BEFORE THE APPELLATE BODY
OF THE WORLD TRADE ORGANIZATION

Indonesia — Importation of Horticultural Products, Animals and Animal Products
(DS477 / DS478)

(AB–2017–2)

OPENING STATEMENT OF NEW ZEALAND

28 August 2017

I. Introduction

1. Good morning Members of the Appellate Body, staff of the Secretariat, colleagues from Indonesia, the United States and Third Participants. May I begin by congratulating Indonesia on the 72nd anniversary of its independence celebrated on 17 August. New Zealand and Indonesia are close friends. 2018 will mark the 60th anniversary of our diplomatic relations.

2. However, even close friends can have an occasional disagreement.

3. New Zealand appears before you today because we are a small country heavily reliant on our agricultural export sector. In 2010, Indonesia represented New Zealand's second largest market for beef and offal exports by volume.[1] Unfortunately, since the introduction of Indonesia's restrictions, those exports have fallen by 84 percent. Our horticulture exports have also been held back.[2] The accumulated, year-on-year, trade impact for our beef sector alone is now estimated to be between 0.5 and 1 billion New Zealand dollars.[3]

4. This dispute concerns 18 measures which prohibit and restrict imports of animals, animal products and horticultural products into Indonesia. The Panel found that all 18 measures are inconsistent with Article XI:1 of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) and that none were justified under its Article XX exceptions.

5. In reaching those conclusions, the Panel found that the "actual policy objective" behind each and every measure is to "achieve self-sufficiency through domestic production by way of restricting and, at times, prohibiting imports".[4]

6. On appeal, Indonesia does not challenge these findings. This appeal is therefore unusual as it is limited to questions of form. The substance of the Panel's analysis and the WTO-inconsistency of the measures are not under appeal. It is therefore unnecessary to determine every ground of appeal to secure a positive solution to the dispute.

[1] New Zealand's first opening statement before the Panel, paras. 4 and 5 referring to Figure 7 and Exhibit NZL-5.
[2] Ibid.
[3] Ibid.
[4] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.822.

II. The Panel did not err by analysing the measures at issue under Article XI:1 of the GATT 1994

7. Indonesia's first ground of appeal is that Article XI:1 of the GATT 1994 does not apply to import restrictions *on agricultural products*. This novel argument would require the Appellate Body to find that Article 4.2 of the Agreement on Agriculture applies "to the exclusion"[5] of Article XI:1. It is an approach contrary to that taken in numerous previous WTO disputes which correctly analysed import restrictions on agricultural products under Article XI:1.[6]

8. It would also contradict established WTO jurisprudence that:

a. where a provision of the GATT 1994 can be read harmoniously with the provisions of another covered agreement, both obligations continue to apply;[7] and that

b. panels have a "margin of discretion" to structure their order of analysis as they see fit, provided it does not have "repercussions for the substance of the analysis itself".[8]

9. Contrary to Indonesia's arguments on appeal, there is no conflict between Articles XI:1 and 4.2. It is therefore not necessary to resort to Article 21.1 of the Agreement on Agriculture to determine a rigid hierarchy between those provisions.

10. Furthermore, if required, the Appellate Body could easily complete the analysis under Article 4.2.

III. The Panel did not err by finding that Indonesia bears the burden of proving a defence under Article XX of the GATT 1994

11. In its second ground of appeal, Indonesia argues that the burden of proof for an affirmative defence under Article XX of the GATT 1994 is *reversed* for agricultural

[5] Indonesia's Appellant Submission, para. 53 (emphasis original).
[6] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.33 and footnote 389 citing Panel Reports, *India – Quantitative Restrictions*, paras. 5.112–5.242; *Korea – Various Measures on Beef*, paras. 747–769; *EC – Seal Products*, paras. 7.652–7.665; *US – Poultry (China)*, paras. 7.484 – 7.487.
[7] Appellate Body Report, *Argentina – Footwear (EC)*, para. 81; Panel Report, *Indonesia – Autos*, para. 14.28.
[8] Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed–in Tariff Program,* para. 5.8; *Canada – Wheat Exports and Grain Imports*, paras. 109 and 126.

quantitative restrictions. This is another novel argument, with fundamental systemic repercussions, that runs contrary to well-established jurisprudence that the burden of proving an Article XX defence falls on a respondent.

IV. The Panel did not fail to make an objective assessment under Article 11 of the DSU with respect to the applicability of Article 4.2 of the Agreement on Agriculture

12. Third, Indonesia argues that the Panel failed to make an objective assessment under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). Despite well-established guidance from the Appellate Body that challenging the objectivity of a panel is "a very serious allegation"[9] that must "stand by itself and be substantiated with specific arguments",[10] Indonesia simply reiterates its erroneous first and second grounds of appeal in support of this flawed argument.

