect of the 80% realisation requirement is to induce importers to reduce the quantities that they request in their Quarterly MOA Recommendations and Import Approvals.

166. The Ministry of Trade has the ability to sanction importers for non-compliance with the realisation requirement through the following mechanisms:

- the Ministry of Trade can suspend an importer's Importer Designation if it does not satisfy the 80% realisation requirement;<sup>283</sup>
- the Ministry of Trade can revoke an importer's Importer Designation if it does not satisfy the 80% realisation requirement twice.<sup>284</sup> Upon being revoked, an importer cannot reapply for an Importer Designation for at least two years; and<sup>285</sup>
- fines can also be imposed for any non-compliance with the provisions of *MOT 46/2013* that include 80% realisation requirement.<sup>286</sup>

167. These sanctions therefore impose strong incentives on importers to comply with the 80% realisation requirement, with failure resulting in an importer being effectively unable to continue to import animal products. The [ ] has been reported warning importers of the consequences of non-compliance with the 80%

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<sup>280</sup> Meat Industry Association Statement, p. 7 (Exhibit NZL-12).

<sup>281</sup> Panel Report, *Colombia - Ports of Entry*, para. 7.275.

<sup>282</sup> Article 13, *MOT 46/2013* (Exhibit JE-18); see paras. 52 - 54 above.

<sup>283</sup> Article 26, *MOT 46/2013* (Exhibit JE-18).

<sup>284</sup> Article 27(a), *MOT 46/2013* (Exhibit JE-18).

<sup>285</sup> Article 29, *MOT 46/2013* (Exhibit JE-18).

<sup>286</sup> Article 30, *MOT 46/2013* (Exhibit JE-18).

realisation requirement stating "we will punish those who cannot import 80%. I think importers must take this seriously".<sup>287</sup>

168. Because importers must predict in advance the quantity of imports that they will require during the validity period of an Import Approval (which is affected by matters outside an importer's control), importers are induced to conservatively estimate, or underestimate, the quantities requested in Import Approvals to ensure they have certainty they will satisfy the 80% realisation requirement in the applicable period. This has a limiting effect on imports, as it imposes a practical constraint on the quantity that importers are able to request without being at risk of not satisfying the 80% realisation requirement and thus losing their ability to import.

169. In *India - Autos*, importers were limited by the "practical threshold that [the importer] will impose on itself as a result of the obligation to satisfy a corresponding export commitment".<sup>288</sup> The panel in that dispute also considered that a measure which "induced [an importer] ... to limit its imports of the relevant products" was a restriction within the meaning of Article XI:1.<sup>289</sup> In this dispute, Indonesian importers also impose a practical threshold on the quantity that they request in an Import Approval, as they must be certain that they will be able to import at least 80% of their aggregated Import Approval quantities over the course of the year. Importers are therefore induced to limit their imports of animals and animal products in order to avoid severe sanctions for non-compliance.

170. The limiting effect of the 80% realisation requirement is magnified when combined with the Fixed Licence Terms. As has been described in the previous Subsection, the Fixed Licence Terms mean that a number of import terms are locked in prior to the commencement of a Quarter. These include *inter alia*, the quantity, product, port of entry, and country of origin. The need to comply with these terms limits the flexibility available to importers to satisfy the 80% realisation requirement (for example by importing from different countries, or into different ports), and therefore further induces importers to reduce the quantities they request in Import Approvals.

171. For these reasons, the design and structure of the 80% realisation requirement (both on its own and in combination with the Fixed Licence Terms) creates an environment which induces importers to limit the quantity of products that they import. Accordingly, the 80% realisation requirement has a limiting effect on imports and thus constitutes a restriction inconsistent with Article XI:1 of the GATT 1994.

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<sup>287</sup> "Beef imports need to be evaluated" *Harian Nasional*, 1 December 2014, <http://www.harnas.co/2014/12/01/impor-sapi-perlu-dievaluasi> (Exhibit NZL-67).

<sup>288</sup> Panel Report, *India - Autos*, para. 7.268.

<sup>289</sup> Panel Report, *India - Autos*, para. 7.268.

**(f) Prohibitions and restrictions on use, sale and distribution of imported animals and animal products are inconsistent with Article XI:1**

172. As explained in Section III.A.3(e), Indonesia prohibits the importation of animals and animal products for particular uses, and for sale and distribution through certain outlets.<sup>290</sup> This constitutes a "restriction" within the meaning of Article XI:1 of the GATT 1994 as it has a "limiting effect" on the importation of such products. Specifically, such restrictions limit the competitive opportunities for importation of bovine meat and offal by prohibiting importation of these products for certain uses.<sup>291</sup>

173. Bovine meat and offal may only be imported into Indonesia for use by "industry, hotel, restaurant, catering, and/or other special needs", and may only be sold or distributed through these same channels or outlets. This requirement is reflected in Article 17 of *MOT 46/2013*, which provides:

Carcasses, meats, and/or offals, as listed in Appendix I of this Ministerial Regulation, can only be imported for the use and distribution of industry, hotels, restaurants, catering, and/or other special needs.<sup>292</sup>

174. These restrictions are also reflected, and described in further detail, in Article 32 of *MOA 139/2014 as amended*, which relevantly provides:<sup>293</sup>

- (1) Intended use, as described in Article 30, item (j), for bovine meat, as described in Article 8, includes for: hotel, restaurant, catering, manufacturing, and other special needs.
- ....
- (3) Other special needs, as described in paragraph (1) and paragraph (2), include:
  - a. gifts/grants for public worship, charity, social services, or for natural disaster mitigation;
  - b. the needs of foreign country/international institution representatives and officials on assignment in Indonesia;
  - c. the needs of science research and development; or
  - d. sample goods that are not for trade (e.g., that are for exhibition) that are up to 200 (two hundred) kilograms.

<sup>290</sup> Article 17, *MOT 46/2013* (Exhibit JE-18) and Article 32, *MOA 139/2014 as amended* (Exhibit JE-28).

<sup>291</sup> The panel in *Colombia - Ports of Entry*, in summarising the jurisprudence on Article XI:1 recognised that the effect of a measure on the "competitive opportunities" for imported products was relevant in assessing the measures compatibility with Article XI:1. Panel Report, *Colombia - Ports of Entry*, para. 7.238 and 7.240 - 7.241.

<sup>292</sup> The animals and animal products specified in Appendix I, *MOT 46/2013* (Exhibit JE-18) and Appendix I, *MOA 139/2014* (Exhibit JE-26) are all bovine animals and animal products. The term "special needs" is not defined in *MOT 46/2013*. However, as set out below, the term "special needs" is defined narrowly in *MOA 139/2014* as including only "Gift or donation for religious purposes, social or natural disaster, Embassy/foreign mission consumption, Scientific research and development and Sample for exhibitions (not traded) less than 200 kg".

<sup>293</sup> Article 32, *MOA 139/2014 as amended* (Exhibit JE-28).



175. Through the provisions set out above, Indonesia prohibits the importation of bovine meat and offal for use, sale and distribution through the following: "hotel, restaurant, catering, manufacturing, and other special needs".<sup>294</sup>

176. The effect of these measures is that bovine carcass, meat and offal are not permitted to be imported into Indonesia for any form of domestic use, or sold or distributed through consumer retail outlets.<sup>295</sup> Importantly, it precludes imported beef 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.<sup>296</sup> 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 bovine products for domestic consumption. Imports of other meat products are not restricted to the same extent, and sales of such products are expressly permitted for sale through modern markets, such as supermarkets or hypermarkets.<sup>297</sup>

177. The panel in *India - Quantitative Restrictions* has previously 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 of such products under Article XI:1.<sup>298</sup> Such a 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.

178. Thus, Indonesia's restrictions on use, sale and distribution are designed in a way which directly restricts the importation of bovine meat and offal. Accordingly, the measure restricts market access for these products, and therefore constitutes a "restriction" in violation of Article XI:1.<sup>299</sup>

#### **(g) The Domestic Purchase Requirement is inconsistent with Article XI:1**

179. The Domestic Purchase Requirement makes the importation of beef contingent on importers purchasing the required quantity of domestic Indonesian beef.<sup>300</sup> As explained in Section III.A.3(f), Article 5 of *MOA 139/2014* requires that all persons that wish to import

<sup>294</sup> As described above, importation of the bovine animal products specified in Appendix I, *MOA 139/2014* (Exhibit JE-26) and Appendix I, *MOT 46/2013* (Exhibit JE-18) is permitted only for distribution and use in "industry, hotels, restaurants, catering, and/or other special needs". In addition state-owned enterprises may, when authorised to import in emergency circumstances (as described in Sections III.A.3(a), IV.A.2(a) and IV.A.2(b)) may only import for the purpose of "stabiliz[ing] prices through market operation activities and to provide disaster relief" (Article 32(4), *MOA 139/2014* (Exhibit JE-26)). Non-bovine products are also permitted to be imported for the purpose of sale in "modern markets" (Article 32(2), *MOA 139/2014* (Exhibit JE-26)).

<sup>295</sup> See Section III.A.3(e).

<sup>296</sup> See paras. 56-57 above.

<sup>297</sup> Article 32(2), *MOA 139/2014 as amended* (Exhibit JE-28), provides that those products listed in Appendix II, *MOA 139/2014* (being non-bovine products) are permitted for distribution and use in "industry, hotel, restaurant, catering, special needs, and modern market". (emphasis added).

<sup>298</sup> Panel Report, *India - Quantitative Restrictions*, para. 5.142-5.143.

<sup>299</sup> Panel Report, *Colombia - Ports of Entry*, para. 7.240.

<sup>300</sup> See paras. 59 - 61 above.

beef ("large ruminant meat") must, as a condition of importation, purchase a specified amount of Indonesian beef.<sup>301</sup> Compliance with this requirement must be demonstrated in order to obtain an MOA Recommendation, which is in turn required in order to obtain an Import Approval.<sup>302</sup>

180. The quantity of Indonesian beef which must be purchased in order to obtain an MOA Recommendation is determined on a quarterly basis.<sup>303</sup> For the Quarter commencing July 2015, the quantity of Indonesian beef required to be purchased by importers was set at 3% of total beef purchases (for beef used for all permitted purposes other than manufacturing) and 1.5% of total beef purchases (for beef imported for use in manufacturing processes).<sup>304</sup>

181. The Domestic Purchase Requirement is enforced by requiring importers to demonstrate, in their application for an MOA Recommendation, that they have "absorbed" the required quantity of Indonesian beef.<sup>305</sup> If, when applying for an MOA Recommendation, an importer requests to import a quantity of beef that would result in the proportion of imported beef relative to Indonesian beef purchased by that importer exceeding that permitted according to the quantity that has been absorbed, its application for an MOA Recommendation will be rejected.

182. For example, if an importer specifies in an application for an MOA Recommendation that it wishes to purchase 97 tonnes of beef, it must supply evidence that it has purchased at least 3 tonnes of Indonesian beef.<sup>306</sup> If an importer supplied evidence of purchasing *less than* the required level of 3 tonnes, its request for an MOA Recommendation would be rejected and it would be required to resubmit its application specifying a lower import quantity (at a level which would allow the Domestic Purchase Requirement to be satisfied).

183. For the purposes of satisfying the Domestic Purchase Requirement, Indonesian beef must be purchased by an importer in the three month period prior to the month in which an application for an MOA Recommendation is made.<sup>307</sup> This means, for example, that the maximum quantity of beef that an importer may request in an MOA Recommendation for the July Quarter is determined by reference to the quantity of Indonesian beef purchased by that importer during the three month period from March - May of that year.<sup>308</sup>

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<sup>301</sup> Article 5, *MOA 139/2014* (Exhibit JE-26).

<sup>302</sup> Article 24(1)(l) and FORMAT-1, *MOA 139/2014* (Exhibit JE-26) and Absorption Presentation, Slides 3, 4 and 6 (Exhibit NZL-38).

<sup>303</sup> Absorption Presentation, Slides 4 and 5 (Exhibit NZL-38).

<sup>304</sup> Ibid (Exhibit NZL-38).

<sup>305</sup> Article 24(1)(l) and FORMAT-1, *MOA 139/2014* (Exhibit JE-26); Ministry of Agriculture Absorption Presentation, slides 5 and 6 (Exhibit NZL-38).

<sup>306</sup> This is consistent with the requirement for 3% of importers' total beef purchases (in tonnes) must come from cattle raised and slaughtered in Indonesia. Ministry of Agriculture Absorption Presentation, slides 4 and 5 (Exhibit NZL-38).

<sup>307</sup> Ministry of Agriculture Absorption Presentation, slide 5 (Exhibit NZL-38). Applications for MOA Recommendations are made in the month immediately prior to the commencement of a Quarter: Article 23(1), *MOA 139/2014* (Exhibit JE-26).

<sup>308</sup> Ministry of Agriculture Absorption Presentation, slide 5 (Exhibit NZL-38).

184. The limiting effect of the Domestic Purchase Requirement is aggravated by the limited supply of beef derived from cattle that have been raised and slaughtered in Indonesia.<sup>309</sup> In many circumstances, importers are unable to obtain a sufficient quantity of Indonesian raised and slaughtered beef to enable them to import their desired quantity of imports while still satisfying the Domestic Purchase Requirement. This results in importers being forced to reduce their planned imports and request lower quantities in MOA Recommendations and Import Approvals than they would in the absence of the Domestic Purchase Requirement.

185. In the event that an importer fails to comply with the Domestic Purchase Requirement, it is liable to have its Import Approvals and Importer Designation revoked and be unable to obtain future MOA Recommendations and Import Approvals.<sup>310</sup>

186. As demonstrated through its architecture, the Domestic Purchase Requirement is designed to restrict the volume of beef imports into Indonesia by substituting imports with domestically produced product, and thus cause a corresponding increase in the volume of beef that is domestically produced. These objectives were confirmed by the [ ] who was reported as stating that the purpose of the Domestic Purchase Requirement is "clearly directed to stimulate domestic beef cattle farming. If there is [supply] available domestically, why should [we] import?"<sup>311</sup>

187. The Domestic Purchase Requirement thus imposes a practical constraint on the quantity of beef that importers are able to import into Indonesia as, *inter alia*, it requires importers to substitute imported beef with domestic beef and thereby limits imports. Measures such as the Domestic Purchase Requirement, which require the purchase of domestic product as a condition of importation, have a limiting effect on importation contrary to Article XI:1 of the GATT 1994. In *Argentina - Import Measures*, the panel confirmed that a suite of trade related requirements, which included a local content requirement, breached Article XI:1. In reaching that conclusion the panel noted that:

The required increase of local content, either by purchasing from domestic producers or by developing local manufacture, has a direct limiting effect on imports, because the measure is designed to force the substitution of imports in line with policies set by Argentina...<sup>312</sup>

188. In that dispute, Argentina imposed a range of measures which required importers to increase the level of local content in their products by substituting imports with products that are produced or could be produced in Argentina.<sup>313</sup> Such restrictions were implemented by

<sup>309</sup> "Ill-Advised Beef Self-Sufficiency Policies Have Depleted Indonesia Cattle Population by 30 Percent, Business Group Says" *Jakarta Globe* (Exhibit NZL-14).

<sup>310</sup> Article 39, *MOA 139/2014* (Exhibit JE-26).

<sup>311</sup> "Beef importers must absorb local beef" *Gatra*, 16 February 2015, <http://www.gatra.com/ekonomi-1/industri/134275-per-maret-2015.-importir-daging-sapi-wajib-serap-daging-sapi-lokal%E2%80%8F.html> (Exhibit NZL-68); See also, "Two types of beef are no longer allowed to be imported. Why?" *Bisnis Indonesia* (Exhibit NZL-11).

<sup>312</sup> Panel Report, *Argentina - Import Measures*, para. 6.258.

<sup>313</sup> Panel Report, *Argentina - Import Measures*, para. 6.196.

requiring that such local content commitments were made and complied with by importers as a condition of conducting importation.

189. Indonesia's Domestic Purchase Requirement is structurally akin to the local content requirement considered by the panel in *Argentina - Import Measures*. All beef importers are required to demonstrate that they have purchased a specified quantity of domestically produced beef in order to import any beef. This has a limiting effect on imports into Indonesia.

190. For these reasons, the Domestic Purchase Requirement constitutes a restriction on the importation of beef in breach of Article XI:1 of the GATT 1994.

**(h) The beef reference price is inconsistent with Article XI:1**

191. As explained in Section III.A.3(g) above, through the beef reference price, Indonesia prohibits importation of bovine animals and animal products when the Indonesian market price of beef secondary cuts falls below a specified "reference price".<sup>314</sup> The reference price for secondary cuts specified in *MOT 46/2013* is 76,000 Rp per kilogram.<sup>315</sup>

192. This measure has the effect of limiting imports by prohibiting the importation of bovine animals and animal products when the domestic market price of these products falls below a stipulated reference price, thereby constituting a prohibition or restriction on imports in breach of Article XI:1.

193. The beef reference price is functionally similar to a traditional "minimum import price", as both a minimum import price and the beef reference price have the effect of establishing a minimum price below which imported beef cannot enter the market. This is consistent with the use of the term "minimum import price" in *Chile - Price Band System*, which was said by the Appellate Body to "refer generally to the lowest price at which imports of a certain product may enter a Member's domestic market".<sup>316</sup>

194. Minimum import and export prices have been determined to be inconsistent with Article XI:1 of the GATT by a number of GATT and WTO panels.<sup>317</sup> The GATT panel in *EEC — Programmes of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables* held that a minimum price for the importation of tomato paste constituted a restriction in violation of Article XI:1.<sup>318</sup> This reasoning was adopted, in the context of minimum export prices, by the GATT panel in *Japan - Semi-Conductors* and most recently by the panel in *China - Raw Materials*. The panel in *China - Raw Materials* confirmed the "inherent" restrictiveness of a minimum export price noting that:

<sup>314</sup> Article 14(1), *MOT 46/2013* (Exhibit JE-18).

<sup>315</sup> Article 14(2), *MOT 46/2013* (Exhibit JE-18).

<sup>316</sup> Appellate Body Report, *Chile - Price Band System*, para. 236.

<sup>317</sup> GATT Panel Report, *EEC — Minimum Import Prices*, para. 4.9 and 4.14; Panel Reports, *Japan — Semiconductors*, para. 105; and *China-Raw Materials*, paras. 7.1081-7.1082.

<sup>318</sup> GATT Panel Report, *EEC — Minimum Import Prices*, para. 4.9 and 4.14.

The Panel agrees with the approach set out in *EEC - Minimum Import Prices* (taken in the case of importation) and followed in *Japan - Semi-Conductors*, that a measure preventing exportation below a minimum price level inherently constitutes a "restriction" that is inconsistent with Article XI:1.

195. The beef reference price also limits imports by creating uncertainty for importers. Importers are unable to predict if, or when, importation of bovine animals and animal products will be prohibited as a consequence of the market price of beef falling below the reference price. This affects the ability of importers to plan their imports in advance, and leaves importers constantly at risk that imports will be prohibited entirely due to price fluctuations that are outside of their control. The existence of this uncertainty was confirmed in a 2014 paper by the [ ]<sup>319</sup> Referring to "Trade liberalization counter measures" undertaken by Indonesia in relation to beef and horticultural products, [ ] stated that the replacement of import quotas with a reference (or "threshold") price was subject to criticism because it "creates uncertainty for importers".<sup>320</sup>

196. The uncertainty created for importers by the beef reference price limits importers ability to plan in advance, thereby limiting their willingness and ability to import. Measures such as this which "create uncertainty and affect investment plans" have the effect of limiting imports, and are therefore inconsistent with Article XI:1.<sup>321</sup>

197. Consistent with these decisions, and the rationale described above, the beef reference price has a limiting effect on imports and is therefore a restriction on imports contrary to Article XI:1 of the GATT 1994

**(i) The import licensing regime for animals and animal products "as a whole" is inconsistent with Article XI:1**

198. As outlined in the Subsections above, each component of Indonesia's import licensing regime for animals and animal products constitutes an independent restriction on imports in violation of Article XI:1. 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 with each other element to form an overarching trade restrictive measure inconsistent with Article XI:1 of the GATT 1994.

**(i) The import licensing regime for animals and animal products "as a whole" is a single measure**

199. In *Argentina-Import Measures* the panel and the Appellate Body considered the question of whether the individual Trade Related Requirements (TRRs) together constituted a single measure. The panel in *Argentina-Import Measures* (in a decision upheld by the

<sup>319</sup> The Frame of Agricultural Policy and Recent Major Agricultural Policies in Indonesia *FFTC Paper* (Exhibit NZL-61).

<sup>320</sup> Ibid. at p. 6.

<sup>321</sup> Panel Report, *Columbia-Ports of Entry*, para.7.240.

Appellate Body) considered the existence and content of the individual TRRs, the manner in which they operated in combination, and thereby determined the existence and content of a single measure (the TRR measure).<sup>322</sup> The panel concluded:

In addition, it appears that the requirements constitute different elements that contribute in different combinations and degrees - as part of a single measure - towards the realization of common policy objectives that guide Argentina's "managed trade" policy, i.e. substituting imports and reducing or eliminating trade deficits. A separate consideration of each of the TRRs would therefore go against the nature of the measure, drawing an artificial segmentation that would not reflect accurately the way in which the measure operates in practice. Moreover, an individual consideration of the requirements would not capture some of the main features of the TRRs measure, namely, its flexibility and versatility.<sup>323</sup>

200. The measures in the present dispute are similar to those considered in *Argentina - Import Measures*. The individual components of Indonesia's import licensing regime each contribute towards realizing Indonesia's policy objective of reducing imports in order to achieve "self-sufficiency" in various food products, especially beef.<sup>324</sup> This objective permeates each individual component of Indonesia's import licensing regime. It would therefore be artificial to consider each component of Indonesia's regime as independent and unrelated. While it is necessary to consider the restrictive nature of the individual components of Indonesia's import licensing regime, it is when viewed as a collective whole in light of its underlying objective that the true extent of the regime's restrictiveness becomes apparent.

(ii) The import licensing regime for animals and animal products "as a whole" restricts imports

201. Indonesia's import licensing regime, viewed as a whole, has a limiting effect on imports. The range of individually restrictive components of Indonesia's import licensing regime means that the regime as a whole also necessarily restricts imports. Specifically, Indonesia's import licensing regime seeks to limit imports through three key mechanisms, which are reflected in the specific measures identified above:

- Prohibiting importation of certain beef products: Beef secondary cuts and bovine offal which once represented nearly two thirds of New Zealand's beef exports to Indonesia,<sup>325</sup> are, along with certain other beef products, effectively prohibited from importation. This is given effect through the inability to obtain MOA Recommendations and Import Approvals for these products, and through the beef reference price;
- Limiting market access for imported products: By prohibiting beef from being imported for certain uses or sale in consumer retail outlets (including modern markets

<sup>322</sup> Panel Report, *Argentina - Import Measures*, para. 6.223-6.225.

<sup>323</sup> Ibid. para. 6.228.

<sup>324</sup> See Section III.A.1 above.

