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)

OPENING STATEMENT OF NEW ZEALAND AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

13 April 2016

I. INTRODUCTION

1. Chairman, Members of the Panel, Staff of the Secretariat, colleagues from Indonesia and the United States.

2. The measures at issue in this dispute all stem from Indonesia's objective to restrict agricultural imports when domestic production is deemed sufficient to fulfil domestic demand. They are all quantitative restrictions and they are all contrary to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

3. Indonesia's second written submission emphasises recent changes to its regulations, which it contends have been made to "address the concerns of the Complainants" as part of "Indonesia's commitment to comply with the WTO agreements and to achieve greater trade liberalization".[1] New Zealand welcomes Indonesia's stated commitment to reforming its trade policy and removing import barriers. Unfortunately, however, the new regulations have not substantially changed Indonesia's import regime. The core trade-restrictive measures at issue in this dispute remain in place.[2]

4. In its second written submission, Indonesia has also introduced new defences, facts and arguments in an attempt to justify its regime. Late introduction of new arguments and facts could prejudice the rights of parties in dispute settlement proceedings.[3] Despite this challenge, New Zealand will demonstrate in this statement why Indonesia's new factual assertions are not supported by the evidence and its new legal arguments are contrary to the standards of the relevant provisions.

5. To that end, this statement will:

(a) *First:* comment on four overarching legal arguments which have been raised for the first time, or substantially developed, by Indonesia in its second written submission;

[1] Indonesia's second written submission, paras. 7 and 8.
[2] New Zealand's responses to the Panel's questions after the first substantive meeting, Question 1, paras. 4-5.
[3] See Article 3.10 of the DSU and the Appellate Body Report, *US – Gambling*, para. 269.

(b) *Second:* explain why Indonesia has failed to demonstrate that its import licensing regimes "as a whole" are justified under Article XX of the GATT 1994; and

(c) *Finally,* respond to Indonesia's new or recently developed argumentation in relation to the specific measures at issue in this dispute.

II. CHARACTERISATION OF THE MEASURES AT ISSUE IN THIS DISPUTE

6. As a preliminary point, New Zealand will briefly comment on how Indonesia has characterised the measures at issue in its second written submission compared to how the Complainants have presented their claims to the Panel. In its second written submission, Indonesia first considers its import licensing regimes "as a whole", rather than addressing the individual components of those regimes.[4]

7. New Zealand reiterates the importance of the Panel considering each of the individual measures at issue in this dispute. New Zealand has been clear, right from the filing of its panel request, that this dispute concerns a number of distinct measures.[5] In order to resolve the matter at issue, the Complainants have requested that the Panel make findings on each of these measures.

8. In addition, because these challenged measures operate in conjunction with each other, the measures collectively form two overarching regimes that are also inconsistent with Indonesia's WTO obligations.[6] These regimes are even more restrictive when viewed as a whole than simply the sum of their parts. It is for this reason that the Complainants have also sought rulings on these two regimes "as a whole".

[4] Indonesia's second written submission, Section III.B.
[5] New Zealand's request for the establishment of a Panel (NZL-10). See generally New Zealand's first written submission, Sections III.A, III.B, IV.A.2, and IV.A.3. New Zealand's responses to Advanced Question 38.
[6] See for example, New Zealand's first written submission, paras. 198, 275-276.

III. NEW OVERARCHING LEGAL ARGUMENTS RAISED IN INDONESIA'S SECOND WRITTEN SUBMISSION

1. Indonesia's import licensing regimes are not excluded from the scope of Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture

9. In its second written submission, Indonesia argues for the first time that its import licensing regimes "as a whole" constitute import licensing procedures under Article 1.1 of the Agreement on Import Licensing Procedures (ILA).[7] Indonesia then alleges that as these licensing regimes are "automatic", within the meaning of Article 2.1 of the ILA, all the measures of concern are "excluded from the scope of Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994".[8]

10. At the outset, it is not clear why Indonesia has sought to justify the consistency of its import licensing regimes "as a whole" with the ILA. The Complainants have *not* claimed that Indonesia's regimes "as a whole" are inconsistent with that Agreement. In any event, Indonesia's argument fails on two principal grounds:

(a) Not all of the measures at issue are import licensing procedures

11. First, with the exception of limited application windows and validity periods which, as described in New Zealand's first written submission, are a quantitative restriction *as well as* a prohibited non-automatic licensing procedure, all other measures at issue *are not* "administrative procedures used for the operation of import licensing regimes".[9] Rather, the measures at issue in this dispute (including the regimes as a whole) are underlying *quantitative import restrictions* inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. While these are *made effective through* import licences, the ILA is not relevant to the Panel's analysis of these claims.

12. It is important for this Panel to distinguish between import licensing procedures, on the one hand, and underlying restrictions made effective through import licences, on the other. This fundamental distinction between import licensing procedures and underlying restrictions

[7] Indonesia's second written submission, Section III:B.
[8] Indonesia's second written submission, para. 67.
[9] Article 1.1, Agreement on Import Licensing Procedures (ILA).

is articulated in WTO jurisprudence. To quote the panel in *Korea – Beef*, "many of the [claims] regarding alleged violations of the *Licensing Agreement* are concerned with the substantive provisions of Korea's import (and distribution) regime … It has been said repeatedly that such substantive matters are of no relevance to the *Licensing Agreement*".[10]

13. Further, the Appellate Body in *EC – Bananas III* confirmed that the ILA covers import licensing procedures and their administration, not underlying import restrictions.[11] Similarly the panel in *EC – Poultry* held that the issuance of import licences based on export performance is "clearly [an issue of rules], not that of application or administration of import licensing procedures".[12] These disputes confirm the distinction between import licensing procedures, which are the mechanisms used to administer import licensing regimes, and the underlying measures or "rules" that determine whether import licences will be granted. Indonesia's attempt to argue that all of the measures at issue are import licensing procedures ignores this critical distinction in the Complainants' claims and WTO jurisprudence.

