

**WORLD TRADE ORGANIZATION**

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

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

**(WT/DS477)**

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

**1 February 2016**

## **I. INTRODUCTION**

1. Chairman, Members of the Panel, staff of the Secretariat. May I begin by offering New Zealand's sincere condolences to the Indonesian delegation following the recent terrorist attack in Jakarta. Indonesia and New Zealand are close friends, and the thoughts of the Government and people of New Zealand are with all those affected by this atrocity.
2. Even close friends can have an occasional disagreement. Today's hearing concerns Indonesian measures that restrict agricultural imports when domestic production is deemed sufficient to fulfil domestic demand.
3. Indonesia asserts in its first written submission that these restrictions have no "adverse impact on trade flows".<sup>1</sup> This could not be further from the truth. Since their introduction in 2010, the impact on agricultural imports has been real, is documented and is dramatic.
4. 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.<sup>2</sup> Unfortunately, since the introduction of Indonesia's governmental restrictions, those exports have fallen 84 percent.<sup>3</sup> 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.

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<sup>1</sup> See for example, Indonesia's first written submission, paras. 55, 78, 80, 84, 93, 141, 161.

<sup>2</sup> Meat Industry Association (New Zealand), Statement in relation to Indonesia's beef import restrictions, 11 November 2015 (Meat Industry Association Statement) (Exhibit NZL-12).

<sup>3</sup> Exhibit NZL-5.

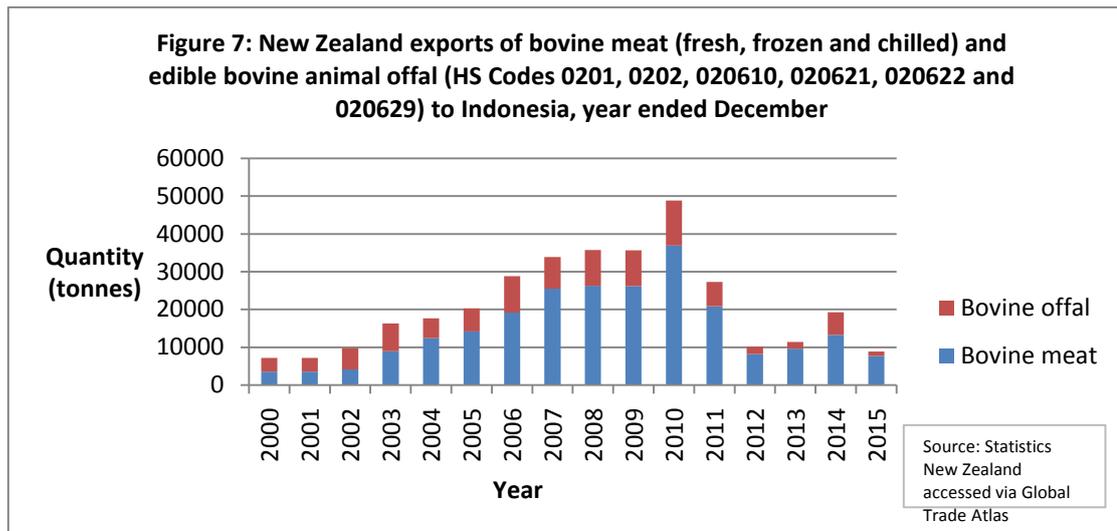


Fig 7: Source of data: Statistics New Zealand, accessed via Global Trade Atlas at [www.gtis.com/gta](http://www.gtis.com/gta) (accessed 30 January 2016)

5. Figure 7, derived from uncontroversial *Global Trade Atlas* data, confirms this drop in New Zealand bovine exports. The steep decline from 2010 to 2013 is partly due to express quotas introduced by Indonesia during that time. You will also see that trade increased, marginally, in 2014 following an initial round of WTO dispute settlement consultations and the welcome removal of those quotas through *MOT 46/2013*. However, 2014 trade remained well down on 2010 volumes due to other restrictions that are still in force today. Unfortunately, trade again dropped substantially last year due to a new ban on all beef secondary cuts and an extension of the ban on offal as a result of *MOA 139/2014*.