<sup>325</sup> Meat Industry Association Statement, p. 6 (Exhibit NZL-12).

and traditional retail outlets), Indonesia limits the opportunities to use and sell beef and therefore imposes a practical restriction on the quantity of products that can be imported; and

- Limiting importation by creating uncertainty and imposing practical thresholds on importation: Through the limited approval and validity periods for MOA Recommendations and Import Approvals, Fixed Licence Terms, the 80% realisation requirement and the Domestic Purchase Requirement, Indonesia imposes practical thresholds on import levels and creates uncertainty for importers and exporters. These closely inter-related components of Indonesia's licensing regime therefore have a limiting effect on the quantity of beef able to be imported into Indonesia.

202. Through these mechanisms, Indonesia undermines its key market access obligation under Article XI:1 of the GATT 1994. As the panel noted in *Colombia - Ports of Entry*, measures "which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly" can constitute restrictions in violation of Article XI:1.<sup>326</sup> By creating an overall environment which is hostile to imports and importers, Indonesia's import licensing regime imposes strong disincentives for commercial operators to conduct importation and invest in developing import businesses.<sup>327</sup> In this sense, the regime is more restrictive when viewed as a whole than simply the sum of its parts.

**(j) The import licensing regime for animals and animal products is made effective through "import licences" or "other measures"**

203. The components of Indonesia's import licensing regime, both when viewed as individual measures and as a single overarching measure, constitute prohibitions or restrictions made effective through an "import licence" or, alternatively, an "other measure" within the meaning of Article XI:1 of the GATT 1994.

204. Import licensing is a procedure which requires the submission of an application or documentation, other than that required for customs purposes, as a prior condition for importation.<sup>328</sup> Article XI:1 of the GATT 1994 applies to "prohibitions or restrictions" ... "whether made effective through quotas, import or export licences or other measures", excluding from its coverage only "duties, taxes, or other charges".<sup>329</sup>

205. As described in the Factual Background section of this submission, Indonesia's import licensing regime, and each of its components, is made effective through applications for MOA Recommendations, Import Approvals and Importer Designations, which constitute conditions

<sup>326</sup> Panel Report, *Columbia-Ports of Entry*, para. 7.240.

<sup>327</sup> Meat Industry Association Statement, p. 8 (Exhibit NZL-12).

<sup>328</sup> Panel Report, *Turkey -Rice*, para. 7.123 (quoting *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993), Vol. I, p. 1578).

<sup>329</sup> Panel Report, *India - Quantitative Restrictions*, para. 5.142.

for the importation of certain products.<sup>330</sup> Such measures fall within the ordinary meaning of the phrase "*made effective through...import...licences*".

206. Even if Indonesia's import licensing regime for animals and animal products, and its individual components, are not considered to be made effective through an "import licence", it is clear that they are made effective through an "other measure" for the purposes of Article XI:1.

207. The term "other measures" in Article XI:1 is a "broad residual category",<sup>331</sup> which includes laws and regulations as well as any other measures which prohibit or restrict imports, irrespective of their form or legal status.<sup>332</sup> The panel in *Argentina - Import Measures* recently confirmed the wide scope of "other measures," noting that the "only measures that are excluded from the scope of Article XI:1 of the GATT 1994 are those that take the form of duties, taxes or other charges".<sup>333</sup>

208. Thus, the components of Indonesia's import licensing regime for animals and animal products, both when viewed as individual measures and as a single overarching measure, are made effective through an "import licence" or "other measure" within the ambit of Article XI:1 of the GATT 1994.

### ***3. Indonesia's import licensing regime for horticultural products is inconsistent with Article XI:1 of the GATT 1994***

209. As has been argued in the previous Subsection with respect to Indonesia's import licensing regime for animals and animal products, each of individual components of Indonesia's import licensing regime for horticultural products constitute "prohibitions" or "restrictions" that are inconsistent with Article XI:1 of the GATT. This import licensing regime when viewed "as a whole" also constitutes a restriction maintained contrary to Article XI:1. As explained in Section IV.A.1, for a measure to be inconsistent with Article XI:1 it must (i) constitute a "prohibition" or "restriction"; and (ii) be made effective through a "quotas, import or export licences or other measures".

210. In Subsections (a)-(i) below, New Zealand demonstrates how each of the components of Indonesia's import licensing regime for horticultural products, and the regime as a whole, constitute a "prohibition" or "restriction" within the meaning of Article XI:1. This is followed in Subsection (j) with further detail concerning how each of these prohibitions and restrictions, and the import licensing regime as a whole, are made effective through "quotas, import or export licences or other measures".

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<sup>330</sup> Namely, applications for Import Approvals, MOA Recommendations and Importer Designations (as described in further detail in Section III.A.2 above).

<sup>331</sup> Panel Report, *Argentina - Hides and Leather*, para. 11.17.

<sup>332</sup> GATT Panel Report, *Japan - Semi-conductors*, paras. 106 and 117.

<sup>333</sup> Panel Reports, *Argentina - Import Measures*, para. 6.435; and *India - Quantitative Restrictions* para. 5.142.



**(a) Limited application windows and validity periods for RIPH and Import Approvals are inconsistent with Article XI:1**

211. As explained in Section III.B.3(a) importers may only submit applications for RIPHs and Import Approvals during limited windows and the RIPHs and Import Approvals set out limited validity periods for the importation of horticultural products into Indonesia.<sup>334</sup> These requirements are structured in such a way that imports are severely restricted over the period between validity periods. Article XI:1 prohibits quantitative restrictions which have a limiting effect on imports as confirmed, *inter alia*, by examining whether the measure restricts market access for imports.<sup>335</sup>

212. RIPHs are issued two times a year for the period January to June and July to December. For the period January to June the application window for RIPHs is 15 working days from the start of November the previous year. For the period June to December the application window for RIPHs is 15 working days from the start of May of the current year.<sup>336</sup>

213. For Import Approvals for RIs the application window for the January to June validity period is December, and for the July to December the validity period is June.<sup>337</sup> However, the application windows for Import Approvals are often not open for the entire month. As shown in Exhibit NZL-51, for the period January-June 2014, the application window for Import Approvals was only seven working days from 9-17 December 2014.<sup>338</sup> Further, importers are only told if their licence applications have been granted at the beginning of each licence validity period.<sup>339</sup>

214. These narrow application windows, combined with seasonality and the time it takes to package and ship product to Indonesia, negatively affects suppliers, particularly those with longer transportation lines. Due to the shipping time between New Zealand and Indonesia,

<sup>334</sup> Article 13, *MOA 86/2013* (Exhibit JE-15) sets out the limited application periods and validity periods for RIPHs. Article 13A, *MOT 16/2013* as amended by *MOT 47/2013* (Exhibit JE-10) sets out the limited application periods and validity periods for Import Approvals. Article 13A, *MOT 40/2015* (Exhibit JE-11) which further amends *MOT 16/2013* sets out the same limited application periods and validity period for Import Approvals.

<sup>335</sup> Appellate Body Report, *Argentina - Import Measures*, para. 5.286 and Panel Report, *Argentina - Import Measures*, paras. 6.454 and 6.474.

<sup>336</sup> Article 13, *MOA 86/2013* (Exhibit JE-15).

<sup>337</sup> Article 13A, *MOT 16/2013* as amended by *MOT 47/2013* (Exhibit JE-10). Article 13A, *MOT 40/2015* (Exhibit JE-11) which further amends *MOT 16/2013* sets out these same application and validity windows.

<sup>338</sup> Import Approval Process Explanation (Exhibit NZL-51). The notification states that:

- That the application period for Import Approvals is only open for 7 working days from 9-17 December 2014 for Semester 1 2015 Approvals
- That importers can only apply for an Import Approval after obtaining a RIPH from the Ministry of Agriculture
- That importers must realise at least 80% of the quantity stipulated in their Import Approval for the previous semester.
- That for those importers that have not met the 80% requirement their RI Designation will be frozen.
- That realisation is calculated based on products that have arrived (proven by an importer's Import Realisation Report) and will only be based on products that have arrived that their destination ports in Indonesia on or before 31 December 2014 (i.e. the end of the Semester).

<sup>339</sup> Onions New Zealand Exporter Statement (Exhibit NZL-49) and Pip Fruit New Zealand Export Statement (Exhibit NZL-50).

horticultural imports entering Indonesia from New Zealand in the first month of a validity period (i.e. January and July) are reduced due to two factors: first, the time it takes to ship product to Indonesia; and second, the unwillingness of exporters to ship product until the start of a validity period once they are sure that Indonesian importers have obtained all the relevant import licences.<sup>340</sup>

215. Imports are also disrupted at the end of each validity period because importers do not want to risk product arriving in Indonesia after the semester has ended. This might occur, for example, if there are delays in transit or at the border.<sup>341</sup> Such risks can be significant as product that arrives in Indonesia after the semester has ended must be re-exported or destroyed.<sup>342</sup>

216. This decrease in imports of horticultural products in the first month of each validity period and at the end of each period can be seen in the trade statistics for New Zealand apple and onion exports to Indonesia (Annexes 4 and 5). When compared to the trade statistics for the same months in the years prior to the import licensing regime being put in place at the end of 2012, a decrease is particularly noticeable at the end of the first semester in June and the beginning of the second semester in July. As shown in the graphs in Annexes 4 and 5 relating to New Zealand onion and apples exports, exports dip significantly at the end of semester I/beginning of semester II.<sup>343</sup> This decline in June/July impacts on imports from New Zealand because the horticultural harvest season runs from April-October.

217. These figures show the restrictive effect of the limited application windows and validity periods for horticultural products. The licensing system creates periods at the start and end of each validity period when imports of horticultural products into Indonesia are limited due to the delay between import approvals being issued and product being processed and shipped to Indonesia.

218. The limited application and validity periods for horticultural products under the import licensing regime have a limiting effect on imports contrary to Article XI:1 as they adversely affect the volume of horticultural imports into Indonesia. The Appellate Body in *Argentina - Import Measures* confirmed that:

The use of the word 'quantitative' in the title of Article XI of the GATT 1994 informs the interpretation of the words 'restriction' and 'prohibition' in Article XI:1, suggesting that the coverage of Article XI includes those prohibitions and restrictions that limit the quantity or amount of a product being imported or exported.<sup>344</sup>

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<sup>340</sup> Ibid.

<sup>341</sup> Shay Wester et al, US-ASEAN Business Council, "Customs Update: Debate Over Port Delays in Indonesia" 25 June 2015, <https://www.usasean.org/article/2015/06/25/customs-update-debate-over-port-delays-indonesia> (Exhibit NZL-69).

<sup>342</sup> Onions New Zealand Exporter Statement (Exhibit NZL-49) and Pip Fruit New Zealand Export Statement (Exhibit NZL-50).

<sup>343</sup> Ibid.

<sup>344</sup> Appellate Body Report, *Argentina - Import Measures*, para. 5.217, citing Appellate Body Report, *China - Raw Materials*, para. 320.

219. Panels in *Colombia - Ports of Entry* and *Argentina - Import Measures* (citing previous GATT panel decisions) have confirmed that measures which restrict market access can constitute quantitative restrictions contrary to Article XI:1 of the GATT 1994.<sup>345</sup> The limited application windows and validity periods restrict market access for imported horticultural products to the Indonesian market by limiting the volume of horticultural products that are imported at the end and at the beginning of each semester period. In the same manner they restrict the competitive opportunities and have a limiting effect on horticultural product imports contrary to Article XI:1 of the GATT 1994.<sup>346</sup>

**(b) Fixed Licence Terms are inconsistent with Article XI:1**

220. As explained in Section III.B.3(b), Importer Designations, RIPHs, and Import Approvals set out fixed terms for the importation of horticultural products, including the quantity of the products permitted to be imported, the specific type of products permitted to be imported, the country of origin of the products, and the port of entry through which the products will enter Indonesia.<sup>347</sup>

221. A measure will constitute a restriction on imports in violation of Article XI:1 if it has a limiting effect on imports.<sup>348</sup> This limiting effect can be demonstrated through the "design, architecture, and revealing structure" of the measure.<sup>349</sup> The Fixed Licence Terms constitute a restriction on imports because they limit imports to the products, quantity, source and port of entry set out in the import approval documents.

222. The Import Approvals that RI must obtain specify the quantity of product that may be imported during a validity period.<sup>350</sup> The quantities specified in the Import Approvals constitute the maximum quantity of that product which may be imported in the following validity period.

223. If a RI exhausts the quantity specified in their Import Approval before the conclusion of a validity period, that RI is unable to import any additional product until at least the next validity period. Furthermore, if an importer tries to import more product than set out in the Import Approvals those products will be re-exported or destroyed.<sup>351</sup>

224. In the volatile world of horticulture, which is very weather dependent, it is very difficult for horticultural importers to accurately predict six months in advance the quantity of products they will be able to source. Furthermore, it is difficult to predict other factors which may have a bearing on the international horticulture market, for instance currency fluctuations

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<sup>345</sup> Panel Report, *Colombia - Ports of Entry*, paras. 7-238-7241 (citing *Canada - Provincial Liquor Boards* (EEC), paras. 4.24 and 4.25; *Canada - Provincial Liquor Boards (US)*, para. 5.6; and *EEC - Minimum Import Prices*, para. 4.9) and Panel Report, *Argentina - Import Measures*, para. 6.454.

<sup>346</sup> Panel Report, *Colombia - Ports of Entry*, para. 7.274.

<sup>347</sup> See description at paras. 89-91 above.

<sup>348</sup> Appellate Body Reports, *China-Raw Materials*, para. 319 and *Argentina-Import Measures*, para. 5.217.

<sup>349</sup> Appellate Body Report, *Argentina - Import Measures*, para. 5.217.

<sup>350</sup> See para. 84 above.

<sup>351</sup> Article 30(3) and (4), *MOT 16/2013* (Exhibit JE-8).

or supply constraints which would affect the quantity and quality of products an importer wishes to import.<sup>352</sup>

225. Once issued, the RIPH and Import Approvals together also specify the type, country of origin, and port of entry of the products that each importer may import during the relevant licensing period.<sup>353</sup> Importers are not able to import products of a different type, from another country, or through a different port than those specified in their RIPH and Import Approval.

226. By determining the import terms at the start of a validity period, and not allowing those terms to be amended during the validity period of the import licences, Indonesia's regime has the effect of, among other things, prohibiting imports from countries other than those specified in the relevant import licence, and prohibiting imports arriving in a different Indonesian port than that specified in the RIPH or Import Approval. These restrictions remove the ability of importers to respond to market forces and external factors that occur during a validity period. The importer must instead wait until the next validity period and request a new import licence.<sup>354</sup>

227. The panel in *Colombia - Ports of Entry* found that restrictions which limited imports from Panama to two ports of entry in Colombia constituted a restriction on imports in violation of Article XI:1.<sup>355</sup> By restricting the parameters within which importers may import products (including the port of entry) through the import licences, importers have fewer opportunities to import horticultural products into Indonesia. Such restrictions have an impact on the "competitive opportunities" available to imported products.<sup>356</sup> This has a consequential limiting effect on imports contrary to Article XI:1 of the GATT 1994.

**(c) The 80% realisation requirement is inconsistent with Article XI:1**

228. As explained in Section III.B.3(c), RIs are prohibited from importing horticultural products in subsequent validity periods if they fail to import at least 80% of the quantity of each type of product specified on their Import Approval.<sup>357</sup> Importers must submit an Import Realisation Control Card every month to demonstrate compliance with this requirement.

229. Evidence provided by importers shows that this 80% realisation requirement is not merely a statistical tool, but has been used as the basis to refuse to issue Import Approvals.<sup>358</sup> Exhibit NZL-70 shows an application for an Import Approval which states that the importer

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<sup>352</sup> Onions New Zealand Exporter Statement (Exhibit NZL-49); Pip Fruit New Zealand Export Statement (Exhibit NZL-50); and ASEIBSSINDO Statement (Exhibit NZL-53).

<sup>353</sup> See Section III.B.2(b) above.

<sup>354</sup> Onions New Zealand Exporter Statement (Exhibit NZL-49); Pip Fruit New Zealand Export Statement (Exhibit NZL-50); and ASEIBSSINDO Statement (Exhibit NZL-53).

<sup>355</sup> Panel Report, *Colombia - Ports of Entry*, para. 7.275.

<sup>356</sup> Panel Report, *Colombia - Ports of Entry*, para. 7.274.

<sup>357</sup> Article 14A, *MOT 16/2013* as amended by *MOT 47/2013* (Exhibit JE-10). Article 14A, *MOT 40/2015* (Exhibit JE-11) which further amends *MOT 16/2013* sets out this same requirement.

<sup>358</sup> Ministry of Trade notification setting out that the importer applying for import approval is not eligible to apply as they did not realise 80% of their import quantity for the previous licence period (importer information redacted for confidentiality purposes) (80% Refusal Notification) (Exhibit NZL-70).

"cannot submit an Import Approval application" because the 80% realisation requirement was not met.

230. Additionally the Indonesian National Horticultural Association stated in February 2015 that 40 companies had their Import Approvals suspended as these companies were unable to meet their 80% realisation requirement for the previous validity period.<sup>359</sup>

231. Importers face a substantial penalty for failure to meet the 80% realisation requirement: their recognition as a RI is frozen for 2 semesters (i.e. 1 year).<sup>360</sup> The penalty process was set out in specific detail in an information document circulated to importers by Indonesian Government officials on 12 August 2014.<sup>361</sup> This states that recognition as an RI will be frozen if the company cannot meet the obligation of realising 80% of the quantity set out in their Import Approval. The information document goes on to state that RIs will not be able to apply for Import Approvals for the following validity period, even if they already have their RIPH approved (RIPH being a prerequisite for RIs to gain an Import Approval).<sup>362</sup> This revocation penalty was also explained back in 2013 by a Ministry of Trade official who was quoted as saying "we will keep monitoring and evaluating. If importers do not fulfil their obligation, their status as registered importers will be revoked".<sup>363</sup>

232. The effect of the 80% realisation requirement is to limit the amount of imports that importers request in their horticulture import licences. As the consequences of failing to comply with the 80% realisation requirement are severe and result in an importer being effectively prevented from operating its business, importers have a strong incentive to comply with the 80% realisation requirement. As is explain in importer and exporter statements, importers respond by conservatively estimating, or underestimating, the quantities requested in their import licences in order to ensure they are able to satisfy the 80% realisation requirement.<sup>364</sup> Importers must predict in advance the quantity of imports that they will require during the validity period of an import licence. Factors, which are outside the control of importers, make it difficult for importers to accurately predict the quantity of imports that they can reliably import in an upcoming validity period. As a result the regulations induce importers to self-limit the quantity of imports they request in their horticulture import licences.

233. The limiting effect of the 80% realisation requirement is exacerbated when combined with the Fixed Licence Terms of the import licences for horticultural products described in the previous section. Certain import terms, such as the quantity, product type, port of entry, and country of origin are locked in prior to the commencement of a validity period. The need

<sup>359</sup> "Import Permit For This Year Is Slashed" *Industri Kontan*, 24 February 2015, <http://industri.kontan.co.id/news/izin-impor-buah-tahun-ini-dipangkas> (Exhibit NZL-71).

<sup>360</sup> Article 25A, *MOT 16/2013* as amended by *MOT 47/2013* (Exhibit JE-10). Article 25A, *MOT 40/2015* (Exhibit JE-11) which further amends *MOT 16/2013* sets out this same penalty.

<sup>361</sup> Import Approval Process Explanation (Exhibit NZL-51).

<sup>362</sup> *Ibid.*

<sup>363</sup> "Chili, Onion Import Based on Reference Price" *Tempo.Co*, 3 September 2013, <http://en.tempo.co/read/news/2013/09/04/056510223/Chili-Onion-Import-Based-on-Reference-Price> (Exhibit NZL-72).

<sup>364</sup> Onions New Zealand Exporter Statement (Exhibit NZL-49); Pip Fruit New Zealand Export Statement (Exhibit NZL-50); and ASEIBSSINDO Statement (Exhibit NZL-53).

to comply with these terms limits not only the quantity to be imported, but also the flexibility available to importers to satisfy the 80% realisation requirement.

234. The design and structure of the 80% realisation requirement acts as a "limitation on action, a limiting condition" and therefore, as the Appellate Body in *Argentina - Import Measures* and *China - Raw Materials* found, is a restriction within the meaning of Article XI:1.

235. The panel in *India - Autos* considered that a similar measure which "induced [an importer] ... to limit its imports of the relevant products" was a restriction within the meaning of Article XI:1.<sup>365</sup> A manufacturer in that case was "in no instance free to import, without commercial constraint", as many auto kits and components as it wished to without regard to its export opportunities and obligations.<sup>366</sup>

236. The measure at issue in this dispute is similarly designed to "induce" an importer to limit the amount of imports requested. The importer is not free to import the amount it wishes but is required to realise 80% of the volume of each product for which an Import Approval has been granted, over each validity period. This is inconsistent with Article XI:1 of the GATT 1994 as it has a limiting effect on imports as demonstrated through its design, architecture and revealing structure.

**(d) Restrictions based on Indonesian harvest periods are inconsistent with Article XI:1**

237. As explained in Section III.B.3(d), the importation of horticultural products is restricted to periods outside the pre-harvest, harvest, and post-harvest season for those same products in Indonesia.<sup>367</sup> The previous Indonesian Minister of Agriculture, IR. H Suswono, has explained that, to protect domestic farmers from competition, the importation of horticultural products should be banned during harvest seasons of those same products in Indonesia.<sup>368</sup>

238. The Ministry of Agriculture issues RIPHs for the importation of fresh horticultural products for direct consumption. As part of the application process for a RIPH, a RI is required to submit a plan for distribution of the imported products by time and region/municipality. The Ministry of Agriculture withholds or limits the quantities approved in a RIPH based on pre-harvest, harvest, and post-harvest periods of Indonesian production of horticultural products.<sup>369</sup> In early May 2015 the Ministry of Agriculture indicated that for the second half of 2015 imports of certain products should be restricted due to Indonesian production over the same period.<sup>370</sup> In particular, the Ministry of Agriculture recommended

<sup>365</sup> Panel Report, *India - Autos*, para. 7.268.

<sup>366</sup> Panel Report, *India - Autos*, para. 7.277.

<sup>367</sup> See description at paras. 95-98.

<sup>368</sup> "Ministry of Agriculture: Horticulture Imports Not Prohibited but Regulated" *Berita 2 Bahasa*, 2 March 2013, <http://berita2bahasa.com/berita/08/10410203-mentan-quot-impor-hortikultura-tidak-dilarang-tapi-diatur-quot> (Exhibit NZL-73)

<sup>369</sup> Article 5(2), *MOA 86/2013* (Exhibit JE-15).

<sup>370</sup> Prohibition/Limitation Letter from the MOA (Exhibit NZL-39).

that no shallot, chili, mango, banana, melon, papaya or pineapple imports should take place and that imports of oranges and mandarin oranges be limited to the period October to December.

239. Reports regarding Indonesian fruit imports confirmed in late May 2015 that the MOA intended to ban citrus imports (except for lemons) between the harvest period from July and September. According to a spokesperson for Indonesia's association of fresh fruit and vegetable importers and exporters:

What we're told is that all type of imported citrus will only be allowed to enter and apply for arrival between October and December. In other words, citrus imports will not be released for the arrival period of July to September.<sup>371</sup>

240. Exhibit NZL-52 shows an importer's plan which is consistent with the recommended time frame for the imports of oranges and mandarin oranges as set out in the internal Ministry of Agriculture letter for the second half of 2015. This ban based on the Indonesian harvest period has operated in practice to severely limit imports.<sup>372</sup>

241. This example confirms how the import licensing regime prohibits the importation of certain horticultural products over the Indonesian harvest period by withholding or limiting RIPHs over those periods.

