

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)

SECOND WRITTEN SUBMISSION OF NEW ZEALAND

2 March 2016

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<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>	Appellate Body Report, <i>Brazil - Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Chile - Price Band System</i>	Appellate Body Report, <i>Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
<i>China – Rare Earths</i>	Panel Reports, <i>China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by the Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R
<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>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>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>Mexico – Taxes on Soft Drinks</i>	Appellate Body Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3
<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>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 – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
<i>US - Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475).
<i>US - Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
<i>US - Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755

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>RI</i>	Registered Importer
<i>RIPH</i>	Horticultural Product Import Recommendation from the Indonesian Ministry of Agriculture
<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-87	Indonesian import data for the bovine meat and offal products set out in Annex 1, Statistics Indonesia (accessed via Global Trade Atlas) and Statistics Indonesia (accessed via http://bps.go.id/all_newtemplate.php on 2 March 2016)	
NZL-88	New Zealand export data for weekly onion and apples exports to Indonesia 2012-2015 set out in Annex 4 and 5 of New Zealand's First Written Submission. Data sourced from NZ Customs Service	
NZL-89	Import Recommendation for Horticulture Product Citrus Semester 1 Year 2016, http://reippt.pertanian.go.id/index.php/news/view/17 (accessed 23 February 2016)	Import Recommendation for Horticulture Product Citrus Semester 1 Year 2016
NZL-90	Supporting data for import recommendation on horticulture product in semester 1 year 2015, Directorate General of Horticulture, Ministry of Agriculture	
NZL-91	Recommendation of export and import of horticulture products.	
NZL-92	Hey, J "Concern over Indonesian citrus imports" <i>Fruitnet</i> , 18 November 2015, http://www.fruitnet.com/asiafruit/article/167132/concern-over-indonesian-citrus-import-rules (accessed 25 February 2016)	

I. INTRODUCTION

1. In its first written submission and oral statement, New Zealand described how and why Indonesia limits importation of a range of animals, animal products and horticultural products. New Zealand demonstrated that, through laws and regulations, Indonesia prohibits imports of agricultural products when domestic production is deemed sufficient to satisfy domestic food demand. These instruments establish complex import licensing regimes that underpin a publicised government strategy to reduce imports to encourage domestic agricultural production in the hope of achieving self-sufficiency in food.

2. In response, Indonesia has challenged the existence or trade-restrictiveness of the measures at issue. It has also pointed to Article XX of the GATT 1994 in an attempt to provide legal justification for the import restrictions by characterising its regime as necessary for "customs enforcement" and "designed to safeguard Indonesia's supply chain from a sanitary, phytosanitary, and religious (or public morals) standpoint".¹

3. In this submission, New Zealand will further demonstrate why Indonesia's arguments must fail. Indonesia has not rebutted New Zealand's claims that its regime is restrictive, has had a substantial impact on trade, and is therefore inconsistent with Indonesia's WTO obligations. Nor has Indonesia shown why it needs to restrict imports in order to achieve the legitimate objectives in Article XX of the GATT 1994.

4. The remainder of this submission is structured in three parts:

- (i) Part II addresses three overarching legal issues raised by Indonesia in its first written submission and oral statement;
- (ii) Part III supplements New Zealand's legal argumentation in respect of each of the measures at issue in this dispute and responds to Indonesia's assertion that certain measures are justified pursuant to paragraphs (a), (b) or (d) of Article XX of the GATT 1994; and
- (ii) Part IV demonstrates that Indonesia's measures also fail to meet the requirements under the "chapeau" of Article XX of the GATT 1994.

II. OVERARCHING LEGAL ISSUES RAISED IN INDONESIA'S FIRST WRITTEN SUBMISSION AND ORAL STATEMENT

(a) The legal obligation under Article XI:1 of the GATT 1994

5. Indonesia asserts that in order to constitute a "quantitative restriction", a measure must impose an "absolute limit" on imports.² This is a mischaracterisation of the relevant legal test. The Appellate Body has confirmed that the test for whether a measure constitutes a

¹ Indonesia's first written submission, para. 7; Indonesia's first opening statement, para. 31.

² Indonesia's first written submission, see for example paras. 54, 55, and 110.

quantitative restriction is whether it has a "limiting effect" on importation.³ Jurisprudence is clear that a measure need not amount to a blanket prohibition or impose a precise numerical limit in order to constitute a quantitative restriction.⁴

6. A measure can have a "limiting effect" on importation for a wide variety of reasons. For example, panels have held that quantitative restrictions can include measures which restrict market access for imports, create uncertainties or affect investment plans.⁵

7. Indonesia also repeatedly asserts that its measures have no "adverse impact on trade flows".⁶ Although the Complainants have demonstrated the severe trade impact of Indonesia's regime, an adverse impact on trade flows is not a necessary component of the legal test for a quantitative restriction. This was confirmed by the Appellate Body in *Argentina – Import Measures*, which stated that the limiting effect of a measure "need not be demonstrated by quantifying the effects of the measure at issue" but rather can be "demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context".⁷

8. While not an essential part of the legal test under Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture, the Panel may nonetheless use statistical data as evidence to inform its overall examination of whether a measure has a limiting effect. This was confirmed by the Appellate Body in *Peru – Agricultural Products* which noted that "evidence on the observable effects of the measure" can be considered but that a "panel is not required to focus its examination primarily on numerical or statistical data" and that "the weight and significance to be accorded to such evidence will, as is the case with any evidence, depend on the circumstances of each case".⁸

9. The Complainants have demonstrated that Indonesia's regime is designed and structured in a manner which limits imports. While not a necessary part of the legal test, New Zealand has also provided evidence of the actual trade effects of these measures to illustrate the practical commercial importance of this dispute to its agricultural exporters.

(b) The legal obligation under Article XX of the GATT 1994

10. Indonesia has raised defences under Article XX of the GATT 1994 in respect of all of the measures at issue except for its prohibition of certain beef and offal imports, implemented by way of a "positive list", a measure which Indonesia denies exists.⁹

11. As set out in Part III, New Zealand has demonstrated the existence of a "positive list" and does not consider any of Indonesia's measures are justified under Article XX.

³ Appellate Body Reports, *China – Raw Materials*, para. 319; and *Argentina – Import Measures*, para. 5.217.

⁴ Panel Report, *India – Autos*, para. 7.270.

⁵ Panel Reports, *Argentina – Import Measures*, para. 6.454; and *Colombia – Ports of Entry*, para. 7.240.

⁶ See for example, Indonesia's first written submission, paras. 55, 78, 80, 84, 93, 141 and 161.

⁷ Appellate Body Report, *Argentina – Import Measures*, para. 5.217.

⁸ Appellate Body Report, *Peru – Agricultural Products*, para. 5.56 and fn. 362.

⁹ Indonesia's first written submission, paras. 96-99; Indonesia's first opening statement, para. 26.

12. Article XX provides (as far as is relevant to Indonesia's claimed defences) that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health; ...
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, ...

13. The assessment of a claim of justification under Article XX involves a two-tier analysis in which a measure must be provisionally justified under one of the paragraphs of Article XX, before it is subsequently appraised under the chapeau of Article XX.¹⁰

14. In analysing whether Indonesia's defences are provisionally justified under one of the paragraphs of Article XX, the first step for the Panel is to examine the design and structure of each measure to assess whether it was adopted or enforced to protect or secure compliance with an objective identified in paragraphs (a), (b) or (d).¹¹ The measure must "address the particular interest specified in that paragraph" and there must be "a sufficient nexus between the measure and the interest protected".¹² This step logically precedes the "necessity" analysis as, unless a measure was adopted or enforced for one of the covered objectives, it cannot be *necessary* for that objective.

15. Only if the Panel finds that the measure was adopted or enforced to protect or secure compliance with such an objective, should the Panel go on to the second step, the necessity analysis. This involves considering whether the measure is necessary to the achievement of the particular objective. The necessity analysis involves a process of "weighing and balancing a series of factors".¹³ These factors include the importance of the objective, the contribution of the measure to that objective and the trade-restrictiveness of the measure.¹⁴ The standard of "necessity" is a high one, "located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'".¹⁵

¹⁰ Appellate Body Report, *EC – Seal Products*, para. 5.169, citing Appellate Body Reports, *US – Gasoline*, p. 22; and *US – Shrimp*, paras. 119 and 120. See also Appellate Body Report, *US – Gambling*, para. 292.

¹¹ See, Appellate Body Report, *EC – Seal Products*, para 5.169; Panel Report *China – Rare Earths*, para. 7.145.

¹² Appellate Body Report, *EC – Seal Products*, para 5.169, citing Appellate Body Report, *US – Gambling*, para. 292.

¹³ Appellate Body Report, *Korea – Various Measures on Beef*, para. 164.

¹⁴ Appellate Body Reports, *EC – Seal Products*, para. 5.169; *Korea – Various Measures on Beef*, para. 164; *US – Gambling*, para. 306; and *Brazil – Retreaded Tyres*, para. 182.

¹⁵ Appellate Body Report, *Korea – Various Measures on Beef*, paras. 161-162 and 164. In footnote 104 the Appellate Body contrasted the more flexible standard in Article XX(g) of "relating to" applied in *United States – Gasoline*, p.22, and *United States – Shrimp* at para. 141.

16. A demonstration of the contribution of a measure to its objective can consist of "quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence".¹⁶

17. As part of the necessity analysis, a comparison between the challenged measure and possible alternatives may be undertaken, although it is not compulsory.¹⁷ Such a comparison involves reviewing whether there is a WTO-consistent alternative measure available which the Member concerned could "reasonably be expected to employ", or whether a less WTO-inconsistent measure is "reasonably available".¹⁸

18. In the paragraphs that follow, New Zealand will analyse and respond to each of Indonesia's Article XX arguments, measure by measure. This exercise is made difficult by the fact that, in the present dispute, Indonesia failed to be specific as to how its measures are "adopted or enforced" to protect or secure compliance with the objectives identified in paragraphs (a), (b) or (d) of Article XX of the GATT 1994.

19. Indeed, given the limited extent of Indonesia's arguments establishing any nexus between the measures and the objectives in paragraphs (a), (b) and (d) of Article XX of the GATT 1994, New Zealand suggests it is difficult to respond on the question of whether the measures are "necessary", or to elaborate on possible alternative less trade-restrictive measures, except at a high level of generality.

20. Appraisal under the chapeau to Article XX is only necessary in respect of WTO-inconsistent measures that have also been found to be provisionally justified under one of the exceptions set out in the paragraphs of Article XX.¹⁹ The burden rests with the party invoking the exception to demonstrate that a measure provisionally justified under one of the exceptions of Article XX does not constitute an abuse of such an exception under the chapeau.²⁰ New Zealand argues that this point is not reached in relation to any of Indonesia's Article XX defences, as Indonesia has not discharged its burden to provisionally justify any of its measures under the paragraphs of Article XX. Furthermore, Indonesia has barely mentioned the chapeau to Article XX in its first written submission.²¹

21. Nonetheless, for completeness, New Zealand considers that Indonesia's measures are undoubtedly "applied in a manner which would constitute a means of arbitrary or unjustifiable

¹⁶ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

¹⁷ Appellate Body Reports, *EC – Seal Products*, para. 5.169; *US – Gambling*, para. 307 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 166). See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 321 (referring to Appellate Body Report, *US – Gambling*, para. 307).

¹⁸ Appellate Body Report, *EC – Seal Products*, para. 5.261, citing Appellate Body Report, *Korea – Various Measures on Beef*, para. 166.

¹⁹ Appellate Body Report, *EC – Seal Products*, para. 5.296.

²⁰ Appellate Body Report, *EC – Seal Products*, para. 5.297 citing Appellate Body report, *US – Gasoline* pp. 22-23.

²¹ The sole reference to the chapeau is at para. 124 of Indonesia's first written submission. In *Thailand – Cigarettes*, the Appellate Body noted at para. 179 the fact that Thailand had only referred to the chapeau once, concluding that "[t]his cannot suffice to establish that the additional administrative requirements fulfil the requirements of the chapeau of Article XX".

discrimination between countries where the same conditions prevail, or a disguised restriction on trade". Our arguments on this point are set out in Part IV of this submission.

22. Moreover, as New Zealand explained in its responses Panel Questions 72 and 74, measures properly maintained under Article XX are outside the scope of Article 4.2 of the Agreement on Agriculture. It is therefore appropriate for the Panel to consider Indonesia's Article XX defences in the context of New Zealand's claims under Article XI:1 of the GATT 1994, first.

(c) Scope of the legal obligation under Article 4.2 of the Agreement on Agriculture

23. Indonesia claims that Article 4.2 of the Agreement on Agriculture is "entirely inapplicable to the challenged measures" because its import licensing regimes are "automatic" and therefore fall outside the scope of Article 4.2.²² This argument fails for two reasons.

24. First, Indonesia's argument is based on a false premise that because footnote 1 to Article 4.2 specifies that "discretionary import licensing" is a measure that is required to be converted to an ordinary customs duty, therefore Article 4.2 cannot apply to other types of import licensing. However, Article 4.2 covers "any measures of the kind which have been required to be converted into ordinary customs duties". The Appellate Body in *Chile – Price Band System* has emphasised the broad scope of Article 4.2.²³ The list of measures in footnote 1 to Article 4.2 is illustrative only. Whether a measure falls within the scope of Article 4.2 requires "an in-depth examination of the design and structure of the measure itself, as well as its operation".²⁴ This makes it clear that it is the nature of the measure that is determinative, not the particular label a respondent has attached to it.

25. Second, an examination of the design, structure and operation of Indonesia's import licensing regimes shows that it is not in fact "automatic".²⁵ Indonesia imposes strict requirements as a pre-condition for applying for MOA Recommendations and Import Approvals and attempts to subsume these as "legal requirements" for the supposed "automatic" grant of an import licence. As the Complainants have demonstrated, the underlying legal requirements are themselves restrictions on imports and constitute measures of the kind that have been required to be converted to ordinary customs duties. The fact that all applications which meet the legal requirements are approved is not decisive in determining whether the import licensing regime is "automatic".

26. In any case, as New Zealand has submitted, even if the import licensing system were automatic, this would not absolve Indonesia from complying with the requirements of Article 4.2 of the Agreement on Agriculture.²⁶ Indonesia's argument is based on a false premise that because footnote 1 to Article 4.2 specifies that "discretionary import licensing" is a measure that is required to be converted to an ordinary customs duty, therefore Article 4.2 cannot

²² Indonesia's first written submission, paras. 51 and 63; Indonesia's first opening statement, para. 18.

²³ Appellate Body Report, *Chile – Price Band System*, para. 208.

²⁴ Appellate Body Report, *Peru – Agricultural Products*, para. 5.39; Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 149.

²⁵ New Zealand's responses to the Panel's questions after the first substantive meeting, Question 11.

²⁶ *Ibid*, Question 11.

apply to other types of import licensing. However, Article 4.2 covers "any measures of the kind which have been required to be converted into ordinary customs duties". The Appellate Body in *Chile – Price Band System* has emphasised the broad scope of Article 4.2.²⁷ The list of measures in footnote 1 to Article 4.2 is illustrative only. Whether a measure falls within the scope of Article 4.2 may require "an in-depth examination of the design and structure of the measure itself, as well as its operation".²⁸ This makes it clear that it is the nature of the measure that is determinative, not the particular label a respondent has attached to it.

III. LEGAL ANALYSIS OF INDONESIA'S IMPORT MEASURES

A. IMPORT LICENSING REGIME FOR ANIMALS AND ANIMAL PRODUCTS

27. In this Section, New Zealand will respond to Indonesia's assertions regarding each of the measures applicable to animals and animal products in this dispute. This Section supplements the legal argumentation advanced in New Zealand's first written submission, first opening statement and responses to the Panel questions.²⁹ It is structured measure-by-measure, so as to demonstrate that all of the measures at issue:

- (a) have a "limiting effect" or impose a "limiting condition" on importation, and accordingly constitute:
 - (i) "prohibitions or restrictions ... on importation" within the meaning of Article XI:1 of the GATT 1994; and
 - (ii) "quantitative import restrictions" or "similar border measures" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture;³⁰ and
- (b) are not justified under paragraphs (a), (b) or (d) of Article XX of the GATT 1994.

28. Further, this Section will also address New Zealand's claims that certain measures are inconsistent with Article III:4 of the GATT 1994 and Article 3.2 of the Agreement on Import Licensing Procedures. Specifically that:

- (a) the Domestic Purchase Requirement and prohibitions and restrictions on use, sale and distribution of certain animals and animal products are inconsistent with Article III:4 of the GATT 1994; and

²⁷ Appellate Body Report, *Chile – Price Band System*, para. 208.

²⁸ Appellate Body Report, *Peru – Agricultural Products*, para. 5.39.

²⁹ See, in particular, New Zealand's first written submission, Sections IV.A.2 and IV.B.2.

³⁰ In respect of the beef reference price, New Zealand submits that this is also a "minimum import price" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture.

- (b) the limited application windows and validity periods for animal products are inconsistent with Article 3.2 of the Agreement on Import Licensing Procedures.

(a) "Positive list" prohibition of certain imports

(i) *Article XI:1 of the GATT 1994*

29. In its first written submission, Indonesia claims that it "does not maintain a 'positive list' of animal product imports" and that the requirements to obtain MOA Recommendations and Import Approvals "do not apply" to unlisted products.³¹ The only evidence cited in support of this proposition is trade data for live cattle imported under two HS Codes, a flawed argument which New Zealand addressed in its first opening statement.³²

30. Indonesia's contention that the positive list does not exist is not supported by its laws, regulations, or the supplementary evidence provided by the Complainants confirming the existence of the positive list. First, Article 2(2), *MOT 46/2013* states that "[t]he types of Animals and Animal Products that can be imported are included in Appendix I and Appendix II".³³ Similarly, Appendix I of *MOA 139/2014*, which list the types of bovine meat, carcass and offal that are permitted to be imported, is entitled "Bovine meat that can be imported into the territory of the Republic of Indonesia".³⁴ As the Complainants have described, Animals and Animal Products are defined broadly in the relevant Indonesian regulations, and *inter alia*, include all edible meat, carcass, offal and other processed meat products.³⁵ Accordingly, Indonesia's laws are clear that unlisted meat, carcass, offal and other processed meat products are not permitted for importation.

31. Second, in its submissions on the positive list, Indonesia does not refer at all to the Ministry of Agriculture disciplines in *MOA 139/2014*. As New Zealand noted in its first written submission, *MOA 139/2014* and *MOT 46/2013* collectively prescribe a 'positive list' of the meat, offal, carcass and processed meat products that are permitted to be imported.³⁶ As noted above, Appendix I of *MOA 139/2014* expressly establishes an exhaustive list of the

³¹ Indonesia's first written submission, paras. 34, 96 and 164. See also Indonesia's first opening statement, para 26 stating that "animals and animal products not listed in Appendix I and II [of *MOT 46/2013*] are simply exempt from the requirements of that regulation".

³² New Zealand's first opening statement, para. 15. See also Australia's third party written submission, paras. 70-72.

³³ Article 2(2), *MOT 46/2013* (Exhibit JE-18).

³⁴ Appendix 1, *MOA 139/2014* (Exhibit JE-26). Article 8, *MOA 139/2014* also provides that Appendix I and Appendix II specify the requirements for bovine products that can be imported stating "Requirements for bovine meats, as listed in Appendix I, are an integral part of this Ministerial Regulation, and non-bovine carcasses and/or meats as well as their processed products that can be imported, as listed in Appendix II, are an integral part of this Ministerial Regulation".

³⁵ Article 1(5), *MOT 46/2013* (Exhibit JE-18) defining "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(1), *MOT 46/2013* (Exhibit JE-18) defining "Animals" as "animals or wildlife that spend all or part of their life cycle on land, in water, and/or in air, whether domesticated or in their natural habitat".

³⁶ New Zealand's first written submission, para. 38; and New Zealand's first opening statement, para. 14.

bovine meat, carcass and offal product that can be imported.³⁷ Products not listed cannot obtain a MOA Recommendation or an Import Approval.³⁸ Indonesia has not explained how products not listed in *MOA 139/2014* (including, *inter alia*, bovine offal, carcass and secondary cuts) are able to obtain MOA Recommendations and Import Approvals.

32. Further, Indonesia's own statements to the Panel confirm that certain unlisted products are prohibited, a position at odds with its denial of the existence of the positive list. In its response to the Panel's questions, Indonesia acknowledges that "certain beef offal products (specifically, heart and liver)" are not permitted to be imported.³⁹ Bovine heart and liver are both unlisted in the relevant regulations and Appendices.⁴⁰ Similarly, a range of other bovine and non-bovine products are also prohibited through the positive list (including, *inter alia*, bovine secondary cuts, and a range of other meat and offal products).⁴¹ All of these products (including bovine heart and liver) are banned through the same mechanism - they are animal products that are unlisted in Appendix I of *MOT 46/2013* and/or Appendix I of *MOA 139/2014* and therefore cannot obtain Import Approvals or MOA Recommendations.⁴²

33. Indonesia's response to Panel Question 1.2 (*sic*) also acknowledges that all animals and animal products (including unlisted animals and animal products) are required to "comply with all other food laws and regulations" including *inter alia* "Law 18/2009 concerning animal husbandry and animal health, as amended by Law 41/2014".⁴³ As New Zealand stated in its response to Panel Question 41, Article 59(1) of *Law 18/2009* provides that "[e]very Person that import Animal Product into the territory of Republic of Indonesia must obtain import permit from the minister that organizes government affairs in trade sector after obtaining recommendation".⁴⁴ This directly contradicts Indonesia's contention that the requirements to obtain MOA Recommendations and Import Approvals "do not apply" to unlisted products⁴⁵ and reinforces the fact that meat, offal, carcass and processed products not listed in the Appendices to either *MOT 46/2013* or *MOA 139/2014* are ineligible for importation.

³⁷ Appendix I, *MOA 139/2014* (Exhibit JE-26), which lists the types of bovine meat, carcass and offal that are permitted to be imported, and is entitled "Bovine meat that can be imported into the territory of the Republic of Indonesia".

³⁸ New Zealand's first written submission, para. 38 and footnotes 63 – 65.

³⁹ Indonesia's responses to the Panel's questions after the first substantive meeting, Question 1.2 (*sic*), para. 25.

⁴⁰ See List of bovine meat and offal products and their eligibility for importation into Indonesia (Exhibit NZL-22).

⁴¹ A more detailed indicative list of the bovine meat, offal and carcass products prohibited from importation into Indonesia is set out in Exhibit NZL-22 (List of bovine meat and offal products and their eligibility for importation into Indonesia).

⁴² See List of bovine meat and offal products and their eligibility for importation into Indonesia (Exhibit NZL-22).

⁴³ Indonesia's responses to the Panel's questions after the first substantive meeting, Question 1.2 (*sic*), para. 25.

⁴⁴ Article 59(1) of the *Animal Law Amendment* (JE-5) relevantly provides that:

"Every Person that import Animal Product into the territory of Republic of Indonesia must obtain import permit from the minister that organizes government affairs in trade sector after obtaining recommendation from:

(a) the Minister for Fresh Animal Product; or

(b) the Head of agency in the field of drug and food control for processed food product of Animal origin".

⁴⁵ Indonesia's first written submission, paras. 34, 96 and 164.

34. New Zealand has also submitted a range of other evidence which supports its submissions regarding the existence of the positive list. Specifically, New Zealand has provided trade data demonstrating the substantial drop in offal imports in 2015 as a consequence of the total ban on bovine offal imports (except tongue and tail) through *MOA 139/2014*.⁴⁶ Similarly, New Zealand has also provided data demonstrating the substantial reduction in Indonesian imports of fresh and frozen beef in 2015 as a consequence of the ban on importation of bovine secondary cuts.⁴⁷ New Zealand also provides, in Annex 1 of this submission, data demonstrating the severe drop in total Indonesian imports of bovine meat⁴⁸ and offal⁴⁹ since 2010. In particular, the graphs in Annex 1 demonstrate the substantial drop in meat and offal imports in 2015 as a consequence of the positive list prohibition on bovine offal (except tongue and tail) and secondary cuts. New Zealand has also presented evidence of reported statements by Indonesian officials and other media sources confirming that all bovine offal and secondary cuts are banned.⁵⁰

⁴⁶ See "Indonesia Import Statistics From all countries 2010-2015" *Global Trade Atlas* (Exhibit NZL-4) demonstrating that 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; New Zealand's first written submission, para. 134.

⁴⁷ See "Indonesia Import Statistics From all countries 2010-2015" *Global Trade Atlas* (Exhibit NZL-4) demonstrating that the quantity of edible bovine meat and offal imported from all countries in the first six months of 2015 was only 34 percent of the volume imported over the same period in 2010; "New Zealand Export Statistics to Indonesia 2010-2015" *Global Trade Atlas* (Exhibit NZL-5) demonstrating that the quantity of edible bovine meat and offal exported from New Zealand to Indonesia in the first six months of 2015 was 84 percent lower than in the first six months of 2010; New Zealand's first written submission, paras. 3-4, 24 and Figure 1. New Zealand's first opening statement, Figure 7.