6. This dispute is not just about New Zealand trade concerns. This is clear from the presence of our co-complainant the United States, and the third parties. *Global Trade Atlas* data again confirms that the volume of beef and offal imports into Indonesia *from all countries* in the first six months of 2015 was a mere 34 percent of the volume imported over the same period in 2010.<sup>4</sup> Nor is this dispute just about beef, New Zealand and global horticultural exports to Indonesia have also been limited as a result of the restrictions challenged in this dispute.

7. The purpose of the World Trade Organization and these proceedings is to seek a positive and durable solution to trade disputes. Ultimately, and we say this to our colleagues from Indonesia who have travelled almost as far as us to be here today, a solution for

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

New Zealand requires a predictable WTO-consistent import regime which would translate into increased trade volumes and a very different graph than the one presented here.

8. Indonesia submits that the restrictions it has introduced are part of a legitimate import licensing regime necessary to protect food safety, to facilitate halal requirements and for customs enforcement.<sup>5</sup> While New Zealand does not dispute the legitimacy of these objectives, indeed our export regime is structured to support these goals, the connection between these specific trade barriers and those objectives is tenuous.

9. It is worth recalling that the express purpose of the overarching Indonesian laws that underlie Indonesia's import regime is to prohibit agricultural imports when domestic supply is deemed sufficient to satisfy domestic demand. This objective is captured in the *Food Law* which provides that "Import of food can only be done if the domestic Food Production is insufficient".<sup>6</sup> Similar provisions are included in Indonesian legislation governing animal products, horticultural products, and the protection of farmers.<sup>7</sup> Indeed, the Ministry of Agriculture beef self-sufficiency "road map" explicitly sets out Indonesia's desire to reduce beef imports to 10 percent of total consumption.<sup>8</sup>

10. These legislative provisions constitute import restrictions in their own right and are not, as Indonesia asserts, insignificant statements of "Indonesia's general commitment to food security".<sup>9</sup> Furthermore, this framework provides the legislative basis for discrete import licensing restrictions set out in a series of regulations. Tied together by this common objective of reducing imports to achieve "self-sufficiency", each component of Indonesia's licensing regime operates in a coordinated manner to limit imports.

11. The remainder of New Zealand's opening statement is structured as follows:

1. *First:* I will provide a succinct overview of the key components of the import licensing regimes challenged in this dispute in order to respond to the specific assertions made in Indonesia's first written submission; and

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<sup>5</sup> Indonesia's first written submission, paras 134 – 170, 186 – 188.

<sup>6</sup> Article 36(1), *Food Law* (Exhibit JE-2).

<sup>7</sup> Article 36B, *Animal Law Amendment* (Exhibit JE-5); Articles 14 and 36, *Food Law* (Exhibit JE-2); Articles 33 and 88, *Horticulture Law* (Exhibit JE-1); and Article 30, *Farmers Law* (Exhibit JE-3).

<sup>8</sup> New Zealand's first written submission para. 24, footnote 31 (Exhibit NZL-3).

<sup>9</sup> Indonesia's first written submission, para. 161.

2. *Second:* I will comment on four overarching issues raised by Indonesia in its submission.

## II. INDONESIA'S IMPORT LICENSING REGIME FOR ANIMALS AND ANIMAL PRODUCTS

12. Indonesia's import licensing regime for animals and animal products has the following key components:

### 1. *Prohibition on imports*

13. *First, Indonesia imposes a 'positive list' for certain animal products* whereby all beef secondary cuts, most forms of bovine offal, and certain forms of bovine manufacturing meat are prohibited from importation.<sup>10</sup> The regulations are explicit: for these products, which do not appear in the lists in their appendices, importers cannot obtain Ministry of Agriculture Recommendations or Ministry of Trade Import Approvals.<sup>11</sup>