242. Prohibitions and restrictions which have a limiting effect on imports through restricting the ability of imported products to compete in the domestic marketplace, have been considered by panels to be inconsistent with Article XI:1.<sup>373</sup> As a prohibition or restriction on the import of horticultural products, the restrictions based on the Indonesian harvest period is a quantitative restriction prohibited by Article XI:1 of the GATT 1994.

**(e) The storage ownership and capacity requirement is inconsistent with Article XI:1**

243. As explained in Section III.B.3(e), Indonesia's import licensing regime for horticultural products imposes a requirement that in order to obtain an Importer Designation as a RI and a RIPH, importers must own storage facilities of a type appropriate to the products they are importing and the quantity of product imported must be commensurate with the storage capacity.<sup>374</sup>

244. This measure has a limiting effect on imports in two ways. First, the requirement to own storage facilities of appropriate capacity places an unnecessary and burdensome limitation on importers when importers could simply hire, or have access to the required storage facilities. Second, it allows Indonesia to place a ceiling on the quantity of imported

<sup>371</sup> "Indonesia's citrus importers under threat" *Asiafruit*, 27 May 2015, <http://www.fruitnet.com/asiafruit/article/165366/indonesias-citrus-imports-under-threat> (Exhibit NZL-74).

<sup>372</sup> "Growers left to find a market as Indonesia turns away citrus" *NewsMail*, 17 July 2015, <http://www.news-mail.com.au/news/citrus-result-a-mixed-bag/2708413/> (Exhibit NZL-75).

<sup>373</sup> Panel Report, *Colombia - Ports of Entry*, para. 7.236.

<sup>374</sup> See description in paras. 99-105.

horticultural product that is allowed into the market according to how much storage capacity the importer owns.

245. In order to assess the storage capacity of an importer, Indonesia requires importers to provide proof of ownership of their storage facilities in order to obtain an Importer Designation and a RIPH. If the importer concerned does not provide proof of ownership of its storage facilities in compliance with the requirements of the Importer Designation and RIPH application, it cannot import horticultural products.<sup>375</sup>

246. In implementing this requirement, the Ministry of Trade sets volume allocations based on the importer's verified cold-storage capacity at a ratio of one to one.<sup>376</sup> Exhibit NZL-57 shows how this is done in practice. The importer reported a certain storage capacity, however the Ministry of Trade determined through the audit process that the importer's refrigerated storage was in fact less than the capacity report by the importer and instructed the importer to change the details in its RI Designation based on the determined storage capacity.<sup>377</sup> Even if proof of ownership of storage facilities is shown, the quantities applied for in an Import Approval are limited by the amount of storage capacity owned by the importer.<sup>378</sup> It is storage capacity that dictates the quantity of product that may be imported, not the performance of the importer or the demand for products in the market.

247. The panel in *Argentina - Import Measures* found that the Advance Sworn Import Declaration (*Declaración Jurada Anticipada de Importación*, DJAI), required by the Argentine Government for most imports of goods into Argentina constituted a restriction within the meaning of Article XI:1.<sup>379</sup> This was because, *inter alia*, "it does not allow companies to import as much as they desire or need without regard to their export performance".<sup>380</sup> In terms of tying to the quantity of imports an importer may bring into a country to another factor, a parallel can be seen in this dispute where Indonesia's storage capacity requirement does not allow companies to import as much as they desire or need without regard to their storage capacity at a one to one ratio. The Indonesian storage ownership and capacity requirement requires the importer to limit the volume of imports based on storage capacity, not based on market demand.

248. This one to one ratio is imposed by the Ministry of Trade even though fresh fruit and vegetables are almost always sold to customers shortly after they are imported - they do not sit in storage for the entire six month import validity period. A ratio of one to one does not take into account any product turnover during that period. This has a significant limiting effect on the quantity of imports that importers are able to apply for in their Import Approvals.<sup>381</sup>

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<sup>375</sup> Article 8(1)(e), (f) *MOT 16/2013* (Exhibit JE-8). Article 13(4), *MOT 40/2015* (Exhibit JE-11) which further amends *MOT 16/2013* confirms this requirement.

<sup>376</sup> ASEIBSSINDO Statement (Exhibit NZL-53).

<sup>377</sup> Notification of Incorrect Storage Capacity Declaration (Exhibit NZL-57). Note that in order to receive an Import Approval an importer needs to be designated as an RI.

<sup>378</sup> ASEIBSSINDO Statement (Exhibit NZL-53).

<sup>379</sup> Panel Report, *Argentina - Import Measures* at para. 6.474.

<sup>380</sup> Panel Report, *Argentina - Import Measures* at para. 6.474.

<sup>381</sup> ASEIBSSINDO Statement (Exhibit NZL-53).



249. This is exacerbated by the requirement to own, rather than lease or have access to, storage facilities of the requisite capacity. In *Brazil - Retreaded Tyres*, the panel considered that there could be restrictions on importation where the measure acted as a disincentive to importation by penalizing it, or making it prohibitively costly.<sup>382</sup> The storage ownership and capacity requirement places a significant burden on importers that is unrelated to their normal importing activity.<sup>383</sup> Importers are not permitted to find alternative storage facilities at a lower cost than through purchasing. They must limit their imports arbitrarily to the maximum volume of their storage capacity.

250. For these reasons the storage ownership and capacity requirement has a limiting effect on imports and is inconsistent with Article XI:1 of the GATT 1994.

**(f) Restrictions on use, sale and distribution of imported horticultural products are inconsistent with Article XI:1**

251. As explained in Section III.B.3(f), Indonesia's import licence regime places restrictions on the use to which imported horticultural products may be put and how such imports may be transferred or traded.<sup>384</sup> Importers of horticultural products must obtain an Import Approval as either an RI or PI in order to import certain horticultural products. RIs may only trade or transfer imported horticultural products to a distributor and are forbidden from trading or transferring the imported products directly to consumers or retailers.<sup>385</sup> PIs may only import horticultural products as raw materials or supplementary materials for industrial production processes and are prohibited from trading and/or transferring imported horticultural product.<sup>386</sup> If RIs and PIs do not comply with these restrictions, their recognition as a RI or PI can be revoked.<sup>387</sup>

252. The effect of the Indonesian restrictions on use, sale and distribution of imported listed horticultural products is that those products may not be imported into Indonesia for direct sale to consumers and retailers. This is a constraint on the ability of RIs to market and sell imported products. It reduces the opportunity for imported products to reach Indonesian householders and adds a distribution layer.

253. PIs are subject to similar constraints and must predict in advance the quantity of imports they will use in processing and are not permitted to trade or transfer any products they are not able to use as forecasted. They must bear the cost burden of destroying or re-exporting products not used in processing.

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<sup>382</sup> Panel Report, *Brazil - Retreaded Tyres*, para. 7.370.

<sup>383</sup> Panel Report, *Argentina - Import Measures*, para. 6.474.

<sup>384</sup> See description in paras. 106-108.

<sup>385</sup> Article 15, *MOT 16/2013* (Exhibit JE-8).

<sup>386</sup> Article 7, *MOT 16/2013* (Exhibit JE-8).

<sup>387</sup> Article 26(f), *MOT 16/2013* (Exhibit JE-8).

254. These restrictions have a limiting effect on the sales of imported horticultural products, especially compared to domestically produced horticultural products which are not subject to those requirements.

255. WTO jurisprudence makes clear that the restriction or limiting effect of a measure must be on "importation" itself.<sup>388</sup> The expression "restriction ... on importation" has been interpreted as a restriction "with regard to" or "in connection with" the importation of a product.<sup>389</sup> Accordingly, there must be a link between the limiting effect of a measure and the importation of a product. This link can be demonstrated through the "design, architecture, and revealing structure" of a measure.<sup>390</sup>

256. In *India-Quantitative Restrictions*, the Panel found that India maintained an import licensing regime that included the requirement that only entities defined as an "Actual User" could import certain goods. An "Actual User" was defined as a "person who utilizes the imported goods for manufacturing in his own unit or manufacturing for his own use in another unit including a jobbing unit" and could not transfer the goods except in limited circumstances.<sup>391</sup> The Panel went on to state that "Applied to the "Actual User" condition, [this] lead[s] to the conclusion that it is a restriction on imports because it precludes imports of products for resale by intermediaries, i.e. distribution to consumers who are unable to import directly for their own immediate use is restricted".<sup>392</sup> The panel found that the condition "operates as a restriction" under Article XI:1.<sup>393</sup>

257. In the present dispute, there is a clear connection between the limiting effect of the restrictions on use, sale and distribution of listed horticultural products and the importation of such products into Indonesia. In particular, the following features of Indonesia's use, sale and distribution requirements illustrate the specific effects of these measures on importation itself:

- RI and PI designations will not be issued unless the importer submits as part of the Importer Designation application proof of a distribution contract and a statement that the importer will not sell directly to consumers (in the case of a RI)<sup>394</sup> or proof of an Industrial Business Licence or similar (in the case of a PI).<sup>395</sup>
- A failure to comply with the use, sale and distribution conditions is enforced through sanctions under which an Importer's Designation may be revoked, and the importer will be unable to import horticultural products.<sup>396</sup>

<sup>388</sup> Appellate Body Report, *Argentina - Import Measures*, para. 5.217 and Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, para. 7.261.

<sup>389</sup> Panel Report, *Argentina - Import Measures*, para. 6.458 (citing Panel Report, *India - Autos*, para. 7.257).

<sup>390</sup> Appellate Body Report, *Argentina - Import Measures*, para. 5.217.

<sup>391</sup> Panel Report, *India-Quantitative Restrictions*, para. 2.24.

<sup>392</sup> Ibid. para. 5.142.

<sup>393</sup> Ibid. para. 5.143.

<sup>394</sup> Article 8(1)(g), (h) and (i), *MOT 16/2013* (Exhibit JE-8).

<sup>395</sup> Article 5(1)(a), *MOT 16/2013* (Exhibit JE-8).

<sup>396</sup> Article 26, *MOT 16/2013* (Exhibit JE-8).

258. Indonesia's restrictions on use, sale and distribution are designed to have a limiting effect, at the border, on the products that can be imported into Indonesia.<sup>397</sup> Similar to the situation in *Brazil - Retreaded Tyres*, the restrictions create disincentives to importation and place an undue burden on imports.<sup>398</sup> Accordingly the measures are restrictions which are inconsistent with Article XI:1 of the GATT 1994.

**(g) Reference prices for chili and shallots are inconsistent with Article XI:1**

259. As Section III.B.3(g) has explained,<sup>399</sup> chili and shallots are prohibited from importation when the domestic price of those products falls below a reference price set by the Ministry of Trade.<sup>400</sup> The issuance of RIPHS for the importation of chili and shallots is based on a reference price determined by the Ministry of Trade.<sup>401</sup> If the price of chili or shallots in the domestic market is below this stipulated reference price, the importation of chili and shallots is "postponed" until the domestic price exceeds the reference price.<sup>402</sup>

260. The postponement or suspension of imports on the basis of reference prices restricts imports contrary to Article XI:1. Since January 2013 the Indonesian Government has used the reference price mechanism to restrict imports.<sup>403</sup> It has done so through prohibiting imports of chili in all but five months. This means that no imports of chili have been permitted into Indonesia for 25 out of the last 30 months.

261. This is illustrated further in Figure 6 below which shows that imports of fresh chili into Indonesia have essentially been non-existent since the current import licensing regime was established at the end of 2012.

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<sup>397</sup> Appellate Body Report, *Argentina - Import Measures*, para. 5.217.

<sup>398</sup> Panel Report, *Brazil - Retreaded Tyres*, para. 7.730, 7.737.

<sup>399</sup> See description in paras. 109-110 above.

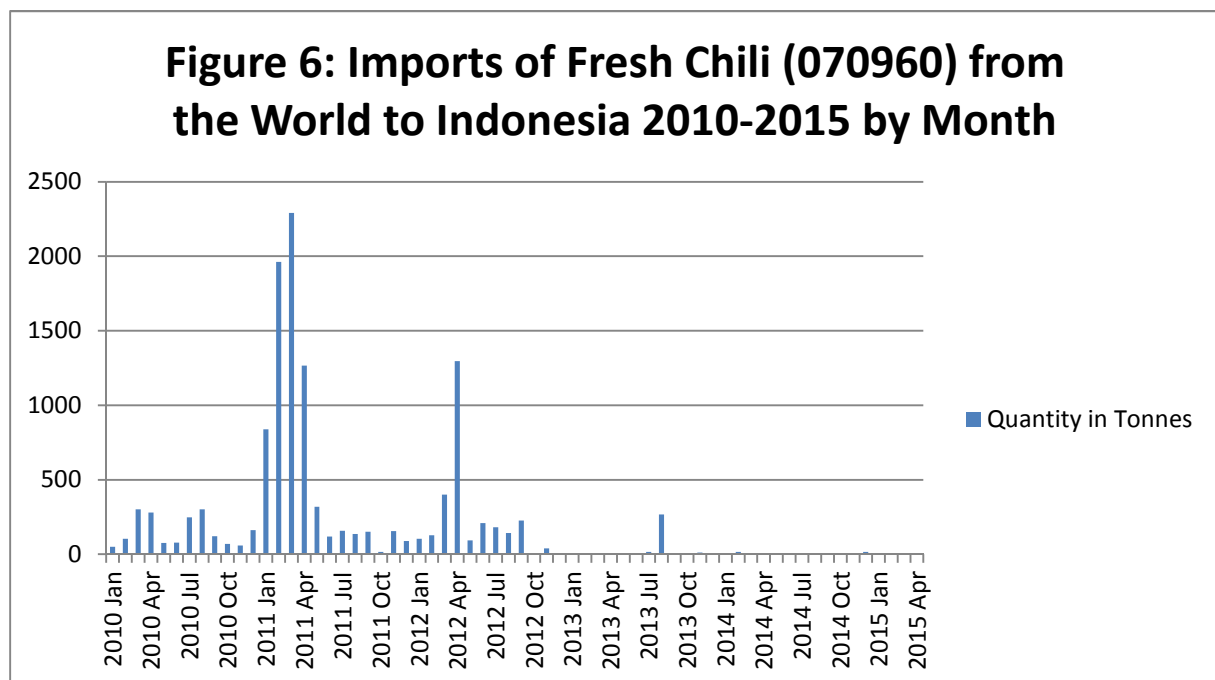
<sup>400</sup> Article 14B, *MOT 16/2013* as amended by *MOT 47/2013* (Exhibit JE-10) and Article 5(4) of *MOA 86/2013* (Exhibit JE-15).

<sup>401</sup> Article 5(4), *MOA 86/2013* (Exhibit JE-15). The current reference price is set out in Reference Price Government Decree (Exhibit NZL-58). The reference prices are:

big red/curly red chilies - IDR 26.300/kg;  
small red chilies - IDR 28.000/kg ; and  
shallots - IDR 25.700/kg.

<sup>402</sup> Article 14B(2), *MOT 16/2013* as amended by *MOT 47/2013* (Exhibit JE-10). Article 14B(1) sets out that observance of the reference price is monitored by the Horticulture Product Price Monitoring Team, established by the Minister of Trade. The reference price system for chili and shallots is also set out in further details in, "Horticultural Import Policy in Indonesia" *FFTC Paper* (Exhibit NZL-59).

<sup>403</sup> "Quotas on Beef, Chilli and Shallots Scrapped as Govt Seeks to Ease Inflation" *Jakarta Globe*, 3 September 2013, <http://jakartaglobe.beritasatu.com/business/quotas-on-beef-chilli-and-shallots-scrapped-as-govt-seeks-to-ease-inflation/> (Exhibit NZL-76).



Source: *Global Trade Atlas Indonesian Reported Statistics*

262. Similar restrictions apply to shallots.<sup>404</sup> The impact of the reference price measure for shallots has been explained publicly by the Indonesian Minister of Agriculture Andi Amran Sulaiman, who was quoted in September 2015 as saying in reference to the shallot trade: "The supply has been enough. No imports for this year".<sup>405</sup> Such statements show that the reference price measures are designed to limit the importation of the products subject to the measure. This is confirmed by an official from the Ministry of Agriculture who drew a direct link between reference prices and quotas.<sup>406</sup>

263. Indonesia's reference price for chili and shallots is similar to minimum import requirements that previous panels and GATT panels have considered. The GATT panel in *EEC —Minimum Import Prices*, found that "the minimum import price system... was a restriction 'other than duties taxes or other charges' within the meaning of Article XI:1".<sup>407</sup> A similar finding was made by the GATT panel in *Japan-Semiconductors*.<sup>408</sup> The panel in *China — Raw Materials* considered the consistency or otherwise of limiting exports below

<sup>404</sup> Comparable trade statistics are not available for shallots as the trade statistics reported publicly by Indonesia are at the HS 6 digit level, whereas Indonesia classifies shallots at the HS 10 digit level.

<sup>405</sup> "Minister Claimed that Control on Food Importation has Saved 50 Trillion Rupiah" *Kompas*, 24 September 2015,

<http://bisniskeuangan.kompas.com/read/2015/09/24/104534626/Mentan.Klaim.Hemat.Rp.50.Triliun.Berkat.Pengendalian.Impor.Pangan> ("Minister Claimed that Control on Food Importation has Saved 50 Trillion Rupiah" *Kompas*) (Exhibit NZL-77).

<sup>406</sup> "Horticultural Import Policy in Indonesia" *FFTC Paper* (Exhibit NZL-59).[ ]

<sup>407</sup> GATT Panel Report, *EEC —Minimum Import Prices*, para. 4.9.

<sup>408</sup> GATT Panel Report, *Japan —Semiconductors*, para. 105.

certain prices.<sup>409</sup> It found that China's requirement on exporting enterprises to export at set or coordinated export prices or otherwise face penalties was a restriction under Article XI:1 because it "by its very nature has a limiting or restricting effect on trade".<sup>410</sup>

264. The issue of minimum prices was also examined in the *Chile - Price Band System* dispute, including by the Appellate Body. The conclusion was that a measure which ensures that certain imported products will not enter a domestic market at a price lower than a certain threshold is inconsistent with the WTO Agreement.<sup>411</sup>

265. Indonesia's import regulations prohibit imports of chili and shallots when the domestic price falls below a stipulated reference price.<sup>412</sup> By its nature the reference price requirement is akin to those found in *Chile - Price Band System* and *China - Raw Materials*.

266. Reference prices also create uncertainty. This has been acknowledged by [ ].<sup>413</sup> The panel in *Chile - Price Band System* confirmed the approach taken by earlier panels, including *Colombia - Ports of Entry*,<sup>414</sup> that "uncertainty" created by a measure may constitute a restriction within the meaning of Article XI:1.<sup>415</sup> There is inherent uncertainty in the reference price system for chili and shallots. The setting of reference prices is opaque.<sup>416</sup> Importers have no ability to plan in advance when imports of chili and shallots will be permitted.

267. For all these reasons the reference prices for chili and shallots are inconsistent with Article XI:1 of the GATT 1994.

#### **(h) The six month harvesting requirement is inconsistent with Article XI:1**

268. As explained in Section III.B.3(h),<sup>417</sup> Indonesia requires that imported fresh horticultural products must have been harvested less than six months previously.<sup>418</sup> A RIPH may only be issued to an importer of horticultural products provided that a declaration to this effect is submitted as part of the application.<sup>419</sup> If an importer is found to have made an

<sup>409</sup> Panel Report, *China-Raw Materials*, paras. 7.1081-7.1082.

<sup>410</sup> Ibid. para. 7.1082.

<sup>411</sup> Appellate Body Report, *Chile-Price Band System*, para. 254(b).

<sup>412</sup> Article 5(4), *MOA 86/2013* (Exhibit JE-15) and Article 14B, *MOT 16/2013* as amended by *MOT 47/2013* (Exhibit JE-10).

<sup>413</sup> The Frame of Agricultural Policy and Recent Major Agricultural Policies in Indonesia" *FFTC Paper* (Exhibit NZL-61).

<sup>414</sup> Panel Report, *Colombia - Ports of Entry*, para. 7.240.

<sup>415</sup> Panel Report, *Argentina - Import Measures*, para. 6.260.

<sup>416</sup> "Horticultural Import Policy in Indonesia" *FFTC Paper* (Exhibit NZL-59).[ ]

<sup>417</sup> See description in paras. 111-112 above.

<sup>418</sup> Article 8(1), *MOA 86/2013* (Exhibit JE-15).

<sup>419</sup> Article 8(1)(a), *MOA 86/2013* (Exhibit JE-15). See also, Six month harvest statement form (Exhibit NZL-60).

incorrect statement in its RIPH application, a RIPH will not be granted for one year, rendering importers unable to import horticultural products into Indonesia.<sup>420</sup>

269. The prohibition on imports of horticultural products harvested more than six months previously is absolute. The Appellate Body in *China - Raw Materials* considered that the term "prohibition" was a "legal ban on the trade or importation of a specified commodity".<sup>421</sup> Panels have also considered that prohibitions may also include requirements which have the effect of a prohibition. Thus the panel in *US - Poultry (China)* found that the rule of the United States "had the effect of prohibiting the importation of poultry products from China".<sup>422</sup> Similarly in *Brazil - Retreaded Tyres*, the measure at issue "operate[d] so as to prohibit" the importation of retreaded tyres.<sup>423</sup>

270. The six month harvesting requirement operates as a prohibition on imports of horticultural products in a similar manner. It therefore falls within the scope of a prohibition or restriction contrary to Article XI:1 of the GATT 1994.

**(i) The import licensing regime for horticultural products "as a whole" restricts imports in violation of Article XI:1**

271. Each of the components of Indonesia's import licensing regime for horticultural products operating independently, is inconsistent with Article XI:1. In addition, these trade restrictive requirements, viewed as a whole, are inconsistent with Article XI:1 of the GATT 1994.

**(i) The import licensing regime for horticultural products "as a whole" is a single measure**

272. In *Argentina-Import Measures* the panel and the Appellate Body considered whether individual trade restrictive requirements can constitute a single measure. It is the manner in which they operate in combination which determines the existence and content of a single measure.<sup>424</sup> Where different elements contribute in different combinations and degrees, as part of a single measure, to the realisation of a common policy objective, it would be artificial only to consider them individually.<sup>425</sup>

273. The present dispute parallels the situation in *Argentina - Import Measures*. The components of Indonesia's import licensing regime constitute different elements that contribute towards Indonesia's policy objective of "self-sufficiency". Consideration of the individual components of the import licensing regime is necessary as a first step in determining the existence and content of a single measure, but is not the end of the exercise. In order to accurately reflect the way in which Indonesia's import licensing regime operates,

<sup>420</sup> Article 14, *MOA 86/2013* (Exhibit JE-15).

<sup>421</sup> Appellate Body Report, *China - Raw Materials*, para. 319.

<sup>422</sup> Panel Report, *US - Poultry (China)*, para. 7.457.

<sup>423</sup> Panel Report, *Brazil - Retreaded Tyres*, para. 7.14.