⁴⁸ See Figure C of Annex 1 and Exhibit NZL-87. Note that Indonesia only publically reports data on beef imports to the 6 digit level. This means there are four HS Codes which cover all fresh, frozen, bone-in and boneless bovine meat (HS Codes 020130, HS 020230, HS 020130 and HS 020220). These HS Codes cover both "prime cuts", which are permitted for importation under Appendix I, and "secondary cuts" which are prohibited as a result of the positive list (See Exhibit NZL-22 and paragraphs 38-45 of New Zealand's first written submission for an indicative list of the permitted and prohibited bovine products under each HS Code). Accordingly, it is only possible to provide aggregated data on imports of "prime cuts" and "secondary cuts" (and unfortunately not possible to provide data solely on banned secondary cuts). The graph in Figure C of Annex 1 shows the effect the prohibition on secondary cuts has had on importation of all meat products, demonstrated by the significant drop in total bovine meat imports (including both prime and secondary cuts) in 2015.

⁴⁹ See Figures A and B of Annex 1 and Exhibit NZL-87. Indonesia only publically reports data on bovine offal imports to the 6 digit level and it is therefore not possible to provide Indonesian import data on a product by product basis for most offal products. Figure A of Annex 1 shows the severe drop in imports of bovine liver following their removal from the positive list in *MOA 139/2014* in December 2014. Similarly, Figure B of Annex 1 shows that all other offal products (including, for example, bovine heart) also dropped substantially since 2010 and even further in 2014 as a result of all offal products (except bovine tail and tongue) being removed from the positive list of permitted products.

⁵⁰ See for example: "Achieving self-sufficiency, government keep importing live cattle" *Lensa Indonesia* (Exhibit NZL-23) quoting Director General of International Trade stating: "import of secondary cuts and offal is banned starting this year"; "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) stating "the Indonesian Government's decree clearly issued after New Year clearly states that no secondary beef cuts will be admitted" and "offals...are now banned with the exception of just a couple of items, understood to be tongue and tail meat"; 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) stating "[Indonesia] has banned imports of most secondary cuts of meat".

35. For these reasons, it is clear that Indonesia's ban on importation of unlisted animals and animal products constitutes a prohibition or restriction inconsistent with Article XI:1 of the GATT 1994.⁵¹

(ii) *Article 4.2 of the Agreement on Agriculture*

36. In response to the Complainants' arguments regarding the positive list prohibition, Indonesia has advanced the same arguments under Article XI:1 and Article 4.2 – i.e. that the positive list simply does not exist.⁵² However, for the same reasons explained in Section III.A(a)(i) above, the positive list does exist and therefore constitutes a "quantitative import restriction" or "similar border measure" under footnote 1 to Article 4.2 of the Agreement on Agriculture.⁵³ Accordingly, it is a measure of a kind that has been required to be "converted into ordinary customs duties" inconsistent with Article 4.2 of the Agreement on Agriculture.

(iii) *Article XX of the GATT 1994*

37. Indonesia does not raise a defence under Article XX of the GATT 1994 in respect of the underlying prohibition of certain beef and offal imports implemented through its "positive list", which it denies exists.⁵⁴ Instead, it only argues a defence under Article XX in respect of the aspect of this measure that permits Ministers to exceptionally permit importation of bovine carcass and beef secondary cuts by state-owned enterprises when certain emergency circumstances are deemed to exist.

38. Indonesia's limited defence in respect of the emergency circumstances exception is based on Article XX(b) of the GATT 1994. Indonesia claims that the measure is necessary for the protection of human life or health because it allows Indonesia to import certain products in response to a direct threat to the population caused by food scarcity.⁵⁵ Indonesia claims that the measure is, on its face, designed to ensure that the government can respond to an imminent food shortage and is "fully in line with the principles of fairness and responsible governance upheld by the WTO".⁵⁶ Indonesia's argument does not meet the standard required under Article XX(b).

39. To recall, the relevant Indonesian regulations provide that 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.⁵⁷ The Ministry of Trade and Ministry of Agriculture regulations only permit directions to State-Owned Enterprises to import to be made by Indonesian Ministers in the following limited circumstances:

⁵¹ See New Zealand's first written submission, Sections IV.A.2(a) and IV.A.2(b).

⁵² Indonesia's first written submission, para. 164.

⁵³ See New Zealand's first written submission, paras. 309-312.

⁵⁴ Indonesia's first written submission, paras. 96-99; Indonesia's first opening statement, para. 26.

⁵⁵ Indonesia's first written submission, para. 168.

⁵⁶ Ibid.

⁵⁷ Articles 23(3) and (4), *MOA 139/2014*, as amended (Exhibit JE-28). See New Zealand's first written submission, paras. 38-45 and 135-146.

- a. certain emergency conditions exist (namely a lack of food availability or an animal disease outbreak, price volatility or inflation, or a natural disaster);⁵⁸
- b. approval is obtained by a second Minister;⁵⁹ and
- c. MOA Recommendations and Import Approvals are issued to the State-Owned Enterprise which receives the Ministerial direction.⁶⁰

40. 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 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.⁶¹ 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.⁶² 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) and can only extend to carcass and secondary cuts.⁶³

41. Indonesia's argument that Article XX(b) applies in respect of the power to direct importation of bovine carcass and beef secondary cuts in emergency circumstances must be considered in light of Indonesia's underlying import ban on all unlisted animals and animal products.

42. Specifically, by prohibiting all imports of unlisted animals and animal products under ordinary circumstances, Indonesia *itself* has created the risk of food scarcity that this measure is allegedly designed to address. If the underlying WTO-inconsistent positive list prohibition did not exist, then the emergency circumstances exception would not be required. Article XX(b) cannot be invoked to justify a WTO-inconsistent aspect of a measure addressing risks to human life and health brought about by a WTO Member's own, WTO-inconsistent, import ban. In this regard, when the "emergency circumstances" aspect of the measure is considered in the context of the underlying import prohibition on unlisted products, Indonesia has not demonstrated that the protection of human life and health is the genuine objective pursued by the measure, as required under the first element of an Article XX(b) analysis.

43. Furthermore, this measure would not meet the "necessity" element of Article XX(b). Indonesia has not provided any evidence that a risk of food scarcity would exist *but for*

⁵⁸ Articles 23(3) and (4), *MOA 139/2014*, as amended (Exhibit JE-28). See New Zealand's first written submission, paras. 44-45.

⁵⁹ Articles 23(3) and (4), *MOA 139/2014*, as amended (Exhibit JE-28).

⁶⁰ Article 18(3), *MOT 46/2013* (Exhibit JE-18). See also: Article 18B, *MOT 41/2015* (Exhibit JE-22).

⁶¹ Article 23(3), *MOA 139/2014* as amended (Exhibit JE-28).

⁶² Articles 23(3) and (5), *MOA 139/2014* as amended (Exhibit JE-28).

⁶³ Articles 23(5), *MOA 139/2014*, as amended (Exhibit JE-28).

Indonesia's own, WTO-inconsistent, ban. As well, the prohibition is extremely trade-restrictive. Even the exception is trade-restrictive as it is uncertain, limited in scope, and limited in duration. When this trade-restrictiveness is balanced against the lack of contribution to the objective in Article XX(b) it is evident that the emergency circumstances exception does not meet the threshold of necessity. A least-restrictive alternative measure, that would directly respond to risks of food scarcity, would be removal of the positive list import prohibition in accordance with Indonesia's WTO obligations so that these products could enter Indonesia without unjustified restrictions and in response to market demand.

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

(i) Article XI:1 of the GATT 1994

44. In its first written submission, Indonesia contends that because "validity periods for [Import Approvals and MOA Recommendations] cover the entire year" and applications can be "submitted four times per year" it is "simply untrue that there is any period of time during which imports are 'restricted'".⁶⁴

45. Indonesia further argues that it "does not 'cut off' imports at the beginning or end of the validity period" nor does it "prohibit importers from shipping goods for the next validity period in anticipation of receiving its import licence prior to the goods' arrival at the port of entry".⁶⁵ Indonesia also seeks to distance itself from the effect of the measure, asserting that New Zealand's claims are "reflective of nothing more than the private business decisions of a handful of importers".⁶⁶

46. Indonesia's assertions are factually inaccurate.

47. First, as New Zealand explained in its first written submission, by preventing MOA Recommendations and Import Approvals from being obtained outside of four limited application periods per year,⁶⁷ Indonesia completely denies access to the Indonesian market for a number of weeks each quarter and months per year.⁶⁸ As demonstrated in Figures 4 and 5 of New Zealand's first written submission, and Figure 8 of New Zealand's first opening statement, this limiting condition is more than hypothetical – imports from all countries into Indonesia drop, with regularity, in the first month of each validity period as a consequence of Indonesia's measures.⁶⁹

⁶⁴ Indonesia's first written submission, para. 100.

⁶⁵ Indonesia's first written submission, para. 101.

⁶⁶ Ibid, para. 101.

⁶⁷ Articles 23 and 29, *MOA 139/2014* (Exhibit JE-26). Articles 28 and 30, *MOA 58/2015* (Exhibit AUS-1), provide that MOA Recommendations may now only be obtained during three application windows per year (December, April and August) and are valid for only four month trimesters (January - April, May - August and September - December). *MOA 58/2015* replaced *MOA 139/2014* with effect from 25 November 2015.

⁶⁸ New Zealand's first written submission, paras. 147-154.

⁶⁹ New Zealand's first written submission, Figures 4 and 5 and New Zealand's first opening statement, Figure 8.

48. Second, health certificates, which must accompany every shipment of animal products to Indonesia, are required by Indonesia to state the Import Approval number and its date of issuance.⁷⁰ Because importers cannot export products until they receive a health certificate from the country of origin, they are unable to export until they have received an Import Approval for the relevant quarter, and these are not issued until (at least) the start of each Quarter.⁷¹ Accordingly, even if an importer were willing to take significant commercial risk by shipping product to Indonesia in "anticipation of receiving its import licence" prior to the products' arrival, they are legally unable to do so as a consequence of Indonesia's regime.

49. Third, Indonesia's regulations clearly state that an "Import Approval ... is valid for 3 (three) months commencing from the date of its issuance".⁷² This is also reflected in the terms of each Import Approval.⁷³ Product is not permitted to be imported after the expiry of an Import Approval validity period, and accordingly imports are necessarily "cut off" at the beginning and end of each period.⁷⁴

50. Finally, it is Indonesia's regulations which limit imports, not the private decisions of importers. Limited application windows and validity periods are clearly set out in Indonesian regulations and constrain the actions of private actors. The measures affect all importers, not just a handful, as demonstrated in trade data which shows that bovine imports from all countries are detrimentally affected by limited application windows and validity periods.⁷⁵

(ii) *Article 4.2 of the Agreement on Agriculture*

51. In respect of limited application windows and validity periods, Indonesia cross-refers to the same arguments under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.⁷⁶ New Zealand demonstrated above that the measure has a limiting effect on importation and accordingly constitutes a restriction under Article XI:1 of the GATT 1994.⁷⁷ Accordingly, for the same reason the measure constitutes a "restriction" under Article XI:1, it also constitutes a "quantitative import restriction" or "similar border

⁷⁰ Stating the Import Approval is issued subject the condition that the importer "Must state Number and date of Import Approval for Fresh Animal Product on the Certificate of Health issued by exporting country". Beef Import Approval Example, para. 1 (Exhibit NZL-21).

⁷¹ Article 12(2), *MOT 46/2013* (Exhibit JE-18) stating 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); and New Zealand's first written submission, para. 149.

⁷² Article 12(3), *MOT 46/2013* (Exhibit JE-18).

⁷³ Beef Import Approval Example, para. 9 (Exhibit NZL-21) stating that "This import approval is valid from 1 July 2015 until 30 September 2015".

⁷⁴ Article 12(3), *MOT 46/2013* (Exhibit JE-18) stating that "Import Approval...is valid for 3 (three) months commencing from the date of its issuance".

⁷⁵ New Zealand's first opening statement, Figure 8. See also, New Zealand's first written submission, Figures 4 and 5.

⁷⁶ Indonesia's first written submission, para. 163.

⁷⁷ See Section III.A(b)(i).

measure" under footnote 1 to Article 4.2 of the Agreement on Agriculture.⁷⁸ Accordingly, it is a measure of a kind that has been required to be "converted into ordinary customs duties" and is therefore inconsistent with Article 4.2 of the Agreement on Agriculture.

(iii) *Article XX of the GATT 1994*

52. Indonesia argues that Article XX applies in respect of its limited application windows and validity periods for MOA Recommendations and Import Approvals.⁷⁹ When prompted by the Panel, Indonesia explained that its Article XX defence for this measure is based on paragraph (d).⁸⁰ For the corresponding measure applicable to horticultural products, Indonesia also argues that Article XX(d) applies.⁸¹ In that context, Indonesia asserts, without further elaboration, that the measure is a necessary component of its customs regime.⁸²

53. Indonesia also argues that "[a]s a developing country, [it] has limited resources to devote to processing *import licence applications*".⁸³ It is unclear whether this reference to the need for application windows and validity periods in order to allocate its resources to "process import license applications" is an elaboration of Indonesia's argument that the measures are necessary for customs enforcement or a separate argument. Neither argument meets the standard required under Article XX(d).

54. Indonesia has failed to demonstrate that customs enforcement is, in fact, the objective of its measure. Specifically, Indonesia has not identified the provisions of its customs enforcement laws and regulations, not inconsistent with the GATT 1994, with which the application windows and validity periods are designed to secure compliance. In its answer to the Panel's Question 71, Indonesia simply lists a few titles of laws and regulations relating to customs, quarantine and food safety that it says are included among "[t]he WTO-consistent laws and regulations" which provide the justification for the limited application windows and validity periods.⁸⁴ Indonesia explains that the list does not purport to be comprehensive and Indonesia has not provided copies of those laws to the Panel and the Parties as exhibits.

55. Of most concern, Indonesia does not identify which specific parts of the laws and regulations are relevant. This lack of specificity is problematic. As the panel found in *Colombia – Ports of Entry*, general references to laws and regulations relating to customs enforcement would not satisfy the legal standard required in Article XX(d).⁸⁵

56. To focus on one specific example, the first law cited by Indonesia in its answer to the Panel's Question 71, *Law 10/1995 Concerning Customs*, is very wide ranging, and deals with

⁷⁸ See New Zealand's first written submission, paras. 313-315.

⁷⁹ Indonesia's first written submission, para. 103.

⁸⁰ Indonesia's additional responses to the Panel's questions after the first substantive meeting, Question 63, para. 39.

⁸¹ Indonesia's first written submission, para. 136.

⁸² Indonesia's first written submission, para. 136 and Indonesia's first opening statement, para. 31.

⁸³ Indonesia's first written submission, para. 136. See also Indonesia's first opening statement, Question 71, para. 31 (emphasis added).

⁸⁴ Indonesia's additional responses to the Panel's questions after the first substantive meeting, para. 46.

⁸⁵ Only once Colombia identified particular legal provisions could the panel properly evaluate Colombia's defence under Article XX(d). Panel Report, *Colombia – Ports of Entry*, paras. 7.516-7.525.

everything from: arrival, unloading and storage of goods; temporary admission; exports; tariff and customs valuations; anti-dumping and countervailing duties; unimposition, exemptions, relief, and refund of the import duty; customs declaration and liability for the import duties; payment of the import duty, collection of debts and security; storage place under customs supervision; book-keeping; prohibitions and restrictions of imports or exports, and control of import or export of goods as a result of violations against intellectual property rights; unclaimed goods, goods claimed by the state and goods that become the state property; authority of the customs official; objection, appeal, and appeal institution; penal provisions investigation; and other matters. Without further explanation by Indonesia it is not immediately clear how any of this law even relates to Indonesia's import licensing regime or the specific measures at issue, let alone how Indonesia's measures are "necessary to secure compliance" with this law, or any of the laws and regulations cited by Indonesia.

57. WTO jurisprudence confirms the Panel is not bound by Indonesia's assertion of the objective of its measures.⁸⁶ Rather, a panel should look at all relevant evidence, including the text, structure, and legislative history of the measure at issue.⁸⁷ Mere assertions concerning the purpose of a challenged measure are not sufficient to establish that is a measure is designed to promote an objective in Article XX. In this instance, nothing in the sources referred to by Indonesia suggest a connection between this measure and customs enforcement.

58. As New Zealand has demonstrated, the true purpose of the measure is reflected in the underlying rationale of Indonesia's import licensing regime for animal products. Specifically, as detailed in New Zealand's first written submission, the true purpose of the measure is to limit importation in order to achieve its protectionist objective of achieving self-sufficiency in the production of agricultural products by limiting imports.⁸⁸

59. Indonesia also fails to demonstrate that these laws and regulations are "not inconsistent with the provisions of [the GATT 1994]", as Article XX(d) requires. Indonesia has therefore failed to meet even the first hurdle in seeking to justify its measures as falling within the scope of Article XX(d).

60. Even if the first element of Article XX(d) were satisfied, Indonesia has not shown that its measures are "necessary" to secure compliance with such laws or regulations. As the Appellate Body observed in *Thailand – Cigarettes*, "it is difficult to make detailed arguments to demonstrate the 'necessity' of a measure under Article XX(d) in the absence of a clear identification of the laws or regulations with which that measure is purportedly necessary to secure compliance".⁸⁹ Furthermore, Indonesia's response to the Panel's Question 71 provides no specific indication that the limited application windows and validity periods measure is necessary to secure compliance with Indonesia's customs regime.⁹⁰ Indeed, the customs regime is administered by an entirely different agency (the Ministry of Finance) than the

⁸⁶ Appellate Body Report, *EC – Seal Products*, para. 5.144.

⁸⁷ Ibid.

⁸⁸ See for example, New Zealand's first written submission, paras. 1-8 and 15-27.

⁸⁹ Appellate Body Report, *Thailand - Cigarettes*, fn. 272.

⁹⁰ Indonesia's additional responses to the Panel's questions after the first substantive meeting, Question 71, para. 46.

import licensing regime (which is administered by the Ministry of Trade and Ministry of Agriculture).

61. It is difficult to see how the application windows and validity periods would permit Indonesia to allocate resources for customs enforcement. The two regimes appear to be completely independent regimes operated by separate entities. This licensing aspect of the regime will only provide an indication of trade over the 3-month validity period of each Import Approval; it will not provide greater specificity. Furthermore, according to Indonesia, importers are able to list "more ports of entry than they ultimately use in their import license applications" which if it were correct would mean that the tool does not permit resource allocation by port.⁹¹

62. Accordingly, weighing the lack of contribution of the measure to the objective in Article XX(d) against its significant trade-restrictiveness,⁹² Indonesia has failed to discharge its burden to establish that the measure at issue is "necessary" to secure such compliance. To be "necessary", there must be "a genuine relationship of ends and means between the objective pursued and the measure at issue".⁹³ Indonesia has failed to demonstrate that relationship.

63. In these circumstances, New Zealand does not consider it is necessary to elaborate on a less trade-restrictive alternative measure. However, a reasonably available less trade-restrictive alternative measure would be for Indonesia to remove application windows and validity periods for animals and animal products altogether. This is not a radical idea. In relation to horticultural products, any products not listed in the relevant regulations are not subject to the import licensing regime at all.⁹⁴ This demonstrates that these licensing measures are not necessary to implement customs enforcement objectives.

64. Alternatively the validity period approach could be abandoned and replaced with a truly automatic import licensing system. Under such a system, importers could apply on any day prior to the customs clearance of goods. Permission to import goods would be automatically granted in respect of the type, quantity, and port of entry. Such a regime would be simple to administer by comparison with the current regime and would provide adequate information on the products intended to be imported for customs purposes.

65. Either of these modifications would help to avoid the limiting effects on imports illustrated in Figures 4 and 5 of New Zealand's first written submission.

66. In its Article XX(d) defence for this measure, Indonesia also appears to argue that the measure allows it to better allocate its "limited resources to devote to processing *import*

⁹¹ Indonesia's first written submission, para. 139.

⁹² As described in New Zealand's first written submission, at paras. 147-154.

⁹³ Appellate Body Report, *EC – Seal Products*, para. 5.180, citing Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 145-157.

⁹⁴ See New Zealand's first written submission, para. 73, referring to Attachment II, *MOA 86/2013* (Exhibit JE-15) and Appendix I, *MOT 16/2013* (Exhibit JE-8).

license applications".⁹⁵ This argument certainly does not meet the requirements of an Article XX(d) defence. Indonesia's argument is circular. The "laws or regulations" Article XX(d) refers to cannot be the laws or regulations that implement the impugned measure itself. That is clear from the fact that paragraph (d) provides that such laws or regulations must "not [be] inconsistent with the provisions of this Agreement".⁹⁶

67. Ultimately, Article XX's purpose is not only to protect the right of a Member to pursue certain non-trade objectives, but also to balance this right with the duty of that same Member to respect the treaty rights of the other Members.⁹⁷ A Member invoking Article XX must identify the policy objective with sufficient specificity, and must provide sufficient evidence and argumentation to confirm that the measure is necessary to achieve the specifically identified objectives and does not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.⁹⁸ Indonesia has met none of these requirements.

(iv) *Article 3.2 of the Agreement on Import Licensing Procedures*

68. Indonesia contends that its licensing regime is "automatic" and therefore "outside the scope of Article 3 of the Agreement on Import Licensing Procedures".⁹⁹ However, as explained in New Zealand's first written submission, Indonesia's licensing regime does not qualify as "automatic" under Article 2.1 of the Agreement on Import Licensing Procedures because *inter alia*, it does not allow for applications to be "submitted on any working day prior to customs clearance".¹⁰⁰ By issuing Import Approvals and MOA Recommendations only four times per year, and only permitting them to be applied for in the month prior to issuance, the measure at issue clearly does not satisfy the requirements for an "automatic" import licensing procedure within the meaning of Article 2.1 of the Agreement on Import Licensing Procedures.¹⁰¹

69. Indonesia further asserts that "there is no causal link between the implementation of the import licensing regime and the a declined market share of the Complainants"(sic).¹⁰² However, for the reasons described above, and as demonstrated in trade data, the measure is trade restrictive.¹⁰³ Importers simply cannot import products during certain periods and Indonesia's imports are limited during certain periods in each year as a direct consequence of the measure at issue.

⁹⁵ Indonesia's first written submission, para. 136 and see also Indonesia's first opening statement, para. 31 (emphasis added).

⁹⁶ See also Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 69, 79.

⁹⁷ Appellate Body Report, *US – Shrimp*, para. 156. See also Japan's third party written submission, para. 15.

⁹⁸ Japan's third party written submission, para. 15.

⁹⁹ Indonesia's first written submission, para. 175.

¹⁰⁰ Articles 2.1 and 2.2(a), Agreement on Import Licensing Procedures; New Zealand's first written submission, Section IV.D.1.

¹⁰¹ Articles 2.1 and 2.2(a), Agreement on Import Licensing Procedures.

¹⁰² Indonesia's first written submission, para. 178.

¹⁰³ New Zealand's first opening statement, Figure 8. See also, New Zealand's first written submission, Figures 4 and 5.

(c) Fixed Licence Terms

(i) *Article XI:1 of the GATT 1994*

70. Indonesia contends that Fixed Licence Terms do not constitute quantitative restrictions because (i) importers can alter terms of importation "from one license application to the next" and accordingly terms are "only static for the length of one validity period"; and (ii) importers are free to preserve flexibility by identifying "broad terms of import on their import license applications".¹⁰⁴ Indonesia also argues that the measure is "adopted by private entities" and therefore outside of the scope of XI:1 of the GATT 1994.¹⁰⁵

71. As detailed in New Zealand's first written submission, it is precisely because Fixed Licence Terms are *static for the length of a validity period* that the measure constitutes a quantitative import restriction. New Zealand does not dispute that importers are permitted to select their Fixed Licence Terms when applying for MOA Recommendations and Import Approvals at the commencement of each Quarter. However, the fact that these remain "fixed" or "static" for the duration of each validity period means that Indonesia effectively imposes a quota on imports of particular products for the duration of that validity period, and removes any flexibility for importers to plan and respond to market fluctuations during the course of each quarter.¹⁰⁶

72. Indonesia also contends that importers can maintain flexibility by selecting 'broad' licence terms. This is incorrect. Each Import Approval specifies a specific type of product, quantity, port of entry and country of origin.¹⁰⁷ Similarly, MOA Recommendations specify a single port of entry and country of origin for each product.¹⁰⁸ When applying for Import Approvals the importer must specify a "package" of terms comprising a single port, quantity and country of origin for each product it wishes to import. This is reflected in Indonesia's regulations,¹⁰⁹ as well as the Import Approvals submitted in evidence by New Zealand.¹¹⁰

73. Finally, New Zealand reiterates that, as with limited application windows and validity periods, the requirement that importers specify Fixed Licence Terms is maintained through Indonesian regulations and does not result from the business decisions of private actors. New Zealand notes that it is not challenging the specific terms that are selected by private importers in their MOA Recommendations and Import Approvals. Rather, New Zealand

¹⁰⁴ Indonesia's first written submission, para. 105.