(b) The characterisation of a measure as "automatic" or "non-automatic" licensing is not relevant to the Panel's inquiry under Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture

14. Second, regardless of whether any of the measures at issue in this dispute constitutes import licensing procedures, a measure is either consistent or not with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture according to the relevant legal standard under those provisions. Such an analysis cannot be conducted simply by assessing whether the licensing procedures used to implement the underlying restrictions are characterised as "automatic" or "non-automatic". Indeed, it would be a perverse result if measures which operated to limit imports were immune from challenge under Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture simply because they were made effective through automatic licensing procedures.

[10] Panel Report, *Korea – Various Measures on Beef*, para. 784 (emphasis added).
[11] Appellate Body Report, *EC – Bananas III*, para. 197. "As a matter of fact, none of the provisions of the *Licensing Agreement* concerns import licensing *rules*, *per se*. As is made clear by the title of the *Licensing Agreement*, it concerns import licensing *procedures*. The preamble of the *Licensing Agreement* indicates clearly that this agreement relates to import licensing procedures and their administration, not to import licensing rules. Article 1.1 of the *Licensing Agreement* defines its scope as the *administrative procedures* used for the operation of import licensing regimes."
[12] Panel Report, *EC – Poultry*, para. 254.

15. Thus, no matter what the label placed on a measure, the recurring question before this Panel is whether the measures at issue constitute a "restriction" within the meaning of Articles XI:1 and 4.2. It is therefore both irrelevant and unnecessary for the Panel to consider whether Indonesia's import licensing regimes "as a whole" are automatic or non-automatic licensing procedures.

2. Limited application windows and validity periods are non-automatic licensing procedures that are inconsistent with Article 3.2 of the ILA

16. As noted, limited application windows and validity periods are the *only* measures which New Zealand has argued are inconsistent with the ILA, as they are the only measures that constitute "administrative procedures" within the scope of that Agreement.

17. New Zealand has previously described why Indonesia's limited application windows and validity periods are non-automatic licensing procedures inconsistent with Article 3.2 of the ILA.[13]

18. Indonesia now cites Article 1.6 of the ILA in support of its contention that they are permitted "automatic" licensing procedures.[14] Indonesia argues that, because Article 1.6 sets out disciplines that apply when an import licensing regime has a "closing date", the limited application periods at issue in this dispute are expressly permitted under the ILA.[15] It appears to consider that, in order to give effect to Article 1.6, Article 2.2(a)(ii) of the ILA must be read in a way whereby "applications for licenses [need not] be submitted on any working day".[16]

19. However, Indonesia's novel interpretation of Article 2.2(a)(ii) takes Article 1.6 out of context, is not supported by the words in Article 2.2, and would, in fact, rob all meaning from that provision.

20. Article 1.6 of the ILA acknowledges only that there may be circumstances where closing periods are permissible as part of an otherwise WTO-consistent import licensing

[13] New Zealand's first written submission, paras. 419-434; New Zealand's first opening statement, paras. 63-65; New Zealand's responses to the Panel's questions after the first substantive meeting, Question 11.
[14] Indonesia's second written submission, paras. 64-66 citing Article 1.6 of the ILA.
[15] Indonesia's second written submission, paras. 61-65.
[16] Indonesia's second written submission, para. 65.

regime. For example, in order for a WTO-consistent tariff rate quota (TRQ) to be administered, it may in some cases be necessary for applications to be subject to a closing date in order to allocate the TRQ between applicants. Such a requirement would fail to meet the requirements of "automatic licensing" set out in Article 2.1 (because, *inter alia*, it would not permit the submission of applications on "any working day"). However it may still be permissible under Article 3.2 as a non-automatic licensing procedure provided that it does not have trade-restrictive or -distortive effects additional to those caused by the imposition of the underlying TRQ.

21. If limited application windows were permissible under the ILA in all circumstances, as Indonesia contends, this would render Article 2.2(a)(ii) meaningless. It would effectively nullify the requirement that applications be able to be submitted on "any working day", thereby removing one of the express conditions for automatic licensing procedures. Such an interpretation is untenable. Automatic licensing must be just that – automatic. This means applications must be able to be made by any eligible person at any time, complete applications must be accepted promptly in all cases, and the regime must not have trade-restricting effects.[17] Indonesia's limited application windows and validity periods do not satisfy these requirements.

22. Furthermore, unlike a WTO-consistent TRQ, there is no WTO-consistent underlying restriction that Indonesia is implementing through its limited application windows and validity periods. Accordingly, because these measures have unnecessary trade-restrictive effects, they constitute non-automatic licensing procedures inconsistent with Article 3.2 of the ILA.

3. Reference prices and the domestic harvest season requirement are not justified under Article XI:2(c) of the GATT 1994

23. In its second written submission, Indonesia has raised an entirely new defence under Article XI:2(c)(ii) of the GATT 1994 in respect of its reference price restrictions for beef, chili and shallots, and the domestic harvest season restrictions for horticultural products.[18] As will be explained further in New Zealand's answers to the Panel's Advanced Question 53,

[17] Article 2.2, ILA.
[18] Indonesia's second written submission, Section III.E.

Article XI:2(c)(ii) is no longer available as a defence to claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Furthermore, Indonesia has not only raised this exception very late, it has also failed to demonstrate that the measures at issue satisfy the requirements of that exception. Due to time constraints, I will leave our elaboration on these points to our oral answer to Question 53.

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

24. Indonesia also raises a novel but flawed argument regarding the burden of proof under Article XX of the GATT 1994. Indonesia accepts that Article XX is an exception to Article XI:1 of the GATT 1994, and that ordinarily the burden is on the respondent to demonstrate that the exception applies. However, Indonesia now contends that in the case of a claim of violation of Article 4.2 of the Agreement on Agriculture, the burden of proof is reversed and falls on the Complainants to demonstrate the absence of such a defence.[19] Indonesia seeks to turn the usual burden of proof in relation to Article XX on its head, contrary to the well-established principle that the burden of identifying and establishing affirmative defences under Article XX rests on the party asserting that defence.[20] There is no justification for shifting the normal burden of proof in this way. New Zealand will again elaborate on this point in its oral answers to the Panel's Advanced Question 40.