<sup>424</sup> Panel Report, *Argentina - Import Measures*, paras. 6.223-6.225.

<sup>425</sup> *Ibid.* para. 6.228.

consideration of Indonesia's import licensing regime as a whole, and the various ways in which the different elements contribute to a regime that acts to limit and restrict trade, is necessary. It is not solely through individual and distinct measures, but through a regime with integrated components, that the true extent of the restrictive nature of the Indonesian import licensing regime can be seen.

(ii) The import licensing regime for horticultural products "as a whole" restricts imports

274. Indonesia's import licensing regime as a whole has a limiting effect on imports which results from the combined effect of individual measures, which are themselves trade restrictive. This is demonstrated in the following ways:

- Limiting importation by imposing limits on imports and creating uncertainty. The import licensing regime for listed horticultural products restricts the opportunities to market imported horticultural products in Indonesia. Import licences for horticulture are only issued twice a year, contain an 80% realisation requirement, and set out detailed terms of importation, including the volume of product to be imported, the country of origin and the port of entry of the imports. These have a limited effect on imports.<sup>426</sup>
- Limiting market access for imported horticultural products. Indonesia restricts the volume of imports of horticultural products that may be imported into Indonesia. It does so based on factors including Indonesian harvest periods and the importer's storage capacity at a ratio of one to one.<sup>427</sup> Indonesia imposes a prohibition on imports of products harvested more than six months previously.<sup>428</sup> The reference prices for chili and shallots effectively prevent imports of chili and shallots from taking place.<sup>429</sup> Indonesia also restricts the use, sale and distribution of listed horticultural products.<sup>430</sup>

275. The various components of Indonesia's restrictive import licensing regime viewed individually and in combination create disincentives to import. The design of the import licensing regime is geared toward limiting the importation of horticultural products as part of an overarching policy objective of achieving "self-sufficiency" in certain foodstuffs.<sup>431</sup> The limiting effect of an individual requirement for importing horticultural products is exacerbated by the effect of the other terms. The range of restrictions imposed on importers is a strong disincentive to importing horticultural products. They operate to restrict market access and affect the competitive opportunities for imported horticultural products, create uncertainties as to whether and on what basis imports will be permitted, and place burdens on importers unrelated to normal business operations. They fall within the analytical framework

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<sup>426</sup> See paras. 211-236 above.

<sup>427</sup> See paras. 237-249 above.

<sup>428</sup> See paras. 269-269 above.

<sup>429</sup> See paras. 259-266 above.

<sup>430</sup> See paras. 252-257 above.

<sup>431</sup> See discussion at paras. 67-69 above.

adopted by the panel in *Argentina - Import Measures*.<sup>432</sup> In this sense, the restrictive impact of the import licensing regime viewed collectively is greater than the sum of the parts.

276. For these reasons, Indonesia's restrictive import licensing regime *as a whole* constitutes a "restriction" prohibited by Article XI:1 of the GATT 1994. The individual components of this regime (while restrictive in and of themselves) work together to create an environment that limits imports of listed horticultural products into Indonesia over and above the individually restrictive terms.

277. The limiting effect on imports of horticultural products set out in this submission demonstrates that Indonesia's import licensing regime as a whole is a restriction on imports and inconsistent with Article XI:1 of the GATT 1994.

**(j) The import licensing regime for horticultural products is made effective through "import licences" or "other measures"**

278. The components of Indonesia's import licensing regime for horticultural products, both when viewed as individual measures and as a single overarching measure, constitute restrictions made effective through an "import licence" or, alternatively, an "other measure" within the meaning of Article XI:1 of the GATT 1994.

279. Article XI:1 of the GATT 1994 applies to restrictions made effective through "quotas, import... licences or other measures", excluding from its coverage only "duties, taxes, or other charges".<sup>433</sup>

280. Indonesia's Importer Designations, RIPHs and Import Approvals, all fall within the ordinary meaning of the term "import licence". An importer may not import product unless and until it has obtained the relevant Importer Designation, RIPH and Import Approval. More specifically, certain information about the product (including the type and quantity of imports, the country of origin of the imported products, the port of entry into Indonesia of the products, the intended use of the products, and whether 80% of the previous validity period's permitted imports were imported) must be submitted to the relevant Indonesian government agency in order to obtain the relevant import licence. The provision of, and acceptance of, this information is a prior condition to obtaining the relevant import licence. Further, the importer may only apply for Importer Designations, RIPHs and Import Approvals during certain time periods and importers may only import products (if all the relevant approvals are obtained) within the limited validity periods set out in the RIPHs and Import Approvals.

281. The other requirements imposed by Indonesia on the import of horticultural products, namely the storage ownership and capacity requirements, the restrictions on use, sale and distribution, the use of reference prices, and the six month harvest requirement are all requirements which are "made effective" through import licences. They are inextricably linked to the import licensing regime for horticultural products:

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<sup>432</sup> Panel Report, *Argentina - Import Measures*, para. 6.474.

<sup>433</sup> Panel Report, *India - Quantitative Restrictions*, para. 5.142.



- The requirement that importers must own their own storage facilities, and the fact that an importer's storage capacity is directly tied to the quantity of imports they will be permitted to import, means that the storage ownership and capacity requirement is used as a condition of importation;
- The restrictions on use, sale and distribution of imported horticultural products are also conditions of importation as they are set out in an importer's import licences and evidence must be provided to demonstrate compliance with the requirements;
- RIPH and Import Approvals are not issued when the price of chili and shallots falls below a stipulated reference price; and
- An importer must submit a statement as part of the RIPH application that it will not import product harvested more than six months previously, otherwise the import will not be permitted.

282. Failure to meet these requirements would either prevent the requisite import licence from being issued or lead to its revocation. As such, the requirements are made effective through import licences.

283. In any event, these requirements are "other measures" that fall within the scope of Article XI of the GATT 1994. The panel in *US-Poultry (China)* summarised the WTO and GATT jurisprudence on the notion of "other measures" concluding that the term encompasses a "broad residual category" and includes any type of measure, "irrespective of the legal status of the measure".<sup>434</sup>

284. It follows that each of the restrictions imposed by Indonesia on imports of horticultural products, and the import licensing regime as a whole, is not a duty, tax or other charge and is either made effective through import licences, or falls within the ambit of "other measures" under Article XI:1 of the GATT 1994.

#### ***4. Indonesia's import restrictions based on "sufficiency" of domestic production are inconsistent with Article XI:1 of the GATT 1994***

285. As detailed in Section III.A.1 (for animals and animal products) and Section III.B.1 (for horticultural products), Indonesia's legislative provisions restrict imports for animals and animal products and horticultural products when domestic production is deemed sufficient to meet domestic demand.<sup>435</sup>

286. Indonesia's domestic insufficiency condition is set out in the *Animal Law*, *Animal Law Amendment*, *Horticulture Law*, *Food Law* and *Farmers Law*. These laws, both separately and

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<sup>434</sup> Panel Report, *US-Poultry (China)*, para. 7.450.

<sup>435</sup> Article 36B, *Animal Law Amendment* (Exhibit JE-5); Articles 14 and 36, *Food Law* (Exhibit JE-2); Articles 33 and 88, *Horticulture Law* (Exhibit JE-1); and Article 30, *Farmers Law* (Exhibit JE-3). See above at paras. 15-18; and 67-69.

collectively, restrict imports of certain animals and animal products and horticultural products in a manner inconsistent with Article XI:1 of the GATT 1994. Specifically, they:

- prohibit and restrict imports, as such and independent of the licensing regimes; and
- prohibit and restrict imports through import licensing regimes which are inconsistent with Article XI:1 as discrete restrictions and as a whole.

**(a) The domestic insufficiency condition is inconsistent with Article XI:1**

- (i) The domestic insufficiency condition prohibits and restricts imports, as such and independent of the licensing regimes

287. The domestic insufficiency condition prohibits and restricts imports, as such and independent of the licensing regimes, in the following ways:

- Prohibition of certain imports: In circumstances when domestic production is deemed sufficient to meet domestic demand, the domestic insufficiency condition prohibits imports of certain products; and
- Limiting effect on imports: The domestic insufficiency condition limits market access for imported products by creating uncertainty for importers.

288. Indonesia's domestic insufficiency condition explicitly limits imports of animals, animal products and horticultural products to circumstances when domestic production is deemed insufficient to meet domestic demand. A measure is a "restriction" under Article XI:1 if it imposes a "limiting condition" on importation.<sup>436</sup> This domestic insufficiency condition limits the competitive opportunities of imported products as they are only given market access on the condition, and to the extent that, domestic supply is deemed insufficient to satisfy Indonesian needs.

289. It is well established that the limiting effect of a measure can be demonstrated through its "design, architecture, and revealing structure".<sup>437</sup> The legislative provisions based on sufficiency of domestic production are structured in such a way as to prohibit or restrict imports of certain products. Their purpose is to protect domestic production by permitting imports only in circumstances where domestic production is deemed insufficient.<sup>438</sup> The

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<sup>436</sup> Appellate Body Report, *Argentina - Import Measures*, para. 5.217 and *China - Raw Materials (AB)*, para. 320.

<sup>437</sup> Appellate Body Report, *Argentina - Import Measures*, para. 5.217.

<sup>438</sup> Arianto A. Patunru and Sjamsu Raharadja, "Trade protectionism in Indonesia: Bad times and bad policy" *Lowy Institute Analysis Paper*, July 2015 ("Trade protectionism in Indonesia; Bad times and bad policy" *Lowy Institute Analysis Paper*) (Exhibit NZL-78); "Ministry of Agriculture: Horticulture Imports Not Prohibited but Regulated" *Berita 2 Bahasa* (Exhibit NZL-73); and "Quotas on Beef, Chilli and Shallots Scrapped as Govt Seeks to Ease Inflation" *Jakarta Globe* (Exhibit NZL-76).

Indonesian Agriculture Ministry sees limiting imports as one of the means to achieve the objective of self-sufficiency.<sup>439</sup>

290. GATT and WTO panels have also found that a limiting effect on imports contrary to Article XI:1 of the GATT 1994 can occur through the "uncertainty" that the measures at issue create for importers.<sup>440</sup> The domestic insufficiency conditions have these limiting effects. The measures lack transparency and predictability. Importers cannot predict when certain products will be prohibited from importation on the basis that domestic production is deemed sufficient by the government. There is a perpetual risk that imports of these products will be prohibited without notice. The result is that exporters and importers "cannot count on a stable environment in which to import" and are unable to plan in advance imports into the Indonesian market.<sup>441</sup>

291. This uncertainty is demonstrated in the way in which the legislative provisions on sufficiency of domestic production are implemented. For example, Indonesian regulations only permit import of beef secondary cuts and carcass in limited emergency circumstances where domestic supply is deemed insufficient.<sup>442</sup> Similarly chili and shallots, while the subject of a reference price, have at times been permitted for importation when domestic supply has not been able to meet domestic demand.<sup>443</sup> Additionally, Exhibit NZL-39 sets out an internal letter between different parts of the Ministry of Agriculture recommending the prohibition or limitation of the issuance of import licences for a number of horticultural products based on the domestic production of such products.<sup>444</sup> These measures have a chilling effect on imports. They adversely affect the ability of the importer to undertake long term investment plans.<sup>445</sup> As a consequence, the domestic insufficiency conditions have a limiting effect on imports, contrary to Article XI:1 of the GATT 1994.

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<sup>439</sup> "Trade protectionism in Indonesia; Bad times and bad policy" *Lowy Institute Analysis Paper* (Exhibit NZL-78); "Law No.13/2010 Governing Horticulture in Indonesia" *FFTC Paper*, 29 July 2014, [http://ap.ftfc.agnet.org/ap\\_db.php?id=278](http://ap.ftfc.agnet.org/ap_db.php?id=278) (Exhibit NZL-79). In this paper [ ] stated that the *Horticulture Law* provides that the importation of horticultural products "must be concerned with domestic availability". [ ] was a researcher at the Indonesian Center for Agriculture Socioeconomic and Policy Studies, which is a department within the Indonesian Ministry of Agriculture's, Research and Development Agency when this paper was written.

<sup>440</sup> GATT Panel Report, *Japan - Leather II (US)*, para. 55; Panel Reports, *Colombia - Ports of Entry*, para. 7.240; and *Argentina - Import Measures*, para. 6.474.

<sup>441</sup> Panel Report, *Argentina - Import Measures*, para. 6.260.

<sup>442</sup> See Section III.A.3(a) above. See also: "'Ministry of Trade: Imports cannot yet be done" *Agro Indonesia* (Exhibit NZL-26) and "Two types of beef are no longer allowed to be imported. Why?" *Bisnis Indonesia* (Exhibit NZL-11).

<sup>443</sup> "Imports are last option for curbing food price increases" *The Jakarta Post* (Exhibit NZL-40) and "Jokowi gives chili, shallot imports the green light" *The Jakarta Post* (Exhibit NZL-41).

<sup>444</sup> Prohibition/Limitation Letter from the Ministry of Agriculture (Exhibit NZL-39). The products recommended in this letter as those products for which imports should be limited include red onions, chili, potato, carrots, mango, banana, melon, papaya, pineapple, oranges and durian.

<sup>445</sup> Panel Report, *Colombia - Ports of Entry*, para. 7.240.

(ii) The domestic insufficiency conditions prohibit and restrict imports through the import licensing regimes

292. The domestic insufficiency conditions in the *Animal Law*, *Animal Law Amendment*, *Horticulture Law*, *Food Law* and *Farmers Law* also provide the basis for more specific measures that operate to restrict imports, including Indonesia's import licensing regime for animals and animal products and for horticultural products.<sup>446</sup>

293. The domestic insufficiency conditions in these laws thus prohibit and restrict imports, as applied through the import licensing regimes, since these licensing regimes are inconsistent with Article XI:1 of the GATT both as discrete elements and as a whole.<sup>447</sup>

294. Indonesian officials have expressly confirmed that the prohibition on importation of bovine secondary cuts and offal (as described in Section III.A.3(a)) is due to domestic supply of these products being deemed to be sufficient to satisfy domestic demand.<sup>448</sup> The [ ] confirmed that Article 36B of the *Animal Law Amendment*<sup>449</sup> provided the basis for the Ministry of Agriculture not issuing MOA Recommendations for bovine secondary cuts and offal, and was reported as stating "We are able to meet the demand for secondary cuts and offal from domestic production, because all abattoirs in the country are already able to produce such products".<sup>450</sup>

295. As described in Section III (Factual Background), the import licensing regimes for animals and animal products, and for horticultural products, are specifically designed to limit imports in order to incentivise domestic production with the objective of achieving domestic self-sufficiency in the production of certain agriculture products, particularly beef, chili and shallots. Just as the specific requirements in the import regime have a limiting effect on imports, the legislative provisions based on sufficiency of domestic production that guide and enable the import licensing regimes, have a limiting effect on imports.<sup>451</sup>

**(b) The domestic insufficiency condition is made effective through "other measures"**

296. The domestic insufficiency conditions are prohibitions or restrictions other than duties, taxes, or other charges "made effective through ... other measures" within the scope of Article XI:1 of the GATT 1994. The term "other measures" in Article XI:1 suggests a "broad residual category" of measures falling within the scope of Article XI:1.<sup>452</sup> The panel in *US -*

<sup>446</sup> See Sections III.A.1 and III.B.1 above.

<sup>447</sup> See Section IV.A.4 above.

<sup>448</sup> "Ministry of Trade: Imports cannot yet be done" *Agro Indonesia* (Exhibit NZL-26) and "Two types of beef are no longer allowed to be imported. Why?" *Bisnis Indonesia* (Exhibit NZL-11).

<sup>449</sup> As described in Section III.A.3(a) above, Article 36B(1), *Animal Law Amendment* (Exhibit JE-5) provides that "Importation of Livestock and Animal Product from overseas into the Territory of the Republic of Indonesia can be performed if domestic production and supply of Livestock and Animal Product has not fulfilled public consumption".

<sup>450</sup> Two types of beef are no longer allowed to be imported. Why?" *Bisnis Indonesia* (Exhibit NZL-11).

<sup>451</sup> Appellate Body, *Argentina - Import Measures*, para. 5.217.

<sup>452</sup> Panel Report, *Argentina - Import Measures*, para. 6.246.

*Poultry (China)* considered that laws enacted by the legislature can constitute "other measures" for the purposes of Article XI:1.<sup>453</sup>

297. Indonesia's legislative provisions on the sufficiency of domestic production are mandatory measures enacted by the Indonesian House of Representatives and form the basis for Indonesia's import licensing regimes. The legislative provisions have a direct effect on both individual actors and the executive branch of Government. Specifically, the legislative provisions: (i) are legally binding obligations which impose criminal penalties for those who violate the statutory requirements;<sup>454</sup> (ii) empower the executive to take further measures to enforce the measures based on sufficiency of domestic production; and (iii) impose a mandatory requirement on Indonesian authorities to impose further measures which prohibit or restrict the importation of certain products when domestic supply is deemed sufficient to meet domestic demand.

298. New Zealand submits that a ruling by the Panel that the domestic insufficiency condition set out in the legislative provisions is inconsistent with Article XI:1 of the GATT 1994 will help to ensure a positive solution to this dispute, consistent with the underlying purpose of the dispute settlement mechanism.<sup>455</sup>

## **B. ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE**

### ***1. The obligation under Article 4.2 of the Agreement on Agriculture***

299. Article 4.2 of the Agreement on Agriculture provides:

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 [footnote 1], except as otherwise provided for in Article 5 and Annex 5.<sup>456</sup>

300. Footnote 1 to Article 4.2 states, in relevant part:

These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trade enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties....<sup>457</sup>

301. Article 4.2 of the Agreement on Agriculture therefore prohibits WTO Members from maintaining, reverting to, or resorting to measures of the kind which have been required to be converted into ordinary customs duties. The list of measures identified in the footnote to

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<sup>453</sup> Panel Report, *US - Poultry (China)*, para. 7.451.

<sup>454</sup> Article 101, *Farmers Law*, (Exhibit JE-3).

<sup>455</sup> Article 3.7, DSU.

<sup>456</sup> Neither Article 5 nor Annex 5 are applicable to this dispute.

<sup>457</sup> The rest of footnote 1 is inapplicable to this dispute, as Indonesia does not maintain its trade-restrictive import licensing scheme under an Indonesia-specific provision of the GATT 1947, nor under balance-of-payments provisions, nor under any other non-agriculture specific provisions of either GATT 1994 or the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

Article 4.2 is illustrative. It includes quantitative import restrictions, minimum import prices, and discretionary import licensing. It also includes "similar" border measures other than ordinary customs duties.

302. The Appellate Body in *Chile - Price Band System* viewed Article 4 of the Agreement on Agriculture "as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products ...".<sup>458</sup> Further, the Appellate Body stated that "Article 4.2 prevents WTO Members from *circumventing* their commitments on 'ordinary customs duties' by prohibiting them from 'maintaining, reverting to, or resorting to' measures other than 'ordinary customs duties'".<sup>459</sup> It considered that the drafters of Article 4.2 "intended to cover a broad category of measures", not only those that were singled out to be converted into ordinary customs duties.<sup>460</sup> It also noted that all of the border measures listed in footnote 1 of Article 4.2 "have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products in ways different from the ways that ordinary customs duties do".<sup>461</sup>

303. The relationship between Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994 has been considered by WTO panels. 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. In reaching this finding, the panel stated:

[W]hen dealing with measures relating to agricultural products which should have been converted into tariffs or tariff-quotas, a violation of Article XI of GATT and its *Ad Note* relating to state-trading operations would necessarily constitute a violation of Article 4.2 of the *Agreement on Agriculture* and its footnote which refers to non-tariff measures maintained through state-trading enterprises.<sup>462</sup>

304. Similarly, the panel in *India - Quantitative Restrictions* found that measures that had been found to violate Article XI:1 were also, to the extent they applied to agricultural products, inconsistent with Article 4.2 of the Agreement on Agriculture.<sup>463</sup>

305. While a measure that is inconsistent with Article XI:1 of the GATT 1994 would, to the extent it applies to agricultural products, be inconsistent with Article 4.2 of the Agreement on Agriculture, the reverse is not necessarily the case. As the Appellate Body indicated in *Chile - Price Band System*, the scope of measures prohibited by Article 4.2 extends beyond the "restrictions other than taxes, duties and charges" that are prohibited by Article XI:1 of the GATT 1994.<sup>464</sup> Thus, a finding of inconsistency under Article XI:1 of the GATT 1994 would not require a further inquiry under the Agreement on Agriculture. However, a finding under

<sup>458</sup> Appellate Body Report, *Chile - Price Band System*, para. 201.

<sup>459</sup> Ibid. para. 187.

<sup>460</sup> Ibid. para. 208.

<sup>461</sup> Ibid. para. 227.

<sup>462</sup> Panel Report, *Korea - Various Measures on Beef*, para. 762.

<sup>463</sup> Panel Report, *India - Quantitative Restrictions*, paras. 5.238-5.242.

<sup>464</sup> Appellate Body Report, *Chile - Price Band System*, para. 256.

Article 4.2 of the Agreement on Agriculture would not be sufficient to resolve the question of whether the measure was inconsistent with Article XI:1 of the GATT 1994.

306. As a finding under Article XI:1 of the GATT 1994 would also deal definitively with the question of any inconsistency under Article 4.2 of the Agreement on Agriculture, New Zealand suggests that the panel examine the consistency of the Indonesian measures challenged in this dispute with Article XI:1 of the GATT 1994, before addressing consistency with Article 4.2 of the Agreement on Agriculture.

***2. Indonesia's import licensing regime for animals and animal products is inconsistent with Article 4.2***

307. New Zealand recalls that the Agreement on Agriculture applies to products that are listed in Annex 1 to that Agreement, which includes products listed under "HS Chapters 1 to 24 less fish and fish products".<sup>465</sup> The animals and animal products that are regulated by *MOA 139/2014* and *MOT 46/2013* fall within these HS Chapters, and are accordingly agricultural products covered by the disciplines of the Agreement on Agriculture.<sup>466</sup>

308. In this Subsection, New Zealand demonstrates that each of the components of Indonesia's import licensing regime for animals and animal products, as well as the regime as a whole, constitute "measures of the kind which have been required to be converted into ordinary customs duties" and are accordingly maintained contrary to Article 4.2 of the Agreement on Agriculture.

**(a) Indonesia's prohibitions and restrictions on imports of certain beef products are a quantitative import restriction or similar border measure inconsistent with Article 4.2**

309. In Sections III.A.3(a), IV.A.2(a) and IV.A.2(b), New Zealand described in detail the mechanism through which Indonesia prohibits and restricts imports of bovine offal, certain forms of manufacturing meat, bovine carcass and beef secondary cuts. For the reasons demonstrated in those Sections, New Zealand has demonstrated that Indonesia prohibits or restricts the quantity of these products that are permitted to be imported into Indonesia.

310. In particular, by prohibiting the importation of bovine offal and certain forms of manufacturing meat by not issuing MOA Recommendations and Import Approvals in any circumstances, and limiting the importation of bovine carcass and secondary cuts by only issuing MOA Recommendations and Import Approvals for limited quantities in emergency circumstances (and only to State-Owned Enterprises), Indonesia directly bans or limits the quantity of these products permitted for importation. The restrictiveness of the measure is enhanced by the lack of transparency and predictability as to if, or when, emergency

<sup>465</sup> Article 2 and Annex 1, Agreement on Agriculture.