¹⁰⁵ Indonesia's first written submission, para. 104.

¹⁰⁶ See New Zealand's first written submission, paras. 155-163.

¹⁰⁷ See Beef Import Approval Example (Exhibit NZL-21) stating that country of origin is "New Zealand", port of entry is "Tanjung Priok seaport" and specifically listing quantity for each product covered by the Import Approval.

¹⁰⁸ FORMAT-3, *MOA 139/2014* (Exhibit JE-28) requiring the following to be separately and individually listed for each product: "Tariff Number", "Product Type/Category", "Type of Cut", "Country of Origin" and "Point of Entry".

¹⁰⁹ Article 30(d) and (h), *MOA 139/2014* (Exhibit JE-28) referring to (singular) "Country of Origin" and "Point of Entry".

¹¹⁰ See Beef Import Approval Example (Exhibit NZL-21) stating that country of origin is "New Zealand", port of entry is "Tanjung Priok seaport" and specifically listing quantity for each product.

challenges *the requirement that importers fix these terms* at the start of each validity period. It is not a private decision that motivates importers to "lock in" their licence terms at the start of each quarter, but rather a requirement under Indonesian law that importers must comply with if they wish to import.¹¹¹

74. Indonesia also seeks to distinguish the present dispute from the panel report in *Colombia - Ports of Entry* on the basis that, according to Indonesia, the Fixed Licence Terms do not "impose a limit on the ports of entry available to importers", "[do] not create uncertainty for importers" and "[do] not impose any additional costs on importers".¹¹²

75. However, as New Zealand described in its first written submission, a key component of the panel's decision in *Colombia - Ports of Entry* was that, for periods of time, the ports available for use by importers were limited.¹¹³ That is also the case in this dispute, because, for the duration of each Import Approval validity period, importers are limited to the port of entry specified in their Import Approval. More importantly, however, in this dispute, the restriction on ports of entry is only one component of the Fixed Licence Terms, which also "lock in" the type of product, its quantity, and country of origin for the relevant validity period. Each of these terms enhances the restrictiveness of the measure and were not present in *Colombia - Ports of Entry*. These terms operate together to restrict imports. The restriction arises not only because importers are only permitted to import into one port, but that the goods coming into that port must be of a certain type, they must not exceed a certain quantity and they must come from one specified country of origin – all of which must be determined well in advance and cannot be modified for the duration of that validity period.

(ii) *Article 4.2 of the Agreement on Agriculture*

76. In respect of Fixed Licence Terms, Indonesia has advanced the same arguments under Article XI:1 and Article 4.2.¹¹⁴ New Zealand demonstrated above that the measure has a limiting effect on importation and accordingly constitutes a restriction under Article XI:1 of the GATT 1994.¹¹⁵ For the same reasons, the measure constitutes a "quantitative import restriction" or "similar border measure" under footnote 1 to Article 4.2 of the Agreement on Agriculture.¹¹⁶ Accordingly, it is a measure of a kind that has been required to be "converted into ordinary customs duties" and is inconsistent with Article 4.2 of the Agreement on Agriculture.

¹¹¹ See New Zealand's first written submission paras. 49-51 and 155-163; Articles 28 and 30, *MOA 139/2014* (Exhibit JE-26) and Beef Import Approval Example (Exhibit NZL-21).

¹¹² Indonesia's first written submission, paras. 76-77.

¹¹³ See Panel Report, *Colombia - Ports of Entry*, paras. 7.274 stating: "The uncertainties that arise from the ports of entry measure are substantial since importers may only access one seaport and one airport whenever the measure is temporarily imposed, instead of the 11 ports open to importers of goods from points of departure other than Panama".

¹¹⁴ Indonesia's first written submission, para. 163.

¹¹⁵ See Section III.A(c)(i) above.

¹¹⁶ See New Zealand's first written submission, paras. 316-319.

(iii) *Article XX of the GATT 1994*

77. Indonesia argues that Article XX applies in respect of the Fixed Licence Terms.¹¹⁷ However, Indonesia does not specify which paragraph of Article XX applies in the context of animals and animal products, nor has it provided any information to support its alleged defence. Indonesia's cursory argument does not meet the required standard under Article XX(d).

78. Indonesia's failure to identify a specifically applicable paragraph of Article XX is one indication that its argument is "patently undeveloped".¹¹⁸ For the sake of argument, New Zealand will assume, based on its equivalent measure for horticultural products, that Indonesia intended to argue that Article XX(d) also applies to Fixed Licence Terms in the context of animals and animal products, but even this fails to meet the standard required.

79. Indonesia has failed to demonstrate that customs enforcement is the objective of its Fixed Licence Terms measure. As explained above in relation to the limited application windows and validity periods,¹¹⁹ Indonesia has done nothing more than list a few titles of laws and regulations relating to customs, quarantine and food safety.¹²⁰ Thus, Indonesia has failed to identify the specific customs enforcement laws and regulations it claims its restrictions are designed to secure compliance with. Neither has it established that the Fixed Licence Terms measure was adopted to secure compliance with laws and regulations relating to customs enforcement.

80. Moreover, there are aspects of Indonesia's response to New Zealand's arguments that give cause for scepticism as to Indonesia's "customs resource allocation" explanation for the Fixed Licence Terms.

81. First, Indonesia claims that importers are not required to allocate anticipated import volumes to specific ports of entry in their applications.¹²¹ This suggests that Indonesian customs would be unable to predict the volume of imports that will be arriving at a particular port at any specific time.

82. Second, Indonesia claims that importers can "preserve flexibility by listing more ports of entry tha[n] they ultimately use in their import license applications".¹²² If this were true, it indicates that the Import Approvals do not provide Indonesian customs with any certainty about whether the imports will arrive at a particular port at all.

83. Furthermore, the Import Approval volumes are for the whole validity period (i.e. several months), and are not allocated on a per shipment basis. All of these factors

¹¹⁷ Indonesia's first written submission, para. 106.

¹¹⁸ These are the words used by the Appellate Body in *Thailand – Cigarettes* at para. 179 to describe Thailand's arguments in relation to "necessity" and the chapeau of Article XX.

¹¹⁹ Section III.A(b)(iii).

¹²⁰ Indonesia's additional responses to the Panel's questions after the first substantive meeting, Question 71, para. 46.

¹²¹ Indonesia's first written submission, para. 139.

¹²² Ibid.

demonstrate that the real reason for Indonesia's Fixed Licence Terms measure is not to secure compliance with customs laws and regulations, but to restrict imports of those products.

84. Even if the first element of Article XX(d) were satisfied, Indonesia has failed to show that the measure is "necessary" for that objective. Indonesia has failed to demonstrate the nexus between the laws and regulations it cites and the measure. Furthermore, weighing the measure's lack of contribution to the objective in Article XX(d) against its the trade-restrictiveness,¹²³ Indonesia has failed to discharge its burden to establish that the measure at issue is "necessary" to secure such compliance.

85. In these circumstances, New Zealand does not consider it is necessary to elaborate on a less restrictive alternative measure. However, if Indonesia was truly focused on making best use of its limited resources, in order to ensure that its government agencies could gather as much information as they can about imports, then it could readily do so in a less trade-restrictive way. It could either use more precise forms of information, such as verification reports, or adopt a truly automatic import licensing regime that would allow importers flexibility regarding the type, country of origin and quantity of products they import.

(d) 80% realisation requirement

(i) Article XI:1 of the GATT 1994

86. Indonesia contends that the 80% realisation requirement is not a quantitative restriction because it is a "function of importers' own estimates" and "because it can be changed by the importer at will from one validity period to the next".¹²⁴

87. It is true that importers are, at the start of each validity period, able to select the quantity specified in their Import Approval. However, as a direct consequence of the 80% realisation requirement, the type of product, its quantity, country of origin and port of entry are not selected entirely "at will" by the importer. The 80% requirement means that an importer must know with a very high degree of certainty that it will import the required type of product, its quantity, country of origin and port of entry in the upcoming validity period. The importer's ability to import a sufficient quantity to meet this threshold will necessarily be affected by a range of factors outside an importer's control (including for example, changes in domestic prices, world prices, supplier availability of supply, domestic demand, shipping availability, and port availability). As a consequence, importers will naturally factor in these variables and underestimate the specified quantity to ensure, with a very high degree of certainty, that they will satisfy the 80% realisation requirement.

88. The need for an importer to be certain it will satisfy the 80% realisation requirement is further enhanced by the seriousness of penalties for non-compliance. If the importer is incorrect in the type, quantity, source and port it requests in its Import Approval, harsh

¹²³ As described in New Zealand's first written submission, at paras. 159-162.

¹²⁴ Indonesia's first written submission, para. 107.

penalties can be applied, including revocation of an importer's Importer Designation for at least two years.¹²⁵

89. Indonesia's contention that this two-year suspension of an importer's Importer Designation is "fair, balanced, and narrowly constructed" is untenable.¹²⁶ For an importer, whose business and livelihood is dependent on its ability to import, the threat of losing this right for two years is extremely serious and disproportionate to Indonesia's vaguely stated objective of "administrative efficiency through import licensing".¹²⁷ The seriousness of such a penalty was acknowledged by the then Indonesian Director General of International Trade, who was reported as stating "we will punish those who cannot import 80%. I think importers must take this seriously".¹²⁸

90. Indonesia also asserts that the measure "serves as a safeguard against importers grossly overstating their anticipated imports" and that the measure "is not meant to constrain imports; there is no upward limit to the amount an importer can import".¹²⁹

91. Indonesia's statement that the measure does not "constrain" imports cannot be reconciled with its contention that the purpose of the measure is to prevent "overstatement" of imports by limiting the amount specified in Import Approval applications. Clearly, by requiring importers to limit their estimates, the measure imposes a constraint on the maximum quantity that importers can specify in their Import Approvals, and thereby acts to limit the quantity that importers can import over that Quarter. As the panel noted in *India - Autos*, a measure that "induced [an importer] ... to limit its imports of the relevant products" by creating a "practical threshold that [the importer] will impose on itself as a result of the obligation to satisfy a corresponding export commitment" can constitute a restriction within the meaning of Article XI:1.¹³⁰ Importers in that dispute were induced to limit imports as a consequence of the need to satisfy an export commitment. Similarly, Indonesian importers are induced to limit their Import Approval quantities to a level that they are certain, having regard to factors outside of their control, they are able to satisfy.

92. Indonesia also claims that its "concerns regarding overstatement of imports apply equally to imports of horticultural products, animals and animal products" and are specific to the risks posed by "perishable food items" that do not apply to other products such as "widgets".¹³¹ However, Indonesia does not apply the 80% realisation requirement equally to imports of all animals and animal products. Rather, the 80% realisation requirement applies only to the bovine animals and animal products listed in Appendix I of *MOT 46/2013*, not to

¹²⁵ Articles 26, 27 and 29, *MOT 46/2013* (Exhibit JE-18). New Zealand's first written submission, paras. 166-168.

¹²⁶ Indonesia's first written submission, paras. 79 and 142.

¹²⁷ *Ibid.*

¹²⁸ "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).

¹²⁹ Indonesia's first written submission, para. 79.

¹³⁰ Panel Report, *India - Autos*, para. 7.268 and 7.277.

¹³¹ Indonesia's responses to the Panel's questions after the first substantive meeting, Question 16, paras. 11-12.

the wider range of animals and animal products listed in Appendix II of *MOT 46/2013*.¹³² The fact that the 80% realisation requirement applies only to bovine products, and not to other animal products of a similar nature, further confirms that the measure is not intended to "guarantee proper quarantine processes" or "other administrative concerns" as Indonesia contends.¹³³ Rather, the measure is specifically directed at limiting imports of bovine animals and animal products to further Indonesia's real (and publically stated) objective of achieving "self-sufficiency" in domestic beef production.¹³⁴

93. Finally, Indonesia argues that the measure incorporates flexibility "to account for exigencies in the global supply chain" and that the "Complainants have been unable to point to a single instance in which a catastrophic supply chain event has caused an importer to fall below the 80 percent realization requirement".¹³⁵

94. As described above, the 80% realisation requirement systemically limits importation by requiring importers to conservatively estimate or underestimate their desired quantity every time they apply for an Import Approval. Accordingly, importation is limited at all times, not just in the event of a "catastrophic supply chain event". Because of the severe consequences of non-compliance, importers are strongly incentivised not to be in a position where they are at risk of losing their Importer Designation. Imports are therefore restricted regardless of the number of Importer Designations revoked as a consequence of failing to meet the threshold. Further, New Zealand has in fact provided evidence of importers having applications for Import Approvals denied as a consequence of failing to satisfy the 80% realisation requirement.¹³⁶

95. For these reasons, Indonesia has not rebutted the *prima facie* case presented by New Zealand that the 80% realisation requirement limits importation of bovine animals and animal products and therefore constitutes a restriction on importation within the meaning of Article XI:1 of the GATT 1994.

¹³² Article 13 of *MOT 46/2013* (Exhibit JE-18) states that "RI-Animals and Animal Products who have received Import Approval, as described in Article 11, paragraph (3), item (a), are required to realize at least 80% (eighty percent) of imports of Animals and Animal Products for 1 (one) year". Only importers of the bovine products listed in Appendix I are required to have an RI-Animals and Animal Products designation, and accordingly the 80% realisation requirement only needs to be satisfied in respect of these products (See Article 4 of *MOT 46/2013* (Exhibit JE-18)).

¹³³ Indonesia's responses to the Panel's questions after the first substantive meeting, Question 16, paras. 11-12.

¹³⁴ See, for example: Annex A, Chapter II (C)(3), *Ministry of Agriculture Beef Self-Sufficiency Roadmap* (Exhibit NZL-3) stating "To achieve the target of decline of imports of feeder cattle and beef to only meet 10% of the community's consumption"; "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* <http://www.thejakartapost.com/news/2014/12/08/jokowi-pledges-achieve-self-sufficiency-meat.html> (Exhibit NZL-32).

¹³⁵ Indonesia's first written submission, para. 79-80.

¹³⁶ 80% Refusal Notification (Exhibit NZL-70) stating "You cannot submit Import Application for Fresh Horticultural Products for consumption ... because realisation of previous period did not reach 80%".

(ii) *Article 4.2 of the Agreement on Agriculture*

96. In respect of the 80% realisation requirement, Indonesia cross-refers to the same arguments under Article XI:1 and Article 4.2.¹³⁷ New Zealand demonstrated above that the measure has a limiting effect on importation and accordingly constitutes a restriction under Article XI:1 of the GATT 1994.¹³⁸ For the same reasons, the measure constitutes a "quantitative import restriction" or "similar border measure" under footnote 1 to Article 4.2 of the Agreement on Agriculture.¹³⁹ Accordingly, it is a measure of a kind that has been required to be "converted into ordinary customs duties" and is inconsistent with Article 4.2 of the Agreement on Agriculture.

(iii) *Article XX of the GATT 1994*

97. Indonesia's alternative defence in respect of the 80% realisation requirement is based on Article XX(b) and (it seems from Indonesia's responses to the Panel's questions) Article XX(d).¹⁴⁰ Indonesia cross-refers to its discussion of the 80% realisation requirement as it applies to horticultural products.¹⁴¹ Indonesia's arguments do not meet the required standard for either of these provisions.

98. With respect to **Article XX(d)**, Indonesia asserts its realisation requirement is necessary for customs enforcement as it serves as a "safeguard against importers grossly overstating their anticipated imports".¹⁴² Indonesia claims that, as it is a developing country, with limited resources to devote to import administration, it is important for it to have information on expected trade volumes for each validity period.¹⁴³ It also asserts that the measure addresses its objective of avoiding "misallocation of limited resources to conduct food safety inspections".¹⁴⁴ These arguments are not sufficient to establish an Article XX(d) defence for the 80% realisation requirement.

99. First, Indonesia has failed to show that customs enforcement is the objective of the 80% realisation requirement. As with its other arguments based on Article XX(d), Indonesia has failed to identify the specific provisions of the "laws or regulations" with which the 80% realisation requirement is "necessary to secure compliance". Furthermore, the design and structure of the measure does not lend any support to Indonesia's Article XX(d) argument. Indeed, Indonesia has provided no data supporting its claim that importers were "grossly overestimating" the quantities of products they were planning to import, or that any such overestimation was causing problems for Indonesia's customs enforcement.

¹³⁷ Indonesia's first written submission, para. 163.

¹³⁸ See Section III.A(d)(i).

¹³⁹ See New Zealand's first written submission, para. 320-322.

¹⁴⁰ Indonesia's first written submission, para. 107, referring to paras. 78-81; Indonesia's responses to the Panel's questions after the first substantive meeting, Question 16, para. 12.

¹⁴¹ Indonesia's first written submission, para. 107, referring to paras. 78-81.

¹⁴² Indonesia's first written submission, para. 79.

¹⁴³ Ibid, para. 79; Indonesia's first opening statement, para. 22.

¹⁴⁴ Indonesia's responses to the Panel's questions after the first substantive meeting, Question 16, para. 11.

100. Second, even if Indonesia were correct that importers would "overestimate" anticipated imports in the absence of the 80% realisation requirement, Indonesia ignores the fact that any such overestimation would only occur as a consequence of other restrictive and WTO-inconsistent aspects of Indonesia's import licensing regime - namely limited application windows and validity periods and Fixed Licence Terms. As New Zealand has demonstrated earlier in this submission, limited application windows and validity periods and Fixed Licence Terms "lock in" import terms for the duration of each validity period, meaning that importers must predict well in advance their import requirements. If Indonesia operated an automatic licensing scheme, there would be no incentive for importers to "overestimate" their import quantities.

101. Finally, even if the first element of Article XX(d) were satisfied, Indonesia has not demonstrated that the measure is necessary for the fulfilment of that objective. As Indonesia has not shown how the 80% realisation requirement contributes to the objective in Article XX(d), little weight can be given to these factors in the weighing and balancing process to analyse whether the measure is "necessary" to achieve the objective. By contrast, New Zealand has described how the measure is trade-restrictive;¹⁴⁵ it induces importers to limit the quantity of bovine animals and animal products they import in order to avoid severe sanctions for non-compliance. These limiting effects are magnified when combined with the Fixed Licence Terms, as the need to comply with these terms further limits the flexibility available to importers to satisfy the 80% realisation requirement. In New Zealand's view, the trade-restrictiveness of the measure, inducing importers to limit the quantities they import rather than breach the 80% realisation requirement, outweighs any contribution it makes towards the objective in Article XX(d). Accordingly, Indonesia has failed to demonstrate that the 80% realisation requirement is "necessary" to protect that objective.

102. Indonesia also appears to contend, in vague terms, that the 80% realisation requirement is justified under **Article XX(b)**.¹⁴⁶ With respect to this Article, Indonesia states it is "concerned about the impact that overstatement of anticipated imports of these products will have on its ability to guarantee proper quarantine procedures as a first-level defence against the transmission of diseases through the food supply ... including misallocation of limited resources to conduct food safety inspections".¹⁴⁷ Indonesia attempts to explain the fact that the 80% realisation requirement does not apply equally to all imported products, but only to certain agricultural products, by claiming that "imports of perishable food items present risks to Indonesia's food supply, that are not presented by imported 'widgets'".¹⁴⁸

103. Again, however, Indonesia has failed to show that the measure makes any contribution to its stated objective of protecting human life or health, and accordingly fails to satisfy the first element of Article XX(b). Specifically, as described above, Indonesia has not provided any evidence demonstrating that "overstatement" of imports was occurring in the absence of the 80% requirement. Nor has Indonesia presented any evidence or explained in any detail why, even if overstatement of imports did occur, that this would present a risk to human

¹⁴⁵ New Zealand's first written submission, paras. 164-171.

¹⁴⁶ Indonesia's responses to the Panel's questions after the first substantive meeting, Question 16, para. 11-12.

¹⁴⁷ Ibid, Question 16, para. 11.

¹⁴⁸ Ibid.

health. As such, Indonesia has not demonstrated that the 80% realisation requirement is related to the human health interest it is claimed to protect.

104. Furthermore, Indonesia has not shown that the 80% realisation requirement is "necessary" to achieve its stated objective under Articles XX(b). Because Indonesia has not shown how the 80% realisation requirement contributes to the objective in Article XX(b), little weight can be given to these factors in the weighing and balancing process to analyse whether the measure is "necessary". By contrast, for the reasons described above, New Zealand has described how the measure is highly trade-restrictive:¹⁴⁹ it induces importers to limit the quantity of animals and animal products they import in order to avoid severe sanctions for non-compliance. Such trade-restrictiveness therefore outweighs any alleged contribution it makes towards the objective in Article XX(b). Accordingly, Indonesia has failed to demonstrate that the 80% realisation requirement is "necessary" to protect that objective.

105. In these circumstances, where Indonesia has failed to establish that the 80% realisation requirement was adopted for either of the objectives cited in Articles XX(d) or XX(b), New Zealand does not consider it is necessary to elaborate on a less restrictive alternative measure. However, New Zealand observes that the two concerns identified by Indonesia – its need to have a "rough idea" of expected trade volumes for each validity period and its need to avoid the misallocation of its limited resources to conduct food safety inspections – can readily be addressed with less restrictive readily available measures. For example, Indonesia would be able to use information already supplied on customs forms to obtain information on anticipated import quantities. This information would be available sufficiently in advance to enable Indonesia to allocate its limited food safety inspection resources. It would also be more precise information because it would relate to the actual quantity in a specific shipment, rather than the estimated quantity over a validity period of several months' duration.

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

(i) Article XI:1 of the GATT 1994

106. Indonesia argues its prohibition on the importation of animals and animal products for use, sale and distribution through certain channels is not a quantitative restriction because it "does not place an absolute limit on the amount of animals and animal products that can be imported for permitted end uses".¹⁵⁰

107. WTO jurisprudence is clear, however, that a measure need not impose an "absolute limit" on importation to constitute a breach of Article XI:1 of the GATT 1994. Rather, the measure must have a "limiting effect" or impose a "limiting condition" on importation as

¹⁴⁹ New Zealand's first written submission, paras. 164-171.

¹⁵⁰ See Indonesia's first written submission, paras. 108, 110 and 165.

evidenced by the measure's design, architecture and structure.¹⁵¹ Provided this legal standard is satisfied, it is irrelevant whether there is a specific or "absolute" volume at which imports are limited to. This is reflected in the principle of WTO jurisprudence that Article XI:1 protects "competitive opportunities of imported products" and that a limitation under Article XI:1 "need not be demonstrated by quantifying the effects of the measure at issue".¹⁵²

108. As New Zealand has demonstrated, Indonesia prevents all retail sale of bovine meat, carcass and offal (including through modern and traditional markets), and all retail sale of non-bovine meat and processed meat products (other than through modern markets).¹⁵³ These significant limitations on market access severely reduce the size of the potential market for beef imports, and necessarily limit the volume of imports which can viably be imported into Indonesia. This conclusion is consistent with the decision of the panel in *India - Quantitative Restrictions*, which held that a measure which prevented imports by persons other than the actual end user of the goods (thereby prohibiting imports for resale by intermediaries) constituted a "restriction on imports because it precludes imports of products for ... distribution to consumers".¹⁵⁴

109. Accordingly, Indonesia has failed to rebut the *prima facie* case established by New Zealand that the prohibitions and restrictions on the use, sale and distribution of imported animals and animal products constitute a "restriction" on importation within the meaning of Article XI:1 of the GATT 1994.¹⁵⁵

(ii) *Article 4.2 of the Agreement on Agriculture*

110. In respect of its prohibition on the importation of animals and animal products for use, sale and distribution through certain channels, Indonesia makes similar arguments under Article 4.2 as it does under Article XI:1. Specifically, it argues that the measure is not a "quantitative import restriction" because it does "not impose any quantitative limits on imports".¹⁵⁶

111. This is materially the same as Indonesia's argumentation under Article XI:1, and for the same reasons described in above,¹⁵⁷ Indonesia has not rebutted the *prima facie* case established by the Complainants under Article 4.2 of the Agreement on Agriculture.

¹⁵¹ Appellate Body Reports, *China - Raw Materials*, para. 319; *Argentina - Import Measures*, para. 5.217; New Zealand's first written submission, paras. 123-128; New Zealand's responses to the Panel's questions after the first substantive meeting, Question 60.