25. In any case, it is not necessary for the Panel to consider this argument if it adopts the order of analysis suggested by the Complainants.

[19] Indonesia's second written submission, para 38.
[20] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.

IV. INDONESIA'S LICENSING REGIMES "AS A WHOLE" ARE NOT JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

1. *Import licensing regimes as a whole*

26. We now turn to the arguments put forward by Indonesia in Part III.B of its second written submission that its import licensing regimes "as a whole" are justified under paragraphs (a), (b) or (d) of Article XX of the GATT 1994.[21]

27. When making this argument in Part III.B, at times, it was unclear to New Zealand whether Indonesia was limiting itself to the measures in this dispute seen collectively or whether it was referring to *all* aspects of its import licensing regime. For example, paragraph 110 of Indonesia's second submission appears to refer to the four implementing regulations as the import licensing regimes "as a whole". In contrast, when New Zealand refers to the regimes "as a whole" it is simply referring to the challenged measures in combination, rather than all aspects of Indonesia's import licensing regimes. We suspect that Indonesia and New Zealand do not disagree. Indeed, in its first written submission, Indonesia adopted the same definition of the measures "as a whole" as New Zealand.[22]

a. Article XX(a)

28. In Section III.B.4(a) of its written submission in relation to Article XX(a), Indonesia states, in very general terms, that its import licensing regime *as a whole* "falls under the scope of public morals."[23]

29. New Zealand respects Indonesia's commitment to protect the right of its people to consume halal food and to protecting the religious beliefs of its citizens.[24] Yet, in seeking to

[21] Indonesia's second written submission, para. 89.
[22] Indonesia's first written submission, paras. 95, 162 and 170.
[23] Indonesia's second written submission, paras. 92-96.
[24] Howse, Robert; Langille, Joanna; and Sykes, Katie, "Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products" (2015). New York University Public Law and Legal Theory Working Papers. Paper 506, pp 103-104 (Exhibit IDN-42 only contains a single page of this article. The full article is located at http://lsr.nellco.org/nyu_plltwp/?utm_source=lsr.nellco.org%2Fnyu_plltwp%2F506&utm_medium=PDF&utm_campaign=PDFCoverPages): "[P]luralism does not require that public morals measures also be self-judging; justifications rooted in public morals are and should be justiciable. Members should not be given carte blanche to claim that any trade restrictive measure is acceptable by simply asserting, on a declaratory basis, that the measure accords with their public morality."

justify its regime Indonesia has merely referred to five overarching laws and then concluded, without any further elaboration, that its import licensing regime as a whole is required to protect public morals.[25] However, it is not enough for Indonesia to argue that some aspects of the overarching laws pursuant to which its regulations are implemented may touch on matters concerning public morals. To sustain an Article XX(a) defence, Indonesia must show that each specific measure identified by the Complainants has an underlying public morals objective as evidenced by its design, architecture and revealing structure. It has not done so.

30. Furthermore, New Zealand has described the comprehensive arrangements that are in place to ensure that all relevant animal product exports to Indonesia are halal.[26] These arrangements remove the risk of Indonesians mistakenly purchasing non-halal animal products. Thus, Indonesia's measures at issue do not contribute to the objective of public morals.

31. In addition, Article XX(a) does not justify Indonesia's restrictions on imports of horticultural products. Indonesia's own submissions, exhibits and laws imply that horticultural products are inherently halal.[27]

32. Accordingly, Indonesia has not established that its measures address, let alone are necessary to protect, public morals.

b. Article XX(b)

33. In respect of Article XX(b), Indonesia makes a similar argument in paragraph 109 of its second written submission as it did for Article XX(a). Indonesia refers to the *Food Law* and by implication concludes that its entire import licensing regime "falls within the range [of] policies designed to protect human, animal or plant life [or] health".[28]

34. However, just because one of the objectives set out in the *Food Law* relates to food safety does not demonstrate that each specific measure at issue in this dispute has a food

[25] Indonesia's second written submission, paras. 91-103.
[26] New Zealand's second written submission, paras, 115-117; New Zealand's first opening statement, paras. 45-51.
[27] See Indonesia's second written submission, para. 211; The Islamic Council of Western Australia (ICWA), "ICWA Halal Guidelines" ("Halal Guidelines"), (Exhibit IDN-46), p 2; and *Law of the Republic of Indonesia, Number 33 Year 2014, Concerning Halal Product Assurance*, (Exhibit IDN-47), Article 20(1).
[28] Indonesia's second written submission, paras. 105-124.

safety objective. For an Article XX defence to succeed, the measure must not only "address the particular interest specified in [paragraph (b)]" but there must also be "a sufficient nexus between the measure and the interest protected".[29] Indonesia must therefore prove that an objective of each discrete trade restriction at issue in this dispute is the protection of life or health. A mere reference to the *Food Law* does not establish this nexus at a sufficient level of granularity.

35. Moreover, Indonesia's general argument is further undermined as the *Food Law* refers to a number of other objectives beyond food safety. Specifically, it also provides that Indonesia only allow imports to the extent of any shortfall in domestic food production.[30] In New Zealand's view, the design, architecture and revealing structure of the specific measures at issue reflect this trade-restrictive objective in the *Food Law*, as opposed to food safety.

36. In contrast to its arguments under Article XX(a), however, Indonesia does provide some evidence in paragraph 110 of its second written submission, which it asserts supports its Article XX(b) claims. In order to expedite proceedings today, New Zealand will address, exhibit by exhibit, in our oral answer to the Panel's Advanced Question 55 why the evidence referred to by Indonesia in paragraph 110 does not support the points Indonesia makes.