<sup>466</sup> For the avoidance of doubt, the unprocessed bovine carcass, meat and offal products subject to Indonesia's import licensing regime for animals and animal products all fall within HS Chapters 01, 02 and 05. The other animals and animal products subject to the Indonesia's import licensing regime also all fall within the scope of products covered by the Agreement on Agriculture.

circumstances will be deemed to exist, and State-Owned Enterprises directed to import bovine carcass and beef secondary cuts. Accordingly, the measure amounts to an express quantitative import restriction that is inconsistent with Article 4.2.

311. Such a restriction is analogous to that considered in *Turkey - Rice*, where the panel found that Turkey's failure to issue documentation necessary for the importation of rice outside of the tariff rate quota was inconsistent with Article 4.2.<sup>467</sup> The panel in that dispute, citing the Appellate Body in *Chile - Price Band System*, confirmed that measures that result in a "lack of transparency and lack of predictability" are similarly liable to limit imports and therefore be inconsistent with Article 4.2.<sup>468</sup> Similarly the panel in *India - Quantitative Restrictions* also found that a measure which only permitted the importation of certain "Restricted Items" by designated state trading entities constituted a quantitative restriction inconsistent with Article XI:1 of the GATT and Article 4.2 of the Agreement on Agriculture.<sup>469</sup> The panel reached this finding of inconsistency, in part, based on evidence that there had been zero importation of certain Restricted Items, and that accordingly such products were effectively prohibited from importation.<sup>470</sup> As a consequence of its finding that the measure was inconsistent with Article XI:1 of the GATT, the panel also found that, to the extent the measure applied to agricultural products, it also constituted a violation of Article 4.2 of the Agreement on Agriculture.<sup>471</sup>

312. Even if not considered a "quantitative import restriction" within the meaning of footnote 1 to Article 4.2, the prohibitions and restrictions on these products constitute a "similar border measure" within the meaning of Article 4.2, as they expressly limit opportunities for importation of animals and animal products. As confirmed by the Appellate Body in *Chile - Price Band System*, the measures listed in footnote 1 to Article 4.2 all "restrict the volume or distort the price of imports of agricultural products".<sup>472</sup> The prohibitions and restrictions on imports of the bovine products described in Section III.A.3(a) restrict the permitted import volumes of these products and share a sufficient degree of similarity in design to a "quantitative import restriction" to constitute a "similar border measure" that a member may not maintain pursuant to Article 4.2 of the Agreement on Agriculture.

**(b) Limited application windows and validity periods are a quantitative import restriction or similar border measure inconsistent with Article 4.2**

313. As described in Sections III.A.3(b) and IV.A.2(c), Indonesia's limited application windows and validity periods for MOA Recommendations and Import Approvals have the effect of limiting the quantity of imports of animals and animal products able to be imported into Indonesia. As is demonstrated in Figures 4 and 5 in Section IV.A.2(c), the measure has the effect of limiting the quantity of beef able to be imported into Indonesia at the start and

<sup>467</sup> Panel Report, *Turkey - Rice*, para. 7.121.

<sup>468</sup> Panel Report, *Turkey - Rice*, para. 7.120 (citing Appellate Body Report, *Chile - Price Band System*, para. 234.)

<sup>469</sup> Panel Report, *India - Quantitative Restrictions*, at para. 5.132 - 5.136.

<sup>470</sup> Panel Report, *India - Quantitative Restrictions*, at para. 5.135 - 5.136.

<sup>471</sup> Panel Report, *India - Quantitative Restrictions*, at para. 5.241 - 5.242.

<sup>472</sup> Appellate Body Report, *Chile - Price Band System*, para. 200.



end of each Quarter.<sup>473</sup> The measure also limits flexibility for importers and prevents them from entering into long-term supply contracts, thereby imposing constraints on the quantity that an importer may import.<sup>474</sup> For the same reasons that the limiting effect of the measure means that it constitutes a restriction under Article XI:1 of the GATT, the measure also constitutes a quantitative import restriction prohibited under Article 4.2 of the Agreement on Agriculture.

314. In *Turkey - Rice*, the panel held that measures which do not intend to systemically restrict importation "at a certain level", but result in a "lack of transparency and lack of predictability" are similarly liable to limit imports and therefore be inconsistent with Article 4.2.<sup>475</sup> In that dispute, the panel found that measures which restricted imports for "periods of time" were inconsistent with Article 4.2.<sup>476</sup> As New Zealand has shown, even though limited application windows and validity periods do not restrict beef imports at a certain specified level, they limit the quantity of animals and animal products that can be imported, as demonstrated by the decline in beef imports during certain periods - namely the start and end of each Quarter. The measure is accordingly a quantitative import restriction prohibited by Article 4.2.

315. 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.<sup>477</sup> 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 bovine animals and animal products which are able to be imported into Indonesia.<sup>478</sup>

**(c) Fixed Licence Terms are a quantitative import restriction or similar border measure inconsistent with Article 4.2**

316. As outlined in Sections III.A.3(c) and IV.A.2(d), the Fixed Licence Terms specified in MOA Recommendations and/or Import Approvals (namely the specific type and quantity of product, country of origin and port of entry) are fixed for the duration of each Quarter. This (i) imposes an express quota on the quantity of product that the importer may import during that Quarter (by prohibiting imports in excess of the quantity specified in an import approval); and (ii) removes 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 Import Approval, thereby imposing a limitation on the quantity of product which may be imported.

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<sup>473</sup> See paras. 150-151 above.

<sup>474</sup> Meat Industry Association Statement, pp. 2 and 8.

<sup>475</sup> Panel Report, *Turkey - Rice*, para. 7.120.

<sup>476</sup> Panel Report, *Turkey - Rice*, para. 7.121.

<sup>477</sup> Appellate Body Report, *Chile Price Band System*, para. 226.

<sup>478</sup> Appellate Body Report, *Peru - Agricultural Products*, para. 5.153.

317. By expressly prohibiting imports in excess of the quantity specified in an Import Approval, and limiting other variables which have the effect of preventing importers from increasing the quantity of product they import, the Fixed Licence Terms constitute a "quantitative import restriction" within the meaning of footnote 1 to Article 4.2.

318. The Panel in *Turkey - Rice* held that a failure to grant licences to import rice outside of the tariff rate quota constituted a "quantitative import restriction" in breach of Article 4.2 of the Agreement on Agriculture because it "restricted the importation of rice for periods of time".<sup>479</sup> Indonesia's Fixed Licence Terms similarly restrict imports by prohibiting importation other than on the terms specified in MOA Recommendations and Import Approvals, which are fixed for the duration of each Quarter. This means that, during each Quarter, 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 Recommendations and Import Approvals. This limits the quantity that importers are able to import during a Quarter, and accordingly the measure constitutes a "quantitative import restriction" inconsistent with Article 4.2.

319. Even if the Fixed Licence Terms do not fall within the meaning of "quantitative import restriction" it is clear that they are a similar border measure to a quantitative import restriction. As the Appellate Body confirmed in *Chile - Price Band System*, all measures specified in footnote 1 to Article 4.2 have in common that they have the "effect of restricting the volumes, and distorting the prices, of imports of agricultural products".<sup>480</sup> New Zealand has demonstrated that the Fixed Licence Terms have a restrictive effect on imports and are therefore similar to the indicative list of measures specified in footnote 1 to Article 4.2. More specifically, the Fixed Licence Terms, through their restrictive impact on import quantities, also share the same design, structure and effect as a "quantitative import restriction".

**(d) The 80% realisation requirement is a quantitative import restriction or similar border measure inconsistent with Article 4.2**

320. In Sections III.A.3(d) and IV.A.2(e), New Zealand demonstrated in detail that the 80% realisation requirement has a limiting effect on imports and therefore constitutes a "restriction" on the quantity of products permitted for importation into Indonesia that is inconsistent with Article XI:1 of the GATT. The measure limits imports by inducing importers to conservatively estimate, or underestimate, the volume of products that they apply to import in order to avoid severe sanctions for non-compliance.<sup>481</sup> For these same reasons, the 80% realisation requirement also constitutes a "quantitative import restriction" within the meaning of Article 4.2 of the Agreement on Agriculture, as it restricts the quantity of animals and animal products that are able to be imported into Indonesia.

321. As the Appellate Body noted in *Chile - Price Band System*, "the border measures listed in footnote 1 have in common the object and effect of restricting the volumes, and

<sup>479</sup> Panel Report, *Turkey Rice*, paras. 7.117 - 7.118 and 7.121.

<sup>480</sup> Appellate Body Report, *Chile - Price Band System*, para. 227.

<sup>481</sup> See paras. 166-168.

distorting the prices, of imports of agricultural products".<sup>482</sup> The 80% realisation requirement restricts import volumes through the imposition of a practical constraint on the quantity of product that is able to be imported into Indonesia. Accordingly, as demonstrated by its restrictive design and effects, the 80% realisation requirement falls within the definition of "quantitative import restriction" in footnote 1 to Article 4.2.

322. Even if the 80% realisation requirement was determined not to be a "quantitative import restriction," it is clear that the measure is a "similar border measure" as it shares a similar "design, structure, and effects" and "shares a sufficient number of characteristics with" a quantitative import restriction".<sup>483</sup> As described in detail in Section III.A.3(d) the design of the 80% realisation requirement has the effect of limiting the quantity of beef imported into Indonesia. In this sense, the measure achieves the same objective as a quantitative import restriction.

**(e) Prohibitions and restrictions on the use, sale and distribution of imported animal and animal products are a quantitative import restriction or similar border measure inconsistent with Article 4.2**

323. New Zealand has demonstrated in Sections III.A.3(e) and IV.A.2(f) that Indonesia's prohibition on imports of bovine meat and offal except for certain uses, and for sale and distribution through certain channels, severely restrict market access for these imported products. Specifically, the measure prevents importation of these products for sale and distribution through channels including, *inter alia*, all modern markets (including supermarkets) and traditional "wet" markets.<sup>484</sup> Such market access restrictions impose a practical constraint on the quantity of these products that is able to be imported, thus limiting imports.

324. 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".<sup>485</sup> Prohibiting the importation of bovine meat and offal for certain uses, and for sale and distribution through certain outlets severely undermines market access for bovine meat and offal and accordingly limits the quantity of these products that may be imported.

325. The panel in *India - Quantitative Restrictions* held that a measure which prohibited imports of certain products except by their "Actual User" was inconsistent with Article XI:1 of the GATT, as it limited imports by preventing their resale to consumers through intermediary importers.<sup>486</sup> As a consequence of its finding that India's import regime (including the Actual User requirement) restricted imports in breach of Article XI:1, the panel also found that, to the extent the regime applied to agricultural products it was also

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<sup>482</sup> Appellate Body Report, *Chile - Price Band System*, para. 227

<sup>483</sup> Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina)*, para. 193.

<sup>484</sup> See paras. 56-58.

<sup>485</sup> Appellate Body Report, *Chile - Price Band System*, para. 219.

<sup>486</sup> Panel Report, *India - Quantitative Restrictions*, paras. 5.142 - 5.143.

inconsistent with Article 4.2 of the Agreement on Agriculture.<sup>487</sup> Indonesia's prohibition of the use, sale and distribution of imported animals and animal products restricts imports in a similar way, by imposing a constraint on the quantity of these products that is able to be imported. Accordingly, the measure limits imports and therefore constitutes a "quantitative import restriction" inconsistent with Article 4.2.

326. In the event that Indonesia's prohibitions on imports of bovine meat and offal for certain uses, and for sale and distribution through certain channels is not considered to be considered a "quantitative import restriction" within the meaning of footnote 1 to Article 4.2, New Zealand submits that the measure constitutes a "similar border measure" to a "quantitative import restriction" and is therefore inconsistent with Article 4.2. Specifically, because the measure operates to restrict import quantities through limiting market access, it has a close "resemblance or likeness to" a quantitative import restriction and is therefore inconsistent with Article 4.2.<sup>488</sup>

**(f) The Domestic Purchase Requirement is a quantitative import restriction or a similar border measure inconsistent with Article 4.2**

327. As described in Sections III.A.3(f) and IV.A.2(g), the Domestic Purchase Requirement dis-incentivises the importation of beef by requiring importers to substitute imported beef with domestic beef and imposing a constraint on the volume of beef that an importer may import due the limited availability of Indonesian produced beef. By discouraging importation in this way, the Domestic Purchase Requirement necessarily limits the quantity of beef that may be imported and thus constitutes a "quantitative import restriction" prohibited by Article 4.2.

328. The panel in *Argentina - Import Measures* held that a 'local content requirement' which required importers to substitute imports with domestically produced products, had "a direct limiting effect on imports" and accordingly, as part of a suite of Trade Restrictive Requirements, restricted import quantities in a manner inconsistent with Article XI:1 of the GATT.<sup>489</sup> The local content requirement is similar in design to Indonesia's Domestic Purchase Requirement, as both measures make imports contingent on the purchase of domestic products, thereby imposing a constraint on the volume of products that can be imported and requiring importers to substitute imports with domestically produced products. While the panel's decision in that dispute was reached in the context of Article XI:1 of the GATT, the Appellate Body indicated in *Chile - Price Band System*, that the scope of measures prohibited by Article 4.2 extends beyond the "restrictions other than taxes, duties and charges" that are prohibited by Article XI:1 of the GATT 1994.<sup>490</sup> Accordingly, a measure of a kind which has been determined to have a limiting effect on the quantity of a good that may be imported (as the Domestic Purchase Requirement has) will constitute a "quantitative import restriction" in violation of Article 4.2.

<sup>487</sup> Panel Report, *India - Quantitative Restrictions*, paras. 5.241 - 5.242 and 6.1.

<sup>488</sup> Appellate Body Report, *Chile - Price Band System*, para. 227.

<sup>489</sup> Panel Report, *Argentina - Import Measures*, para. 6.258.

<sup>490</sup> Appellate Body Report, *Chile - Price Band System*, para. 256.

329. Even if the Domestic Purchase Requirement is found not to constitute a "quantitative import restriction," it is clear that the measure is a "similar border measure" and therefore prohibited by Article 4.2. Because the measure is of a kind which has been demonstrated to impose a limit on the quantity of product that may be imported, it shares a similar design and structure, and has the same effects, as a "quantitative import restriction". For this reason the Domestic Purchase Requirement is a border measure of the kind that has been required to be converted into an ordinary customs duty and therefore inconsistent with Article 4.2 of the Agreement on Agriculture.

**(g) The beef reference price is a minimum import price, quantitative import restriction or similar border measure inconsistent with Article 4.2**

330. In Sections III.A.3(g) and IV.A.2(h), New Zealand describes the structure and effect of the beef reference price. By prohibiting imports of bovine animals and animal products when the domestic beef price falls below a specified reference price, the beef reference price constitutes a "minimum import price" as specified in footnote 1 to Article 4.2. In *Chile - Price Band System*, Appellate Body held that a "minimum import price" refers generally to "the lowest price at which imports of a certain product may enter a Member's domestic market".<sup>491</sup> The beef reference price falls within this definition, as it prevents bovine animals and animal products from entering the Indonesian market at a price lower than the specified reference price.

331. The Appellate Body in *Peru - Agricultural Products* recently confirmed that the scope of measures encompassed by the term "minimum import price" is not limited to those which use the transaction value of a shipment as the benchmark for determining "the lowest price at which imports ... may enter a ... market".<sup>492</sup> The Appellate Body further confirmed that, in determining whether a measure constituted a "minimum import price", an assessment would have to be made "on the basis of the total configuration of the measure", and through examining its design, structure, operation and impact.<sup>493</sup>

332. The beef reference price is specifically designed to establish a price below which imports cannot enter the market. Specifically, when the domestic price of beef secondary cuts falls below a certain level, access to the Indonesian market for all bovine animals and animal products is completely eliminated. The reference price is therefore designed and structured to establish a threshold minimum price below which imported products cannot enter the Indonesian market and accordingly meets the test set out by the Appellate Body in *Chile - Price Band* and *Peru - Agricultural Products*.

333. The beef reference price is also a "quantitative import restriction" within the meaning of footnote 1 to Article 4.2. By imposing a total prohibition on importation of bovine animals and animal products in circumstances where domestic prices fall below a specified level, the measure expressly restricts the quantity of bovine animals and animal products that are permitted for importation into Indonesia.

<sup>491</sup> Appellate Body Report, *Chile - Price Band System*, para. 236.

<sup>492</sup> Appellate Body Report, *Peru - Agricultural Products*, para. 5.129.

<sup>493</sup> Ibid.

334. Even if the beef reference price is not considered to be a "minimum import price" or "quantitative import restriction," it is clear that the measure constitutes a "similar border measure" to those described in footnote 1 to Article 4.2. The beef reference price is designed with the purpose, and has the effect, of disconnecting Indonesian domestic beef prices from international prices. As such, the measure falls within the class of measures listed in footnote 1 of Article 4.2, which the Appellate Body confirmed all "disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market".<sup>494</sup> As described above, the beef reference price also has a similar design, structure and effect to a "minimum import price", and is therefore a "similar border measure" within the meaning of footnote 1.<sup>495</sup>

**(h) The import licensing regime for animals and animal products "as a whole" is a quantitative import restriction or similar border measure inconsistent with Article 4.2**

335. All components of Indonesia's import licensing regime for animals and animal products contribute to the same underlying objective - namely restricting import quantities in order to further Indonesia's goal of self-sufficiency in the products subject to the licensing regime.<sup>496</sup> As detailed Section IV.A.2(i), the import licensing regime as a whole operates as a single quantitative import restriction, or measure similar to a quantitative import restriction, by: (i) prohibiting imports of certain beef products; (ii) limiting market access opportunities; and (iii) creating uncertainty and imposing practical thresholds on importation.<sup>497</sup>

336. Through the inter-related trade restrictive components of its import licensing regime for animals and animal products, Indonesia limits import quantities other than through ordinary customs duties. Accordingly, Indonesia's import licensing regime is inconsistent with the agricultural market access obligation set out in Article 4.2 of the Agreement on Agriculture.<sup>498</sup> As the Appellate Body held in *Chile - Price Band System*, "all of the border measures listed in footnote 1 have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products in ways different from the ways that ordinary customs duties do".<sup>499</sup> As has been demonstrated, the import licensing regime is inconsistent with these objectives, and by limiting imports of products subject to the regime, constitutes a "quantitative import restriction" prohibited by Article 4.2 of the Agreement on Agriculture.

337. For these reasons, and due to its inconsistency with Article XI:1 of the GATT 1994, Indonesia's import licensing regime constitutes a "quantitative import restriction" or "similar border measure" prohibited by Article 4.2 of the Agreement on Agriculture.

<sup>494</sup> Appellate Body Report, *Chile - Price Band System*, para. 227.

<sup>495</sup> Appellate Body Report, *Chile - Price Band System (Article 21.5 - Argentina)*, para. 193.

<sup>496</sup> See paras. 201 - 202.

<sup>497</sup> Ibid. See also the discussion of the individual components of the import licensing regime for animals and animal products in Sections IV.A.2.

<sup>498</sup> Appellate Body Report, *Peru - Agricultural Products*, paras. 5.37 - 5.38 (citing Appellate Body Report, *Chile - Price Band System*, para. 200).

<sup>499</sup> Panel Report, *Chile - Price Band System*, para. 227.

**3. Indonesia's import licensing regime for horticultural products is inconsistent with Article 4.2**

338. The requirements of the Agreement on Agriculture apply to Indonesia's import licensing regime for horticultural products.<sup>500</sup> The individual measures challenged in this dispute and the import licensing regime for horticultural products as a whole 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.

339. The aspects of the import licence regime for horticultural products that are inconsistent with Article 4.2 are the same as those inconsistent with Article XI:1 of the GATT 1994 and for reasons that are along similar lines. Each of the measures constitutes a quantitative restriction, minimum import price or "similar" border measure that are required to be converted into ordinary customs duties. Accordingly they are inconsistent with Article 4.2 of the Agreement on Agriculture.

340. This section explains how each of the individual elements of the import licensing regime for horticultural products are inconsistent with Article 4.2 and how the regime as a whole is inconsistent with Article 4.2 of the Agreement on Agriculture.

**(a) Limited application windows and validity periods are a quantitative import restriction or similar border measure inconsistent with Article 4.2**

341. New Zealand has described in Section III.B.3(a) and IV.A.2(c) above how the limited application windows and the six month period of validity of the approvals for the import of horticultural products into Indonesia have the effect of limiting the quantity of imports.<sup>501</sup> The time lag between Import Approvals being issued and the product being processed and shipped to Indonesia that is symptomatic of the import licensing regime for horticultural products, results in a decrease in the quantity of imports to Indonesia, particularly at the beginning and end of each licence validity period. This is demonstrated in the graphs set out in Annexes 4 and 5 and in Exhibits NZL-49 and NZL-50 and is particularly acute for countries with long shipping times.<sup>502</sup>

342. A measure which limits imports "for periods of time" was found by the panel in *Turkey - Rice*<sup>503</sup> to fall within the scope of Article 4.2. This finding is consistent with the

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<sup>500</sup> The Agreement on Agriculture applies to agricultural products listed in Annex 1 by reference to the harmonised system of product classification. The horticultural products regulated by Indonesia's restrictive import regime fall within HS Code Chapters 7, 8, 20 and 21 and therefore are covered by the Agreement on Agriculture.

<sup>501</sup> See description in paras. 211-219 above.

<sup>502</sup> Annexes 4 and 5 set out graphs showing exports of onions and apples from New Zealand to Indonesia. These graphs clearly show the dip in exports at the end of semester I/beginning of semester II in June/July since Indonesia enacted their current import regime. See also Onions New Zealand Exporter Statement (Exhibit NZL-49) and Pip Fruit New Zealand Export Statement (Exhibit NZL-50).

<sup>503</sup> Panel Report, *Turkey - Rice*, para. 7.121.

factual situation in this dispute where the limited application windows and validity period operate as quantitative restrictions.

343. The limited application windows and validity period also distort the domestic market price for the imported product. The Appellate Body in *Chile - Price Band System* considered that measures which had the effect of impeding the transmission of international price developments to the domestic market were within the scope of Article 4.2.<sup>504</sup> The inability of the importer to enter into longer term supply contracts, because of the uncertainty over whether a RIPH or an Import Approval will be granted, tends to increase the price of imported products in the domestic market.

344. As the limited application windows and validity period measure restricts the volume and distort the price of imports of horticultural products, they are a quantitative import restriction or similar border measure of the kind that have been required to be converted into ordinary customs duties and therefore inconsistent with Article 4.2 of the Agreement on Agriculture.

**(b) Fixed Licence Terms are a quantitative import restriction or similar border measure inconsistent with Article 4.2**

345. As outlined in Sections III.B.3(b) and IV.A.3(b) the terms which are set out in the Import Approvals and RIPHs for horticultural products, including the type of product, quantity, country of origin, and port of entry are fixed for the six month validity period of the licence. As has been described in Section IV.A.3(b) this limits the ability of the importer to adjust to changing domestic or international market conditions for the importation of horticultural products. No account can be taken of unforeseen factors, such as unseasonable weather or price increases in foreign markets, and no re-assessment or amendment to the import licence terms can be made in light of these factors or changing market forces.