V. Article XI:2(c) of the GATT 1994 has been rendered inoperative by Article 4.2 of the Agreement on Agriculture

13. Fourth, Indonesia challenges the Panel's conclusion that Article XI:2(c) of the GATT 1994 has been rendered inoperative by Article 4.2 of the Agreement on Agriculture. Indonesia's appeal is premised on the view that Article XI:2(c) defines the term "quantitative import restriction" in footnote 1 to Article 4.2.[11] But, as the European Union explained in its Third Participant Submission, Article XI:2(c) "excludes certain measures from the prohibition of 'quantitative restrictions' in Article XI, however, these measures remain 'quantitative restrictions' and are therefore covered by Article 4.2."[12]

14. In any event, Indonesia did not satisfy its burden of proving that Article XI:2(c) justifies Measures 4, 7 and 16.[13] In contrast, New Zealand has demonstrated that the essential requirements of Article XI:2(c) are not present in this case.

[9] Appellate Body Report, *Peru – Agricultural Products*, para. 5.66 citing Appellate Body Report, *China – Rare Earths*, para. 5.227 (quoting Appellate Body Report, *EC – Poultry*, para. 133).
[10] Appellate Body Report, *Peru - Agricultural Products*, para. 5.66 citing Appellate Body Report, *US – Anti–Dumping and Countervailing Duties (China)*, para. 337 (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 498; *Australia – Apples*, para. 406).
[11] Indonesia's Appellant Submission, para. 120.
[12] The European Union's Third Participant Submission, para. 48.
[13] New Zealand's Appellee Submission, paras. 125 – 128.

VI. The Panel did not err by finding that Measures 9 through 17 are not justified under Article XX of the GATT 1994

15. Finally, Indonesia challenges the Panel's decision to cease its analysis of Indonesia's Article XX defences for Measures 9 to 17 after finding that none of those measures is justified under the Article XX *chapeau*.

16. It is important to pause to appreciate why, despite what a cursory examination might suggest, Indonesia erroneously relies on the Appellate Body's decision in *US - Shrimp* by over-simplifying what that case stands for.[14] Both the facts and admittedly incorrect legal standard applied by the panel in *US - Shrimp*, are distinguishable from the present case.

17. In *US - Shrimp,* the Appellate Body correctly found that the panel had fundamentally misconstrued the relevant test for determining the consistency of a measure with the Article XX *chapeau*. In conducting its *chapeau* analysis the panel in *US - Shrimp* committed reversible legal error by taking into account the object and purpose of the "*whole of the GATT 1994 and the WTO Agreement*", as opposed to the specific policy objectives set out in the Article XX subparagraphs.[15]

18. However, that flawed approach by the panel in *US - Shrimp* differs vastly from the Panel's approach in the present case, where each step of the Panel's *chapeau* analysis correctly and expressly considered the policy objectives invoked by Indonesia under the Article XX subparagraphs.[16] In doing so, the Panel found that the discriminatory application of each of the 18 measures could not be reconciled with, and is not rationally related to, the policy objectives allegedly pursued under Articles XX(a), (b) or (d).[17]

19. New Zealand does not dispute that because it is necessary to consider the objectives contained in the relevant Article XX subparagraphs as part of the *chapeau* assessment, panels will ordinarily commence their Article XX analysis under those subparagraphs. As the Appellate Body found in *Canada – Autos* deviating from that sequence, while not fatal, may involve greater "peril of reaching flawed results".[18]

[14] Indonesia's Appellant Submission, paras. 141 - 145, 151 and 152.
[15] Appellate Body Report, *US - Shrimp*, para. 116 (italics in original).
[16] Panel Report, *Indonesia - Import Licensing Regimes*, paras. 7.812 -7.830. See New Zealand's Appellee Submission, paras. 154 - 181.
[17] Panel Report, *Indonesia - Import Licensing Regimes*, paras. 7.819 -7.821.
[18] Appellate Body Report, *Canada – Autos,* para. 151.

20. Indeed, in the circumstances of *US - Shrimp*, the Appellate Body found that the panel's incorrect application of the chapeau "flows" from the panel's decision to analyse the *chapeau* without first examining the relevant subparagraphs.[19] However, in the present dispute, the Panel did not make any legal error in its *chapeau* analysis. It followed the legal standards established by the Appellate Body, including in *US – Shrimp,* by analysing each measure in light of each objective Indonesia raised under Article XX.

21. It is also important to emphasise that this Panel report does not stand for a reversal of the ordinary sequence of analysis under Article XX. Indeed, the Panel correctly and expressly articulated the ordinary sequence of the two-tier analysis under Article XX in paragraph 7.561. It then applied that order for Measures 1 to 8 by looking at the subparagraphs first.