37. As a separate matter, Indonesia frequently conflates the concepts of food safety and "food security".[31] It is questionable whether the objective of "food security", as used by Indonesia, would fall under the Article XX(b) exception. For Indonesia, "food security" appears to equate to protecting local producers rather than ensuring people have safe food. Indonesia's own exhibit titled "The Future of Food Policy in Indonesia" puts this very clearly.[32] While acknowledging the political appeal of trade barriers to promote domestic production, the paper notes that these policies tend to fail on three counts: they lead to higher domestic prices which increases poverty, they stifle economic growth and, "ironically, they fail to recognize the crucial role of international trade … in Indonesia's own food security".[33]

[29] Appellate Body Report, *EC – Seal Products*, para 5.169, citing Appellate Body Report, *US – Gambling*, para. 292.
[30] Articles 14, 36, *Food Law* (Exhibit JE-2). Article 36(1) provides: "Import of Food can only be done if the domestic Food Production is insufficient and/or cannot be produced domestically."
[31] See, e.g. Indonesia's second written submission, paras. 123, 207(b), section III.D.2
[32] C. Peter Timmer, "The Future of Food Policy in Indonesia" (Nov 30, 2006) (Exhibit IDN-64).
[33] Ibid. at p. 7.

38. Furthermore, Indonesia has not explained how the measures at issue contribute to the objectives of food security, even if it was relevant. To the contrary, Indonesia's import-limiting measures appear to have had the effect of exacerbating food shortages, driving up prices and causing consequent flow-on effects on nutrition.[34]

39. Finally, Indonesia argues that its import licensing regime is less trade-restrictive than a comprehensive import ban and thus more easily considered "necessary" than a measure with greater restrictive effects.[35] But Indonesia cannot justify its measures by merely arguing that they could be worse than they already are. As Indonesia's Exhibit IDN-50 explains, WTO Members are entitled to take measures to ensure that their citizens are supplied with safe food but they must also ensure those measures are necessary to protect human health, are not arbitrary, and are not used as a means to protect domestic producers from competition.[36]

40. For all these reasons, Indonesia has not demonstrated that its licensing regimes are as a whole necessary to protect human, animal or plant life or health.

c. Article XX(d)

41. In Part III.B.4(c) of its second submission, Indonesia also argues its import licensing regime *as a whole* is designed to secure compliance with customs laws and regulations and consequently justified under Article XX(d).[37]

42. Indonesia's continued lack of specificity in its Article XX(d) defence is problematic.[38] Following the first hearing, Indonesia provided a list of titles of laws relating to customs, quarantine and food safety that it said are included among "[t]he WTO-consistent laws and regulations" providing the justification for its various measures.[39] But, even now, Indonesia has not provided most of those legal instruments to the Panel and the Parties as exhibits or

[34] See, for example, Exhibits NZL-25, NZL-41, NZL-64, NZL-66. See also Exhibits US-100, US-101, US-103. Note also "The Indonesian Consumer Behaviour, Attitudes and Perceptions Toward Food" (Exhibit IDN-51) at p. 27, referring to domestic production of beef not meeting demand.
[35] Indonesia's second written submission, para. 122.
[36] Iddya Karunasagar, "Food Safety and Public Health Risks Associated with Products of Aquaculture" (Exhibit IDN-50), p 10.
[37] Indonesia's second written submission, para. 130.
[38] New Zealand's second written submission, para. 52 ff.
[39] Indonesia's additional responses to the Panel's questions after the first substantive meeting, para. 46.

identified which specific provisions of them are relevant. This lack of specificity makes it challenging for the Complainants to respond to Indonesia's vague Article XX(d) defence.

43. For instance, Indonesia has noted that some of its agriculture and trade regulations contain references to the *Customs Law*.[40] However, this alone is insufficient to demonstrate that each specific trade restrictive measure before this Panel is designed to secure compliance with the *Customs Law*, let alone that the measures are necessary to achieve that objective. Indonesia's vague assertion that its import licensing regime "would indeed serve to 'secure compliance' with the customs enforcement"[41] does not explain what element of customs enforcement is involved.

44. This is particularly problematic as Indonesia's general *Customs Law* is very wide ranging, dealing with a multitude of different aspects of customs law and practice.[42] Furthermore, Indonesia defines "customs" widely as "everything related to monitoring over flow of goods in or out of customs area and collection of import duty and export duty".[43] Without further explanation by Indonesia, it is far from clear what specific elements of the *Customs Law* or customs enforcement relate to the specific measures at issue in this dispute.

45. On their face, the measures at issue have nothing to do with the collection of import and export duties. Nor do they appear to have been adopted to serve the "purpose of attaining data for statistical purposes"[44] or the "rightful oversight of" the flow of goods.[45]

46. Even if they were aimed at this objective, there are far less trade-restrictive ways by which Indonesia could gather data relating to imports for statistical purposes.[46] Many of these mechanisms already exist independently in Indonesia. Thus, Indonesia has provided no credible reason why its measures, that have a limiting effect on importation, are necessary.

[40] *Law 10/1995 Concerning Customs as amended by Law No 17/2006*; Indonesia's second written submission, para. 134, Exhibits IDN-65 and IDN-66.
[41] Indonesia's second written submission, para. 135
[42] See New Zealand's second written submission, para. 56.
[43] Indonesia's second written submission, para. 131, referring to *Law 17/2006*, Article 1(1), (Exhibit IDN-66).
[44] Indonesia's second written submission, para. 242.
[45] Indonesia's second written submission, para.132.
[46] See New Zealand's second written submission, para. 105.