14. Indonesia asserts that "[i]t is simply untrue that only the animals and animal products listed in Appendix I and Appendix II of MOT 46/2013 are allowed to be imported into Indonesia."<sup>12</sup> Unfortunately, in its submissions on this point, Indonesia omits *any* reference to the Ministry of Agriculture disciplines in *MOA 139/2014*. This regulation should not be ignored. New Zealand's first submission was explicit "*MOA 139/2014* and *MOT 46/2013* collectively prescribe a 'positive list' of the ... products that are permitted".<sup>13</sup> Specifically, Appendix I of *MOA 139/2014*, entitled "Bovine meat that can be imported into the territory of the Republic of Indonesia", sets out an exhaustive list of the permitted beef and offal imports.<sup>14</sup> Products not listed cannot obtain a MOA Recommendation or a MOT Import Approval.<sup>15</sup>

15. The *only* evidence cited by Indonesia in support of its claim that the "positive list" does not exist is trade data for live cattle imported under two HS Codes. HS Codes, it claims, are

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<sup>10</sup> New Zealand's first written submission, paras. 30 – 35, 38 – 45, 131, 309 – 312.

<sup>11</sup> New Zealand's first written submission, para. 38 and footnotes 63 – 65.

<sup>12</sup> Indonesia's first written submission, para. 96.

<sup>13</sup> New Zealand's first written submission, para. 38 (emphasis added).

<sup>14</sup> Appendix I, *MOA 139/2014* (Exhibit JE-26).

<sup>15</sup> New Zealand's first written submission, para. 38 and footnotes 63 – 65.

"not included in Appendix I and II of MOT Regulation 46/2013".<sup>16</sup> However, the version of *MOT Regulation 46/2013* which, as at the date of the hearing, is published on the official Indonesian Ministry of Trade website in fact *includes* these two HS Codes, implying that they are expressly permitted by the regulation. This is the *Bahasa Indonesia* version of *MOT Regulation 46/2013* that was cited by the complainants as Exhibit JE-18. A screenshot of the page including the pdf link to this regulation is included today as Exhibit NZL-80.<sup>17</sup> New Zealand is unsure of the source of the English translation cited by Indonesia. As a factual matter, New Zealand does not export live cattle to Indonesia for slaughter. Australia, however, is a live cattle exporter and we point the Panel to its alternative explanation for why ready to slaughter cattle has, sporadically, been imported into Indonesia under these tariff codes.<sup>18</sup>

16. Indonesia's rebuttal includes a claim that products not listed in *MOT Regulation 46/2013* are able to be imported freely without being subject to any import requirements.<sup>19</sup> However this is directly contradicted by Article 59(1) of the *Animal Amendment Law* which provides that all importers of animal products must obtain an Import Licence from the Ministry of Trade after receiving a Recommendation.<sup>20</sup>

17. Indonesia also misconstrues New Zealand's submissions regarding the importation of certain bovine animal products by State-Owned Enterprises in limited "emergency circumstances". New Zealand does not contend that Indonesia is *prohibited* from importing these products in response to a "threat to the population caused by food scarcity".<sup>21</sup> Rather, New Zealand contends that by prohibiting imports across the board, except in exceptional circumstances, Indonesia restricts imports contrary to Articles XI:1 of the GATT 1994 and 4.2 of the Agreement on Agriculture. If Indonesia permitted imports in a manner consistent with those WTO obligations *at the outset*, it would not need to seek to invoke a GATT Article XX(b) exception to respond to food shortages. Indeed, if imports were permitted this would

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<sup>16</sup> Indonesia's first written submission, para. 98.

<sup>17</sup> Indonesian Ministry of Trade website, Ministry of Trade Regulation 46/2013 available at <http://jdih.kemendag.go.id/id/news/2013/09/30/ketentuan-impor-dan-ekspor-hewan-dan-produk-hewan>, accessed 30 January 2016 (Exhibit NZL-80).

<sup>18</sup> Third party written submission of Australia, paras. 71 and 72.

<sup>19</sup> Indonesia's first written submission, paras. 34, 96 – 98.