¹⁵² Panel Report, *Argentina - Import Measures*, para. 6.264 (citing Panel Report, *Argentina - Hides and Leather*, para. 11.20); and Appellate Body Report, *Argentina - Import Measures*, para. 5.217.

¹⁵³ New Zealand's first written submission, paras. 55-58 and 173-176. Article 17, *MOT 46/2013* (Exhibit JE-18) stating "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" (excluding reference to "modern market"); and Article 32(1), *MOA 139/2014* as amended (Exhibit JE-28) stating "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" (excluding reference to "modern market").

¹⁵⁴ Panel Report, *India - Quantitative Restrictions*, paras. 5.142-5.143.

¹⁵⁵ See New Zealand's first written submission, paras. 172-178 and 323-326.

¹⁵⁶ Indonesia's first written submission, paras. 108 and 110.

¹⁵⁷ Section III.A(e)(i).

New Zealand further notes however, that WTO jurisprudence is clear that a measure may constitute a quantitative import restriction even if there is no precise limit imposed on the quantity that importers are technically allowed to import. This is consistent with the panel's confirmation in *Turkey – Rice* that a measure can breach Article 4.2 of the Agreement on Agriculture without any "systematic intention to restrict importation ... at a certain level".¹⁵⁸

(iii) *Article XX of the GATT 1994*

112. Indonesia's alternative defence in respect of the use, sale and distribution restrictions is based on Articles XX(a) and (b). Indonesia's arguments do not meet the standard required for a defence under either of these Articles.

113. Indonesia's defence based on **Article XX(a)** is that the measure is necessary to protect public morals because it prevents consumers from "mistakenly purchasing animals or animal products that do not conform to Halal requirements".¹⁵⁹ Indonesia states that there is no widely-used product labelling system in place in its traditional, open-air markets and that consumers in these markets "generally assume that all products sold therein conform to Halal requirements".¹⁶⁰ Accordingly, Indonesia states that it "prevents imported animals and animal products from being sold in these traditional markets" in order to "prevent the commingling of Halal and non-Halal foods".¹⁶¹ Indonesia's argument does not satisfy the elements of an Article XX(a) defence.

114. First, Indonesia has failed to show that the objective of the measure is genuinely the protection of public morals. Contrary to Indonesia's arguments, the prohibition on the sale of imported animal products in *traditional* markets cannot have been adopted by Indonesia to protect public morals under Article XX(a) as the risk of consumers mistakenly purchasing imported animals or animal products that do not conform to halal requirements simply does not exist.

115. As New Zealand has already demonstrated, according to Indonesian law all relevant animal products that are imported into Indonesia must be certified as halal.¹⁶²

116. In turn, New Zealand law requires that all relevant meat and offal products exported from New Zealand to Indonesia are certified in New Zealand as satisfying halal requirements.¹⁶³

¹⁵⁸ Panel Report, *Turkey – Rice*, para. 7.120. See also, Panel Report, *India – Autos*, para. 7.270 stating that there need not be a precise numerical limit for a measure to constitute a restriction.

¹⁵⁹ See Indonesia's first written submission, para. 166.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Articles 7 and 13, *MOA 139/2014* (JE-28); Article 19(2)(e), *MOT 46/2013* (Exhibit JE-21); Article 97(3)(e), *Food Law* (JE-2). See New Zealand's first opening statement, paras. 45-51.

¹⁶³ Animal Products (Overseas Market Access Requirements for Halal Assurances) Notice (No. 3) 2015, cls 6(1), 6(8) (Exhibit NZL-81); Indonesia, Meat and Meat Products Overseas Market Access Requirements, Part 2 (Exhibit NZL-82).

117. Indonesia has formally recognised that New Zealand's slaughter and meat processing practices comply with Indonesia's halal requirements.¹⁶⁴ There is no substance to Indonesia's claim that its offers to certify producers as 'halal-compliant' have been rebuffed.¹⁶⁵

118. Second, the measure cannot be "necessary" for the achievement of the stated public morals objective under Article XX(a). Because the risk of consumers inadvertently purchasing non-halal animal products is already removed entirely by these laws and arrangements, there is nothing left for the measure to contribute to in terms of the protection of public morals. Moreover, Indonesia has not provided any evidence from the design and structure of the measure to demonstrate that its purpose was to prevent inadvertent purchase of non-halal animal products. Nor has Indonesia provided evidence (such as official reports or studies) that such inadvertent purchase was occurring prior to the measure's implementation and that the measure would address any such problem.

119. Finally, Indonesia has not offered any justification for its prohibition of the sale of imported animal products in *modern* markets – i.e. supermarkets and other stores.¹⁶⁶ Only halal animal products are able to be imported into Indonesia. The arguments made by Indonesia based on Article XX(a) relating to labelling are therefore also readily addressed in the context of modern markets.

120. As the measure makes no contribution to the objective cited, its trade-restrictiveness easily outweighs the purpose Indonesia claims for it. Accordingly, the measure cannot be regarded as "necessary" to protect public morals.

121. As Indonesia has failed to establish the prohibitions and restrictions on use, sale and distribution of imported animals and animals products were adopted for the objectives cited, New Zealand does not consider it is necessary to elaborate on a less restrictive alternative measure. Both Indonesian and New Zealand law, and arrangements between both countries, adequately protect the interests of Indonesian consumers, including at traditional markets, by ensuring they only purchase halal animal products

122. Indonesia's defence based on **Article XX(b)** is that the measure is necessary to protect human, animal or plant life of health because it is an integral part of Indonesia's food safety and security plan – although the details of this "plan" have never been elaborated, or any evidence in support of its existence submitted.¹⁶⁷ Indonesia claims that animals and animal products are not permitted to be sold in traditional Indonesian markets because of the "extremely high risk of unsafe food handling that would result" and because imported meat is "deceptively similar to fresh meat".¹⁶⁸ Accordingly, Indonesia claims that its prohibition on

¹⁶⁴ Arrangement between the New Zealand Ministry for Primary Industries and the Majelis Ulama Indonesia on Halal certification of Halal Animal Products (Exhibit NZL-83).

¹⁶⁵ Indonesia's first opening statement, para. 12; New Zealand's responses to the Panel's questions after the first substantive meeting, Question 73, paras. 129-132; United States' responses to the Panel's questions after the first substantive meeting, Question 73, para. 169. Compare Indonesia's additional responses to the Panel's questions after the first substantive meeting, Question 70, para. 44.

¹⁶⁶ Article 32(1), *MOA 139/2014* (Exhibit JE-26) and Article 17, *MOT 46/2013* (Exhibit JE-18).

¹⁶⁷ Indonesia's first written submission, para. 188.

¹⁶⁸ Indonesia's first written submission, para. 109.

the display and sale of imported meat in traditional markets is imposed "[i]n order to ensure the quality of meat sold in traditional markets and to reduce consumer deception".¹⁶⁹

123. Indonesia restated these themes in its opening statement, noting its average daily temperature of 29°C and the serious concerns of proper food storage and heightened risk of food spoilage.¹⁷⁰ Indonesia claims, without evidence or elaboration, that "problems have arisen in the past involving thawed and refrozen meats offered for sale in these open-air markets", and that the Government's "first priority is the health and safety of the Indonesian people".¹⁷¹

124. Again, Indonesia has not demonstrated that the measure was adopted to protect human health under Article XX(b). No such contribution is apparent from the design and structure of the measure, and Indonesia has produced no evidence (for example data or official reports) to indicate that food safety concerns led to the development and implementation of the measure.

125. Further, Indonesia has not demonstrated that the measure is "necessary" for the Article XX(b) objective it invokes. Indeed, as the United States has pointed out, there is evidence that the Indonesian state-owned purchasing company BULOG has distributed frozen meat imported from Australia to traditional markets in Jakarta in an effort to lower the price of beef.¹⁷² The fact that an Indonesian state-owned enterprise is prepared to distribute frozen beef in traditional markets indicates that, rather than food safety, the real purpose of the measure is to limit imports.

126. Finally, as described above, Indonesia has not offered any justification of its prohibition on imports of animal products for sale in *modern* markets – i.e. supermarkets and other stores.¹⁷³ Indonesia's arguments based on Article XX(b) relating to labelling and food spoilage are readily addressed in the context of modern markets. Indonesia's arguments are inapplicable to such sales. This measure does not contribute to the objectives underlying those Articles at all, and nor is it necessary to meet such objectives.

127. Accordingly, as Indonesia has failed to demonstrate that the measure was adopted to protect human health, the self-evident trade-restrictiveness of a ban on sales in traditional and modern markets easily outweighs any contribution by the measure to the objective in Article XX(b). For these reasons, New Zealand does not consider it is necessary to elaborate on a less restrictive alternative measure. However, New Zealand notes that it has already mentioned some possible alternative measures that could be taken at traditional markets.¹⁷⁴ Such measures would, however, need to be applied in a non-discriminatory manner to both imported and domestic products.

¹⁶⁹ Indonesia's first written submission, para. 109.

¹⁷⁰ Indonesia's first opening statement, para. 6.

¹⁷¹ Ibid.

¹⁷² See "Bulog Sells 8 tons of Cheap Imported Beef in 3 Markets of Jakarta Today" (Exhibit USA-62).

¹⁷³ Article 32(1), *MOA 139/2014* (Exhibit JE-26) and Article 17, *MOT 46/2013* (Exhibit JE-18).

¹⁷⁴ See New Zealand's first opening statement, para. 55.

(iv) *Article III:4 of the GATT 1994*

128. Indonesia contends the prohibition on the importation of animals and animal products for use, sale and distribution through certain channels does not accord "'less favourable treatment' to imports than to like domestic products within the meaning of Article III:4 of the GATT 1994" because its "end use limitations for animal products – specifically, the restriction on sales of imported meat products in traditional Indonesian markets – applies uniformly to imports and domestic products".¹⁷⁵

129. Indonesia does not provide any evidence for its assertion that the measure applies uniformly to domestic and imported products. As detailed in New Zealand's first written submission, the prohibition on sale of bovine meat and offal in traditional and modern markets is contained in Indonesia's import regulations and applies only to imported products.¹⁷⁶ New Zealand is not aware of, and Indonesia has not introduced evidence of, any equivalent restrictions that are applicable to like domestic products. New Zealand's arguments are supported by the availability of domestic beef and offal for sale in traditional markets. In fact, contrary to Indonesia's argument, domestically produced beef and offal is readily available in traditional markets.

130. As New Zealand stated in its first written submission, the treatment accorded to imported bovine meat and offal is both formally different to that accorded to Indonesian bovine meat and offal, and less favourable, as it prevents the sale of imported product in outlets where domestic beef is permitted to be sold.¹⁷⁷

131. Furthermore, Indonesia fails to address the prohibition on imports of bovine meat and offal products for sale in "modern markets" (such as supermarkets).¹⁷⁸ As New Zealand demonstrated in its first written submission, Indonesia's regulations are clear that *bovine* meat and offal are permitted for use only in "industry, hotels, restaurant, catering and/or other special needs" and therefore cannot be sold in either traditional markets *or modern markets* (including supermarkets).¹⁷⁹

132. Indonesia does not respond to this aspect of New Zealand's claim at all, and only attempts to rebut New Zealand's arguments regarding the prohibition on sale of meat products in *traditional* markets. In its first written submission, Indonesia only refers to the measure as it applies to "sales of imported meat products in traditional Indonesian markets".¹⁸⁰ In its first opening statement, Indonesia incorrectly asserts that end uses of certain imported products are

¹⁷⁵ Indonesia's first written submission, para. 188.

¹⁷⁶ See New Zealand's first written submission, paras. 55-58; and 411-418.

¹⁷⁷ Ibid.

¹⁷⁸ New Zealand's first written submission, paras. 55-58 and 173-176. Article 17, *MOT 46/2013* (Exhibit JE-18) stating "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" (excluding reference to "modern market"); and Article 32(1), *MOA 139/2014* as amended (Exhibit JE-28) stating "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". (excluding reference to "modern market").

¹⁷⁹ New Zealand's first written submission, paras. 55-58. Article 17, *MOT 46/2013* (Exhibit JE-18) and Article 32(1), *MOA 139/2014* (Exhibit JE-26).

¹⁸⁰ Indonesia's first written submission, para. 188.

restricted to "hotels, restaurants and *supermarkets*".¹⁸¹ This reference to supermarkets is contradicted by the relevant regulations.¹⁸² Thus, Indonesia does not attempt to rebut New Zealand's claim that the prohibition on importation of meat and offal for sale in *modern markets* is inconsistent with Article III:4 of the GATT.

133. Accordingly, Indonesia has not rebutted the *prima facie* case made by New Zealand that the prohibitions on the use, sale and distribution of imported bovine meat and offal is inconsistent with Article III:4 of the GATT 1994.

(f) Domestic Purchase Requirement

(i) Article XI:1 of the GATT 1994

134. Indonesia contends that the Domestic Purchase Requirement cannot constitute a quantitative restriction because it was "suggested by the importers' association of Indonesia" and that "there is plenty of domestic supply to meet the Domestic Purchase Requirement".¹⁸³

135. New Zealand does not agree with either of these statements. However, more fundamentally, New Zealand considers that even if these statements were true, the Domestic Purchase Requirement would still constitute a breach of Article XI:1 of the GATT 1994.

136. First, Indonesia has provided no evidence to support its claim that the Domestic Purchase Requirement was "suggested by the *importers' association* of Indonesia" and New Zealand understands this statement to be incorrect. However, the origin of the Domestic Purchase Requirement is irrelevant, as New Zealand challenges the measure as it is set out in *MOA 139/2014*.¹⁸⁴ That regulation is clear. Importers must, as a matter of Indonesian law, comply with the Domestic Purchase Requirement as a condition of importing beef.

137. Importers may, of course, choose to voluntarily purchase whatever quantity of domestic beef they wish. However, compliance with the Domestic Purchase Requirement is not voluntary, but rather a mandatory requirement expressed in Indonesia's regulations that importers must satisfy in order to import beef.¹⁸⁵

138. New Zealand also disagrees with Indonesia's assertion that there is sufficient domestic beef available for importers to satisfy the Domestic Purchase Requirement. In response to the Panel's questions, Indonesia has provided unreferenced data indicating that, based on certified slaughterhouse capacity, there is 263 tonnes of domestic beef produced per day. However, even if these numbers are correct, and slaughterhouses are producing at maximum capacity at all times, when divided by Indonesia's population of over 255 million, this would amount to

¹⁸¹ Indonesia's first opening statement, para. 27 (emphasis added).

¹⁸² Article 32(1), *MOA 139/2014* (Exhibit JE-26) and Article 17, *MOT 46/2013* (Exhibit JE-18).

¹⁸³ Indonesia's first written submission, paras. 111-112.

¹⁸⁴ Article 5, *MOA 139/2014* (Exhibit JE-26). See also, Article 5, *MOA 58/2015* (Exhibit AUS-1).

¹⁸⁵ Article 5, *MOA 139/2014* (Exhibit JE-26) See also, Article 5, *MOA 58/2015* (Exhibit AUS-1); and Ministry of Agriculture Absorption Presentation (Exhibit NZL-38).

just over 1 gram of beef per Indonesian consumer per day.¹⁸⁶ New Zealand has also provided evidence that the price of beef has risen substantially since the introduction of Indonesia's import restrictions, further confirming that in reality, beef is scarce within Indonesia.¹⁸⁷

139. However, irrespective of whether there is sufficient domestic beef available within Indonesia to enable importers to satisfy the Domestic Purchase Requirement, the measure still constitutes a quantitative restriction. In particular, the measure imposes a limiting condition on importation by requiring importers to substitute imported product with domestically produced product and imposes additional costs for importers (by requiring them to purchase domestic beef). As described in New Zealand's first written submission, past panels have also found measures similar to the Domestic Purchase Requirement to be inconsistent with Article XI:1 of the GATT 1994.¹⁸⁸

140. Finally, Indonesia also states that the Domestic Purchase Requirement "was only included in the relevant regulations in March 2015" and "has not been enforced".¹⁸⁹

141. New Zealand notes that the Domestic Purchase Requirement is contained in *MOA 139/2014*, which came into force in December 2014.¹⁹⁰ However, the regulation provided that the Domestic Purchase Requirement does not come into force until 1 March 2015.¹⁹¹

142. New Zealand has provided evidence demonstrating that the Ministry of Agriculture has told importers of the need to comply with the Domestic Purchase Requirement, and set the relevant quantities of domestic beef which must be purchased.¹⁹² This strongly indicates that importers are being required to comply with the Domestic Purchase Requirement, and the measure is being enforced. However, whether the Domestic Purchase Requirement is *in fact* currently being enforced is irrelevant, as measures that are not enforced are not immune from challenge. Indeed, WTO jurisprudence is clear that mandatory measures that are in force but not being enforced may still be challenged as inconsistent *as such* with a Member's WTO obligations.¹⁹³ Accordingly, irrespective of whether Indonesia's contention that the measure "has not been enforced" is accurate, the measure is inconsistent *as such* with Article XI:1 of the GATT 1994.

¹⁸⁶ Indonesia's first opening statement, para. 4.

¹⁸⁷ New Zealand's first written submission, Figure 2.

¹⁸⁸ New Zealand's first written submission, paras. 187-189; See: Panel Report, *Argentina - Import Measures*, para. 6.196.

¹⁸⁹ Indonesia's first written submission, para. 111.

¹⁹⁰ Article 41, *MOA 139/2014* (Exhibit JE-26).

¹⁹¹ Article 41(1), *MOA 139/2014* (Exhibit JE-26).

¹⁹² Ministry of Agriculture Absorption Presentation (Exhibit NZL-38). See also New Zealand's first written submission, paras. 59-61 and 180-186, and Article 5(3), *MOA 58/2015* (Exhibit AUS-1) specifying that the required absorption quantity is "3 (three) percent for general importers and 1.5 (one point five) percent for producer importer, out of the total upcoming imports".

¹⁹³ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

(ii) *Article 4.2 of the Agreement on Agriculture*

143. In respect of the Domestic Purchase Requirement, Indonesia has advanced materially the same arguments under Article XI:1 and Article 4.2.¹⁹⁴ New Zealand demonstrated above that the measure has a limiting effect on importation and accordingly constitutes a restriction under Article XI:1 of the GATT 1994.¹⁹⁵ For the same reasons, it also constitutes a "quantitative import restriction" or "similar border measure" under footnote 1 to Article 4.2 of the Agreement on Agriculture.¹⁹⁶ Accordingly, it is a measure of a kind that has been required to be "converted into ordinary customs duties" and is inconsistent with Article 4.2 of the Agreement on Agriculture.

(iii) *Article XX of the GATT 1994*

144. Indonesia's alternative defence in respect of the Domestic Purchase Requirement is based on Article XX(b). It argues that the measure is necessary to protect life or health "because it is an integral part of Indonesia's food safety and security plan".¹⁹⁷

145. Indonesia has made little effort to demonstrate that its measure was adopted to protect the objectives identified in Article XX(b). There is nothing in the design or structure of the measure that indicates that was the measure's purpose. Rather, the measure itself seems to have been designed (as New Zealand argues is the case for the entire Indonesian import licensing regime for animals and animal products) as an additional form of protection for domestic beef producers from competition from imported beef.

146. Indonesia asserts that the Domestic Purchase Requirement is an integral part of its "food safety and security plan".¹⁹⁸ No further elaboration of the contents of that plan has been provided. This "mere assertion" by way of a vague reference to a "plan" that is not provided or otherwise substantiated is not sufficient to demonstrate that the measure is designed to achieve the objectives identified in Article XX(b).¹⁹⁹

147. Indonesia provided a document entitled "Agency for Food Security 'at a glance'" with its responses to the Panel's questions.²⁰⁰ That document does not mention the Domestic Purchase Requirement, and it does not demonstrate how the measure contributes to the achievement of any of the objectives identified in Article XX(b).

148. Indeed, as New Zealand has demonstrated, the true purpose of the Domestic Purchase Requirement is to limit imports in order to increase domestic production. This is reflected in the comments of the then Indonesian Director General of Livestock and Animal Health Services, who is reported as stating that the purpose of the Domestic Purchase Requirement is

¹⁹⁴ Indonesia's first written submission, para. 169.

¹⁹⁵ See Section III.A(f)(i).

¹⁹⁶ See New Zealand's first written submission, paras. 327-329.

¹⁹⁷ Indonesia's first written submission, paras. 169 and 186.

¹⁹⁸ Indonesia's first written submission, para. 169.

¹⁹⁹ See Panel Report, *China – Rare Earths*, paras. 7.156, 7.191-7.192.

²⁰⁰ Exhibit IDN-25.

"clearly directed to stimulate domestic beef cattle farming. If there is [supply] available domestically, why should [we] import?"²⁰¹

149. This objective, stimulating local production, does not correspond with the protection of human life or health in terms of Article XX(b). If it did, Members could simply prohibit imports on the basis that doing so was necessary to stimulate local production.

150. Accordingly, Indonesia has failed to demonstrate that its measure was adopted to protect an objective identified in Article XX(b).

151. Having failed to demonstrate that the Domestic Purchase Requirement was adopted to protect the objectives in Article XX(b), Indonesia cannot show the measure was necessary to do so, especially when weighed against the restrictiveness of the measure. The Panel's analysis of Indonesia's alleged defence under Article XX(b) could end here without consideration of a less trade-restrictive alternative measure. New Zealand notes, however, that Indonesia is entitled to encourage local beef production in the interests of promoting food security. But it must do so, consistently with the WTO Agreement, in a manner which does not have a limiting effect on importation.

(iv) *Article III:4 of the GATT 1994*

152. Indonesia claims that the Domestic Purchase Requirement is not inconsistent with Article III:4 of the GATT 1994 because it "has never been used to prevent the issuance of an import license".²⁰² Additionally, Indonesia contends that the measure falls within the "general exceptions included in Article XX of the GATT 1994 because it is an integral component of Indonesia's food safety and security plan".²⁰³

153. Irrespective of whether the Domestic Purchase Requirement has been explicitly referred to as the basis to reject a request for an import licence, it can result in less favourable treatment to imports over domestic products for the reasons set out above in Section III.A(f)(i). Indeed, as set out in paragraph 142 above, a measure that is in force but has not yet been enforced may still be challenged as being inconsistent with a Member's obligations. As such, it is irrelevant whether the measure has in fact been used to prevent the issuance of an import licence.

154. Further, for the reasons described in the immediately preceding section, the Domestic Purchase Requirement cannot be justified under Article XX(b) of the GATT.²⁰⁴

²⁰¹ "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).

²⁰² Indonesia's first written submission, para. 186.

²⁰³ *Ibid.*

²⁰⁴ See Section III.A(f)(iv).

(g) Beef reference price

(i) Article XI:1 of the GATT 1994

155. Indonesia implicitly accepts that the beef reference price constitutes a restriction within the meaning of Article XI:1 of the GATT 1994. It has not sought to rebut the *prima facie* case established in New Zealand's first written submission that the reference price for beef is a "prohibition" or "restriction" under Article XI:1,²⁰⁵ and argues only that the measure is justified under Article XX(b) as an "integral part of Indonesia's food safety and security plan".²⁰⁶

156. Indonesia does, however, assert in its additional responses to the Panel's questions from the Panel that "[t]o date there has never been an import of secondary cuts of beef that has been restricted or limited due to the reference price system in effect during 2013 - 2015".²⁰⁷ New Zealand understands that it is correct that no imports have been directly *prohibited* due to the beef reference price for the following two reasons.

157. First, as the Complainants have described, Indonesia's import regime limits imports through a range of other measures.²⁰⁸ These other measures have the effect of limiting supply of beef in the Indonesian market and thus increasing prices – thereby keeping the price of beef above the reference price. As demonstrated in Figure 2 of New Zealand's first written submission, Indonesia's measures have dramatically increased the price of beef in Indonesia, driving the price of beef above the reference price.²⁰⁹ In fact, between September 2010 and June 2012, before the most severe restrictions were imposed on beef imports, the price of beef remained below the reference price.²¹⁰ It was only after the introduction of Indonesia's restrictions that the price of beef rose above a level where imports would not be prohibited by the reference price.

158. Second, since December 2014, imports of bovine secondary cuts have been prohibited by virtue of the positive list measure described by the Complainants. Accordingly, while it may be strictly correct that imports of beef have not been prohibited *by the reference price*, this is because there is a prohibition on imports of these products at all times (irrespective of the domestic price).²¹¹

159. In addition, New Zealand does not agree with Indonesia's contention that imports of secondary beef cuts have not been "restricted or limited" due to the beef reference price. As described in New Zealand's first written submission, the beef reference price creates

²⁰⁵ See for example New Zealand's first written submission, paras. 330-334 and 191-197.

²⁰⁶ Indonesia's first written submission, para. 167.