47. Finally, Indonesia cannot simply "deem" its laws and regulations relating to customs enforcement consistent with the provisions of the GATT 1994.[47] A Member which invokes Article XX(d) has the burden of demonstrating that its requirements are met, including that the "laws and regulations" invoked are "not inconsistent" with the GATT 1994.[48] Again, this highlights that the "laws or regulations" referred to in support of a paragraph (d) defence, must be precisely identified. Simply naming three general customs instruments and ten other regulations without specifying what aspects of these legal instruments are relevant to the Panel's analysis does not satisfy Indonesia's burden to prove Article XX(d) elements.[49] Indonesia needed to show what contribution the measures make to the objective of customs enforcement, and why the measures were necessary to secure compliance with those laws, weighed against their trade restrictiveness. Indonesia has not done so.

d. Article XX Chapeau

48. As Indonesia has failed to provisionally justify its import licensing regimes as a whole in terms of the sub-paragraphs of Article XX, the Article XX chapeau is not reached. In any event, as New Zealand argued in its second written submission, Indonesia has also failed to show that its measures are applied consistently with the chapeau.[50]

49. In its second written submission, Indonesia argues, based on the first element of the chapeau, that its import licensing regime is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[51]

50. This argument should be rejected. The Appellate Body has confirmed that one of the most important factors in the assessment of arbitrary or unjustifiable discrimination is whether the discrimination can be reconciled with, or is rationally related to, the policy objective with which the measure has been provisionally justified under the subparagraphs of Article XX.[52]

[47] Indonesia's second written submission, para. 137.
[48] Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.
[49] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16; Indonesia's second written submission, para. 130; Indonesia's additional responses to the Panel's questions after the first substantive meeting, Question 20, para.12 and Question 71, para. 46.
[50] New Zealand's second written submission, para. 300.
[51] Indonesia's second written submission, para. 148.
[52] Appellate Body Report, *EC – Seal Products*, para. 5.306.

As New Zealand has demonstrated, Indonesia has failed to show that any of its measures can be reconciled with or is rationally connected to the policy objectives in Article XX.[53]

51. Indonesia now also argues that, because its measures are not hidden but are "publicly announced each time through the enforcement of a MOT or MOA Regulation", they are not disguised restrictions on trade.[54] This argument, based on the second element of the chapeau to Article XX, should also be dismissed. The Appellate Body has held that a "*concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of 'disguised restriction'" under the chapeau.[55]

52. Rather, in *US – Gasoline* the Appellate Body confirmed that "'disguised restriction', whatever else it covers, may properly be read as embracing restrictions… taken under the guise of a measure formally within the terms of an exception listed in Article XX."[56] This broader reading of "disguised restriction" is consistent with the purpose of "avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX".[57] Accordingly, as New Zealand has demonstrated, Indonesia's measures are "disguised restrictions".[58]

V. MEASURE-BY-MEASURE ANALYSIS

53. I now turn to the third and final part of this opening statement which addresses the individual measure-by-measure arguments Indonesia has made in Parts III.C and III.D of its second written submission. I will follow the order of measures established by New Zealand in its first written submission. In the interests of time, I will only address new arguments that have been raised by Indonesia in its second submission.

[53] New Zealand's second written submission, paras. 307-309.
[54] Indonesia's second written submission, paras. 157 and 250.
[55] Appellate Body Report, *US – Gasoline*, p. 25 (emphasis in original).
[56] Appellate Body Report, *US – Gasoline*, p. 25.
[57] Appellate Body Report, *US – Gasoline*, p. 25.
[58] New Zealand's second written submission, paras. 300-306.

1. Prohibition on imports

a. Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

54. New Zealand has detailed extensively how Indonesia prohibits imports of certain animals and animal products – in particular certain bovine meat, all bovine offal and bovine carcass – by not listing these products in the relevant appendices to *MOA 139/2014* and *MOT 46/2013*.[59] In the face of overwhelming evidence demonstrating the existence and effect of these prohibitions, Indonesia has continued to deny their existence.[60]

55. Yet it is clear from the evidence before the Panel that such bovine meat, offal and carcass products are prohibited from importation. Even Indonesia has, in the later stages of these proceedings, now acknowledged that bovine heart and liver are banned.[61] Indonesia's regulations are clear that all unlisted animal products are, *as such*, prohibited from importation (subject only, in the case of bovine secondary cuts, to the emergency importation exception). Although not strictly required by the legal test, the Complainants have also shown, *in fact*, the dramatic decline in imports of a range of key bovine meat and offal products not listed in Appendix I.[62]

56. In respect of those non-bovine meat products not listed in Appendix II of *MOT 46/2013*, the only evidence Indonesia has provided is trade data showing food imports since 2013 under a single 4 digit HS Code.[63] Simply because Indonesia has not enforced its regulations as they apply to one HS Code does not detract from the explicit text of Indonesia's regulations and their application to a wide range of products.[64] Thus, Indonesia has still not provided any credible evidence to rebut the *prima facie* case established by New Zealand that a positive list ban exists.

[59] See New Zealand's first written submission, paras. Sections III.A.3(a), IV.A.2(a) and IV.A.2(b); New Zealand's second written submission, paras. 29-36, New Zealand's first opening statement, paras. 13-19.
[60] Indonesia's first written submission, paras. 98-99; Indonesia's second written submission, para. 205.
[61] Indonesia's responses to the Panel's questions after the first substantive meeting, Question 1.2 (*sic*), para. 25, Indonesia's second written submission, para. 236.
[62] See New Zealand's first written submission, paras. 3-4, 134 and Figure 1, New Zealand's second written submission, para. 34 and Annex 1, New Zealand's first opening statement, paras. 4-6.
[63] Indonesia's second written submission, paras. 194 and 205, and "Import Statistic Animals and Animal Products" (Exhibit IDN-32).
[64] See New Zealand's first written submission, paras. 3-4, 134 and Figure 1, New Zealand's second written submission, para. 34 and Annex 1, New Zealand's first opening statement, paras. 4-6.

b. Article XX(b) of the GATT 1994

57. It is probably for this reason that, for the first time in its second written submission, Indonesia now concedes that certain bovine offal products *are* prohibited from importation but that this is justified under Article XX(b).[65]

58. Indonesia offers very little elaboration of its Article XX(b) positive-list defence, apart from a few passing references to concerns about hormone-treated beef.[66]