346. The Fixed Licence Terms operate to limit the quantity that an importer is able to import and the market access opportunities for imports. The panel in *Turkey - Rice* found that Turkey had denied or failed to grant licences to import rice outside of the tariff rate quota for periods of time.<sup>505</sup> This constituted a restriction on the quantities of product that could enter the domestic (Turkish) market and therefore was a quantitative restriction within the scope of Article 4.2.<sup>506</sup>

347. The Fixed Licence Terms similarly restrict the quantity of product that can be imported into Indonesia. As such, they are a quantitative restriction which is listed in footnote 1 to Article 4.2 of the Agreement on Agriculture as a measure which has been required to be converted to ordinary customs duties. The Appellate Body in *Chile - Price Band System* found that if a measure falls within any one of the categories of the measures listed in footnote 1, it is among the "measures of the kind which have been required to be

<sup>504</sup> Appellate Body Report, *Chile - Price Band System*, paras. 231-36.

<sup>505</sup> Panel Report, *Turkey - Rice*, para. 7.117-7.118.

<sup>506</sup> Ibid. para. 7121.



converted into ordinary customs duties," and must not be maintained, resorted to, or reverted to.<sup>507</sup>

348. Even if not a quantitative restriction, the Fixed Licence Terms are similar to a quantitative restriction in that they limit the market access opportunities for horticultural products. The Appellate Body in *Chile - Price Band System* clarified that the measures listed in footnote 1 to Article 4.2 all have in common "the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products in ways different from the way that ordinary customs duties do".<sup>508</sup> The Fixed Licence Terms impose restrictions that are "of the same kind" as quantitative restrictions.<sup>509</sup> They are therefore measures of the kind that have been required to be converted into ordinary customs duties and consequently inconsistent with Article 4.2 of the Agreement on Agriculture.

**(c) The 80% realisation requirement is a quantitative import restriction or similar border measure inconsistent with Article 4.2**

349. In Sections III.b.3(c) and IV.A.3(c) New Zealand described how Indonesia imposes a requirement that RI must "realise" 80% of the quantity of each type of product specified in the Import Approval.<sup>510</sup> An Import Approval for the following validity period cannot be submitted unless this requirement is met.<sup>511</sup> Given the sanction on non-compliance and the possibility that imports may be affected by a range of factors inside or outside the importer's control, the 80% realisation requirement provides a direct incentive for importers to conservatively estimate the quantities that they request in their horticulture import licences. The 80% realisation requirement has the effect of limiting the quantities which are imported in any validity period.

350. A measure which through its design, structure and effects restricts the volume of imports is a "quantitative restriction" under Article 4.2, footnote 1 of the Agreement on Agriculture. As the panel in *Turkey - Rice* found, measures which are "liable to restrict the volume of imports" constitute quantitative restrictions.<sup>512</sup>

351. In any case, the 80% realisation requirement is a "similar border measure" to a quantitative import restriction. A measure is "similar" to another measure when it shares a "resemblance" or "likeness" to that other measure, even if not identical.<sup>513</sup>

352. The 80% realisation requirement is designed to control the volume of imports and has the effect of limiting the quantity of imports of horticultural products into Indonesia. Even if the requirement were not a "quantitative import restriction" it would be a "similar border

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<sup>507</sup> Appellate Body Report, *Chile - Price Band System*, para. 221.

<sup>508</sup> Ibid. para. 227.

<sup>509</sup> Ibid. para. 227.

<sup>510</sup> Article 14A MOT 16/2013 as amended by MOT 47/2013 (Exhibit JE-10).

<sup>511</sup> Import Approval Process Explanation (Exhibit NZL-51).

<sup>512</sup> Panel Report, *Turkey - Rice*, para. 7.120.

<sup>513</sup> Appellate Body Report, *Chile - Price Band*, paras. 226 and 227.

measure" as it restricts the quantity of products imported. It is therefore inconsistent with Article 4.2 of the Agreement on Agriculture.

**(d) Limitations based on Indonesian harvest periods are a quantitative import restriction or similar border measure inconsistent with Article 4.2**

353. Indonesia has implemented its import licences for horticultural products in a manner which prohibits or restricts imports based on the harvest period and quantity of Indonesian product available. New Zealand has shown in Section III.B.3(d) and IV.A.3(d) the way in which the Ministry of Agriculture has recommended that imports of certain horticultural products either not be approved, or be restricted to certain months of the year which do not coincide with the Indonesian harvest period.<sup>514</sup>

354. These restrictions are prohibitions or restrictions on the quantity of imports of horticultural products and, as such, are quantitative restrictions falling under Article 4.2 of the Agreement on Agriculture. The panel in *Turkey - Rice* found that practices which restricted the importation of rice for periods of time constituted quantitative restrictions, inconsistent with Article 4.2 of the Agreement on Agriculture.<sup>515</sup> The panel also clarified that, even without any systematic intention to restrict the importation of rice at a certain level, the "lack of transparency and of predictability" of Turkey's system for the importation of rice was similarly likely to restrict the volume of imports.<sup>516</sup> The Appellate Body in *Peru - Agricultural Products* has recently confirmed that the lack of transparency and predictability may constitute additional features which compromise the objectives of the Agreement on Agriculture to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties.<sup>517</sup>

355. A lack of transparency and predictability is apparent in the restrictions imposed on horticultural imports based on Indonesian harvest periods. The withholding of import approvals or restricting the time periods within which imports may be imported depending on the Indonesian harvest hinges on recommendations from the Ministry of Agriculture. An importer is not able to predict in advance when or whether such decisions will be made. This has the effect of restricting the imports of horticultural products.

356. As the restrictions based on Indonesian harvest periods are a quantitative restriction, there is no need to also consider whether the measure is also "discretionary import licensing", which falls under the illustrative list in footnote 1 to Article 4.2. Nevertheless New Zealand notes the characterisation of the practice of discretionary import licensing adopted by the panel in *Turkey - Rice* as "the discretionary use by authorities in an importing country of the concession, or refusal to grant, a particular document which is necessary for the importation of a good, as an instrument to administer trade".<sup>518</sup> Given the lack of transparency and predictability in the decision by the Indonesian Ministry of Trade not to grant an import

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<sup>514</sup> Prohibition/Limitation Letter from the MOA (Exhibit NZL-39).

<sup>515</sup> Panel Report *Turkey - Rice*, para. 7.121.

<sup>516</sup> Ibid. para. 7.120.

<sup>517</sup> Appellate Body Report, *Peru - Agricultural Products*, para. 5.41.

<sup>518</sup> Panel Report, *Turkey - Rice*, para. 7.133.

approval for certain products based on the Indonesian harvesting period for that product, this measure is a border measure of the kind that has been required to be converted to ordinary customs duties and maintained contrary to Article 4.2 of the Agreement on Agriculture.

**(e) The storage ownership and capacity requirement is a quantitative import restriction or similar border measure inconsistent with Article 4.2**

357. As set out in Sections III.B.3(e) and IV.A.3(e) the requirement to own storage facilities is a prerequisite to receiving an Import Approval from the Indonesian Ministry of Trade to import horticultural products as has been described in Section IV.A.3(e). Importers who may nevertheless have access to storage facilities, for example through lease arrangements, but do not own facilities, fail to meet the ownership requirement. Furthermore, the Ministry of Trade will not issue an Import Approval to an importer who has applied for a quantity greater than its audited storage capacity.<sup>519</sup> It is the storage capacity which dictates the quantity of product imported, not market conditions.

358. The storage ownership and capacity requirements have the effect of limiting the quantity of horticultural products that may be imported. No allowance is made for normal business operations, such as lease arrangements or product turnover. The storage ownership and capacity requirements impose unnecessary costs on importers. They must expend financial resources in owning storage facilities that are greater than they need to be. A portion of their capacity will remain unutilised, especially toward the end of the validity period of the import licence as product in store declines through sales to distributors. Increases in costs have a downstream impact on the price of imported horticultural products.

359. The effect of the storage ownership and capacity requirement is to restrict the volume and to distort the price of imported horticultural products in Indonesia. The Appellate Body in *Chile - Price Band System* has considered that features of a measure which had the effect of impeding the transmission of international price developments to the domestic market were factors to be taken into account in an analysis under Article 4.2.<sup>520</sup> Where measures have the effect of restricting the quantity of imports and distorting the price of imported products, they fall within the scope of footnote 1 to Article 4.2.<sup>521</sup>

360. The restrictions on storage ownership and capacity restrict the quantity of imports and distort the price of imported products. As such they are quantitative restrictions falling under footnote 1 of Article 4.2. In any event, as border measures similar to quantitative restrictions, they are inconsistent with Article 4.2 of the Agreement on Agriculture.

<sup>519</sup> ASEIBBSINDO Statement (Exhibit NZL-53).

<sup>520</sup> Appellate Body, *Chile - Price Band System*, paras. 231-234.

<sup>521</sup> Ibid. para. 227.

**(f) Restrictions on use, sale and distribution of imported horticultural products are a quantitative import restriction or similar border measure inconsistent with Article 4.2**

361. New Zealand has described in Sections IV.A.3(f) above Indonesia's restrictions on the use, sale and distribution of imported horticultural products.<sup>522</sup> In summary, RIs are prohibited from selling direct to retailers and consumers and PIs are prohibited from trading or transferring imported horticultural products. These restrictions constrain the ability of importers to market imported products; reduce the opportunity for imported product to reach consumers; and increase the price of imported products due to the additional distribution layers.

362. The effect of these measures is to restrict market access of imported horticultural products. This is contrary to the intention of the negotiators of the Agreement on Agriculture which, as articulated by the Appellate Body, was to identify measures that had to be converted into ordinary customs duties "in order to ensure enhanced market access for imports of agricultural products".<sup>523</sup>

363. The restrictions on use, sale and distribution are similar to the "actual user" requirement considered by the panel in *India - Quantitative Restrictions*. The panel found in that dispute that use requirement was a "restriction" under Article XI:1 of the GATT 1994 and inconsistent with Article 4.2 of the Agreement on Agriculture.<sup>524</sup> Similarly Indonesia's restrictions on use, sale and distribution are inconsistent with Article 4.2 of the Agreement on Agriculture.

**(g) Reference prices for chili and shallots are minimum import prices, quantitative import restrictions or similar border measures inconsistent with Article 4.2**

364. As set out in Sections III.B.3(g) and IV.A.3(g) Indonesia sets a reference price for chili or shallots in the domestic market and if the domestic price is below this stipulated reference price, the importation of chili and shallot is "postponed" until the price falls below the reference price.<sup>525</sup> The reference price for chili and shallots is a "minimum import price" below which certain horticultural products are not permitted to be imported. In *Chile - Price Band System* the term "minimum import price" was said to "refer generally to the lowest price at which imports of a certain product may enter a Member's domestic market".<sup>526</sup>

365. "Minimum import prices" are included in the illustrative list of measures in footnote 1 to Article 4.2 which are required to be converted into ordinary customs duties. If a measure falls within any of the measures listed in footnote 1, it is covered by Article 4.2.<sup>527</sup> The Appellate Body in *Peru - Agricultural Products* considered that measures that define the

<sup>522</sup> See paras. 251-258 above.

<sup>523</sup> Appellate Body Report, *Chile - Price Band System*, para. 219.

<sup>524</sup> Panel Report, *India - Quantitative Restrictions*, para. 5.242.

<sup>525</sup> See description in paras. 259-2267 above.

<sup>526</sup> Appellate Body Report, *Chile - Price Band System*, para. 236.

<sup>527</sup> Ibid. para. 221.

lowest price at which imports may enter a market could qualify as a "minimum import price" scheme or as a "similar border measure". Such an assessment would have to be made "on the basis of the total configuration of the measure",<sup>528</sup> and through examining its design, structure and operation.<sup>529</sup>

366. The Indonesia reference price for chili and shallots has the effect of setting a threshold price below which chili and shallots may not be imported into Indonesia. It is designed and structured to operate as a ceiling below which imports of chili and shallots cannot enter the domestic market and therefore falls within the Appellate Body's interpretation of "minimum import price".<sup>530</sup>

367. Even if Indonesia's reference prices for chili and shallots are not "minimum import prices" they are a "similar border measure". A measure is "similar" to a measure listed in footnote 1 of Article 4.2 if, in its particular features, it shares "a resemblance or likeness".<sup>531</sup> The reference price for chili and shallots is "similar" to a minimum price: imports are prohibited if the domestic price for chili and shallots is below this reference price. Imports are only permitted if prices reach the reference price. It therefore has a "similar" design and characteristics as a minimum import price and falls within footnote 1 to Article 4.2.

368. Furthermore, the reference price for chili and shallots is "similar" to a quantitative import restriction. "Quantitative import restrictions" are one of the border measures listed in footnote 1 of Article 4.2. As was explained in Section IV.A.3(g) in relation to Article XI:1 of the GATT 1994, the reference price for chili and shallots acts as a quantitative restriction on imports of chili and shallots. This is how it is seen by the Minister of Agriculture who said publicly that the supply of shallots has been sufficient.<sup>532</sup> Reference prices have also been seen by officials of the Indonesian Government as an alternative to a quota.<sup>533</sup>

369. For these reasons New Zealand submits that the reference price for chili and shallots is inconsistent with Article 4.2 of the Agreement on Agriculture.

**(h) The six month harvesting requirement is a quantitative import restriction or similar border measure inconsistent with Article 4.2**

370. As described in Sections III.B.3(h) and IV.A.3(h), Indonesia prohibits the importation of horticultural products which are harvested more than six months prior to importation. This restriction makes no distinction based on factors, such as the storage life of horticultural products.

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<sup>528</sup> Appellate Body Report, *Peru - Agricultural Products*, para. 5.129.

<sup>529</sup> *Ibid.* para. 5.142.

<sup>530</sup> Appellate Body Report, *Chile - Price Band System*, para. 236.

<sup>531</sup> *Ibid.* para. 226 and 227.

<sup>532</sup> "Minister Claimed that Control on Food Importation has Saved 50 Trillion Rupiah" *Kompas* (Exhibit NZL-77).

<sup>533</sup> "Horticultural Import Policy in Indonesia" *FFTC Paper* (Exhibit NZL-59).

371. The prohibition on importing horticultural products harvested more than six months previously restricts the quantity of imports of certain horticultural products, particularly those with a long shelf-life. Measures that have the effect of restricting imports have been found by the panel in *Turkey - Rice* to be of the kind required to be converted to ordinary customs duties.<sup>534</sup> It is therefore a quantitative restriction or similar border measures which is required to have been converted to ordinary customs duties in accordance with Article 4.2 of the Agreement on Agriculture.

**(i) The horticultural import licensing regime "as a whole" is a quantitative import restriction or similar border measure inconsistent with Article 4.2**

372. The measures comprising Indonesia's horticultural import licensing regime when viewed individually, and when viewed as a whole, create impediments to imports. The design of the import licensing regime is geared toward limiting the importation of horticultural products as part of an overarching policy objective of achieving self-sufficiency in the production of certain foodstuffs. The import licensing regime for horticultural products is structured in such a way that it limits the quantity of imports of horticultural products and places additional costs on importers. This is particularly acute in relation to some of the individual elements of the regime, such as the quantitative restrictions on imports based on the Indonesian harvest period, the storage ownership and capacity requirement, the reference price for chili and shallots, and the prohibition on imports of products harvested more than six months previously. It is also apparent in the way in which the regime is structured to limit the volume of imports and create additional cost burdens on importers.

373. The Appellate Body in *Chile - Price Band System* has identified the common features of all the measures listed in footnote 1 to Article 4.2. They have "the object and effect of restricting volumes, and distorting prices, of imports in ways different to ordinary customs duties",<sup>535</sup> they "disconnect domestic prices from international price developments",<sup>536</sup> lack transparency and predictability,<sup>537</sup> and have sufficient "resemblance or likeness to", or are "of the same nature or kind" of, at least one of the specific categories in footnote 1 to Article 4.2.<sup>538</sup>

374. When viewed as a whole, Indonesia's import licensing regime for horticultural products affects market access for imported horticultural products in Indonesia. It restricts, and is designed to restrict, volumes of imported horticultural products and distorts prices. The regime lacks transparency and predictability as importers are not able to determine with confidence that all of the products that they wish to import will be permitted entry.

375. It follows that the import licensing regime for horticultural products as a whole is a quantitative import restriction or a similar border measure which restricts the quantity of horticultural products imported into Indonesia and adversely impacts on the market access for

<sup>534</sup> Panel Report, *Turkey - Rice*, para. 7.121.

<sup>535</sup> Appellate Body Report, *Chile - Price Band System*, para. 227.

<sup>536</sup> Ibid.

<sup>537</sup> Ibid. para. 247.

<sup>538</sup> Ibid. para. 227.

those products. The regime as a whole is a border measure of the kind that has been required to be converted to ordinary customs duties and is maintained contrary to Article 4.2 of the Agreement on Agriculture.

***4. Indonesia's import restrictions based on sufficiency of domestic production are quantitative import restrictions or similar measures inconsistent with Article 4.2***

376. In Sections III and IV.A.4, New Zealand has described how Indonesia's import restrictions based on sufficiency of domestic production limit imports where domestic production is deemed sufficient to meet demand.<sup>539</sup> The legislative provisions which condition importation on domestic insufficiency underpin the import licensing regimes for animals and animal products and horticultural products and shape the way in which the Indonesian Government implements the import licensing regimes. They also operate as quantitative import restrictions in and of themselves. The effect is to limit market access for imported animals and animal products and horticultural products in Indonesia. For the same reasons that New Zealand has argued that these measures are quantitative restrictions inconsistent with Article XI:1 of the GATT 1994, they are also quantitative restrictions within the terms of footnote 1 to Article 4.2.

377. As described in Section IV.A.4, the domestic insufficiency conditions explicitly limit imports of animals and animal products and horticultural products through denying import approvals for imported products.<sup>540</sup> This is analogous to the situation in *Turkey - Rice* where the panel found that Turkey had failed to grant the necessary import permits, thereby preventing imports of rice.<sup>541</sup>

378. Furthermore, the domestic insufficiency conditions lack transparency and predictability. There is generally no explanation or understanding of when or on what basis domestic production will be deemed to be sufficient to meet domestic demand. It is not possible to determine or predict when prohibitions or restrictions based on these measures will be imposed. Yet it is clear that the domestic insufficiency conditions drive the import licensing regimes for agricultural products.

379. The Appellate Body in *Argentina - Chile Price Band System* considered that a lack of transparency and lack of predictability was inherent in how Chile's price bands were established, as well as in how the reference price in Chile's price band system was determined.<sup>542</sup> The Appellate Body found that the measure was inconsistent with Article 4.2 of the Agreement on Agriculture including because of this lack of transparency and predictability. Similarly, in this dispute, the domestic insufficiency conditions lack transparency and predictability.

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<sup>539</sup> See description in paras. 285-298.

<sup>540</sup> Ibid.

<sup>541</sup> Panel Report, *Turkey - Rice*, para. 7.118.

<sup>542</sup> Appellate Body Report, *Chile - Price Band System*, para. 247.

380. Due to the adverse impact on market access for imports, and their lack of transparency and predictability, Indonesia's import restrictions based on sufficiency of domestic production are quantitative restrictions or other border measures inconsistent with Article 4.2 of the Agreement on Agriculture.

### C. ARTICLE III:4 OF THE GATT 1994

#### 1. *Obligation under Article III:4 of the GATT 1994*

381. Article III:4 of the GATT 1994 provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

382. For a violation of Article III:4 to be established, three elements must be satisfied: (i) the imported and domestic products at issue must be "like products"; (ii) the measure at issue must be a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and (iii) the imported products are accorded "less favourable" treatment than that accorded to like domestic products.<sup>543</sup>

383. With respect to the first element, a number of panels have determined that, in circumstances where "origin is the only factor distinguishing between imported and domestic products", the relevant products will be considered "like" for the purposes of Article III:4.<sup>544</sup> In these circumstances, panels have confirmed that there is no need to conduct a full likeness analysis by considering the nature and extent of the competitive relationship between the domestic and imported products.<sup>545</sup>

384. With respect to the second element, a key consideration as to whether the "laws, regulations and requirements" at issue fell within the scope of Article III:4 is whether they "affect" the "internal sale, offering for sale, purchase, transportation, distribution or use" of products. This consideration helps distinguish between measures that violate Article III:4 (i.e. affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported products) and those that violate Article XI:1 of the GATT 1994 (i.e. measures limiting the importation of products). The use of the term "on the importation" in Article XI:1, rather than "imports", or "imported products", confirms that Article XI:1 targets those restrictions on importation itself, and not to already imported products.<sup>546</sup> It is the nature of

<sup>543</sup> Appellate Body Report, *Korea - Various Measures on Beef*, para. 133.

<sup>544</sup> Panel Report, *Argentina - Import Measures*, para. 6.274. (citing: Panel Reports, *India - Autos*, para. 7.174; *Canada - Wheat Exports and Grain Imports*, para. 6.164; *Canada - Autos*, para. 10.74; *Turkey - Rice*, paras. 7.214-7.216; *China - Auto Parts*, paras. 7.216-7.217 and 7.235; *China - Publications and Audiovisual Products*, paras. 7.1444-7.1447; and *Thailand - Cigarettes (Philippines)*, paras. 7.661-7.662).

<sup>545</sup> Panel Reports, *Argentina - Import Measures*, para. 6.274; and *Turkey - Rice*, paras. 7.214-7.216.

<sup>546</sup> Panel Report, *India - Autos*, para. 7.259; and *Dominican Republic - Import and Sale of Cigarettes*, para. 7.261. See also GATT Panel Report, *Canada - FIRA*, para. 5.14.



the measure as a restriction in relation to importation which is the key factor in determining whether a measure may properly fall within the scope of Article XI:1 or Article III:4. This determination is not always simple, there may be cases when a measure can affect both the conditions of competition between imported products and domestic products after importation, as well as the opportunities for importation.<sup>547</sup> Likewise, Article XI:1 is not limited to border measures, and can apply to internal measures provided there is a sufficient connection to "importation".<sup>548</sup>

385. With respect to the third element, whether or not imported products are treated "less favourably" than like domestic products should be assessed by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.<sup>549</sup>

**2. *The Domestic Purchase Requirement for beef is inconsistent with Article III:4***

386. New Zealand submits that the Domestic Purchase Requirement for beef described in Section III.A.3(f) constitutes a condition of importation of beef that is applied at the border and is therefore contrary to Article XI:1 of the GATT 1994.

387. However, insofar as the Domestic Purchase Requirement is considered by the Panel to be an internal measure "affecting internal sale, offering for sale, purchase, transportation, distribution or use", New Zealand submits that the measure is also contrary to Article III:4 of the GATT 1994.

388. As mentioned above, the Appellate Body has recently affirmed the three elements that must be demonstrated to establish that a measure is inconsistent with Article III:4. The following Subsections describe how the Domestic Purchase Requirement satisfies each of these elements.