²⁰⁷ Indonesia's additional responses to the Panel's questions after the first substantive meeting, Question 55, para. 37.

²⁰⁸ *Ibid*, paras. 13-25.

²⁰⁹ New Zealand's first written submission, Figure 2. Additional data presented by Indonesia demonstrates that these price increases have continued throughout 2015: See Exhibit IDN-33.

²¹⁰ Indonesian Retail Beef Prices, Monthly Average September 2010 - August 2015 (Exhibit NZL-20), sourced from Indonesia Ministry of Trade data.

²¹¹ New Zealand's first written submission, paras. 38-45.

uncertainty for importers as to whether or when imports will be permitted.²¹² This uncertainty is enhanced by the fact that the reference price can be amended "at any time" by the beef price monitoring team.²¹³ As a consequence, the beef reference price limits imports *at all times*, not only when the domestic price of secondary cuts is below the reference price.

(ii) *Article 4.2 of the Agreement on Agriculture*

160. Indonesia has not attempted any specific rebuttal to the *prima facie* case established by New Zealand that the reference price for beef constitutes both a "quantitative import restriction ... or similar border measure" and "minimum import price ... or similar border measure" within the meaning of Article 4.2 of the Agreement on Agriculture.²¹⁴ At a general level, in its response to the Panel's questions, Indonesia "strenuously denies all challenges to the so-called 'reference price system'".²¹⁵ However, Indonesia does not provide any elaboration as to the basis on which it rejects the Complainants' claims regarding the beef reference price, and therefore has not provided the Complainants' with any opportunity to respond to Indonesia's objections. Accordingly, in the absence of any specific Indonesian rebuttal to the beef reference price claim and argument, New Zealand affirms the argumentation regarding the beef reference price set out in its first written submission.²¹⁶

(iii) *Article XX of the GATT 1994*

161. Indonesia's defence in respect of the beef reference price is based on Article XX(b). Indonesia argues that the measure is necessary to the protection of human life or health "because it is an integral part of Indonesia's food safety and security plan".²¹⁷ This "mere assertion" by way of a vague reference to a "plan" that is not provided or otherwise substantiated is not sufficient to demonstrate that the measure is designed to achieve the objectives identified in Article XX(b).²¹⁸ Accordingly, Indonesia has not satisfied the legal standard in respect of its defence under Article XX(b).

162. In response to the Panel's questions, Indonesia provides some elaboration of this argument by stating that the reference price system for beef is one tool it uses to protect against:

- a. harmful oversupply of perishable food items in equatorial heat; and
- b. the consequences of extreme price volatility on the availability of a continuous supply of fresh beef in Indonesia's food supply.²¹⁹

²¹² New Zealand's first written submission, paras. 195-196.

²¹³ Article 14(3), *MOT 46/2013* (Exhibit JE-18).

²¹⁴ New Zealand's first written submission, paras. 330-334.

²¹⁵ Indonesia's additional responses to the Panel's questions after the first substantive meeting, Question 65, para. 41.

²¹⁶ New Zealand's first written submission, paras. 191-197.

²¹⁷ Indonesia's first written submission, para. 167.

²¹⁸ See Panel Report, *China – Rare Earths*, paras. 7.156, 7.191-7.192.

²¹⁹ Indonesia's responses to the Panel's questions after the first substantive meeting, Question 27.

163. Neither of these arguments provide sufficient basis for Indonesia's contention that the beef reference price is justified under Article XX(b).

164. First, Indonesia has not demonstrated that the protection of life or health is the true purpose of the beef reference price. Rather, the true purpose of the beef reference price is to protect domestic beef producers from competition from imported beef, which accordingly keeps the market price of beef artificially high.

165. In *EC – Seal Products* the Appellate Body held that, at the outset, a panel "should take into account the Member's articulation of the objective or objectives it pursues through its measure, but it is not bound by that Member's characterizations of such objective(s)".²²⁰ It added "the panel must take account of all evidence put before it in this regard, including the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure at issue".²²¹ In the present dispute, that evidence includes Indonesia's framework legislation for animals and animal products, in which the Indonesian Government's self-sufficiency objectives are prescribed. These objectives have been summarised by New Zealand in its first written submission.²²²

166. In contrast to the evidence submitted by the Complainants setting out the purpose of Indonesia's import licensing regime (including the beef reference price), Indonesia has put no evidence before the Panel to show that its measure makes any contribution to food safety or security. There is also nothing New Zealand is aware of either in the text or legislative history of Article 14 of *MOT 46/2013* to indicate that the measure contributes to these objectives in any way.

167. Specifically, Indonesia's explanation that the purpose of the measure is to prevent "harmful oversupply of perishable food items in equatorial heat" is not supported with any evidence from the design and structure of the measure. Nor has Indonesia provided any evidence that oversupply of imported beef has occurred in the past such as to warrant the measure's introduction. Indeed it is difficult for New Zealand to believe that ordinary market forces are not an adequate means of dealing with the consequences of oversupply.

168. Indonesia's second explanation for the beef reference price, that it is necessary to protect against the consequences of extreme price volatility on the availability of a continuous supply of fresh beef in Indonesia's food supply, is again opaque and not obviously connected with the objectives in Article XX(b).²²³

169. Further, even if Indonesia had demonstrated that the beef reference price was adopted to protect the objectives in Article XX(b), Indonesia has not shown that the measure is *necessary* to do so. In the weighing and balancing exercise that is required for the necessity analysis, the trade-restrictiveness of this measure, in particular the uncertainty created for importers by the possibility of a complete ban, easily outweighs any contribution the measure

²²⁰ Appellate Body Report, *EC – Seal Products*, para. 5.144, citing Appellate Body Report, *US-Tuna II* (Mexico), para. 314.

²²¹ Appellate Body Report, *EC – Seal Products*, para. 5.144.

²²² New Zealand's first written submission, paras. 15-27.

²²³ Indonesia's responses to the Panel's questions after the first substantive meeting, Question 27, para. 27.

might make to the protection of human life or health, for the reasons stated in New Zealand's first written submission.²²⁴

170. In these circumstances, where Indonesia has failed to establish that the beef reference price was adopted for the objective cited, New Zealand does not consider it is necessary to elaborate on a less trade-restrictive alternative measure. However, New Zealand observes that ordinary market forces should be sufficient to ensure that oversupply of beef does not lead to health concerns in Indonesia's equatorial climate.

(h) The import licensing regime for animals and animal products "as a whole"

(i) Article XI:1 of the GATT 1994

171. Indonesia claims that as "the Complainants have failed to establish that any of the component parts of Indonesia's import licensing regime for [animals and animal products] constitute 'restrictions' on imports, it follows that Indonesia's import licensing regime as a whole is not a 'restriction' within the meaning of Article XI:1".²²⁵ For the reasons described earlier in this submission, Indonesia has not successfully rebutted the case established by the Complainants that each of the measures at issue in this dispute are "restrictions" within the meaning of Article XI:1 of the GATT 1994. Further, it has not rebutted New Zealand's submission that 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.²²⁶ As New Zealand set out in its first written submission, each of the components of Indonesia's import regime for animals and animal products is designed to contribute towards realizing Indonesia's policy objective of reducing imports in order to achieve "self-sufficiency" in various food products, especially beef.²²⁷

172. In addition, Indonesia has not addressed the Complainants' submission that the combined operation of the individual components of Indonesia's import licensing regime for animals and animal products creates a regime which is even more restrictive than the sum of its individual components.²²⁸ While New Zealand has demonstrated that each of the measures at issue individually constitute restrictions, New Zealand has also shown that the combined operation of these measures creates a regime that is hostile to imports and importers and amplifies their individual effects. This characterisation was strongly supported by third parties, including the European Union, which stated that "these import licensing regimes as a whole impose an even greater restriction on imports ... than their individual components" and accordingly "the Panel should also consider the effect of Indonesia's import licensing regime on imports of animals and animal products as a whole".²²⁹

²²⁴ New Zealand's first written submission, paras. 191-196.

²²⁵ Indonesia's first written submission, para. 170.

²²⁶ New Zealand's first written submission, paras. 198-202.

²²⁷ New Zealand's first written submission, paras. 200.

²²⁸ New Zealand's first written submission, paras. 200 and 202.

²²⁹ The European Union's first opening statement, paras. 4-5. See also, Australia's third party written submission, para. 60.

(ii) *Article 4.2 of the Agreement on Agriculture*

173. Indonesia has not addressed New Zealand's claim that Indonesia's import licensing regime for animals and animal products "as a whole" is inconsistent with Article 4.2 of the Agreement on Agriculture. Accordingly, Indonesia has not rebutted the *prima facie* case set out in New Zealand's first written submission that the regime is inconsistent with Article 4.2 of the Agreement on Agriculture.²³⁰

(iii) *Article XX of the GATT 1994*

174. Indonesia argues that the import licensing regime for animals and animal products "as a whole" is justified under Articles XX(a), (b) and (d) of the GATT 1994.²³¹ There is no further elaboration of the basis of the defence, including identification of the specific objective(s) for which Indonesia alleges the measure was adopted, evidence that the measure was adopted for those objectives, or explanation why the measure is necessary to protect against or secure compliance with those objectives. Indonesia's argument therefore fails to meet the standard of Articles XX(a), (b) and (d). Indeed, Indonesia's response is "patently undeveloped".²³²

175. For the sake of argument, New Zealand assumes that Indonesia intended to rely on its Article XX arguments in relation to the individual measures. For that purpose, New Zealand repeats its Article XX responses in respect of each individual measure. Indonesia has failed to establish that protection of public morals, life and health, or securing compliance with GATT 1994 consistent laws or regulations is an objective pursued by any of the individual measures, as is required under the first element of Articles XX(a), (b) or (d). It follows that Indonesia has also failed to establish the import licensing regime as a whole is justified under Article XX. In addition, even if Indonesia had established this first element of an Article XX(a), (b) or (d) defence, the restrictions would not meet the "necessary" standard, for the reasons New Zealand has articulated in relation to each individual measure.

176. Thus, New Zealand considers that Indonesia's Article XX defence for the import licensing regime for animals and animal products a whole should fail.

B. IMPORT LICENSING REGIME FOR HORTICULTURAL PRODUCTS

177. In this Section, New Zealand will respond to Indonesia's assertions on each of the measures applicable to horticultural products in this dispute. Specifically, New Zealand will summarise and supplement the analysis included in its submissions to date and demonstrate that *all of the measures at issue*:

- (a) have a "limiting effect" or impose a "limiting condition" on importation, and accordingly constitute:

²³⁰ New Zealand's first written submission, paras. 335-337.

²³¹ Indonesia's first written submission, para. 170.

²³² Appellate Body Report, *Thailand – Cigarettes*, para. 179.

- (i) "prohibitions or restrictions ... on importation" within the meaning of Article XI:1 of the GATT 1994; and
 - (ii) "quantitative import restrictions ... or similar border measures" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture;²³³ and
- (b) are not justified under paragraphs (a), (b) or (d) of Article XX of the GATT 1994.

178. Further, this Section will also address New Zealand's claims that certain measures are inconsistent with III:4 of the GATT 1994 and Article 3.2 of the Agreement on Import Licensing Procedures, and specifically that:

- (a) the prohibitions and restrictions on use, sale and distribution of certain horticultural products are inconsistent with Article III:4 of the GATT 1994; and
- (b) limited application windows and validity periods for horticultural products are inconsistent with Article 3.2 of the Agreement on Import Licensing Procedures.

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

(i) *Article XI:1 of the GATT 1994*

179. Indonesia argues in its first written submission that the limited application windows and validity periods for horticultural products are not a restriction on imports because there is no "period of time during which imports are 'restricted' as a function of the timing of the import licence application process".²³⁴ It claims that evidence presented by New Zealand to the contrary does not "reflect reality" of Indonesia's import licensing regime for horticultural products²³⁵ and that importers are not prohibited from shipping "in anticipation of receiving its import licence prior to the goods' arrival at the port of entry".²³⁶ Each of these claims fails on the evidence.

180. The application windows are not, contrary to Indonesia's initial claim, "always open".²³⁷ Indeed Article 13A of *MOT 16/2013* as amended by *MOT 47/2013* specifies that applications for Import Approvals may only be submitted during the months of December or

²³³ In respect of the chili and shallot reference prices, New Zealand submits that this is also a "minimum import price" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture.

²³⁴ Indonesia's first written submission, para. 134. See also Indonesia's first written submission para. 66 and Indonesia's first opening statement, para. 20.

²³⁵ Indonesia's first written submission, para. 67.

²³⁶ Ibid.

²³⁷ Set out in Indonesia's first written submission, para. 70.

June for the first and second semesters respectively.²³⁸ Neither, as Indonesia later conceded, are application windows "typically one month long".²³⁹ In fact, application windows for Import Approvals for fresh horticultural products are often shorter than the one month period that is alleged to be "typical". For example, the application window for Import Approvals for the first semester of 2015 was only open from 9 to 17 December 2014: a mere 7 working days.²⁴⁰

181. Furthermore, Import Approvals are not granted until the commencement of each six month validity period, in January or in July of each year.²⁴¹ As has been demonstrated, it is not possible for fresh horticultural products to be shipped from the country of origin until after the Import Approval has been granted.²⁴² Importers are, contrary to the Indonesian claims, prohibited from shipping in anticipation of receiving an Import Approval. This necessarily results in a period of time during which imports of horticultural products are restricted.²⁴³

182. The resulting limiting effect on imports is supported by the evidence. Annexes 4 and 5 of New Zealand's first written submission are not, contrary to Indonesia's claims, "anecdotal" evidence. Rather they are evidence sourced from the New Zealand Customs Service of exports to Indonesia of horticultural products of particular importance to New Zealand. The underlying data for the graphs is set out in Exhibit NZL-88.

(ii) *Article 4.2 of the Agreement on Agriculture*

183. In respect of limited application windows and validity periods, Indonesia has advanced the same arguments under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.²⁴⁴ New Zealand demonstrated above that the measure has a limiting effect on importation and thus constitutes a restriction under Article XI:1 of the GATT 1994.²⁴⁵ For the same reasons, it also constitutes a "quantitative import restriction" or "similar border measure" under footnote 1 to Article 4.2 of the Agreement on Agriculture.²⁴⁶ Accordingly, it is a measure of a kind that has been required to be "converted into ordinary customs duties" and is therefore inconsistent with Article 4.2 of the Agreement on Agriculture.

²³⁸ MOT 16/2013 as amended by MOT 47/2013 (Exhibit JE-10).

²³⁹ Indonesia's first opening statement, para. 20.

²⁴⁰ See Import Approval Process Explanation (Exhibit NZL-51).

²⁴¹ Article 13A MOT 16/2013 as amended by MOT 47/2013 (Exhibit JE-10). See also Onions New Zealand Exporter Statement (Exhibit NZL-49) and Pip Fruit New Zealand Exporter Statement (Exhibit NZL-50).

²⁴² See Exhibit US-69 (KSO, SUCOFINDO, "Conditions for Verification of Importer (VPTI) Commodity: Horticultural Products") which sets out the pre-shipment application process for horticultural products which requires that importers have an Import Approval before pre-shipment inspection in the country of origin.

²⁴³ Contrary to the claims of Indonesia in its first written submission at para. 134.

²⁴⁴ Indonesia's first written submission, paras. 65-72 and paras. 134-136.

²⁴⁵ See Section III.B(a)(i) above.

²⁴⁶ See New Zealand's first written submission, paras. 341-344.

(iii) *Article XX of the GATT 1994*

184. Indonesia's alternative defence in respect of the limited application windows and validity periods for RIPH and Import Approvals is that this measure is a "necessary component of Indonesia's customs regime", justified under Article XX(d) of the GATT 1994.²⁴⁷ Indonesia explains that, "[a]s a developing country, [it] has limited resources to devote to processing import licence applications".²⁴⁸ Indonesia's argument, however, does not meet the standard of Article XX(d).

185. Indonesia has not demonstrated that customs enforcement is, in fact, the objective of its measure. Indonesia has failed to identify the provisions of its customs enforcement laws and regulations, not inconsistent with the GATT 1994, with which the application windows and validity periods are designed to secure compliance. In its answer to the Panel's Question 71, Indonesia simply lists a few titles of laws and regulations relating to customs, quarantine and food safety that it says are included among "[t]he WTO-consistent laws and regulations" which justify the challenged measures.²⁴⁹ Indonesia does not identify which specific parts of the laws are relevant. Neither has it provided copies of those laws to the Panel and the Parties as Exhibits, which is problematic.²⁵⁰ Indonesia also fails to demonstrate that these laws are "not inconsistent with the provisions of [the GATT 1994]", as Article XX(d) requires.

186. WTO jurisprudence confirms that a panel is not bound by Indonesia's assertion of the objective of its measures.²⁵¹ Rather, a panel should look at all relevant evidence, including the text, structure, and legislative history of the measure at issue.²⁵² Mere assertions concerning the purpose of a challenged measure are not sufficient to establish that a measure is designed to promote an objective protected by Article XX. In this instance, nothing in the sources referred to by Indonesia suggests a connection between this measure and customs enforcement. Indeed, when notifying the applicable regulations to the WTO Import Licensing Committee, Indonesia did not list "customs enforcement" as one of the objectives of the regime.²⁵³

187. Rather, as described in New Zealand's first written submission, the basis and rationale for the import licensing restrictions on horticultural products is found in the legislative provisions based on sufficiency of domestic production. The specific import licensing restrictions were promulgated in contemplation of these laws.²⁵⁴ Thus, their purpose is contrary to that alleged by Indonesia.

²⁴⁷ Indonesia's first written submission, para. 136.

²⁴⁸ Indonesia's first written submission, para. 136 and see also Indonesia's first opening statement, para. 31.

²⁴⁹ Indonesia's additional responses to the Panel's questions after the first substantive meeting, para. 46.

²⁵⁰ See Panel Report, *Colombia – Ports of Entry*, paras. 7.516-7.525.

²⁵¹ Appellate Body Report, *EC – Seal Products*, para. 5.144.

²⁵² *Ibid.*

²⁵³ Notification to the Committee on Import Licensing under Article 5.1-5.4 of the Agreement on Import Licensing Procedures, G/LIC/N/2/IDN/14, 26 June 2013 (Exhibit US-54) stating no administrative purpose for *MOT 16/2013*.

²⁵⁴ New Zealand's first written submission, paras. 70-71.

188. Even if the first element of Article XX(d) were satisfied, Indonesia has not explained why the measures are "necessary to secure compliance" with such laws or regulations. Despite having been given several opportunities to do so, Indonesia has not satisfied its burden to establish "necessity". As the Appellate Body observed in *Thailand – Cigarettes*, "it is difficult to make detailed arguments to demonstrate the 'necessity' of a measure under Article XX(d) in the absence of a clear identification of the laws or regulations with which that measure is purportedly necessary to secure compliance".²⁵⁵

189. It is difficult to see how the application windows and validity periods would permit Indonesia to allocate resources for customs enforcement. The two regimes appear to be completely independent regimes operated by separate entities. This regime will only provide an indication of trade volumes over the entire 6-month period, it will not provide greater specificity relating to volumes in each anticipated shipment.

190. Accordingly, weighing the measure's lack of contribution to the objective in Article XX(d) against its significant trade-restrictiveness,²⁵⁶ Indonesia has failed to discharge its burden to establish that the measure at issue is "necessary" to secure such compliance. To be "necessary", there must be "a genuine relationship of ends and means between the objective pursued and the measure at issue".²⁵⁷ Indonesia has failed to demonstrate any such relationship.

191. In these circumstances, for the reasons set out above, New Zealand does not consider it is necessary to elaborate on a less trade-restrictive alternative measure. However, a reasonably available less trade-restrictive alternative measure would be for Indonesia to remove its import licensing regime for horticultural products altogether. A large number of horticultural products are not subject to import licensing and Indonesia has given no reason why this approach could not be applied to all imported horticultural products.²⁵⁸

192. Alternatively, New Zealand considers that an alternative measure for Indonesia, if it needs any import licensing, would be to operate a truly automatic import licensing regime, in which applications could be submitted on any working day prior to customs clearance. Permission to import goods would be automatically granted in respect of the type and quantity of product to be imported, the country of origin and the port of entry. Such a regime would be simple to administer by comparison with the current regime. The information provided would be available sufficiently in advance to enable Indonesia to allocate its resources effectively among its "many" ports.²⁵⁹ It would provide more precise information because it would relate to the actual quantity in a specific shipment, rather than the estimated quantity for an entire validity period of several months' duration. It would also be much less burdensome to administer than the current regime and achieve the purported objective to a greater degree than the current regime.

²⁵⁵ Appellate Body Report, *Thailand - Cigarettes*, fn. 272.

²⁵⁶ As described in New Zealand's first written submission, at paras. 149-154.

²⁵⁷ Appellate Body Report, *EC – Seal Products*, para. 5.180, citing Appellate Body Report, *Brazil – Retreaded Tyres*, paras 145-157.

²⁵⁸ See New Zealand's first written submission, para. 73, referring to Attachment II, *MOA 86/2013* (Exhibit JE-15) and Appendix I, *MOT 16/2013* (Exhibit JE-8).

²⁵⁹ See Indonesia's responses to the Panel's questions after the first substantive meeting, Question 14.

(iv) *Article 3.2 of the Agreement on Import Licensing Procedures*

193. Indonesia contends that its licensing regime is "automatic" and therefore "outside the scope of Article 3 of the Agreement on Import Licensing Procedures".²⁶⁰ However, as explained in New Zealand's first written submission,²⁶¹ and in Section III.A(b)(iv) above, the limited application windows and validity periods measure clearly does not satisfy the requirements for an "automatic" import licensing procedure within the meaning of Article 2.1 of the Agreement on Import Licensing Procedures.²⁶² The non-automatic nature of Indonesia's import licensing regime is further explained in New Zealand's responses to the Panel's questions.²⁶³

194. Indonesia further asserts that its import licensing regime does not produce trade-restrictive effects and that "there is no causal link between the implementation of the import licensing regime the a declined market share of the Complainants" (*sic*).²⁶⁴ It then cites data relating to market share of certain fresh horticultural products.²⁶⁵ However, New Zealand has demonstrated the trade-restrictive effect of the limited application windows and validity periods.²⁶⁶ Importers simply cannot import products during certain periods and Indonesia's imports are limited during certain periods in each year as a direct consequence of the measure at issue.

(b) Fixed Licence Terms

(i) *Article XI:1 of the GATT 1994*

195. As New Zealand has argued, the Fixed Licence Terms limit imports to the products, quantity, source and port of entry set out in the Import Approval and this removes the ability of importers to respond to market forces and external factors that occur during a validity period. Indonesia alleges in response that the Fixed Licence Terms are at the discretion of, and determined by, importers and therefore not "instituted or maintained" by Indonesia.²⁶⁷ And further, it alleges that importers are "free to alter their terms of importation from one license application to the next" and that Indonesia does not place *any limitations* on the terms identified, other than the 80% realisation requirement.²⁶⁸

²⁶⁰ Indonesia's first written submission, para. 175.

²⁶¹ Articles 2.1 and 2.2(a), Agreement on Import Licensing Procedures; New Zealand's first written submission, Section IV.D.1.

²⁶² Articles 2.1 and 2.2(a), Agreement on Import Licensing Procedures.

²⁶³ New Zealand's responses to the Panel's questions after the first substantive meeting, Question 11.

²⁶⁴ Indonesia's first written submission, para. 178.

²⁶⁵ *Ibid.*

²⁶⁶ New Zealand's first written submission, Annexes 4 and 5.

²⁶⁷ Indonesia's first written submission, para. 138; see also paras. 74 and 138.

²⁶⁸ Indonesia's first written submission, para. 75.

196. New Zealand again reiterates its position that the requirement to fix the terms of the import licence is a measure that is instituted and maintained by Indonesia.²⁶⁹ Once determined, the terms are locked in place for the period of validity of the licence.

197. Indonesia has not rebutted the evidence that locking in place the quantity and country of origin of a particular product over the term of the validity period means that importers cannot respond to seasonal or weather-dependent events in the source country.²⁷⁰ The Indonesian Exporter-Importer of Fresh Fruit and Vegetable Association sought flexibility to put an alternative country of origin of product to deal with the possibility of crop failure in the country of origin.²⁷¹ However, this suggestion was rejected by the Ministry of Agriculture.²⁷²

198. Furthermore, not only are these terms fixed for the period of validity of the licence, but Indonesia also limits which terms can be included in the import licence through the operation of other components of its import licensing regime for horticultural products. For example, applications for RIPH and Import Approvals must comply with the restrictions imposed on horticultural imports during the Indonesian domestic harvest period. As a result of these restrictions, the Ministry of Agriculture limited the period for importation of citrus in the first six months of 2016 to the months of February to March.²⁷³ However, as shown in Exhibit NZL-89, the Ministry later amended this to the period January – April 2016.²⁷⁴ Unfortunately, it appears that this information may not have been provided until January 2016 – after Import Approvals had been granted. It would not be possible, therefore, for importers in early 2016 to amend their Import Approvals to import additional product as a result of the extended period for imports permitted by the Ministry of Agriculture.