59. New Zealand emphasises that its bovine meat and offal products are safe. They are exported widely around the world to developed and developing countries, and are consumed domestically in New Zealand.[67] No health issues have arisen warranting Indonesia's trade ban. Indonesia has presented no relevant evidence to the contrary and its exhibits do not support its reliance on Article XX(b).[68] In particular, new Exhibits IDN-58, IDN-83, and IDN-84 do not explain why Indonesia bans the import of bovine offal and secondary cuts through the "positive list".[69] Rather, those exhibits are, respectively, a blog expressing concerns about hormones in milk and meat, a partisan summary of the *EC –Hormones* dispute, and a promotional article from the Organic Consumers Association encouraging its members to purchase organic beef.[70]

60. Furthermore, Indonesia's prohibition of certain beef and offal imports bears no rational relationship to the alleged concerns about hormone-treated beef. This is clear from the fact that imports of some beef products are permitted.[71] Yet there is again no reference to limits of imports of these products when the beef has been treated with hormones. Surely if Indonesia intended to protect its population from purported risks arising from hormones, it would impose measures that applied universally to all hormone-treated beef products, rather than just certain bovine offal and secondary cuts in certain circumstances. Finally, the positive list bans all unlisted products – not just hormone-treated beef. That is why

[65] Indonesia's second written submission, Section II.D.2(e), para. 206.
[66] Indonesia's second written submission, paras. 110, 236.
[67] See, for example, "New Zealand Export Statistics to Indonesia 2010 - 2015" *Global Trade Atlas* (Exhibit NZL-5) and Meat Industry Association Statement (Exhibit NZL-12).
[68] Huffington Post "Hormonal Milk and Meat: A Dangerous Public Health Risk" (Exhibit IDN-58); "Hormones in Meat" (Exhibit IDN-83); "Growth Hormones Fed to Beef Cattle Damage Human Health" (Exhibit IDN-84).
[69] See New Zealand's first written submission, paras. 40-43.
[70] Indonesia's second written submission, paras. 110, 236.
[71] See New Zealand's first written submission, para. 43.

New Zealand beef and offal is prohibited, even though it is not treated with hormones. Furthermore, none of the evidence publicising this measure made any reference to hormones.[72] For all these reasons, Indonesia's positive list restriction cannot be justified under Article XX(b).

2. Limited application windows and validity periods

a. Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

61. New Zealand has explained in detail previously how Indonesia's limited application windows and validity periods restrict imports.[73] Indonesia misconstrues the Complainants' argument to be that the "mere existence" of an application window or validity period is WTO-inconsistent.[74] This is not true. In these proceedings, the Complainants have clearly shown, both through the structure and design of the measure, and the use of trade data, that the measures have had an unjustified limiting effect on imports.[75] It is for this reason that they are inconsistent with Article XI:1 and Article 4.2.

b. Article XX(d) of the GATT 1994

62. In relation to Article XX(d), Indonesia now claims for the first time that its limited application windows and validity periods measures are "mandated because the products at issue are products that spoil easily. As such, data would be more accurate if it is closer to the import date".[76] However, the measures at issue require importers to provide information up to six months in advance of importation. If limited application windows and validity periods were removed, as New Zealand suggests should occur, Indonesia would be better placed to obtain more accurate data because it would be obtained closer to the time of importation.

63. Indonesia also acknowledges for the first time in its second written submission that its limited application windows apply only to certain animal products (namely bovine meat, offal

[72] See the exhibits listed at footnote 66 of New Zealand's first written submission.
[73] See New Zealand's first written submission, paras. 147-163 and 211-219; New Zealand's second written submission, paras. 44-51 and 179-183.
[74] Indonesia's second written submission, para. 66.
[75] See New Zealand's first written submission, paras. 147-163 and 211-219; New Zealand's second written submission, paras. 44-51 and 179-183.
[76] Indonesia's second written submission, para. 242.

and carcass) and only certain fresh horticultural products.[77] Indonesia's inconsistent application of this measure shows that avoiding food spoilage or data collection is not its true objective.

3. Fixed Licence Terms

a. Article XX(d) of the GATT 1994

64. In relation to Fixed Licence Terms, Indonesia expands its argumentation in relation to Article XX(d). It argues that the purpose of the Fixed Licence Terms is to "oblige importers to include information such as port of entry, volume, etc. in order for the customs officials to assess customs classification and import eligibility" and to "gather information for statistical purposes".[78] But Indonesia could readily obtain better information from other sources, providing data on what importers actually import, rather than just what they apply to import. As we have already explained, there are existing processes that are used for information gathering purposes.[79]

4. 80% Realisation Requirement

a. Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

65. With regard to the 80% realisation requirement, Indonesia states that this measure has now been removed.[80] New Zealand notes, however, that under Indonesia's new regulations for animals and animal products, and for horticultural products, importers are still required to submit an import realisation card detailing the percentage of their import quantity that they have imported during each Import Approval validity period.[81] By retaining this requirement, Indonesia could easily reintroduce the 80% requirement in the future. In order to ensure a positive resolution of the dispute, New Zealand seeks findings from the Panel on this measure despite its removal in the most recent revisions to Indonesia's regulations.

[77] Indonesia's second written submission, paras. 57 and 58.
[78] Indonesia's second written submission, para. 243.
[79] New Zealand's second written submission, para. 105.
[80] Indonesia's second written submission, paras. 172 and 176.
[81] Articles 23(1)(k) and 33(d) *MOA 58/2015* (Exhibit IDN-40); Article 22(1), Appendix V and VI, *MOT 5/2016* (Exhibit IDN-41); and Article 20(1) *MOT 71/2015* (Exhibit JE-12).