22. Rather, the Panel's decision to cease its analysis of Measures 9 to 17, after finding that none of those measures is justified under the *chapeau*, ought to be appreciated in light of the exceptional circumstances the Panel was confronted with. In particular:

a. For Measures 1 to 7, the Panel did not proceed to the *chapeau* analysis as the measures failed under the first tier of those subparagraphs – none were "designed" for the policy objectives in Articles XX(a), (b) or (d).

b. For Measure 8, although the Panel found again that the measure did not satisfy the Article XX(b) subparagraph, it decided to continue to the *chapeau* for completeness.

c. However, and this is a critical point, Indonesia's arguments under the *chapeau* at the panel stage concerned the "regimes as a whole" as opposed to a measure by measure justification. As the Panel noted, "Indonesia only provided argumentation on a measure by measure basis with respect to the first tier of the analysis for each of the relevant subparagraphs of Article XX. The second tier, i.e. whether the measures at issue are applied in a manner consistent with the *chapeau* of Article XX, has been argued by Indonesia for its import licensing regime as a whole, thus making no distinctions between measures or defences."[20]

[19] Appellate Body Report, *US – Shrimp*, paras. 117 and 120.
[20] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.569.

d. This necessarily informed how the Panel examined the *chapeau* under Measure 8. Indonesia presented its chapeau defence "without making any relevant distinctions between the individual measures at issue and it conflated all three defences under subparagraphs (a), (b) and (d) of Article XX of the GATT 1994"[21]. "Given the manner in which Indonesia formulated its defence",[22] the Panel assessed Indonesia's *chapeau* defence with respect to all measures and made comprehensive *chapeau* findings for each.[23]

23. This approach is consistent with the Appellate Body's guidance in *Canada – Wheat Exports and Grain Imports* that "as a general principle, Panels are free to structure the order of their analysis as they see fit. In so doing, panels may find it useful to take account of the manner in which a claim is presented to them by a complaining Member."[24]

24. After nine pages of analysis, including 57 footnotes, the Panel found that Indonesia had "failed to demonstrate that its import licensing regimes … as a whole, and the individual measures therein, … are applied in a manner consistent with the *chapeau* of Article XX."[25]

25. Having reached this point, the Panel considered whether it made sense to continue its subparagraph analysis for Measures 9 to 17. It correctly noted that "compliance with the *chapeau* of Article XX is a necessary requirement in order for a measure to find justification under this provision".[26] Therefore, continuing to the subparagraphs was "unwarranted"[27] as Indonesia could not rely on an Article XX defence "even if the measures were found to be 'necessary' under [the] subparagraphs".[28] In this instance, the Panel's approach was an efficient yet thorough disposition of Indonesia's Article XX defence.

26. It was unwarranted for the Panel to labour through a full assessment of Measures 9 to 17 under the subparagraphs, in the same manner it had done for Measures 1 to 8.

[21] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.805 (footnote omitted).
[22] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.805.
[23] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.805 -7.830.
[24] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.
[25] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.827.
[26] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.829.
[27] Panel Report, *Indonesia – Import Licensing Regimes*, para. 6.47.
[28] Ibid.

Doing so would not have made the Panel's findings more precise or resolved the dispute more fully; it simply would have lengthened the report.

27. While the Panel did not err in its Article XX assessment of Measures 9 to 17, if the Appellate Body considers it necessary to complete the analysis of those measures under the Article XX subparagraphs, it can easily do so.

28. To provisionally justify Measures 9 to 17, Indonesia was required to demonstrate that (i) each measure was designed to protect the objectives in subparagraphs (a), (b) or (d); and (ii) was "necessary".

29. The Panel record shows that Indonesia failed to satisfy its burden of proof on both elements. The Panel found that the "actual policy objective" of all 18 measures was "to achieve self-sufficiency through domestic production by way of restricting and, at times, prohibiting imports".[29]

30. The Panel went further and found that none of the measures were designed to protect the objectives in the invoked subparagraphs. Specifically, the Panel found that:

- with respect to Article XX(a), "ensuring compliance with Halal requirements is done through other means" and that "relevant imported goods can only come into Indonesia if accompanied by the necessary Halal certifications". Therefore there is no rational connection between Indonesia's measures and the protection of public morals;[30]
- With respect to Article XX(b), that the measures bear "no relationship to the protection of human life or health";[31] and
- With respect to Article XX(d), that "Indonesia has failed to identify specific rules, obligations, or requirements contained in WTO-consistent laws or regulations".[32]

31. Furthermore, Indonesia's presentation of its Article XX subparagraph defences contained other "critical flaws", which resulted in Indonesia failing to demonstrate that any of Measures 9 to 17 were "necessary" to achieve objectives protected by Article XX.

[29] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.822.
[30] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.719 and 7.819.
[31] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.820.
[32] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.585.

32. The framework for completion of the analysis set out by the Appellate Body in *Thailand – Cigarettes* of identifying such "critical flaws"[33] is equally applicable in this case. If desired, we would be happy to elaborate on this framework and how the Appellate Body could complete the analysis under the subparagraphs in response to questions.

33. To conclude, the Panel exercised an appropriate margin of discretion in its sequence of analysis and it committed no error of law.

34. Thank you for your attention. We look forward to answering your questions.

[33] Appellate Body Report, *Thailand – Cigarettes*, paras. 177 - 181.