199. It is therefore not correct, as Indonesia attempts to argue, that Indonesia does not place *any limitations* on the terms identified. Rather the various legal requirements operate together with the Fixed Licence Terms to place limitations on the terms identified in import licences. Applications are assessed against the legal requirements,²⁷⁵ and only those that meet all the requirements would be accepted as valid applications.²⁷⁶ Indonesia claims that the rejection rate of applications for RIPH and Import Approvals is low.²⁷⁷ However, there is evidence that importers have been required to adjust the quantity they may request to import, for example based on their audited storage capacity.²⁷⁸ This is clearly a limitation on the terms identified in the Import Approval.

²⁶⁹ See New Zealand's responses to the Panel's questions after the first substantive meeting, Questions 12 and 58.

²⁷⁰ Onions New Zealand Exporter Statement (Exhibit NZL-49); Pip Fruit New Zealand Exporter Statement (Exhibit NZL-50); and ASEIBSSINDO Statement (Exhibit NZL-53).

²⁷¹ Letter from Hendra Juwono, ASEIBSSINDO, to the Ministry of Agriculture, Dec. 7, 2015 (Exhibit USA-72).

²⁷² Letter from Dr. Ir. Spudnik Sujono K. MM, Director General, Directorate of Horticulture, Ministry of Agriculture, to General Secretary of ASEIBSSINDO, Dec. 21, 2015 (Exhibit USA-71).

²⁷³ Ibid.

²⁷⁴ Import Recommendation for Horticulture Product Citrus Semester 1 Year 2016 (Exhibit NZL-89).

²⁷⁵ See Import Approval Process Explanation (Exhibit NZL-51), para. 8.

²⁷⁶ Applications are rejected if incomplete or containing inaccurate information: see Article 13, *MOT 16/2013* (Exhibit JE-8).

²⁷⁷ Indonesia's additional responses to the Panel's questions after the first substantive meeting, Question 8.

²⁷⁸ Notification Regarding Results of an Importer's Storage Capacity Audit (Exhibit NZL-57).

200. Indonesia also attempts – as with the Fixed Licence Terms for animals and animal products – to distinguish *Colombia – Ports of Entry* by *inter alia* suggesting that importers have the flexibility to identify more than one port of entry on the Import Approval application. However such "flexibility" is at odds with the legal requirement set out in Article 32 of *MOT 16/2013* that "[e]ach Horticultural Product can only be imported through destination ports that are in accordance with regulatory legislation".²⁷⁹ It is also inconsistent with evidence of the manner in which Indonesia's requirements are implemented in practice, including that the port of destination must be "clearly stated".²⁸⁰

201. In any case, the requirement to set out the port of destination is only one of the Fixed Licence Terms that cannot be amended during the period of validity of the Import Approval. Horticultural imports must be of a certain type, not exceed a certain quantity and come from one specified country of origin. These terms must also be determined well in advance of actual importation and cannot be modified for any reason during a full six-month validity period. Therefore, the Fixed Licence Terms have a limiting effect on imports contrary to Article XI:1 of the GATT 1994.

(ii) *Article 4.2 of the Agreement on Agriculture*

202. In respect of Fixed Licence Terms, Indonesia has advanced the same arguments under Article XI:1 and Article 4.2.²⁸¹ New Zealand demonstrated above that the measure has a limiting effect on importation and thus constitutes a restriction under Article XI:1 of the GATT 1994.²⁸² For the same reasons, the measure also constitutes a "quantitative import restriction" or "similar border measure" under footnote 1 to Article 4.2 of the Agreement on Agriculture.²⁸³ Accordingly, it is a measure of a kind that has been required to be "converted into ordinary customs duties" and is therefore inconsistent with Article 4.2 of the Agreement on Agriculture.

(iii) *Article XX of the GATT 1994*

203. Indonesia's alternative defence in respect of the Fixed Licence Terms is that the measure is "necessary for Indonesia's customs enforcement" under Article XX(d).²⁸⁴ Indonesia claims that, as a developing country, it has limited resources to devote to customs enforcement and the measure gives Indonesian customs authorities an opportunity to allocate their limited resources accordingly.²⁸⁵ Indonesia also claims that through this measure it "partner[s] with importers to ensure safe and efficient customs administration".²⁸⁶ However, Indonesia's argument does not meet the standard of Article XX(d).

²⁷⁹ *MOT 16/2013* (Exhibit JE-8).

²⁸⁰ Letter from Dr. Ir. Spudnik Sujono K. MM, Director General, Directorate of Horticulture, Ministry of Agriculture, to General Secretary of ASEIBSSINDO, Dec. 21, 2015 (Exhibit USA-71). See also Example Import Approval 1 (Exhibit NZL-47) and Example Import Approval 2 (Exhibit NZL-48).

²⁸¹ Indonesia's first written submission, paras. 73-77 and 137-139.

²⁸² See Section III.B(b)(i) above.

²⁸³ See New Zealand's first written submission, paras. 345-348.

²⁸⁴ Indonesia's first written submission, para. 140 and Indonesia's first opening statement, para. 31.

²⁸⁵ *Ibid.*

²⁸⁶ Indonesia's first opening statement, para. 8.

204. Indonesia has not demonstrated that customs enforcement is in fact the objective being pursued by this measure. As explained above in relation to the limited application windows and validity periods,²⁸⁷ despite listing a few titles of laws and regulations relating to customs, quarantine and food safety that it says are included among "[t]he WTO-consistent laws and regulations" with which the measure is designed to secure compliance,²⁸⁸ Indonesia has failed to identify the specific provisions in the customs enforcement laws and regulations it claims its restrictions are designed to secure compliance with. Neither has it established that the Fixed Licence Terms measure was adopted to secure compliance with laws and regulations relating to customs enforcement.

205. Even if the first element of Article XX(d) were satisfied, the restriction would not meet the "necessary" standard. Indonesia has failed to demonstrate how the measure contributes to the objective of securing compliance with those laws and regulations. Indonesia claims that the measure is intended to give customs authorities an opportunity to allocate resources. Yet the measure requires that certain terms, such as the country of origin, are fixed and cannot be amended for the length of the validity period. Fixing the country of origin of projected imports over a six month period does not meet the need claimed by Indonesia to allocate customs resources. Furthermore, the customs regime and horticultural import licensing regime appear to be completely independent and operated by separate entities. It is not clear how the operation of the import licensing regime could contribute to enforcement of a separate customs regime.

206. Accordingly, weighing the lack of contribution of the measure to the objective in Article XX(d) against the trade-restrictiveness of this measure,²⁸⁹ Indonesia has failed to discharge its burden of establishing that the measure at issue is "necessary" to secure compliance with customs laws.

207. In these circumstances, where Indonesia has failed to establish the measure was adopted for the objective cited or is necessary to achieve that objective, New Zealand does not consider it needs to elaborate on a less trade-restrictive alternative measure. However, for the sake of argument, if an import licensing regime were maintained, this should be a fully automatic import licensing regime allowing importers to apply on any day to import products of whatever type, quantity, and country of origin they choose. Such a regime would provide Indonesia with more information about the products to be imported, would be simpler to administer, and would be less trade-restrictive than the current import licensing regime.

(c) 80% realisation requirement

(i) Article XI:1 of the GATT 1994

208. In response to the Complainants' arguments and evidence of the restrictive effect of the 80% realisation requirement, Indonesia either indicates that this "is based on nothing more

²⁸⁷ Section III.B(a)(iii).

²⁸⁸ Indonesia's additional responses to the Panel's questions after the first substantive meeting, para. 46.

²⁸⁹ As described in New Zealand's first written submission, at paras. 224-226.

than anecdotal conjecture"²⁹⁰ or that the requirement "serves as a safeguard against importers grossly overstating their anticipated imports".²⁹¹ The requirement to import 80% of anticipated imports, Indonesia claims, allows for a "reasonable margin of error" before "reasonable" penalties are applied and fulfils the objective of "administrative efficiency through import licensing".²⁹²

209. New Zealand has presented evidence to the contrary from importer and exporter associations that the 80% realisation requirement encourages importers to conservatively estimate or underestimate their proposed imports for a validity period because of the severe consequences of non-compliance with the requirement.²⁹³ In 2015, as a result of the 80% realisation requirement, 40 horticultural importers – 24% of the total number of horticultural importers – had their licences to import fresh horticultural products suspended for two years.²⁹⁴ As a consequence, these importers were not able to import fresh horticultural products over this period. This is borne out by the number of Import Approval applications for horticultural products which dropped from 275 in 2014 to 161 in 2015.²⁹⁵ The imposition of such a severe penalty is sufficient to induce importers to underestimate their intended imports so as to meet the 80% realisation requirement. It thus has a limiting effect on imports contrary to Article XI:1 of the GATT 1994.

(ii) *Article 4.2 of the Agreement on Agriculture*

210. In respect of the 80% realisation requirement, Indonesia has advanced identical arguments under Article XI:1 and Article 4.2.²⁹⁶ New Zealand demonstrated above that the measure has a limiting effect on importation and therefore constitutes a restriction under Article XI:1 of the GATT 1994.²⁹⁷ For the same reasons the measure also constitutes a "quantitative import restriction" or "similar border measure" under footnote 1 to Article 4.2 of the Agreement on Agriculture.²⁹⁸ Accordingly, it is a measure of a kind that has been required to be "converted into ordinary customs duties" and is therefore inconsistent with Article 4.2 of the Agreement on Agriculture.

(iii) *Article XX of the GATT 1994*

211. Indonesia's alternative defence in respect of the 80% realisation requirement for horticultural products is based on Article XX(d) and also (it seems from Indonesia's responses to the Panel's questions) Article XX(b).²⁹⁹

²⁹⁰ Indonesia's first written submission, para. 78, para. 141.

²⁹¹ Indonesia's first written submission, para. 79, para. 142; Indonesia's first opening statement, para. 22.

²⁹² Indonesia's first written submission, para. 79, 142.

²⁹³ ASEIBSSINDO Statement (Exhibit NZL-53); Onions New Zealand Exporter Statement (Exhibit NZL-49) and Pip Fruit New Zealand Exporter Statement (Exhibit NZL-50).

²⁹⁴ "Import Permit For This Year Is Slashed" *Industri Kontan*, (Exhibit NZL-71). See also 80% Refusal Notification (Exhibit NZL-70) stating "You cannot submit Import Application for Fresh Horticultural Products for consumption...because realisation of previous period did not reach 80%".

²⁹⁵ Indonesia's additional responses to Panel's questions after the first substantive meeting, Question 8.

²⁹⁶ Indonesia's first written submission, para. 163.

²⁹⁷ See Section III.B(c)(i) above.

²⁹⁸ See New Zealand's first written submission, paras. 349-352.

²⁹⁹ Indonesia's responses to the Panel's questions after the first substantive meeting, Question 8.

212. In respect of its alleged defence under **Article XX(d)**, Indonesia argues that the 80% realisation requirement "is necessary for Indonesia's customs enforcement".³⁰⁰ This appears to be based on the argument that the measure is a safeguard against importers "grossly overstating" their anticipated imports,³⁰¹ and that Indonesia is a developing country with limited resources to devote to import administration and that it is "therefore important" for Indonesia to have an estimate of expected trade volumes for each validity period.³⁰² Indonesia also claims that its measure is "narrowly constructed to fulfil Indonesia's legitimate objective of administrative efficiency through import licensing".³⁰³ However, Indonesia has not met the standard of Article XX.

213. Indonesia has not demonstrated that customs enforcement is the objective of its measure. As with its other arguments based on Article XX(d), Indonesia has failed to identify the specific "laws or regulations" with which the 80% realisation requirement is "necessary to secure compliance". Furthermore, the design and structure of the measure does not lend any support to Indonesia's Article XX(d) argument. Indonesia has not pointed to the specific provisions of the relevant legal instruments or to any other official documents to verify its claims that the measure was adopted to promote the objective of customs enforcement.

214. Moreover, despite Indonesia's assertions that it does not limit the amount of products an importer may import,³⁰⁴ the design of the 80% realisation requirement measure suggests an import-limiting objective in mind. As New Zealand has explained, the 80% realisation requirement, combined with the Fixed Licence Terms, creates an environment which induces importers to limit the quantities they import, particularly because of the sanctions that can be imposed on importers for non-compliance.³⁰⁵

215. Even if the first element of Article XX(d) were established, Indonesia has not explained why the measure is "necessary to secure compliance" with such laws or regulations. In New Zealand's view, there is insufficient relationship between the 80% realisation requirement and the interests Indonesia claims to be protected by it. Even assuming, *arguendo*, that importers did overstate the quantity requested on the Import Approval, if the overstated quantity were not imported, this would not impose an additional burden on customs enforcement.

216. As Indonesia has not shown how the 80% realisation requirement contributes to the objective in Article XX(d), little weight can be given to these factors in the weighing and balancing process to analyse whether the measure is "necessary". In New Zealand's view, the trade-restrictiveness of the measure explained above outweighs any minimal contribution it may make towards the objectives in Article XX(d). Thus, Indonesia has failed to demonstrate that the 80% realisation requirement is "necessary" to meet this objective.

³⁰⁰ Indonesia's first written submission, para. 145.

³⁰¹ Indonesia's first written submission, para. 142; Indonesia's first opening statement, para. 22.

³⁰² Indonesia's first written submission, para. 78.

³⁰³ Indonesia's first written submission, para. 142.

³⁰⁴ Indonesia's first opening statement, para. 23.

³⁰⁵ See New Zealand's first written submission, paras. 228-236.

217. Indonesia also appears to have asserted a defence under **Article XX(b)** in its responses to the Panel's questions, adding that not only was the 80% realisation requirement necessary for Indonesia's enforcement of its customs laws and regulations, "but it also was necessary for the protection of human health".³⁰⁶ It referred to its concerns about "the impact that overstatement of anticipated imports of these products will have on its ability to guarantee proper quarantine procedures as a first-level defence against the transmission of diseases through the food supply".³⁰⁷ However, Indonesia's argument that the 80% realisation requirement was adopted to protect human health through guaranteeing proper quarantine procedures is equally unconvincing and does not meet the standard of Article XX(b).

218. Indonesia has provided no evidence that any overstatement of anticipated imports was occurring nor that it was causing problems for Indonesia's import administration to the extent that human life or health would be jeopardised unless Indonesia introduced this measure. Rather, as described in New Zealand's first written submission, the 80% realisation requirement appears designed to limit imports of horticultural products and has been the basis for refusals to issue Import Approvals.³⁰⁸

219. Even if the first element of Article XX(b) were met, Indonesia has not explained why the measure is "necessary" to protect human health. There is insufficient relationship of ends and means between the 80% realisation requirement and the food safety interests Indonesia claims to be protected by the measure. Indonesia has thus failed to demonstrate that the measure is necessary to protect the objective of human life and health.

220. In these circumstances, where Indonesia has failed to establish that the 80% realisation requirement was adopted for either of the objectives cited, New Zealand does not consider it is necessary to elaborate on a less trade-restrictive alternative measure. However, New Zealand observes that the two concerns identified by Indonesia – its need to have expected trade volumes for each validity period and its ability to guarantee proper quarantine procedures – can readily be addressed with less restrictive readily available measures. For example, Indonesia would be able to use information already supplied on customs forms to obtain information on anticipated import quantities. This information would be available sufficiently in advance to enable Indonesia to allocate its limited food safety inspection resources. It would also be more precise information because it would relate to the actual quantity in a specific shipment, rather than the estimated quantity for an entire validity period (which can cover up to 6 months).

³⁰⁶ Indonesia's responses to the Panel's questions after the first substantive meeting, Question 16, para. 12; Indonesia's additional responses to the Panel's questions after the first substantive meeting, Question 50, para. 33.

³⁰⁷ Indonesia's responses to the Panel's questions after the first substantive meeting, Question 16, para. 11; Indonesia's additional responses to the Panel's questions after the first substantive meeting, Question 50, para. 32.

³⁰⁸ New Zealand's first written submission, paras. 228-236.

(d) Prohibitions and restrictions based on Indonesian harvest periods

(i) Article XI:1 of the GATT 1994

221. Indonesia does not even attempt to argue that Indonesia's limitation of imports during periods of domestic harvest of the same products is not a "restriction" within the meaning of Article XI:1 of the GATT 1994. Rather, it seeks to rely on a defence under Article XX(b), which is discussed further below.

(ii) Article 4.2 of the Agreement on Agriculture

222. With respect to Article 4.2 of the Agreement on Agriculture, Indonesia claims that "[t]he Complainants have not demonstrated that Indonesia's temporary limitation on imports for specified periods during the year have had a limiting effect on imports of any horticultural products overall" and that therefore the measure does not constitute a quantitative import restriction within footnote 1 of Article 4.2 of the Agreement on Agriculture.³⁰⁹ In doing so, Indonesia misstates the legal standard for a quantitative restriction by implying that a "temporary" limitation on imports is not a quantitative restriction and that what is required is for the restriction to have a limiting effect on overall imports. As New Zealand has demonstrated, this is not the proper legal standard to be applied.³¹⁰

223. In any case, the evidence clearly shows that the prohibitions and restrictions based on Indonesian domestic harvest periods operate to prevent imports from occurring at certain times of the year. Exhibit NZL-90 demonstrates the manner in which the Ministry of Agriculture analyses the domestic harvest seasons by region to determine whether there is sufficient domestic demand for horticultural products to restrict imports. This clearly sets out the link between restricting imports and the quantity and season of Indonesian domestic production of the same product. In the case of banana, melon, papaya and pineapple, which are exported by Indonesia, no imports were permitted in the second semester of 2015.³¹¹

224. Exhibit NZL-91 shows the result of the same kind of analysis for 2016. This again demonstrates that certain products are prohibited either entirely (in the case of chili, shallots, banana, melon, pineapple, papaya and mango), or their import is restricted to certain months of the year. In the case of carrots, it is the quantity of imports that is restricted. In the case of citrus fruit except lemons, imports were initially restricted to February and March of 2016.³¹² Subsequently, this period was extended by two months.³¹³ Even with extensions, there is still an overall limitation that constitutes a restriction on horticultural imports.³¹⁴

³⁰⁹ Indonesia's first written submission, para. 82.

³¹⁰ See Section II(a) above.

³¹¹ Prohibition/Limitation Letter from the Ministry of Agriculture (Exhibit NZL-39).

³¹² Letter from Dr. Ir. Spudnik Sujono K. MM, Director General, Directorate of Horticulture, Ministry of Agriculture, to General Secretary of ASEIBSSINDO, Dec. 21, 2015 (Exhibit USA-71).

³¹³ Import Recommendation for Horticulture Product Citrus Semester 1 Year 2016 (Exhibit NZL-89).

³¹⁴ See Hey, J "Concern over Indonesia citrus imports" *Fruitnet*, 18 November 2016 (Exhibit NZL-91), noting Australian concern over the prohibition of mandarin exports over the May/June period.

225. This evidence shows, contrary to the Indonesian claims, that the prohibitions and restrictions based on the Indonesian domestic harvest period are indeed quantitative restrictions within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture and are therefore inconsistent with Article 4.2.

(iii) *Article XX of the GATT 1994*

226. Indonesia's defence in respect of its measure relating to Indonesian harvest periods is based on Article XX(b).

227. Indonesia argues that oversupply of fresh horticultural products in a particular region of Indonesia's vast archipelago could have "disastrous consequences" because of the spread of certain pathogenic bacteria caused by rotted produce in Indonesia's equatorial climate.³¹⁵ Indonesia claims that in the absence of its coordination of imports with domestic harvest times, "stockpiles of rotting fresh horticultural products are likely to result in serious public health threats".³¹⁶ Indonesia even attempts to argue that "by ensuring that imports are directed elsewhere in Indonesia during domestic harvest periods – not prohibited altogether or restricted to certain quantities – Indonesia is taking a proactive approach to protecting its population from disease".³¹⁷ However, Indonesia's argument does not meet the standard of Article XX(b).

228. First, Indonesia has not demonstrated that public health is the objective of its measure. Mere assertion that this is the objective of the measure is insufficient to satisfy the first element of Article XX(b).³¹⁸ Nothing about the design or structure of the measure indicates that it was adopted or enforced to protect human health. Indonesia has produced no evidence that "stockpiles of rotting horticultural products" have previously resulted, or would result in the future, from imports during domestic harvest seasons or that this was the reason for the measure's introduction. Rather, the evidence presented by New Zealand shows that the real reason for the measure is to protect domestic farmers from import competition.³¹⁹

229. Even if the first element of Article XX(b) were satisfied, there is no evidence that the measure is "necessary" to protect human health, contrary to Indonesia's claims. While New Zealand agrees that the protection of human health from food-borne disease is an important objective, Indonesia has not established that the measure contributes to that objective, let-alone that it makes a material contribution to that objective, as is required when a measure produces restrictive effects on international trade as severe as those resulting from an import ban.³²⁰ Indeed, market forces would be expected to mitigate the hypothetical risk identified by Indonesia.

³¹⁵ Indonesia's first written submission, para. 155; Indonesia's first opening statement, para. 33.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Appellate Body Report, *EC – Seal Products*, para. 5.144.

³¹⁹ New Zealand's first written submission, para. 263, referring to "Ministry of Agriculture: Horticulture Imports Not Prohibited but Regulations" *Berita 2 Bahasa* (Exhibit NZL-73).

³²⁰ Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 150-151.

230. Moreover, the measure is disproportionately trade-restrictive in relation to the objective now claimed for it by Indonesia. Imports of certain horticultural products have been completely banned, as New Zealand has showed,³²¹ rather than "redirected elsewhere in Indonesia" as Indonesia claims.³²²

231. In New Zealand's view, therefore, Indonesia has failed to show that the domestic harvest measure is necessary to achieve the objective of Article XX(b).

232. In these circumstances, New Zealand is not required to elaborate on an alternative measure. However, even if the measure made some contribution to human health, a less trade-restrictive alternative would be for Indonesia to rely on market forces to resolve any issues of over-supply. Producers and importers will be capable of adjusting the quantities of horticultural products they produce or import, to accommodate demand and avoid wastage.

(e) Storage ownership and capacity requirement

(i) Article XI:1 of the GATT 1994

233. Indonesia claims that its storage ownership and capacity requirement does not have a limiting effect on imports as "any limitations placed on an importer's ability to import is self-imposed" because in essence importers can secure more storage capacity and it therefore "does not interfere with trade volumes".³²³ New Zealand reiterates that WTO jurisprudence does not require a quantification of trade effects in order for a breach of Article XI:1 to be found.

234. Indonesia has failed to explain why it is necessary for importers to *own* storage capacity and why importers could not lease or otherwise acquire access to appropriate storage capacity. More importantly, Indonesia has not explained why it is necessary for importers to own storage capacity which must equal the quantity of product imported over the entire six month period in a one-to-one ratio. This fails to take into account normal commercial business practices including product turnover and restricts the opportunity for importers to import horticultural products.

235. Contrary to the Indonesian arguments, evidence shows that if the owned storage capacity does not equate to the findings of the Ministry of Trade audit, an importer is required to reapply for registration as a Registered Importer and specify on the application the storage capacity as determined by the Ministry of Trade.³²⁴ The quantity of imports is limited by the audited storage capacity and therefore has a limiting effect on imports, contrary to Article XI:1 of the GATT 1994.

³²¹ See New Zealand's first written submission at para. 237, referring to Prohibition/Limitation Letter from MOA (Exhibit NZL-39).

³²² Indonesia's first written submission, para. 155.

³²³ Indonesia's first written submission, paras. 85-86 and 147.

³²⁴ Notification Regarding Results of an Importer's Storage Capacity Audit (Exhibit NZL-57).

(ii) *Article 4.2 of the Agreement on Agriculture*

236. In respect of the storage ownership and capacity requirement, Indonesia has advanced the same arguments under Article XI:1 and Article 4.2.³²⁵ New Zealand has demonstrated above that the measure has a limiting effect on importation and thus constitutes a restriction under Article XI:1 of the GATT 1994.³²⁶ For the same reasons the measure constitutes a "quantitative import restriction" or "similar border measure" under footnote 1 to Article 4.2 of the Agreement on Agriculture.³²⁷ Accordingly, it is a measure of a kind that has been required to be "converted into ordinary customs duties" and is therefore inconsistent with Article 4.2 of the Agreement on Agriculture.

(iii) *Article XX of the GATT 1994*

237. Indonesia's alternative defence to its measure restricting imports through a storage ownership and capacity requirement is based on Articles XX(b) and (d).