5. Use, sale and distribution requirements for animals and animal products and for horticultural products

a. Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

66. In relation to its use, sale and distribution requirements for animals and animal products, Indonesia claims that the measure does "not place any limit on the quantity of products that can be imported" and claims that the prohibition of sales of "non-fresh meat (i.e. defrosted or thawed)" in traditional markets applies to both imported and domestic meat.[82] Both of these claims are unsupported by evidence. Indonesia has not provided any law, regulation or other source for its contention that frozen or thawed domestic beef is prohibited from sale in either traditional or modern markets. Further, as New Zealand has demonstrated, imports of bovine animal products have dropped substantially since the introduction of Indonesia's import restrictions including the use, sale and distribution requirements.[83]

b. Article III:4 of the GATT 1994

67. Indonesia also rejects New Zealand's claims under Article III:4 of the GATT 1994 in respect of use, sale and distribution requirements.[84] In respect of the discrimination applicable to imported horticultural products, Indonesia seeks only to justify the measure under Articles XX(a) and XX(b) of the GATT, implying that it accepts the measure constitutes a *prima facie* breach of Article III:4.[85] In respect of the discrimination against imported animal products, Indonesia merely repeats its contention that the requirements apply "uniformly to imports and domestic products",[86] but without providing any evidence to support this claim.

c. Article XX of the GATT 1994

68. In seeking to justify the use, sale and distribution restrictions under **Article XX(b)** of the GATT 1994, Indonesia argues that preventing frozen meats from being sold in traditional markets ensures food safety because of the dangers that arise from freezing, thawing and

[82] Indonesia's second written submission, paras. 193-194.
[83] See New Zealand's second written submission, Annex 1.
[84] Indonesia's second written submission, paras. 272-277.
[85] Indonesia's second written submission, para. 277.
[86] Indonesia's second written submission, para. 276.

refreezing meats.[87] Indonesia also refers to the limited cold chain system in its traditional markets "which affects meat quality and texture".[88]

69. However, as we will explain in our oral answer to Panel Question 55, Indonesia has produced no relevant evidence that protecting human health was the reason for Indonesia's restrictions on sales of imported meat in traditional markets, or that imported meat sold in traditional markets poses a greater risk to human health than locally-slaughtered meat.

70. Of course, New Zealand accepts that unhygienic meat handling practices can result in harmful bacteria that can lead to illness. But Indonesia has not shown that such a risk exists in relation to frozen meat or that this is what the measure aims to address. As stated in Indonesia's own Exhibit IDN-79, frozen meat is safe provided it was safe when frozen. When thawed, microbes will become active and multiply, but at the same rate as in fresh meat.[89]

71. Furthermore, Exhibit IDN-57 produced in support of Indonesia's defence of its measure, titled "The effect of Freezing and Thawing on Technological Properties of Meat" relates to food quality not food safety.[90] Indonesia's repeated arguments based on "meat quality and texture"[91] are not only unsubstantiated but also irrelevant to an Article XX(b) defence.

72. In relation to Indonesia's defence of these measures under **Article XX(a)**, New Zealand has already demonstrated that all New Zealand meat exported to Indonesia is halal.[92]

73. In relation to the use, sale and distribution restrictions for horticultural products, Indonesia now also seeks to justify its measure under **Article XX(d)**. Indonesia argues for the first time that "the measure distinguishes the use, sale and transfer of imports from Producer Importers and Registered Importers" and "that this information is specifically used to calculate the national supply and demand for specific horticultural goods".[93] Again, it is not clear how this justification relates to either customs enforcement, or to the measure

[87] Indonesia's second written submission, para. 110.
[88] Indonesia's second written submission, para. 110.
[89] "Rules of Thawing and Refreezing Meat" (Exhibit IDN-79).
[90] Corina Gambuteanu, Daniela Borda and Petru Alexe, "The Effect of Freezing and Thawing on Technological Properties of Meat: Review" (Exhibit IDN-57).
[91] Indonesia's second written submission, paras. 109 ("establish quality… requirements"), 110, 193 and 225.
[92] New Zealand's second written submission, paras. 113-121.
[93] Indonesia's second written submission, para. 245.

New Zealand is challenging. Indonesia has not explained which laws or regulations the measure is "necessary to secure compliance with" let alone why it is "necessary".

6. Storage ownership and capacity requirements for horticultural products

a. Article XX of the GATT 1994

74. In its second written submission, Indonesia now raises various Article XX defences for its storage ownership and capacity requirements by arguing that the measure "is to ensure that fruits and meat products for consumption are safe, nutritious and also of good quality. "[94]

75. New Zealand notes that its challenge to Indonesia's storage ownership and capacity requirement is confined to horticultural products (which are inherently halal). Thus, Indonesia's public morals arguments under **Article XX(a)** should be rejected.

76. In respect of its claims under **Article XX(b)**, New Zealand's challenge relates exclusively to the requirements that importers *own* storage facilities with capacity equalling the quantity of product imported over a six-month period in a *one-to-one ratio*.[95]

77. None of Indonesia's evidence supports the need for a requirement that importers *own* their storage. Exhibit IDN-82 entitled "Storage Guidelines for Fruits & Vegetables", for example, relates to home storage and says nothing about *ownership* of storage by importers.[96] Nor do any of Indonesia's other exhibits support its ownership arguments. There is no reason why "ownership" as opposed to leasing of storage facilities shows a greater "commitment" to provide food that is safe for consumption.

78. Finally, Indonesia's explanation of why importers are only allowed to import products up to the maximum capacity of their storage – to "show the importer's commitment to provide food that is safe for consumption" – is inadequate for the reasons set out in New Zealand's previous submission.[97]

[94] Indonesia's second written submission, para. 110 and see also paras. 116-119 and 233.
[95] See New Zealand's first written submission, paras. 99 ff.
[96] "Storage Guidelines for Fruits & Vegetables" (Exhibit IDN-82).
[97] Indonesia's second written submission, paras. 119, 178, 207(a) and 214.