<sup>20</sup> Article 59(1), *Animal Amendment Law* (Exhibit JE-5).

<sup>21</sup> Indonesia's first written submission, para. 168.

nullify the food scarcity risk and respond to Indonesia's food security objectives in a WTO consistent manner.

18. Indonesia's denial of the existence of a positive list is actually at odds with Indonesian regulations, reported statements by Indonesian officials, statements by exporters, media coverage, statements by other WTO Members and trade statistics.<sup>22</sup>

19. On 7 December 2015, Indonesia introduced new Ministry of Agriculture regulations which affect imports of animals and animal products.<sup>23</sup> These new regulations do not materially alter the measures challenged by the Complainants and actually confirm the restrictiveness of Indonesia's import regime. They even impose additional restrictions: Article 9 of *MOA Regulation 58/2015* now introduces a new prohibition on imports of chilled animal products slaughtered more than 3 months before importation and on imports of frozen animal products slaughtered 6 months before importation.

## ***2. Limited application windows and validity periods***

20. The *second* key component to Indonesia's licensing regime are limited application windows and validity periods that restrict imports. Figure 8 illustrates that by limiting the periods during which importers are able to obtain Import Approvals and Recommendations, Indonesia's laws and regulations result in several months per year when Indonesia is effectively closed to imports.

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<sup>22</sup> New Zealand's first written submission, footnote 65; Articles 8 and 26, Appendix I –II, *MOA 139/2014* (Exhibit JE-26); Appendix I – II, *MOT 46/2013* (Exhibit JE-18); List of bovine meat and offal products and their eligibility for importation into Indonesia (Exhibit NZL-22); "Achieving self-sufficiency, government keep importing live cattle" *Lensa Indonesia*, (Exhibit NZL-23). See also: "Indonesia imposes significant bans on beef, offal imports" *Beef Central*, 14 January 2015, <http://www.beefcentral.com/trade/export/indonesia-imposes-significant-bans-on-beef-offal-imports/> (Exhibit NZL-24) and "Australian Beef Intestines Are Off the Menu With Indonesian Ban" *Bloomberg Business*, 4 March 2015, <http://www.bloomberg.com/news/articles/2015-03-03/aussie-beef-lung-off-the-menu-with-indonesia-ban-southeast-asia> (Exhibit NZL-25); Meat Industry Association Statement (Exhibit NZL-12); Australia's third party submission, paras. 13-15 and 69- 72; "Indonesia Import Statistics from all countries 2010 – 2015" (Exhibit NZL-4), showing that Indonesian imports of edible bovine offal are only 5% of the volume imported in 2010.

<sup>23</sup> Regulation of the Minister of Agriculture of the Republic of Indonesia Number 58/Permentan/PK210/11/2015 Regarding importation of carcass, meat, and/or its derivatives into the territory of the Republic of Indonesia ("*MOA 58/2015*") (Exhibit AUS-1).

**Figure 8: Indonesian imports of bovine meat (fresh, frozen and chilled) and edible bovine animal offal (HS Codes 0201,0202,020610,020621,020622, and 020629) from all countries October 2013 - June 2015**