238. In relation to **Article XX(d)**, Indonesia argues the storage capacity requirements are necessary to secure compliance with "customs enforcement".³²⁸ It claims that its limited administrative, economic, and human resources available for customs enforcement drive the measure as it ensures that all importers have facilities to store their imported horticultural products immediately upon their arrival, and that government officials have this information in *advance* of the arrival of the products.³²⁹ This, Indonesia argues, is necessary for the "proper operation of Indonesia's customs laws and regulations".³³⁰ However, Indonesia's arguments do not meet the standard of Article XX(d).

239. Indonesia has not demonstrated that customs enforcement is the objective of its measure. As with its other Article XX(d) defences, Indonesia has failed to identify the specific provisions of the "laws or regulations" with which the storage ownership and capacity requirement is "necessary to secure compliance". It merely lists a few titles of laws and regulations relating to customs, quarantine and food safety and claims that these provide the justification for the storage capacity requirements.³³¹ However, the design of the measure suggests its real objective is to limit imports.³³²

240. Even if the first element of Article XX(d) were satisfied, Indonesia has not explained why the measures are "necessary to ensure compliance" with customs laws and regulations. It is unclear how the storage ownership and capacity requirement is connected to customs enforcement or how it contributes to that objective. For these reasons, Indonesia has not

³²⁵ Indonesia's first written submission, paras. 84-86 and 146-147.

³²⁶ See Section III.B(e)(i).

³²⁷ See New Zealand's first written submission, para. 320-322.

³²⁸ Indonesia's first written submission, para. 149.

³²⁹ Indonesia's first written submission, para. 149; Indonesia's first opening statement, para. 31.

³³⁰ Ibid.

³³¹ Indonesia's additional responses to the Panel's questions after the first substantive meeting, Question 71, para. 46.

³³² See New Zealand's first written submission, paras. 243-248.

established that its storage ownership and capacity requirement is "necessary" for customs enforcement purposes.

241. In relation to **Article XX(b)**, Indonesia describes the requirement as "merely a food-safety measure".³³³ It argues that:

- a. its limited capacity to store imported fresh horticultural products after their arrival but before their transfer to the distributor or other end user, and
- b. the equatorial climate in Indonesia,

give rise to the supposed "absolute need" to ensure proper storage facilities in order to protect human, animal, and plant life or health.³³⁴ However, again Indonesia has not met the standard of Article XX(b).

242. Indonesia has not demonstrated, and provided no evidence, that the protection of life and health is indeed the objective being pursued by the measure. Indonesia's characterisation of its measure as a food safety measure is insufficient to demonstrate that it does indeed have that purpose.³³⁵

243. Assuming for the sake of argument, however, that the purpose of the measure is directed at maintaining food safety by ensuring imported horticultural products are properly stored, Indonesia has not explained why the measure is "necessary" to protect human health. There is insufficient relationship of ends and means between the measure and the interests protected in paragraph (b).

244. The two most objectionable aspects of the measure, to New Zealand, are that an importer must *own* the storage facilities for the horticultural products it imports and that the volume allocations in its Import Approvals are limited to the importer's verified cold-storage capacity on a one-to-one ratio, with no allowance for turnover of product during the six-month Import Approval validity period.

245. Indonesia has not explained how *ownership* of storage facilities contributes to the objective of food safety and why other sorts of access to storage (such as rental or lease arrangements) would not make an equal, but less trade-restrictive, contribution to this objective. Indeed, as the United States has pointed out, importers could simply transfer their products directly to a distributor's warehouse, and therefore might not need direct access to storage at all.³³⁶

246. Nor is it clear why there is no allowance for product turnover during a validity period. Keeping storage facilities empty for several months after the products in them have been sold, but before the next validity period, makes no contribution to food safety. However, the

³³³ Indonesia's first written submission, paras. 86, 147; Indonesia's first opening statement, para 23.

³³⁴ Indonesia's first written submission, para. 148.

³³⁵ Appellate Body Report, *EC – Seal Products*, para. 5.144.

³³⁶ United States' first opening statement, para. 28.

combination of the ownership requirement and the one-to-one ratio of imports per validity period, has a significant trade-restrictive effect on import volumes.

247. Accordingly, Indonesia has not adopted this measure to protect or secure compliance with the objectives cited in Articles XX(b) and (d), nor has it shown the contribution of this measure to those objectives. The trade-restrictiveness of the measure easily outweighs Indonesia's purported justification for it. In these circumstances, New Zealand is not required to elaborate on an alternative measure. However, New Zealand suggests that a less trade-restrictive alternative could involve Indonesia being more flexible about the types of storage arrangements it regards as acceptable, both as to ownership and volume. These storage arrangements would need to be non-discriminatory, applying equally to domestically-produced horticultural products.

(f) Prohibitions and restrictions on use, sale and distribution of imported horticultural products

(i) Article XI:1 of the GATT 1994

248. Indonesia argues that its restrictions on the use, sale and distribution of horticultural products are not a prohibited restriction within the meaning of Article XI:1 of the GATT 1994 because, allegedly, the Complainants have failed to demonstrate that "limiting imports of horticultural products to certain end uses" has limited imports of horticultural products "overall".³³⁷ In doing so, Indonesia appears to be arguing that the Complainants must show that there is a quantitative impact on imports in order for a breach of Article XI:1 to be found. However, as New Zealand has earlier submitted, this argument must fail.³³⁸ The legal standard for a breach of Article XI:1 of the GATT 1994 is for the measure to have a "limiting effect" on imports. WTO jurisprudence makes it clear that this need not be demonstrated by quantifying the effects of the measure at issue.³³⁹

249. The limiting effect of the restrictions on use, sale and distribution arises from the inability of Registered Importers (RIs) to import certain horticultural products for direct sale to consumers and retailers. They are only permitted to sell to a distributor. Producer Importers (PIs) must use all the horticultural products they import for processing or destroy or re-export product not used.³⁴⁰ These requirements operate as a restriction on imports similar to that found by the panel in *India-Quantitative Restrictions*, contrary to Article XI:1 of the GATT 1994.³⁴¹

³³⁷ Indonesia's first written submission, para. 156 and para. 90.

³³⁸ See Section II(a) above.

³³⁹ Panel Report, *Argentina - Import Measures*, para. 6.264 (citing Panel Report, *Argentina - Hides and Leather*, para. 11.20); and Appellate Body Report, *Argentina - Import Measures*, para. 5.217.

³⁴⁰ New Zealand's first written submission, paras. 251-253.

³⁴¹ Panel Report, *India - Quantitative Restrictions*, paras. 5.142-5.143.

(ii) *Article 4.2 of the Agreement on Agriculture*

250. In respect of the restrictions on the use, sale and distribution of horticultural products, Indonesia has advanced the same arguments under Article XI:1 and Article 4.2.³⁴² However a measure may constitute a quantitative import restriction contrary to Article 4.2 even if there is no precise limit imposed on the quantity that importers are technically allowed to import, or if there is no "systematic intention to restrict importation ... at a certain level".³⁴³ New Zealand demonstrated above that the measure has a limiting effect on importation and accordingly constitutes a restriction under Article XI:1 of the GATT.³⁴⁴ For the same reasons, the measure also constitutes a "quantitative import restriction" or "similar border measure" under footnote 1 to Article 4.2 of the Agreement on Agriculture.³⁴⁵ Thus it is a measure of a kind that has been required to be "converted into ordinary customs duties" and is therefore inconsistent with Article 4.2 of the Agreement on Agriculture.

(iii) *Article XX of the GATT 1994*

251. Indonesia's alternative defence to its measure restricting the use, sale and distribution of imported horticultural products is based on Articles XX(a), (b) and (d).

252. In relation to **Article XX(a)**, Indonesia argues that this measure is necessary to protect public morals; i.e. to protect the people of Indonesia from horticultural products that do not conform to the religious beliefs of the vast majority of its population.³⁴⁶ It claims that the measure achieves this by aiming to ensure that non-halal foods are kept out of traditional Indonesian markets.³⁴⁷ This is necessary, it claims, because of a "widely held assumption" in Indonesia that all food products sold in the traditional open-air markets conform to halal requirements and no widely-used labelling system to prevent consumer deception regarding whether certain food products are halal.³⁴⁸ However, Indonesia's argument does not meet the standard of Article XX(a).

253. Indonesia has not demonstrated that the objective of the measure is to protect public morals or the religious beliefs of the Indonesian people. Again, the bare assertion of an objective is insufficient to demonstrate that this is the objective of the measure.³⁴⁹ Indeed, New Zealand does not consider that preventing consumer deception regarding the halal status of horticultural products is the real objective of the restrictions on use, sale, and distribution of imported horticultural products. There is no reference to halal in the relevant legal instruments through which the measure is implemented and, to New Zealand's knowledge, Indonesia has no halal certification requirements for imported horticultural products.

³⁴² Indonesia's first written submission, paras. 90 and 156.

³⁴³ Panel, *Turkey – Rice*, para. 7.120. See also, Panel Report, *India – Autos*, para. 7.270 stating that there need not be a precise numerical limit for a measure to constitute a restriction.

³⁴⁴ See Section III.B(f)(i) above.

³⁴⁵ See New Zealand's first written submission, paras. 361-363.

³⁴⁶ Indonesia's first written submission, para. 158; Indonesia's first opening statement, para. 34.

³⁴⁷ Indonesia's first written submission, para. 187.

³⁴⁸ Indonesia's first written submission, para. 159.

³⁴⁹ Appellate Body Report, *EC – Seal Products*, para. 5.144.

254. Even if the first element of Article XX(a) were satisfied, Indonesia has not explained why the measures are "necessary to protect public morals". Indeed, the design of the measure suggests otherwise. Indonesia's measure forbids an importer designated as an RI from selling imported horticultural products directly to consumers or retailers, instead requiring it to trade and/or transfer such products to a distributor.³⁵⁰ However, there is no restriction on such products being on-sold in traditional markets by the distributor. Therefore, Indonesia's claim that the measure is necessary to prevent consumer deception in traditional open-air markets does not make sense since imported horticultural products *can* be sold in traditional open-air markets. Further, Indonesia does not even attempt to justify on halal grounds the prohibition on PIs trading or transferring horticultural products imported as raw materials or supplementary materials for industrial production processes.

255. Accordingly, in New Zealand's view, Indonesia's restrictions on the use, sale and distribution of imported horticultural products make no contribution to the protection of public morals though ensuring people in Indonesia are not deceived into purchasing non-halal products. Indonesia has not demonstrated that the measure is "necessary" under Article XX(a).

256. In other defences under Article XX, Indonesia conflates its defences under Article XX(b) and Article XX(d) and argues that its measure "is necessary to protect human, animal, and plant life or health, and to secure compliance with Indonesia's food safety requirements in accordance with Article XX subparagraphs (b) and (d)".³⁵¹ It claims that by limiting the distribution channels available to certain imports, "Indonesian officials with limited resources are better able to track the origin of products that contain pathogenic bacteria and therefore reduce the spread of such bacteria into the food supply of the general public".³⁵² However, Indonesia's argument again does not meet the standard of Articles XX(b) or (d).

257. In relation to **Article XX(d)**, Indonesia has not demonstrated that the restrictions on use, sale and distribution have the objective of ensuring compliance with food safety requirements. Indonesia has not provided any specificity on either the laws and regulations with which this measure is designed to ensure compliance, or on the specific provisions of those laws and regulations. Indeed its argument is based on a mere assertion of a long list of "food safety" laws and regulations, without any explanation.³⁵³ The Panel is not bound by Indonesia's vague assertions of the objective of its measure.³⁵⁴

258. Even if the first element of Article XX(d) were met, Indonesia provides no explanation as to how the restrictions which impose an additional distribution layer for imported fresh horticultural products would contribute to the objective of ensuring compliance with food safety laws and therefore whether the measure is "necessary" to achieve this objective. Indeed, adding an extra distribution layer would seem to add to the difficulty of tracing the origin of product, rather than reduce it.

³⁵⁰ See New Zealand's first written submission, para. 106 citing Article 15 of *MOT 16/2013* (Exhibit JE-8).

³⁵¹ Indonesia's first written submission, para. 160; Indonesia's first opening statement, para. 34.

³⁵² *Ibid.*

³⁵³ Indonesia's additional responses to the Panel's questions after the first substantive meeting, Question 20, para. 12.

³⁵⁴ Appellate Body Report, *EC – Seal Products*, para. 5.144.

259. It follows that Indonesia has failed to establish that its end use restrictions for horticultural products are "necessary" to secure compliance with any WTO-consistent laws and regulations.

260. Neither has Indonesia demonstrated that the restrictions have the objective of protecting human health under **Article XX(b)**. There is no evidence from the text of the regulations or their operation that the restrictions have the objective of protecting human health. Even if the first element of Article XX(b) were satisfied, Indonesia has not explained how the measure contributes to the objective of protecting human health. There is no evidence that the requirements would reduce the spread of pathogens into the food supply of the general public and thereby contribute to the objective of human health. The requirements add an extra distribution layer for fresh horticultural products imported for consumption. This would seem to add to the difficulties of tracking pathogens in the food supply.

261. This measure's lack of contribution to the objectives in Article XX(a), (b) and (d) weighed against its significant trade-restrictiveness, leads to the conclusion that it is not "necessary" in terms of Article XX. In these circumstances, New Zealand is not required to elaborate on an alternative measure. However, New Zealand suggests that a less trade-restrictive alternative measure might involve public education programmes on the importance of safe food handling and for the Indonesian Government to take any practicable further steps to improve the standards of hygiene at traditional markets, for both imported and domestic products.

(iv) *Article III:4 of the GATT 1994*

262. Indonesia does not appear to contest that the restrictions on the use, sale and distribution of imported horticultural products fall within the meaning of Article III:4 of the GATT 1994, but rather relies on defences under Article XX of the GATT.³⁵⁵ In doing so Indonesia appears to understand the New Zealand argument as challenging restrictions on the sale of fresh horticultural products in traditional, open-air Indonesian markets.³⁵⁶ However, New Zealand understands that fresh imported horticultural products are not prohibited from sale in traditional, open-air Indonesian markets. Rather, fresh horticultural products imported by a RI must be transferred to a distributor and RIs are prohibited from trading or transferring the horticultural products directly to consumers or retailers.³⁵⁷ Similarly a PI 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 products.³⁵⁸ No such restriction is imposed on the like domestic product.

263. Indonesia seeks to rely on defences under Article XX(a) as the measures "aim to ensure that non-Halal foods are kept out of traditional Indonesian markets" and under

³⁵⁵ Indonesia's first written submission, para. 187.

³⁵⁶ Ibid.

³⁵⁷ New Zealand first written submission, paras. 106-108.

³⁵⁸ Ibid.

Article XX(b) as "they are an integral part of Indonesia's food safety and security plan". As New Zealand has explained above, Indonesia has not demonstrated that the use, sale and distribution restrictions have the objective either of protecting public morals or religious beliefs, or of protecting human, plant, or animal life or health.³⁵⁹ Neither does the measure make a contribution to either objective and accordingly it is not "necessary" under these paragraphs of Article XX.

(g) Reference prices for chili and shallots

(i) Article XI:1 of the GATT 1994

264. Contrary to the evidence presented by the Complainants, Indonesia contends that the reference price for chili and shallots, "is not applied to individual entries" and does not prevent individual imports of chilli and shallots from entering the Indonesian market: through the application of a "threshold" price; through the application of additional duties; "or by denying entry outright".³⁶⁰ Such claims are not factually correct.

265. The statistics presented by Indonesia indicate that no imports of chili took place in February, March and April of 2015.³⁶¹ The domestic price of big red chili in these months was lower than the reference price and therefore imports would have been "postponed".³⁶² Similarly there were no imports of shallots in January 2015 when the domestic price was lower than the reference price.³⁶³ Indonesia has conceded that the reference price system for chili and shallots was in place in 2015.³⁶⁴ However, the substantial drop in imports of chili from 5349.5 tonnes in 2011 to 29.5 tonnes in 2014, when the domestic price of chili was mostly lower than the reference price, provides support for the argument that the reference price system has a limiting effect on imports.³⁶⁵ Indeed, the evidence shows that the reference price operates in a manner which ensures that imports are prevented from entering Indonesia.

266. Accordingly, Indonesia has failed to rebut the *prima facie* case presented by the Complainants that the reference price system for chili and shallots has a limiting effect on imports contrary to Article XI:1 of the GATT 1994.

(ii) Article 4.2 of the Agreement on Agriculture

267. New Zealand has argued that the reference price system for chili and shallots is a "minimum import price" within the meaning of footnote 1 of Article 4.2 of the Agreement on

³⁵⁹ Section III.B(f)(iii).

³⁶⁰ Indonesia's first written submission, para. 154.

³⁶¹ Import Statistic of Horticultural Products (Exhibit IND-29).

³⁶² Chili And Shallot Prices (Exhibit IND-31).

³⁶³ Import Statistic of Horticultural Products (Exhibit IND-29) and Chili And Shallot Prices (Exhibit IND-31). As Indonesia has not provided monthly import statistics, it is not possible to make a monthly comparison for all chili and shallot products.

³⁶⁴ Indonesia's additional responses to the Panel's questions after the first substantive meeting, Question 37.

³⁶⁵ See Import Statistic of Horticultural Products (Exhibit IND-29) and Chili And Shallot Prices (Exhibit IND-31).

Agriculture, or a "quantitative import restriction" or a similar border measure. Indonesia attempts to argue that Indonesia's reference price system "does not share the essential attributes of a minimum import price scheme" because it does not include an "additional duty" levied on individual imports.³⁶⁶ As explained in New Zealand's responses to the Panel's questions, the reference price system for chili and shallots meets the meaning of a minimum import price as identified by the WTO Appellate Body.³⁶⁷

268. Indonesia goes on to argue that its reference price system for chili and shallots "does not operate to prevent individual entries below a 'minimum import price'".³⁶⁸ However, this is exactly how the reference price system for chili and shallots operates. If the domestic price falls below a certain level, imports are "postponed" or in other words prohibited. To claim, as Indonesia does, that the reference price system has "no impact on trade",³⁶⁹ ignores the reality of the import statistics presented by Indonesia.³⁷⁰

269. Additionally, Indonesia claims that the reference price system for chili and shallots does not impede the transmission of world market prices to the domestic market.³⁷¹ As New Zealand has submitted in its responses to questions from the Panel, the reference price for chili and shallots insulates the domestic price from world prices by prohibiting imports when the domestic price falls below a threshold price.³⁷² Accordingly, for the reasons submitted in New Zealand's first written submission,³⁷³ the reference price for chili and shallots is a minimum import price or similar border measure that is maintained contrary to Article 4.2 of the Agreement on Agriculture.

(iii) *Article XX of the GATT 1994*

270. Indonesia's alternative defence in respect of its measure limiting imports of chili and shallots when the domestic price falls below the reference price is based on Article XX(b). Indonesia argues that the measure "is an integral part of Indonesia's food safety and security plan".³⁷⁴ It also claims that the reference price system for chili and shallots is one tool that it uses to protect against the "harmful oversupply" of perishable food items which can spoil in the equatorial heat, and the consequences of extreme price volatility on the availability of a continuous supply of fresh chili and shallots given the importance of the product in Indonesia's food supply.³⁷⁵ It is, according to Indonesia, "a limited tool used to respect to immediate threats to the Indonesian food supply".³⁷⁶ However, Indonesia's argument does not meet the standard of Article XX(b).

³⁶⁶ Indonesia's first written submission, para. 92.

³⁶⁷ New Zealand's responses to the Panel's questions after the first substantive meeting, Question 39 and 61.

³⁶⁸ Indonesia's first written submission, para. 93.

³⁶⁹ Ibid.

³⁷⁰ Import Statistic of Horticultural Products (Exhibit IND-29).

³⁷¹ Indonesia's first written submission, para. 93.

³⁷² New Zealand's responses to the Panel's questions after the first substantive meeting, Question 61, para. 123.

³⁷³ New Zealand's first written submission, paras. 364-369.

³⁷⁴ Indonesia's first written submission, para. 155; Indonesia's responses to the Panel's questions after the first substantive meeting, Question 18, para. 19.

³⁷⁵ Indonesia's responses to the Panel's questions after the first substantive meeting, Question 18, paras. 18 and 19.

³⁷⁶ Indonesia's responses to the Panel's questions after the first substantive meeting, Question 18, para. 20.

271. First, Indonesia has not demonstrated that the protection of human health is, in fact, the objective of its reference price measure for chili and shallots. No details of Indonesia's "food safety and security plan" have been provided. The Decree stipulating the reference price for chili and shallots states that the reference price "is used as instrument [sic] for consumption, taking into account harvest season and availability of domestic supply".³⁷⁷ Contrary to Indonesia's claim, the evidence shows that the purpose of the measure is in fact "to protect domestic horticultural farmers".³⁷⁸

272. Even if the first element of Article XX(b) were satisfied, Indonesia has not explained how the measure contributes to the protection of human health. It has supplied no evidence of the "harmful oversupply" of chili and shallots, in particular what harms have been caused or that this measure was designed to address them. Nor has Indonesia described how this measure, which operates to prevent the importation of chili and shallots when the market price for such products falls below the reference price, could in any way improve the problems, as claimed by Indonesia, of "food insecurity", "under-nutrition in Indonesia's poorer communities", "stunting" or "chronic malnutrition that results in underdevelopment".³⁷⁹ There is no genuine relationship of ends and means between the objective pursued and the measure at issue and no evidence of a contribution of that measure to the objective.

273. Accordingly, Indonesia has failed to establish that a reference price requirement for chili and shallots is "necessary" for the purposes of protecting human health. This is particularly the case given the trade-restrictiveness of the measure. As has been demonstrated by New Zealand, the measure operates to prevent the importation of chili and shallots.³⁸⁰ This trade-restrictiveness outweighs any contribution the measure might make to the protection of human health.

274. Although New Zealand does not consider that it is necessary to elaborate on a less trade-restrictive alternative measure, one alternative that would address the immediate concern identified by Indonesia is to undertake a public education programme on the safe storage of food. New Zealand also considers that allowing market forces to operate would be a more effective (and less trade-restrictive) way to ensure Indonesia has a continuous supply of fresh chili and shallots.

275. For these reasons, Indonesia's attempt to rely on Article XX(b) in relation to its reference price system for chili and shallots should be rejected.

³⁷⁷ Reference Price Government Decree (Exhibit NZL-58), third stipulation.

³⁷⁸ "Horticultural Import Policy in Indonesia" *FFTC Paper*, (Exhibit NZL-59), para. 3.

³⁷⁹ Indonesia's responses to the Panel's questions after the first substantive meeting, Question 18, paras. 19-20.

³⁸⁰ New Zealand's first written submission, paras. 259-262.

(h) Six month harvesting requirement

(i) Article XI:1 of the GATT 1994

276. Indonesia appears to concede that its prohibition on the import of horticultural products harvested more than six months previously is a ban on importation, but argues that this requirement does not limit imports because imported product can be stored in Indonesia instead.³⁸¹ In doing so, Indonesia fails to have regard to the meaning of the term "prohibition" in Article XI:1 of the GATT 1994 which is considered by the WTO Appellate Body to be a "legal ban on the trade or importation of a specified commodity".³⁸² The six month harvesting requirement operates as a prohibition on imports of horticultural products and therefore falls within the scope of Article XI:1 of the GATT. Indonesia has not sought to rebut the *prima facie* case established in New Zealand's first written submission that this requirement is a "prohibition" or "restriction" under Article XI:1 of the GATT 1994.³⁸³

(ii) Article 4.2 of the Agreement on Agriculture

277. In respect of the six month harvesting requirement, Indonesia has advanced the same arguments under Article XI:1 and Article 4.2.³⁸⁴ New Zealand demonstrated above that the measure has a limiting effect on importation and thus constitutes a restriction under Article XI:1 of the GATT 1994.³⁸⁵ For the same reasons the measure also constitutes a "quantitative import restriction" or "similar border measure" under footnote 1 to Article 4.2 of the Agreement on Agriculture.³⁸⁶ Therefore, it is a measure of a kind that has been required to be "converted into ordinary customs duties" and is therefore inconsistent with Article 4.2 of the Agreement on Agriculture.

(iii) Article XX of the GATT 1994

278. Indonesia's alternative defence in respect of the six month harvesting requirement is based on Article XX(b). Indonesia claims the measure has been implemented "for reasons of food safety" and to "guarantee the safety of its food supply".³⁸⁷ While admitting that horticultural products may be stored for more than six months, Indonesia adds that its health authorities "prefer" such products to be stored locally so they can be "readily inspected to ensure quality".³⁸⁸ However, Indonesia's argument does not meet the standard of Article XX(b).

279. First, Indonesia has not demonstrated that the objective of the measure is in fact to protect human health. It has made a bare assertion of this objective without any evidence in

³⁸¹ Indonesia's first written submission, paras. 88 and 150-152.