**(a) Domestic and imported beef are "like" products**

389. As set out above, a number of panels have determined that in circumstances where a difference in treatment between domestic and imported products is based exclusively on the products' origin, such products will be considered "like" products for the purposes of Article III:4.<sup>550</sup> The Domestic Purchase Requirement for beef is based exclusively on a product's origin, as, by its design, it requires domestically produced beef to be purchased in order to obtain the right to import beef from elsewhere. Accordingly, beef produced in Indonesia is "like" beef produced elsewhere for the purposes of Article III:4 of the GATT.

<sup>547</sup> Panel Report, *Turkey - Rice*, para. 7.253.

<sup>548</sup> Panel Report, *India - Autos*, paras. 7.257-7.262.

<sup>549</sup> Appellate Body Report, *Korea - Various Measures on Beef*, para. 137.

<sup>550</sup> For example, see Panel Report, *Argentina - Import Measures*, paras. 6.274-6.276 (citing Panel Reports, *India - Autos*, para. 7.174, *Canada - Wheat Exports and Grain Imports*, para. 6.164, *Canada - Autos*, para. 10.74, *Turkey - Rice*, paras. 7.214-7.216, *China - Auto Parts*, paras. 7.216-7.217 and 7.235, *China - Publications and Audiovisual Products*, paras. 7.1444-7.1447, and *Thailand - Cigarettes (Philippines)*, paras. 7.661-7.662).

**(b) The Domestic Purchase Requirement is a law, regulation, or requirement affecting the internal sale, purchase or use of beef**

390. The Domestic Purchase Requirement is a "law, regulation, or requirement" in the sense of Article III:4 of the GATT 1994. The measure is implemented through *MOA 139/2014* and constitutes a legal requirement that importers must comply with in order to import products into Indonesia. As described in Section III.A.3(f) above, the Domestic Purchase Requirement is a mandatory obligation for the importation of "large ruminant meat" (including beef) into Indonesia.

391. The Domestic Purchase Requirement also "affects" the "internal sale, purchase, or use" of imported products within the meaning of Article III:4. The Appellate Body and WTO panels have found the term "affecting" to broadly mean having "an effect on", encompassing measures that adversely modify the conditions of competition between domestic and imported goods in the market.<sup>551</sup>

392. Further, the Appellate Body and WTO panels have found that measures that "create an incentive" for domestic over imported goods "affect", *inter alia*, the internal "use", "purchase" or "sale" of those goods.<sup>552</sup> Similar domestic purchase or import substitution requirements have been found to affect the internal sale, purchase or use of imported products. For example, in *Turkey - Rice*, the panel found that a similar measure which required importers to purchase domestically produced rice in order to import rice at a concessionary tariff rate "had an effect on" the competitive relationship between imported and domestic rice, and thus affected the decisions of operators on the purchase of imported and domestic rice".<sup>553</sup>

393. Similarly, in this dispute the Domestic Purchase Requirement incentivises the purchase of domestically produced beef in favour of imported beef and thereby "affects" the "internal sale, purchase, or use" of beef within Indonesia. Importers are not free to purchase imported products in line with their own commercial considerations. Instead, their purchasing decisions in respect of imported and domestically produced beef are distorted in favour of domestically produced products.

**(c) The Domestic Purchase Requirement accords less favourable treatment to imported products than to "like" domestic products**

394. The Domestic Purchase Requirement accords less favourable treatment to imported products than the treatment granted to like domestic products. The Domestic Purchase Requirement "modifies the conditions of competition in the relevant market to the detriment of imported products"<sup>554</sup> by according an advantage to the purchase of like domestically produced products that is not accorded to imported product. Specifically, as a consequence of

<sup>551</sup> Panel Reports, *Turkey - Rice*, paras. 7.221-22; *Canada - Autos*, para. 10.80; and Appellate Body Report, *Canada - Autos*, para. 158.

<sup>552</sup> Appellate Body Report, *China - Auto Parts*, para. 196. See also Panel Report, *India - Autos*, paras. 7.195-7.198 and 7.305-7.309.

<sup>553</sup> Panel Report, *Turkey - Rice*, paras. 7.225.

<sup>554</sup> Appellate Body Report, *Korea - Various Measures on Beef*, para. 137.

the Domestic Purchase Requirement, the purchase of domestically produced beef provides importers with the ability to import beef products through the granting of MOA Recommendations which importers would be unable to obtain in the absence of demonstrating compliance with the Domestic Purchase Requirement. By definition, the purchase of imported products does not confer the same advantage.

395. In this sense the Domestic Purchase Requirement is analogous to the requirement to purchase domestically produced rice considered by the panel in *Turkey - Rice* where it was held that "The purchase of domestic rice accorded an advantage that the purchase of the like imported product did not, i.e. the option to buy imported rice at reduced tariff rates".<sup>555</sup> The Domestic Purchase Requirement is also similar to the local content requirement in *Argentina - Import Measures* which the panel found created a "preference for the purchase and/or use of domestic over imported like products" which affected the "conditions of competition of imported products" in the Argentine market.<sup>556</sup>

396. As a consequence of satisfying the specific elements of Article III:4 described above, to the extent it is considered in an internal measures the Domestic Purchase Requirement is inconsistent with Article III:4 of the GATT 1994.

**3. *Limiting the use, sale and distribution of imported bovine meat and offal is inconsistent with Article III:4***

397. New Zealand submits that Indonesia's restrictions on use, sale and distribution of imports of animals and animal products set out in Section III.A.3(e) are imposed as a condition of importation at the border and are therefore contrary to Article XI:1 of the GATT 1994.

398. However, insofar as these same measures are considered by the Panel to be internal measures they are also contrary to Article III:4 of the GATT 1994.

**(a) Domestic and imported bovine meat and offal are "like" products**

399. As set out above, a number of panels have determined that in circumstances where a difference in treatment between domestic and imported products is based exclusively on the products' origin, such products will be considered "like" products for the purposes of Article III:4.<sup>557</sup>

400. *MOA 139/2014*<sup>558</sup> and *MOT 46/2013*<sup>559</sup> each contain restrictions on use, sale and distribution of bovine meat and offal. Both of these regulations impose such restrictions solely

<sup>555</sup> Panel Report, *Turkey - Rice*, paras. 7.234.

<sup>556</sup> Panel Report, *Argentina - Import Measures*, paras. 6.292 and 6.294.

<sup>557</sup> For example, see Panel Report, *Argentina - Import Measures*, paras. 6.274-6.276 (citing Panel Reports, *India - Autos*, para. 7.174, *Canada - Wheat Exports and Grain Imports*, para. 6.164, *Canada - Autos*, para. 10.74, *Turkey - Rice*, paras. 7.214-7.216, *China - Auto Parts*, paras. 7.216-7.217 and 7.235, *China - Publications and Audiovisual Products*, paras. 7.1444-7.1447, and *Thailand - Cigarettes (Philippines)*, paras. 7.661-7.662). See also paras. 383 and 389 above.

<sup>558</sup> Article 32, *MOA 139/2014* (Exhibit JE-26).

in respect of imported products, not domestic products. Indonesia does not maintain any equivalent restrictions that apply to domestic animals and animal products. Because the only factor that determines whether the use, sale and distribution restrictions apply is origin, imported and domestic bovine meat and offal are "like" for the purposes of Article III:4 of the GATT 1994.

**(b) The restrictions are a law, regulation, or requirement affecting sale, offering for sale, purchase, distribution or use**

401. Article III:4 concerns "laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use". *MOA 139/2014* and *MOT 46/2013* are "laws, regulations and requirements". The issue is therefore whether the use restrictions affect the "internal sale, offering for sale ... or use" of bovine meat and offal.

402. Indonesia's restrictions described in Section III.A.3(e) undoubtedly affect the internal sale and use of imported bovine meat and offal.

403. First, the Indonesian regulations affect the "use" of animals and animal products by explicitly prescribing the use to which imported bovine meat and offal may be put. These uses are limited to those listed, namely use in industry, hotels, restaurant, catering and other special needs. Second, the Indonesian regulations also affect the internal sale and offering for sale of imported bovine meat and offal because imported bovine meat and offal cannot be sold directly to consumers, at either modern markets (such as supermarkets or hypermarkets) or traditional markets (such as wet markets, small shops or stalls, or street carts).

**(c) The restrictions accord less favourable treatment to imported products than "like" domestic products**

404. An analysis of "treatment no less favourable" requires an examination of the "design, structure, and expected operation of the measure" to discern its implications on the conditions of competition between imported and like domestic products.<sup>560</sup> 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.<sup>561</sup> 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, too) was distributed to Korean households and other consumers throughout the country".<sup>562</sup> 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).<sup>563</sup>

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<sup>559</sup> Article 17, *MOT 46/2013* (Exhibit JE-18).

<sup>560</sup> Appellate Body Report, *Thailand - Cigarettes (Philippines)*, para. 129.

<sup>561</sup> Appellate Body Report, *Korea - Various Measures on Beef*, para. 186(e).

<sup>562</sup> Ibid. para. 145.

<sup>563</sup> Ibid. para. 145.

405. The Indonesian regulations formally treat imported bovine meat and offal differently from their domestic equivalents. Domestic bovine meat and offal are not restricted in the use to which they may be put in the Indonesian domestic market or to certain points of sale. By contrast, imported like equivalents may only be used in industry, hotel, restaurant, catering or other special needs and may not be sold in modern or traditional markets.<sup>564</sup>

406. The Indonesian regulations therefore drastically reduce the "commercial opportunity to reach" consumers in an analogous fashion to the dual retail system in *Korea - Various Measures on Beef*.

407. 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 imported animals and animal products.

408. Consequently, Indonesia's restrictions on the use, sale and distribution of imported animals and animal products, insofar as they are considered internal measures by the Panel, are inconsistent with Article III:4 of the GATT 1994.

***4. Limiting the use, sale and distribution of imported horticultural products is inconsistent with Article III:4***

409. New Zealand submits that Indonesia's restrictions on use, sale and distribution of imports of horticultural products set out in Section III.B.3(f) are imposed as a condition of import at the border and are therefore contrary to Article XI:1 of the GATT 1994.

410. However, insofar as these same measures are considered by the Panel to be internal measures they are also contrary to Article III:4 of the GATT 1994.

**(a) Domestic and imported horticultural products are "like" products**

411. As set out above, a number of panels have determined that in circumstances where a difference in treatment between domestic and imported products is based exclusively on the products' origin, such products will be considered "like" for the purposes of Article III:4.<sup>565</sup>

412. Indonesia's restrictions on use, sale and distribution of horticultural products are contained in *MOT 16/2013*.<sup>566</sup> This regulation applies only to imported products of certain HS Codes and imposes obligations in respect of these listed imported horticultural products, not domestic products. Indonesia does not maintain any equivalent restrictions that apply to domestic horticultural products. As the only factor that determines whether the use, sale and

<sup>564</sup> Article 17, *MOT 46/2013* (Exhibit JE-18) and Article 32, *MOA 139/2014* (Exhibit JE-26).

<sup>565</sup> For example, see Panel Report, *Argentina - Import Measures*, paras. 6.274-6.276 (citing Panel Reports, *India - Autos*, para. 7.174, *Canada - Wheat Exports and Grain Imports*, para. 6.164, *Canada - Autos*, para. 10.74, *Turkey - Rice*, paras. 7.214-7.216, *China - Auto Parts*, paras. 7.216-7.217 and 7.235, *China - Publications and Audiovisual Products*, paras. 7.1444-7.1447, and *Thailand - Cigarettes (Philippines)*, paras. 7.661-7.662).

<sup>566</sup> Articles 7 and 15, *MOT 16/2013* (Exhibit JE-8).

distribution restrictions apply is origin, the covered imported and domestic horticultural products are "like" for the purposes of Article III:4 of the GATT 1994.

**(b) The restrictions are a law, regulation, or requirement affecting sale, offering for sale, purchase, distribution or use**

413. Article III:4 concerns "laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use". *MOT 16/2013* falls within the definition of "laws, regulations and requirements".

414. Indonesia's use, sale and distribution restrictions described in Section III.B.3(f) also affect the internal sale, distribution and use of imported horticultural products so as to fall within the scope of Article III:4. The Indonesian regulations explicitly prescribe the use, sale and distribution channels through which imported horticultural products may be channelled, namely they cannot be sold directly to consumer or retailers but must go through distributors or else may only be used in industrial production processes.

**(c) The restrictions accord imported products less favourable treatment than "like" domestic products**

415. An analysis of "treatment no less favourable" requires an examination of the "design, structure, and expected operation of the measure" to discern its implications on the conditions of competition between imported and like domestic products.<sup>567</sup> 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.<sup>568</sup> 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, too) was distributed to Korean households and other consumers throughout the country".<sup>569</sup> 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).<sup>570</sup>

416. The Indonesian regulations formally treat imported horticultural products differently from their domestic equivalents. Domestic horticultural products are not restricted in the use to which they may be put, or the distribution channels that they must go through in the Indonesian domestic market. In contrast, imported "like" equivalents may only be used in industrial production processes or else sold to distributors.<sup>571</sup>

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<sup>567</sup> Appellate Body Report, *Thailand - Cigarettes (Philippines)*, para. 129.

<sup>568</sup> Appellate Body Report, *Korea - Various Measures on Beef*, para. 186(e).

<sup>569</sup> Ibid. para. 145.

<sup>570</sup> Ibid.

<sup>571</sup> Article 7 and 15, *MOT 16/2013* (Exhibit JE-8).

417. Indonesia's formally different treatment for "like" imported and domestic horticultural products therefore affects the conditions of competition to the detriment of imported products and accords treatment that is "less favourable" to imported horticultural products.

418. Consequently, Indonesia's restrictions on the use, sale and distribution of imported listed horticultural products, insofar as they are considered internal measures by the Panel, are inconsistent with Article III:4 of the GATT.

#### **D. THE AGREEMENT ON IMPORT LICENSING PROCEDURES**

419. For the reasons set out above,<sup>572</sup> New Zealand submits that the limited application windows and validity periods for MOA Recommendations and Import Approvals for animals and animal products and RIPH<sup>573</sup> and Import Approvals for horticultural products are inconsistent with Article XI:1 of the GATT 1994.

420. Import licensing procedures may be used to implement an underlying restriction that is justified pursuant to another provision of the WTO Agreement, so long as the licence does not by its nature have a limiting or restrictive effect.<sup>574</sup> However, as the panel noted in *China - Raw Materials* "a licence requirement that results in a restriction additional to that inherent in a permissible measure would be inconsistent with GATT Article XI:1".<sup>575</sup> There are no underlying permissible justifications for the limited application windows and validity periods for import approvals for animals, animal products and horticulture products. Consequently, as New Zealand has argued, those measures constitute restrictions inconsistent with Article XI:1.

421. Furthermore, to the extent that the Panel finds that the limited application windows and validity periods for animals, animal products and horticultural products are non-automatic licensing procedures, New Zealand submits that they are inconsistent with Article 3.2 of the Agreement on Import Licensing Procedures.

##### ***1. Limited application windows and validity periods are non-automatic licensing procedures***

422. The limited application windows and validity periods associated with MOA Recommendations and Import Approvals for animals, animal products and horticultural products are administrative procedures central to the operation of Indonesia's import licensing regimes.<sup>576</sup>

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<sup>572</sup> See Section IV.A.2(c) and Section IV.A.3(a) above.

<sup>573</sup> For convenience, RIPH will be termed MOA Recommendations in this Section.

<sup>574</sup> Panel Report, *China — Raw Materials*, para. 7.955. See also Appellate Body Report, *Argentina - Import Measures*, para. 2.32.

<sup>575</sup> Panel Report, *China — Raw Materials*, paras. 7.957.

<sup>576</sup> Article 1.1 of the Agreement on Import Licensing Procedures defines "import licensing" as "administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member".

423. The limited application windows and validity periods are "non-automatic import licensing procedures" within the meaning of Article 3.1 of the Agreement on Import Licensing Procedures. Article 3.1 provides that "non-automatic import licensing procedures are defined as import licensing not falling within the definition contained in paragraph 1 of Article 2". Article 2.1 of the Agreement on Import Licensing Procedures defines "automatic import licensing" as "import licensing where approval of the application is granted in all cases, and which is in accordance with the requirements of paragraph 2(a)".

424. Under the Agreement on Import Licensing Procedures, import licensing procedures are "non-automatic" in circumstances where either:

- a. approval of import licence applications is not approved in all cases;<sup>577</sup> or
- b. the import licensing procedures are administered in such a manner as to have restricting effects on imports. Such trade restricting effects are deemed to exist unless:  
(i) all applicants fulfilling the applicable legal requirements are equally eligible to apply for and obtain import licences; (ii) applications may be submitted on any working day prior to customs clearance; and (iii) complete applications are approved immediately (to the extent administratively feasible), but within a maximum of 10 working days.<sup>578</sup>

425. The limited application windows and validity periods are non-automatic import licensing procedures, because:

- applications for MOA Recommendations and Import Approvals may only be applied for and granted during limited time periods, and thus are not able to "be submitted on any working day prior to customs clearance"; and
- the administration of the licensing scheme through the imposition of limited application windows and validity periods have a restricting effect on imports.<sup>579</sup>

426. For these reasons, the limited application windows and validity periods are "non-automatic import licensing procedures" subject to the obligations in Article 3 of the Agreement on Import Licensing Procedures.

**2. *Limited application windows and validity periods are inconsistent with Article 3.2 of the Agreement on Import Licensing Procedures***

427. Article 3.2 of the Agreement on Import Licensing Procedures provides:

Non-automatic licensing shall not have trade-restrictive or distortive effects on imports additional to those caused by the imposition of the restriction. Non-automatic licensing procedures shall correspond in

<sup>577</sup> Article 3.1 of the Agreement on Import Licensing Procedures.

<sup>578</sup> Article 3.2(a) of the Agreement on Import Licensing Procedures.

<sup>579</sup> See following subsection. See also Section IV.A.2(c) and Section IV.A.3(a) above.



scope and duration to the measure they are used to implement and shall be no more administratively burdensome than absolutely necessary to administer the measure.

428. 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. Accordingly, in order to determine whether the relevant import licensing administrative procedures have additional trade-restrictive or distortive effects, it is necessary to identify the underlying "measure" that is implemented through these procedures. 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 those requirements are additional to the underlying restriction and therefore inconsistent with Article 3.2 of the Agreement on Import Licensing Procedures.

429. The trade-restrictive and distortive effects on imports created by the limited application windows and validity periods for MOA Recommendations and Import Approvals have been described by New Zealand earlier in this submission.<sup>580</sup> In summary:

- importers are prevented from obtaining import licences outside the limited application windows;
- this results in a decline in imports at the start of each validity period, due to the delay between Import Approvals being issued and the product being processed and shipped to Indonesia; and
- this also results in the disruption in imports at the end of each validity period as importers do not wish shipping or other delays to result in product arriving after the end of the period of validity of the licence, which could result in sanctions being implemented against the importer.

430. As the Appellate Body confirmed in *EC - Poultry*, there must be a causal link between trade distorting effects and the licensing procedures and requirements.<sup>581</sup> In this case the evidence provided by New Zealand shows that trade distortive effects are clearly attributable to the limited application windows and validity periods.<sup>582</sup>

431. Furthermore, because these import licensing procedures are not used to implement an underlying substantive measure, any trade-restrictive or distortive effect will necessarily be "additional" for the purposes of Article 3.2. As such the measures are inconsistent with the first sentence of Article 3.2 of the Agreement on Import Licensing Procedures.

432. The second sentence of Article 3.2 provides that "non-automatic licensing procedures shall correspond in scope and duration to the measure they are used to implement, and shall be no more administratively burdensome than absolutely necessary to administer the measure". The limited application windows and validity periods for MOA Recommendations and Import Approvals are not used to implement any legitimate underlying measure, and

<sup>580</sup> See Section IV.A.2(c) and Section IV.A.3(a) above.

<sup>581</sup> Appellate Body Report, *EC - Poultry*, paras. 126-128.

<sup>582</sup> See Section IV.A.2(c) and Section IV.A.3(a) above.

accordingly any administrative burden imposed by these requirements is also inconsistent with the second sentence in Article 3.2.

433. MOA Recommendations and Import Approvals must be applied for during limited time periods and are valid for three to six months. As New Zealand has demonstrated,<sup>583</sup> compliance with each of these requirements is extremely burdensome for importers. Such procedures do not meet the high standard of being no more burdensome than "absolutely necessary" as required under Article 3.2.

434. It follows that the limited application windows and periods of validity of the MOA Recommendations and Import Approvals for animals, animal products and horticultural products are non-automatic licensing procedures inconsistent with Article 3.2 of the Agreement on Import Licensing Procedures.

## V. CONCLUSION

435. For the reasons set out in this submission, New Zealand respectfully requests that the Panel find that:

- (a) Indonesia's import licensing regime for animals and animal products is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, both when viewed as a single measure and when its components are viewed as individual measures;
- (b) Indonesia's import licensing regime for horticultural products is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, both when viewed as a single measure and when its components are viewed as individual measures;
- (c) Indonesia's import restrictions based on the sufficiency of domestic production are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture;
- (d) to the extent they affect the internal sale, offering for sale, purchase, transportation, distribution or use of products, the Domestic Purchase Requirement for beef and the restrictions on use, sale and distribution of animals and animal products are inconsistent with Article III:4 of the GATT 1994;

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<sup>583</sup> Ibid.