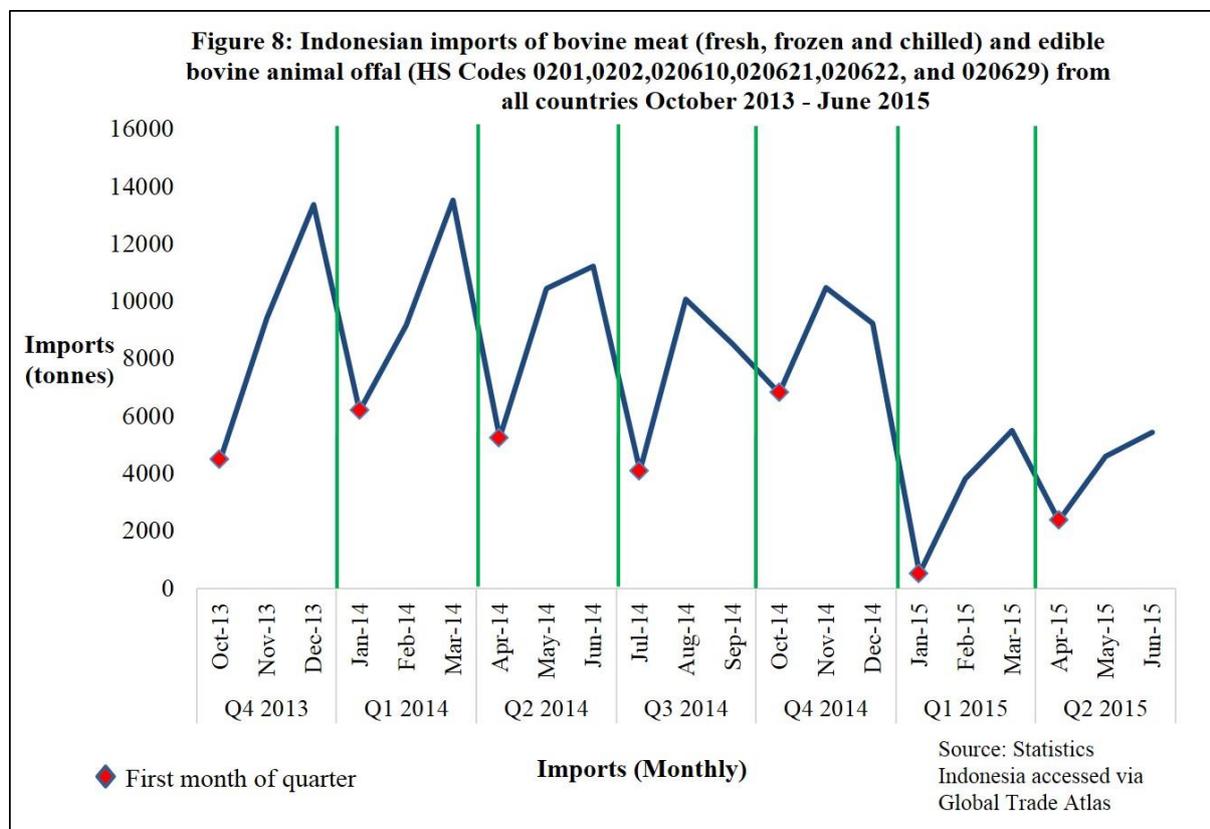


Fig 8: Source of data: Statistics Indonesia, accessed via Global Trade Atlas at [www.gtis.com/gta](http://www.gtis.com/gta) (accessed 11 November 2015)

21. The green lines in Figure 8 represent each quarter.<sup>24</sup> As the Panel will recall, MOA Recommendations and MOT Import Approvals are issued for three-month quarters: January to March, April to June, July to September, and October to December. The red diamonds confirm that trade has declined, on a recurring basis, in the first month of each quarter – January, April, July and October. Indonesia alleges that New Zealand has only presented "anecdotal evidence" of a "handful of importers" but this graph represents imports from *all countries*, since October 2013, and is based on *Global Trade Atlas* data. The equivalent graph for horticultural products, in Annexes 4 and 5 of our first written submission, is based on official New Zealand data from our Customs Service.

<sup>24</sup> This is the only difference between Figure 8 and Figure 4 in New Zealand’s first written submission.

22. The quarterly decreases in trade demonstrated by New Zealand are not the result of "private business decisions of importers" but the actual regulatory constraints imposed by Indonesia's regime. It is legally impossible for importers to ship animal products to Indonesia until they have obtained an Import Approval.<sup>25</sup> As exporters need time to prepare, package and ship product, the design, architecture and structure of the licensing regime restricts imports. Indonesia's suggestion that a "temporary 'slowdown'" of this consistency and magnitude cannot constitute a quantitative restriction fails to recognise the limiting effects of these measures for four of twelve months of the year.<sup>26</sup>