³⁸² Appellate Body Report, *China – Raw Materials*, para. 319.

³⁸³ New Zealand's first written submission, paras. 268-270.

³⁸⁴ Indonesia's first written submission, paras. 88 and 150-152.

³⁸⁵ See Section III.B(h)(i).

³⁸⁶ New Zealand's first written submission, paras. 370-371.

³⁸⁷ Indonesia's first written submission, paras. 88 and 151

³⁸⁸ Ibid.

support. In New Zealand's view, a consideration of the design and structure of the regulations does not demonstrate that the policy objective of the six month harvesting requirement was for the purpose of protecting human health as Indonesia claims. The purpose of the Indonesian regulations in which the six month harvesting requirement is contained as a prerequisite for obtaining a RIPH, is stated as being to "increase the effectiveness and efficiency of horticulture product import management" and "provide certainty in RIPH issuing service".³⁸⁹ As New Zealand has submitted, the underlying rationale of the Indonesian requirements is to promote domestic production at the expense of imports.³⁹⁰

280. Second, even if the first element of Article XX(b) were satisfied, Indonesia has not explained why the measure is necessary to protect human health or how it makes a contribution to food safety. Indonesia's argument is contradictory. It argues that Indonesia's equatorial climate affects food safety, yet claims that it is better to store products in Indonesia.³⁹¹ It also argues on the one hand that it has "limited capacity" to store imported horticultural products,³⁹² and on the other hand in relation to its argument on the six month harvesting period, that "storage capacity is already available in Indonesia for importers who wish to store horticultural products for longer than 6 months".³⁹³ No evidence has been produced by Indonesia to support either proposition.

281. Even if, for the sake of argument, the measure did contribute to the protection of human health by way of enhanced food safety, the trade-restrictiveness of the measure outweighs any contribution that the measure might make to protecting human health. As New Zealand has explained, the six month harvest requirement for horticultural products is an absolute prohibition on imports of horticultural products harvested more than six months previously.³⁹⁴ It follows that, when relevant factors are weighed and balanced, Indonesia has not established that a six month harvest requirement is "necessary" for the purposes of human health.

282. For the reasons set out above, New Zealand does not consider it is necessary to elaborate on a less trade-restrictive alternative measure. However, New Zealand notes that Indonesia already requires a health certificate and phytosanitary certificate for fresh horticultural products. Indonesia has not explained why these requirements, which seem to be designed precisely to achieve the objective Indonesia claims for its six month harvesting requirement, would not be adequate to ensure imported horticultural products are safe. Accordingly, New Zealand suggests these existing requirements should be considered as less trade-restrictive alternative measures.

³⁸⁹ Article 3, *MOA 86/2013* (Exhibit JE-15).

³⁹⁰ New Zealand's first written submission, paras. 70-71.

³⁹¹ Indonesia's first written submission, paras. 88 and 151.

³⁹² Indonesia's first written submission, para. 148.

³⁹³ Indonesia's first written submission, paras. 88 and 151.

³⁹⁴ New Zealand's first written submission, paras. 268-270.

(i) The import licensing regime for horticultural products "as a whole"

(i) Article XI:1 of the GATT 1994

283. Indonesia claims that because the constituent parts of Indonesia's import licensing regime are not quantitative restrictions, the regime as a whole is not a quantitative restriction.³⁹⁵ However, as New Zealand has demonstrated in its first written submission, Indonesia's import licensing regime for horticultural products "as a whole" has a limiting effect on imports contrary to Article XI:1 of the GATT 1994.³⁹⁶

284. Indonesia also claims that the Complainants "have failed to present sufficient pre- and post-implementation data" to support the argument that the regime as a whole restricts imports of horticultural products.³⁹⁷ In doing so Indonesia has again sought to rely on a false premise that quantification of trade effects is necessary for a breach of Article XI:1 to be found. However, as New Zealand has submitted, this view is contrary to established WTO jurisprudence.³⁹⁸

(ii) Article 4.2 of the Agreement on Agriculture

285. Indonesia has adopted the same arguments under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture in respect of the import licensing regime for horticultural products as a whole.³⁹⁹ For the same reasons elaborated above and in earlier submissions, Indonesia's regime "as a whole" is contrary to Article 4.2 of the Agreement on Agriculture.

(iii) Article XX of the GATT 1994

286. Indonesia's alternative defence in respect of the import licensing regime for horticultural products "as a whole" is based on Articles XX(a), (b) and (d).⁴⁰⁰ There is no further elaboration of the basis of the defence, including identification of the specific objective(s) for which Indonesia alleges the measure was adopted, evidence that the measure was adopted for those objectives, or explanation why the measure is necessary to protect against or secure compliance with those objectives. Indonesia's argument therefore fails to meet the standard of Articles XX(a), (b) and (d). Indeed, Indonesia's response is "patently undeveloped".⁴⁰¹

287. For the sake of argument, New Zealand assumes that Indonesia intended to rely on its Article XX arguments in relation to the individual measures. For that purpose, New Zealand repeats its Article XX responses in respect of each individual measure. Indonesia has failed to

³⁹⁵ Indonesia's first written submission, para. 95.

³⁹⁶ New Zealand's first written submission, paras. 271-277.

³⁹⁷ Indonesia's first written submission, para. 95.

³⁹⁸ See Section II(a) above.

³⁹⁹ Indonesia's first written submission, paras. 95 and 162.

⁴⁰⁰ Indonesia's first written submission, paras. 95 and 162.

⁴⁰¹ Appellate Body Report, *Thailand – Cigarettes*, para. 179.

establish that protection of public morals or life and health, or securing compliance with GATT 1994 consistent laws or regulations is an objective pursued by any of the individual measures, as is required under the first element of Articles XX(a), (b) or (d). It follows that Indonesia has also failed to establish the import licensing regime as a whole is justified under Article XX. In addition, even if Indonesia had established the first element of Article XX(a), (b) or (d), the restrictions would not meet the "necessary" standard, for the reasons New Zealand has articulated in relation to each individual measure.

288. Moreover, Indonesia fails to address New Zealand's argument that the individual components of Indonesia's import licensing regime for horticultural products (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.⁴⁰² New Zealand's first opening statement, its responses to questions from the Panel and this submission all demonstrate that none of these measures are individually justified under Article XX of the GATT 1994. For those same reasons, the import licensing regime for horticultural products "as a whole" is not justified under Article XX.

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

(i) Article XI:1 of the GATT 1994

289. Indonesia submits that the domestic sufficiency restrictions imposed on animals, animal products and horticultural products serve only as a general statement of Indonesia's commitment to food security and "are not 'measures' that have any impact on imports".⁴⁰³ Indonesia also criticises the Complainants for not presenting "any evidence that these provisions have had an adverse impact on trade flows".⁴⁰⁴

290. First, as New Zealand described in its first written submission, the provisions of Indonesia's laws that restrict importation based on the sufficiency of domestic production are much more than "general statements of Indonesia's commitment to food security". In reality, the provisions create mandatory and enforceable obligations (in one instance backed by criminal penalties for non-compliance)⁴⁰⁵ which (a) directly prohibit certain products in certain circumstances; and (b) restrict imports by creating uncertainty for importers as to when imports will be permitted.⁴⁰⁶

291. The domestic sufficiency restrictions challenged in this dispute are clearly "measures" which may be challenged by the Complainants. The legislative provisions cited by New Zealand as establishing the domestic sufficiency restrictions are framed in mandatory

⁴⁰² New Zealand's first written submission, paras. 274-276.

⁴⁰³ Indonesia's first written submission, para. 161.

⁴⁰⁴ Indonesia's first written submission, para. 161.

⁴⁰⁵ Article 101, *Farmers Law* (Exhibit JE-3) (stating that "Every Person importing Agricultural Commodities during the availability of sufficient domestic Agricultural Commodities for consumption and/or Government food reserves as intended in Article 30 paragraph (1) shall be punished with imprisonment of at most 2 (two) years and a fine of at most Rp 2.000.000.000,00 (two billion rupiah)").

⁴⁰⁶ New Zealand's first written submission, paras. 287-295.

terms, and state that importation is prohibited unless domestic supply is insufficient.⁴⁰⁷ Accordingly, the provisions are express and complete prohibitions on importation, conditional only on the level of domestic production of certain products. They are not "general statements" but binding legal obligations that limit importation.

292. The Complainants have also provided a range of examples where the domestic sufficiency measure has been invoked in practice to prohibit or restrict imports.⁴⁰⁸ The measure permeates all aspects of Indonesia's licensing regimes for animals, animal products and horticultural products and constitutes the root of Indonesia's WTO-inconsistent import regime.⁴⁰⁹

293. Irrespective of these examples, which demonstrate that the domestic sufficiency restrictions have been applied, and continue to be applied, to expressly limit imports, WTO jurisprudence is also clear that measures may be challenged as such, irrespective of their application in a particular case. As the Appellate Body explained in *US-Corrosion-Resistant Steel Sunset Review*, challenges on an *as such* basis to "acts setting forth rules or norms that are intended to have general and prospective application" are permitted in order to "protect not only existing trade, but also the security and predictability needed to conduct future trade".⁴¹⁰ The ability of Members to challenge such measures helps avoid multiplicity of litigation, and prevents future disputes by allowing "the root of WTO-inconsistent behaviour to be eliminated".⁴¹¹

294. As New Zealand has detailed, however, the domestic insufficiency condition does not only limit imports when domestic supply is deemed sufficient to meet domestic demand. Rather, the constant uncertainty created for importers as to when imports will be permitted or prohibited means that importers are unable to plan and invest in imports. Importers are constantly at risk that the importation of particular products will be prevented based on domestic supply, thus creating an unstable environment for trade. Uncertainty of this kind has been held by a number of panels to constitute a restriction on importation that is inconsistent with Article XI:1 of the GATT.⁴¹² This was summarised by the panel in *Argentina - Import Measures* which noted:

⁴⁰⁷ See Article 30, *Farmers Law* (Exhibit JE-3) (stating that "Every person is prohibited from importing Agricultural Commodities when the availability of domestic Agricultural Commodities is sufficient"); Article 36, *Food Law* (Exhibit JE-2) (stating that "Import of Food can only be done if the domestic Food Production is insufficient" and/or if products are not "produced domestically"); Article 36B, *Animal Law Amendment* (Exhibit JE-4) (stating "Import of animals or cattle and animal products from foreign countries shall be done if local production and supply of animals or cattle and animal products is not sufficient to fulfil consumption needs of the society"); Article 33(1)-(2), *Horticulture Law*, (Exhibit JE-1) (stating that horticultural business in Indonesia "shall be carried out by giving priority to the use of domestic horticultural means" and that "[i]n case domestic horticultural means are not sufficient or available, horticultural means originating from abroad may be used").

⁴⁰⁸ New Zealand's first written submission, para. 291; and United States' first written submission, para. 371.

⁴⁰⁹ See, for example: New Zealand's first written submission, paras. 15-18; and 67-71.

⁴¹⁰ Appellate Body Report, *US-Corrosion-Resistant Steel Sunset Review*, para. 82.

⁴¹¹ *Ibid.*

⁴¹² Panel Report, *Colombia - Ports of Entry*, para. 7.240; and Panel Report, and *Argentina – Import Measures*, para. 6.260.

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.⁴¹³

295. Finally, as New Zealand has described previously, it is not necessary for a measure to have an impact on trade flows in order to be inconsistent with Article XI:1, as the limiting effect of a measure may be demonstrated through its design, architecture and structure.⁴¹⁴

(ii) *Article 4.2 of the Agreement on Agriculture*

296. Indonesia has not introduced any rebuttal to New Zealand's submission that Indonesia's restrictions based on the sufficiency of domestic production constitute a "quantitative import restriction" or "similar border measure" under Article 4.2 of the Agreement on Agriculture.⁴¹⁵ Accordingly Indonesia has not rebutted the *prima facie* case established by New Zealand that the measure is inconsistent with Article 4.2 of the Agreement on Agriculture.

(iii) *Article XX of the GATT 1994*

297. Indonesia's alternative defence in respect of the prohibitions and restrictions imposed by the legislative provisions regarding the sufficiency of domestic production is based on Article XX(b). Indonesia asserts that this measure falls within the general exception for protection of human, animal, and plant life or health.⁴¹⁶ However, Indonesia's argument does not meet the standard of Article XX(b).

298. Indonesia has not demonstrated that protection of human, animal or plant life or health is an objective pursued by the measure, as is required under the first element of Article XX(b). Indeed New Zealand has shown that the true objective of the domestic insufficiency condition is to limit imports when domestic production is deemed sufficient to meet domestic demand.⁴¹⁷

299. Even if the first element of Article XX(b) were satisfied, Indonesia has failed to establish that the measure is "necessary" to protect human, animal and plant life or health. It cannot be said that the trade-restrictive effects of the domestic insufficiency condition are outweighed by a non-existent contribution to the protection of human, animal and plant life or health. New Zealand accepts that Indonesia is entitled to encourage local production in the interests of promoting food security. But it must do so consistently with the WTO Agreement.

⁴¹³ Panel Report, *Argentina – Import Measures*, para. 6.260.

⁴¹⁴ Appellate Body Report, *Argentina – Import Measures*, para. 5.217.

⁴¹⁵ New Zealand's first written submission, paras. 376-380.

⁴¹⁶ Indonesia's first written submission, para. 161.

⁴¹⁷ See New Zealand's first written submission, paras. 285-298.

IV. ARTICLE XX CHAPEAU

300. Even if Indonesia had shown that any of the challenged measures were "necessary" to achieve one of the objectives covered in paragraphs (a), (b) or (d) of Article XX, Indonesia would still have to show that the measure was applied consistently with the Article XX chapeau. Indonesia has failed to do so. Indeed, Indonesia has barely mentioned the chapeau to Article XX in its submissions.⁴¹⁸

301. The chapeau's function is to prevent abuse or misuse of a Member's right to invoke the exceptions contained in Article XX's paragraphs.⁴¹⁹ The party invoking Article XX has the burden of showing that a measure is applied consistently with the chapeau.⁴²⁰ Thus, Indonesia would have to demonstrate that any measure justified under an Article XX paragraph is not a disguised restriction on trade. Indonesia must also demonstrate that the measure does not discriminate "between countries where the same conditions prevail", including between Indonesia and other Members, and that such discrimination is not "arbitrary or unjustifiable". In *US – Gasoline*, the Appellate Body held that the concepts of "disguised restriction on international trade" and "arbitrary or unjustifiable discrimination" are related concepts which "impart meaning to one another".⁴²¹

302. Whether a measure is applied consistently with the chapeau requires an objective determination based, most often, on the "design, the architecture, and the revealing structure of a measure".⁴²² The Appellate Body has described the burden of demonstrating that a measure provisionally justified under one of the exceptions of Article XX does not constitute an abuse of such an exception under the chapeau as a "heavier task than that involved in showing that an exception ... encompasses the measure at issue".⁴²³

303. As New Zealand has set out fully in its submissions, the text, structure and history of the import licensing regulations and the framework legislation pursuant to which Indonesia's import licensing regimes were established, show that the actual purpose of the challenged measures is to restrict imports of agricultural products when domestic production is deemed sufficient as part of Indonesia's policy to achieve self-sufficiency in food.⁴²⁴ For example, Indonesia's *Animal Law* states that importation of animals and animal products should only be done "if domestic production and supply of Livestock and Animal Product has not fulfill public consumption".⁴²⁵ Similarly, Indonesia's *Food Law* provides that imports of food are only allowed to the extent of any domestic shortfall.⁴²⁶ Indonesia's *Farmers Law* also

⁴¹⁸ The sole reference to the chapeau is at para. 124 of Indonesia's first written submission. In *Thailand – Cigarettes*, the Appellate Body noted the fact that Thailand had only referred to the chapeau once, concluding that "[t]his cannot suffice to establish that the additional administrative requirements fulfil the requirements of the chapeau of Article XX" (para 179).

⁴¹⁹ Appellate Body Report, *EC – Seal Products*, para. 5.297.

⁴²⁰ Ibid.

⁴²¹ Appellate Body Report, *US – Gasoline*, p. 23.

⁴²² Appellate Body Report, *EC – Seal Products*, para. 5.302.

⁴²³ Appellate Body, *US – Gasoline*, p. 23.

⁴²⁴ New Zealand's first written submission, paras. 2, 15-18, 67-71.

⁴²⁵ Article 36B(1), *Animal Law Amendment* (Exhibit JE-5).

⁴²⁶ Articles 14, 36, *Food Law* (Exhibit JE-2).

prohibits importation of agricultural commodities when the availability of domestic agricultural commodities is sufficient for consumption and/or government food reserves.⁴²⁷ The import licensing regimes at issue are implemented through regulations made under these overarching laws. These regulations carry into effect, through the measures at issue, the self-trade-restricting objectives in these laws.

(a) Indonesia's measures are applied in a manner which constitutes a disguised restriction on international trade

304. Indonesia has failed to discharge its burden to show that its measures do not constitute disguised restrictions on international trade.

305. New Zealand has identified that the real purpose of each of Indonesia's measures is as part of a regime designed to restrict imports of agricultural products where domestic production is deemed sufficient to fulfil domestic demand.⁴²⁸

306. Indonesia's measures are "disguised" restrictions in the sense that Indonesia has invoked Article XX to justify them. The measures are "taken under the guise of" measures formally within the terms of an exception listed in Article XX.⁴²⁹ New Zealand has demonstrated, in its measure-by-measure responses above, that in each case Indonesia has failed to make a *prima facie* case that Article XX applies. Therefore the justification adopted by Indonesia for its measures can be seen for what it is, a disguised form of trade restriction. Indeed, there are numerous indications that Indonesia's genuine purpose for its measures is to limit importation of agricultural products.⁴³⁰

(b) Indonesia's measures are applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail

307. In *US – Shrimp*, the Appellate Body set out the three elements that comprise arbitrary or unjustifiable discrimination between countries where the same conditions prevail, for the purposes of Article XX.⁴³¹ They are: (1) the application of the measure must result in discrimination; (2) the discrimination must be arbitrary or unjustifiable in character; and (3)

⁴²⁷ Article 30(1), *Farmers Law* (Exhibit JE-3).

⁴²⁸ See New Zealand's first written submission, **for animals and animal products**: paras. 138-145 (prohibition on imports of certain animals and animal products), paras. 147-153 (limited application windows and validity period), paras. 157-162 (Fixed Licence Terms), paras. 167-171 (80% realisation requirement), paras. 176-178 (prohibitions and restrictions on use, sale and distribution), paras. 181-187 (domestic purchase requirement), paras. 195-197 (beef reference price), and para. 200 (regime as a whole); **for horticultural products**: paras. 214-218 (limited application windows and validity periods), paras. 224-226 (fixed licence terms), paras. 232-236 (80% realisation requirement), paras. 237-242 (restrictions based on Indonesian harvest periods), paras. 244-250 (storage ownership and capacity), paras. 252-258 (restrictions on use, sale and distribution), paras. 260-267 (reference prices for chili and shallots), paras. 269-270 (six month harvesting requirement), paras. 274-276 (regime as a whole); **domestic insufficiency condition**: paras. 287-295.

⁴²⁹ Appellate Body Report, *US – Gasoline*, p. 23.

⁴³⁰ See, for example, the references in New Zealand's first written submission, at paras. 18, 69, 97, 132, 186, 262. See also fn. 428 above.

⁴³¹ Appellate Body Report, *US – Shrimp*, para. 150.

the discrimination must occur between countries where the same conditions prevail. As Indonesia has the burden of proving its claim that Article XX provides a justification for each of its measures, it must demonstrate that each of these elements does not apply. It has not done so.

308. Indonesia has not demonstrated that any of the measures at issue apply in respect of domestic products. Nor has it explained any rational basis for discriminating between domestic and local products. For example, Indonesia has offered no explanation of why it restricts the use, sale and distribution of imported products alone. In relation to the third element, Indonesia makes frequent reference to its equatorial climate. But this does not justify, for example, the Indonesian harvest period measure, as the same climatic conditions prevail for imported and domestic products, once they are in Indonesia.

309. Accordingly, Indonesia has not only failed to establish that its measures are necessary to protect or secure compliance with the objectives in paragraphs (a), (b) or (d) of Article XX. It has also failed to discharge its burden of demonstrating that its measures meet the requirements of the chapeau to Article XX. Indeed it has failed to address those requirements at all. Its Article XX defences must therefore fail.

V. CONCLUSION

310. For the reasons outlined in this submission, and the earlier submissions made by New Zealand in this dispute, New Zealand requests that the Panel recommend to the Dispute Settlement Body that Indonesia brings its measures into conformity with its WTO obligations.

Annex 1: Indonesian imports of beef and offal products

Figure A

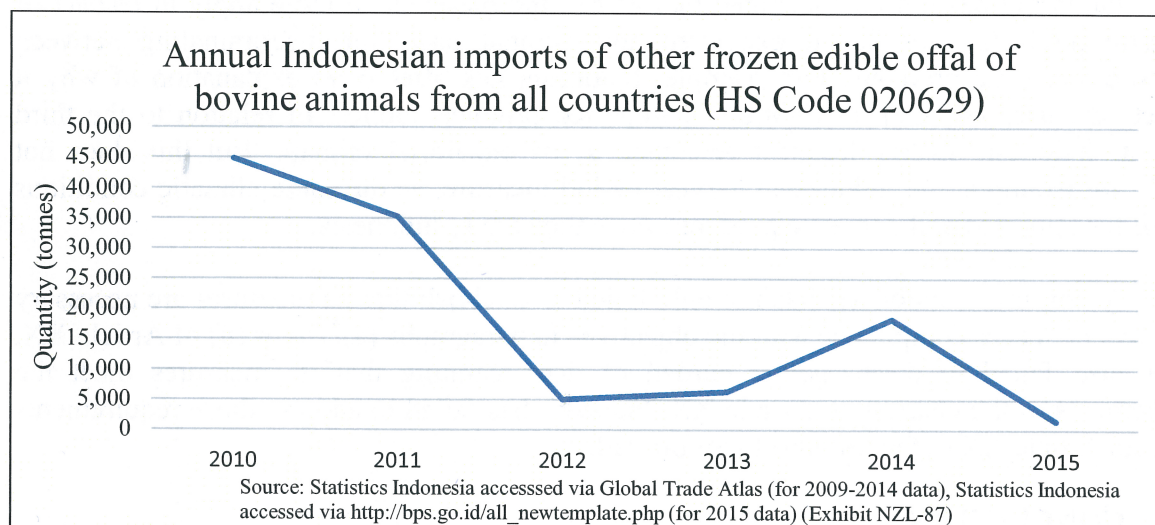


Figure B

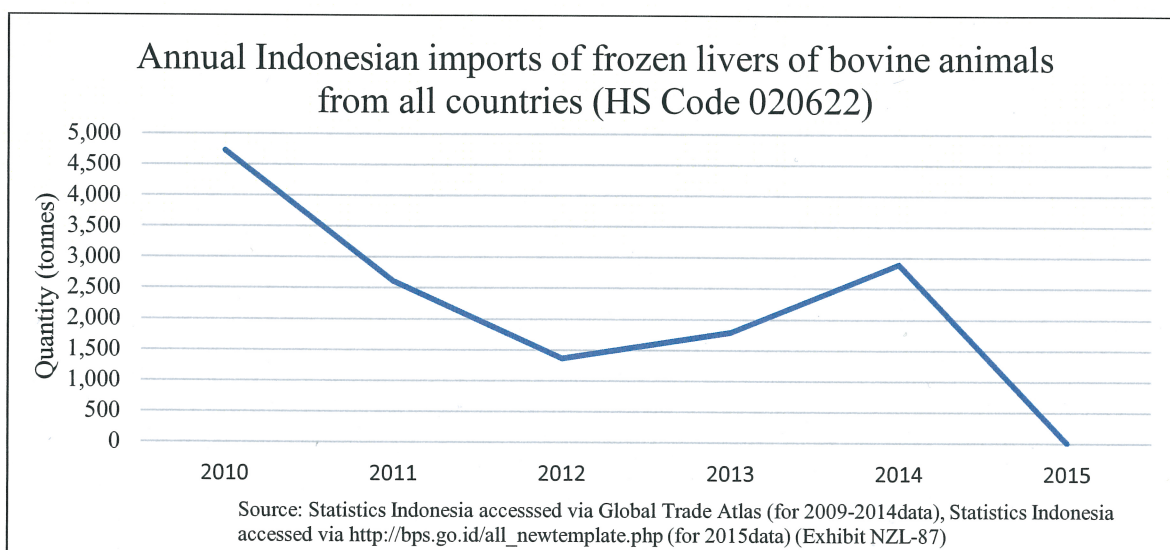


Figure C