7. Reference price for beef, and reference price for chili and shallots

a. Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

79. In in its second written submission Indonesia now contends that its reference prices for beef, chili and shallots are not restrictions under Articles XI:1 or 4.2 because they are "not continuously in effect", the system "is not automatically activated", and "[i]mporters can import … provided the market price is still above such reference price."[98] It is not clear what Indonesia refers to when it states that reference prices are not immediately activated, and it has not provided any evidence suggesting that this is the case. To the contrary, Indonesia's regulations are clear. Imports of chili, shallots and beef cannot be imported when the market price falls below the specified level.[99]

b. Article XX(b) of the GATT 1994

80. Indonesia has also failed to produce any credible evidence showing its reference price requirements contribute to the protection of human, animal or plant life or health under Article XX(b). The design and structure of this measure does not indicate that it is necessary to protect Indonesian citizens from public health threats.[100]

81. Indonesia has produced neither any evidence of any oversupply of these products, nor of any prospect of "immediate crisis" or "immediate threats to the Indonesia food supply",[101] including in the exhibit Indonesia produced on its "food security plan".[102] To the contrary, Indonesia's answers to questions from the Panel, and its exhibits, point to chronic undersupply of food, with persistent threats of food insecurity and under-nutrition in Indonesia's poorer communities, as demonstrated by chronic malnutrition.[103] The evidence shows instead that Indonesia needs additional safe, high-quality, protein, as explained by the strong growth in

[98] Indonesia's second written submission, paras. 197, 238 and 256.
[99] Article 14(1), *MOT 46/2013* (Exhibit JE-18), Article 16(2), *MOT 5/2016* (Exhibit IDN-41), Article 5(4), *MOA 86/2013* (Exhibit JE-15).
[100] Compare Indonesia's second written submission, para. 240.
[101] Indonesia's responses to the Panel's questions after the first substantive meeting, Question 18, para 20.
[102] Ministry of Agriculture, "Agency for Food Security, 'at a Glance'" (Exhibit IDN-25). And see also Indonesia's responses to the Panel's questions after the first substantive meeting, Questions 17, 18, 27.
[103] Indonesia's responses to the Panel's questions after the first substantive meeting, Question 18, para. 19. See also "Indonesia Retail Report Update 2013 by Global Agricultural Information" (Exhibit IDN-78); "The Indonesian Consumer Behaviour, Attitudes and Perceptions Toward Food" (Exhibit IDN-51) at p. 14; "Rural Poverty in Indonesia", Rural Poverty Portal (Exhibit IDN-4).

New Zealand beef and beef offal exports to Indonesia in the first decade of this millennium before the measures at issue were introduced.[104]

8. Six-month since harvest requirement

a. Article XX(b) of the GATT 1994

82. In its second written submission, Indonesia claims that the purpose of its six month harvesting requirement for fresh horticultural products is to ensure that horticultural products are fresh, nutritious, chemical and preservative-free, safe and of good quality.[105] Relying on Article XX(b), Indonesia argues that not all fresh fruit can be stored for longer than six months, and in certain cases fruit are exposed to hazardous chemicals in order to last longer.[106]

83. This measure is arbitrary as it makes no distinction based on factors such as the storage life of particular horticultural products. Some horticultural products have a longer storage life than six months.[107] For example, as acknowledged by Indonesia in its first written submission,[108] apples and pears can be stored for longer than six months under controlled atmosphere conditions that use low oxygen and high carbon dioxide levels to slow down respiration.[109] Onions too have a storage life greater than six months.[110]

84. Moreover, New Zealand does not accept that the purpose of the six-month since harvest requirement is to protect against "hazardous chemicals". These are regulated separately by way of measures implemented through Indonesian regulations that are not at issue in this dispute.[111] As we will elaborate in our oral answer to Question 55, Indonesia has presented

[104] See e.g. Meat Industry Association (New Zealand), Statement in relation to Indonesia's beef import restrictions, 11 November 2015 (Exhibit NZL-12).
[105] Indonesia's second written submission, paras. 110, 218.
[106] Indonesia's second written submission, para. 110.
[107] See Kitinoja, Lisa, and Adel Kader, "Section 7: Storage of Horticultural Crops" FAO Corporate Document Repository, Agriculture and Consumer Protection (Exhibit IDN-73).
[108] Indonesia's first written submission, para. 150.
[109] Dianne M. Barrett, "Maximizing the Nutritional Value of Fruits & Vegetables <http://www.fruitandvegetable.ucdavis.edu/files/197179.pdf, p. 40-41 (Exhibit IDN-54).
[110] Kitinoja, Lisa, and Adel Kader, "Section 7: Storage of Horticultural Crops" FAO Corporate Document Repository, Agriculture and Consumer Protection (Exhibit IDN-73).
[111] *MOA 88/2011 concerning Food Safety Control over the Import and Export of Fresh Food of Plant Origin*, available at http://www.thaibizindonesia.com/upload/pdf/No-88-2011.pdf.

no pertinent evidence to show that food safety was the reason for the six-month since harvesting measure.[112]

VI. CONCLUSION

85. In conclusion, throughout its submissions, Indonesia has denied the restrictiveness of its regime. In particular, it has argued that its regime does not "restrict or limit" imports and that importers "can import as much as they like".[113] However, as the Complainants have demonstrated throughout this dispute,[114] Indonesia does prevent importers from importing as much as they like. In reality, imports are restricted because, among other things:

(a) importers are prohibited from importing certain products (such as bovine offal and secondary cuts);

(b) for permitted products, importers cannot import more than the quantity specified in their Import Approval per validity period;

(c) nor can they import different products, into different ports or from different countries of origin per validity period;

(d) importers must be conservative in estimating the quantity of products that they request per validity period, or risk having their ability to import revoked;

(e) importers are prevented from importing certain products during the domestic harvest season, or when the domestic price is above a certain level, or when harvested earlier than a certain period before importation;

(f) importers cannot import certain products for the purpose of sale to consumers through modern or traditional markets;

(g) horticultural importers cannot import more than their owned storage capacity in any six-month period; and

[112] Exhibits IDN-74 and IDN-75 do not discuss food safety.
[113] See: Indonesia's second written submission, paras. 29, 180, 186, 190, 238.
[114] New Zealand's responses to the Panel's questions after the first substantive meeting, Question 13(c), paras. 58-62.

(h) importers must satisfy a domestic purchase requirement in order to import beef.

86. For all of these reasons, and those set out in the Complainants' submissions, Indonesia restricts imports in a manner inconsistent with its WTO obligations.

87. Thank you for your attention. We look forward to answering any questions you may have.