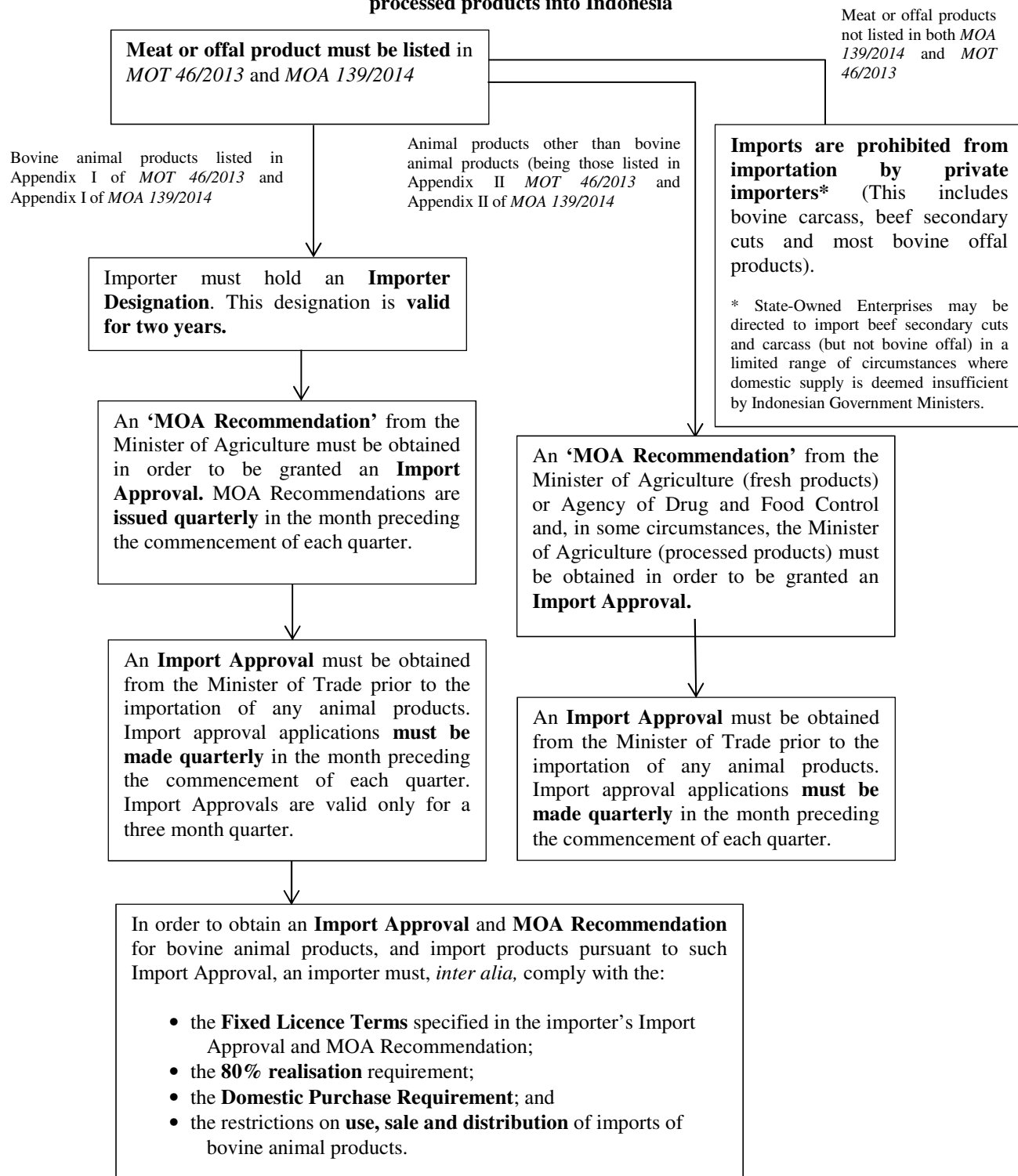
- (e) to the extent they affect the internal sale, offering for sale, purchase, transportation, distribution or use of products, the restrictions on use, sale and distribution of horticultural products are inconsistent with Article III:4 of the GATT 1994; and
- (f) to the extent that they are non-automatic import licensing procedures, the limited application windows and validity periods for MOA Recommendations and Import Approvals for animals and animal products and horticultural products are inconsistent with Article 3.2 of the Agreement on Import Licensing Procedures.

437. Accordingly, New Zealand requests that the Panel recommend to the Dispute Settlement Body that Indonesia brings its prohibitions and restrictions on the imports of animals and animal products and horticultural products into conformity with its WTO obligations.

## ANNEXES

### Annex 1

#### High level overview of import licensing documentation required for the importation of meat, offal and processed products into Indonesia



## Annex 2

### Description of Indonesian Beef Categories

Broadly, Indonesia separates unprocessed bovine meat and offal into the following five categories:

- **Prime Cut Meat:** This is defined in MOA 139/2014 as "a meat cut that has tenderness and juiciness and is top quality, in the form of bone-in and boneless meat cuts originating from ruminants, in chilled or frozen forms."<sup>1</sup>
- **Secondary Cuts:** These are not expressly defined in MOA 139/2014, however there are a number of references to secondary cuts within MOA 139/2014 and MOT 46/2014. A definition of secondary cuts was, however, included in MOA 84/2013, which was the predecessor to MOA 139/2014. MOA 84/2013 defined "Secondary Cut Meat" as "A meat cut outside of the prime cut which has the tenderness, juiciness and quality lower than the quality of prime cut, in the shape of bone in and boneless meat cut originating from ruminant livestock in fresh chilled and frozen form"<sup>2</sup> Secondary Cuts effectively include all identifiable bovine meat cuts that are not classified as Prime Cuts.
- **Variety/Fancy Cut Meat (referred to in this submission as "offal")**<sup>3</sup>: This is defined in MOA 139/2014 as "a meat part other than prime cut meat, secondary meat, and manufacturing meat, consisting of bone-in and boneless meat cuts in chilled or frozen form originating from ruminants, and consisting of tail and tongue as well as types of these cuts".<sup>4</sup>
- **Manufacturing Meat:** This is defined in MOA 139/2014 "manufacturing meat is a meat part other than prime cut meat, secondary meat, and variety/fancy meat, consisting of trimming that ranges from 65 CL up to 95 CL, minced meat, and diced meat for industrial purposes".<sup>5</sup>
- **Ruminant Carcass:** This is defined in MOA 139/2014 as "body parts from healthy ruminants that have been slaughtered in the proper way according to Islamic law (*halal*), skinned, and the offal removed, as well as the head, legs from tarsus/corpus down, reproductive organs and udder, tail, and also excess fat has been removed".<sup>6</sup>

<sup>1</sup> Article 1(5), *MOA 139/2014* (Exhibit JE-26).

<sup>2</sup> Article 1(7), *MOA 84/2013* (Exhibit JE-25).

<sup>3</sup> In this submission, references made to "bovine offal" or "offal" include HS Codes: 020610 (Offal Of Bovine Animals, Edible, Fresh Or Chilled), 020621 (Tongues Of Bovine Animals, Edible, Frozen), 020622 (Livers Of Bovine Animals, Edible, Frozen) and 020629 (Offal Of Bovine Animals, Edible, Nesoi, Frozen). In its regulations, Indonesia also uses the terms "variety meat" and "fancy meat" to refer to certain forms of bovine offal (including, for example, tongue, tail and lips). See Appendix I, *MOA 84/2013* (Exhibit JE-25), which classifies these products as "Fancy and variety boneless meat". A list of the bovine offal products (including those products referred to as "variety" or "fancy" cuts) which New Zealand submits are prohibited from importation is set out in: List of bovine meat and offal products and their eligibility for importation into Indonesia (Exhibit NZL-22).

<sup>3</sup> Bovine tongue and tail are the only offal products specified in Appendix I, *MOA 139/2014* (Exhibit JE-26) and therefore the only offal products eligible to obtain an MOA Recommendation.

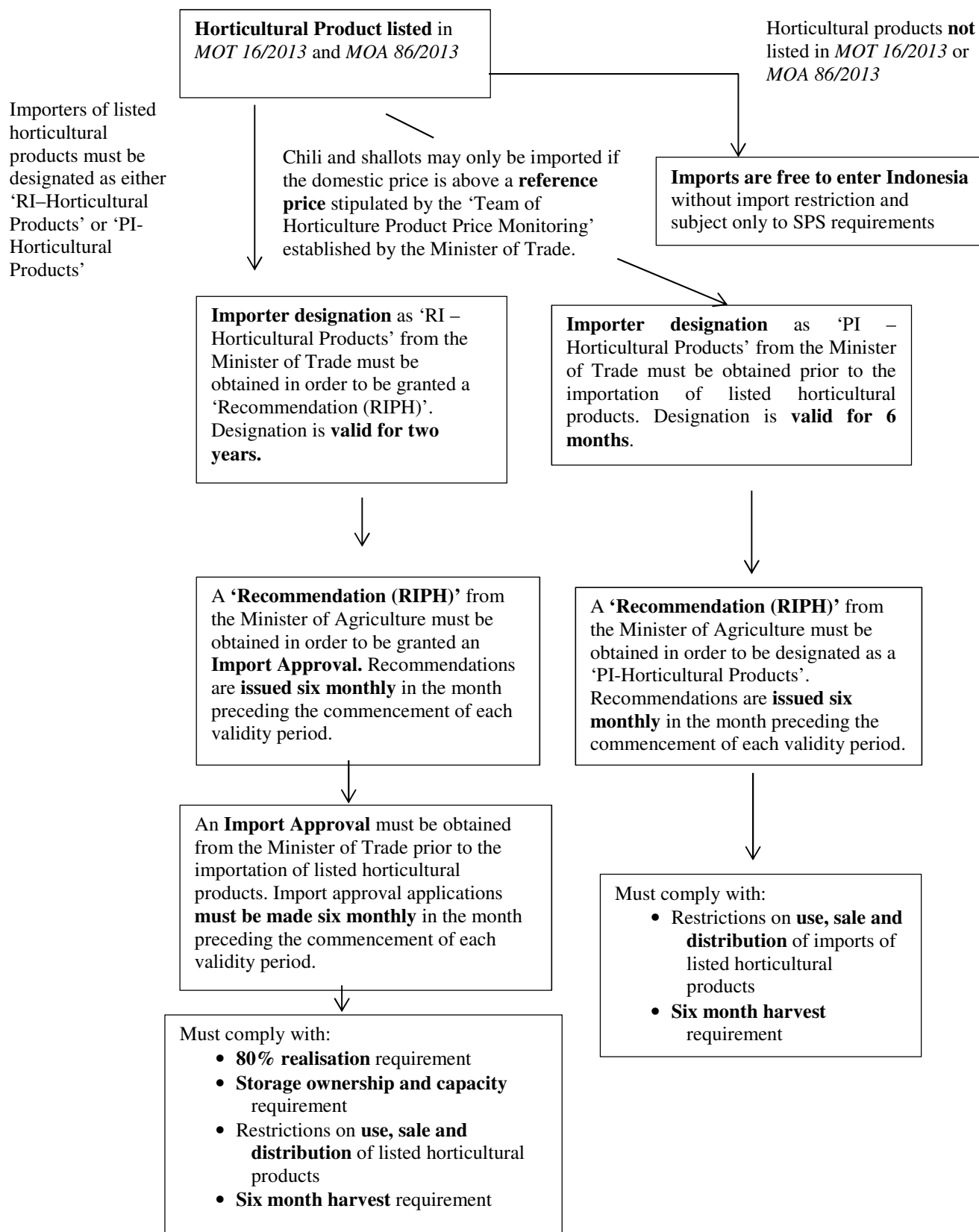
<sup>4</sup> Article 1(6), *MOA 139/2014* (Exhibit JE-26).

<sup>5</sup> Article 1(7), *MOA 139/2014* (Exhibit JE-26).

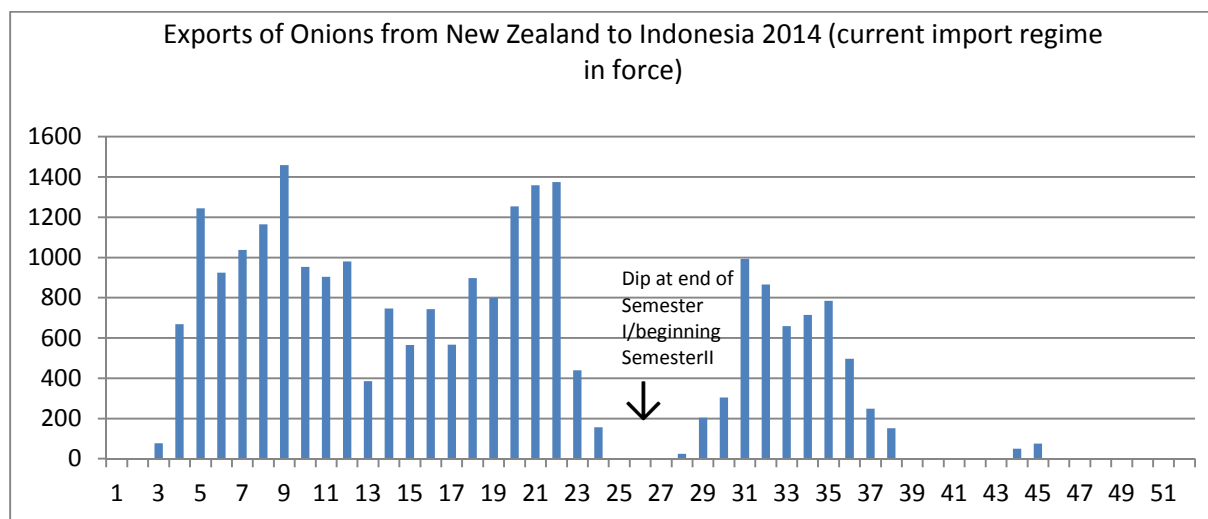
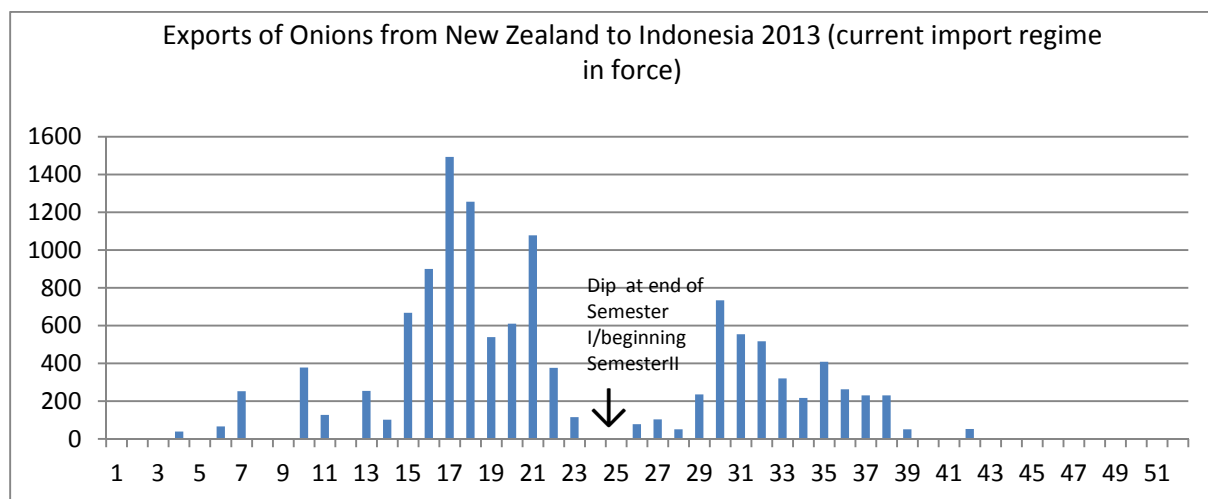
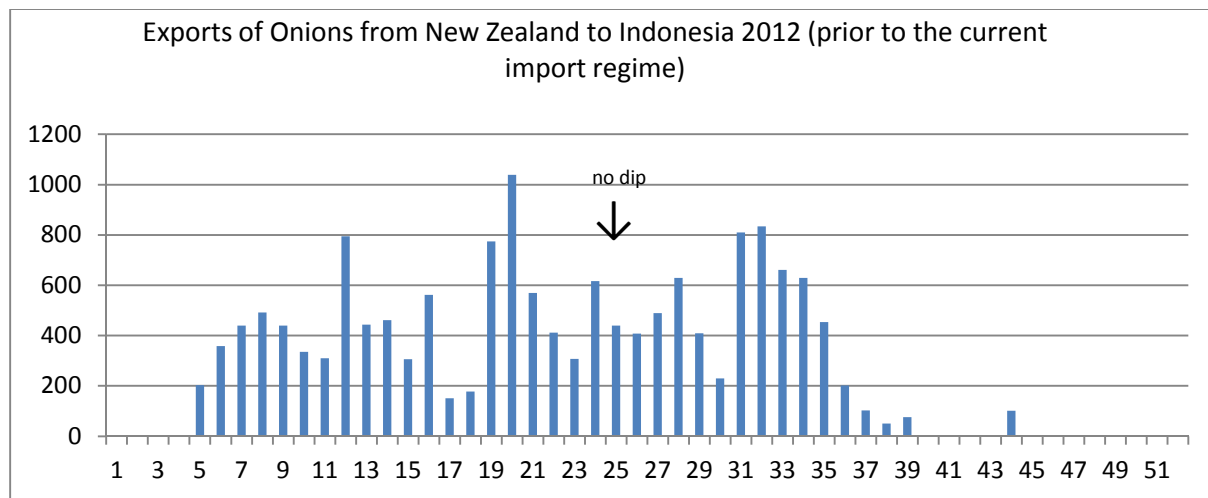
<sup>6</sup> Article 1(1), *MOA 139/2014* (Exhibit JE-26).

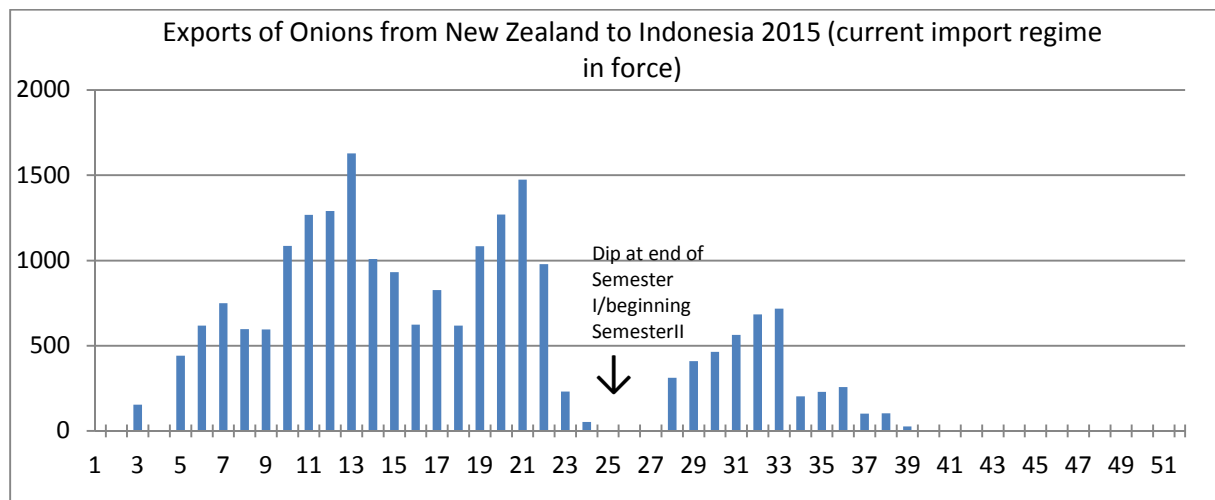
### Annex 3

#### High level overview of import licensing documentation required for the importation of listed horticultural products into Indonesia



#### Annex 4 Graphs showing exports of Onions from New Zealand to Indonesia



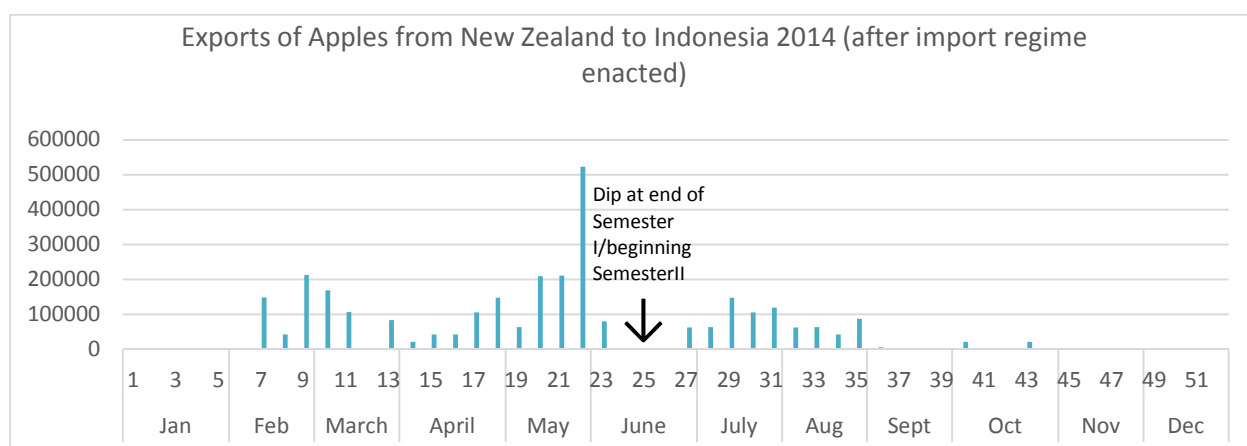
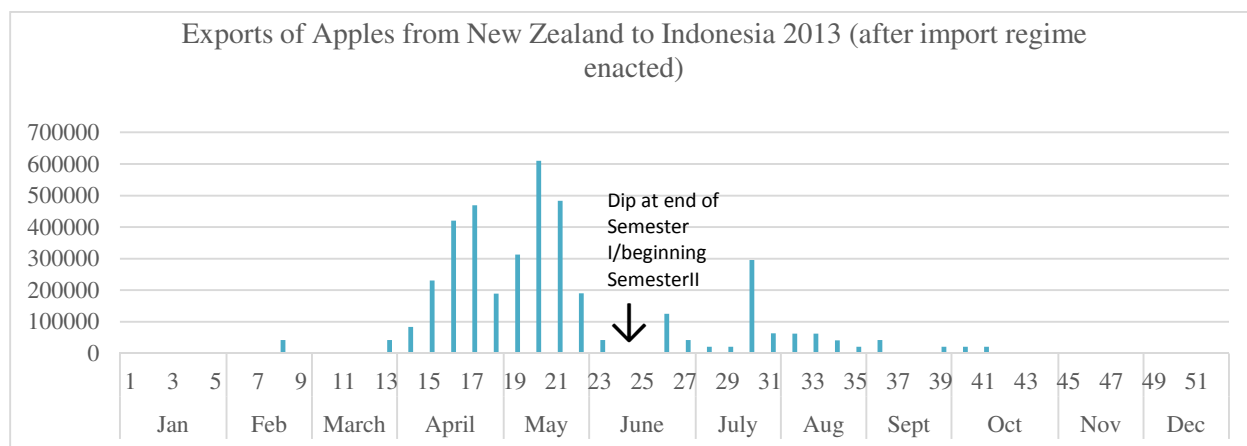


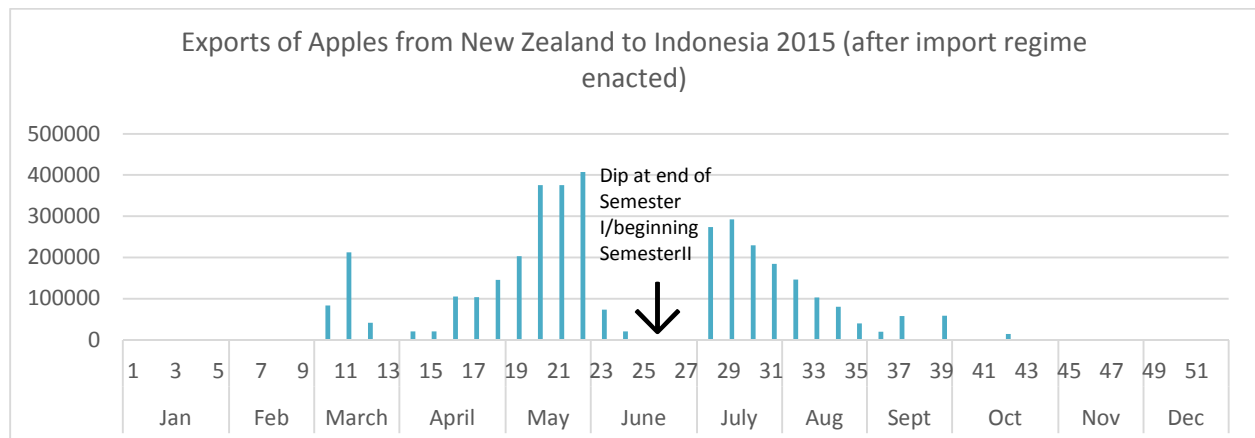
Source: New Zealand Customs Service



### Annex 5

#### Graphs showing exports of Apples from New Zealand to Indonesia





Source: New Zealand Customs Service