### **3. Fixed License Terms**

23. Third, Indonesia restricts imports through Fixed Licence Terms. MOA Recommendations and MOT Import Approvals collectively specify the type, quantity, country of origin and port of entry of animals and animal products permitted per quarter. Indonesia concedes that these terms are "static for the length of the validity period".<sup>27</sup> As a result, these requirements impose a quota on imports during that 3-month period. Again, Indonesia seeks to distance itself from these measures by arguing that the terms are self-selected by private actors.<sup>28</sup> However, it is precisely because importers are required to "lock in" each term per period, while at the same time mandating that non-complying products will be re-exported, that Indonesia eliminates importer flexibility and restricts trade. This loss of flexibility is not a result of autonomous decisions by importers, but rather a direct consequence of the design, architecture and revealing structure of Indonesia's regulations.

### **4. The 80% realisation requirement**

24. Fourth, Indonesia's 80% Realisation Requirement restricts imports. It means that importers must be conservative in determining their import quantities or face the severe sanction of having their ability to import suspended for at least 2 years.<sup>29</sup> This is not a balanced or reasonable measure. Indonesia acknowledges that the 80% Requirement is

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<sup>25</sup> Beef Import Approval Example, Stipulation 1 (Exhibit NZL-21); New Zealand's first written submission, para 149 and footnote 256.

<sup>26</sup> Indonesia's first written submission, para. 71.

<sup>27</sup> Indonesia's first written submission, para. 105.

<sup>28</sup> Indonesia's first written submission, para. 104 – 106.

<sup>29</sup> New Zealand's first written submission, para. 164 – 168.

designed to prevent importers from "overstating their anticipated imports", while at the same time arguing that the measure "is not meant to constrain imports".<sup>30</sup> This is incorrect. Once coupled with the Fixed Licence Terms and limited application and validity periods, the 80% Requirement creates an environment which very much induces importers to limit imports.

### ***5. Prohibitions on use, sale and distribution***

25. *Fifth, Indonesia prohibits the importation of bovine meat and offal at both modern and traditional markets.* Imported products are therefore completely prevented from sale to consumers through these key retail channels. As we have explained, traditional markets dominate the retail landscape in Indonesia, and the inability to access these markets altogether severely reduces market access opportunities for beef imports.<sup>31</sup> Indonesia contends that these restrictions are required to ensure the safety of imported products, and to ensure that products sold through these channels are halal.<sup>32</sup> Both of these justifications are without merit for reasons I will describe when discussing Article XX.

### ***6. Domestic Purchase Requirement***

26. *Sixth, the Domestic Purchase Requirement limits the quantity of beef that importers can import.* In order to import beef for consumption, at least three percent of an importer's total beef purchases must be derived from Indonesian cows.<sup>33</sup> This requirement forces importers to substitute imported beef with domestically-produced beef, and therefore directly limits the quantity of beef that importers could otherwise import. Indonesia asserts simply that the measure is not restrictive because "there is plenty of domestic supply available".<sup>34</sup> As the Panel identifies in its Question 26, Indonesia has not provided evidence supporting this assertion. New Zealand disputes that there is sufficient supply of domestic beef available as exhibited in the rising price of beef in Indonesia since the introduction of its import restrictions.<sup>35</sup> However, even if domestic supply were available to satisfy the requirement, the measure is inherently restrictive. It requires importers to substitute imported beef with beef

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<sup>30</sup> Indonesia's first written submission, para. 79.

<sup>31</sup> New Zealand's first written submission, para. 57 and footnote 101.

<sup>32</sup> Indonesia's first written submission, paras. 14, 15, 159, 166, 187, 188.

<sup>33</sup> In the case of beef imported for manufacturing purposes, importers are required to purchase 1.5% of their total beef purchases from domestic sources. See New Zealand's first written submission, para.61.

<sup>34</sup> Indonesia's first written submission, para. 112.

<sup>35</sup> New Zealand's first written submission, Figure 2.

that is domestically-produced and therefore necessarily has a limiting effect on import quantities.

### **7. Beef reference price**

27. Finally the beef reference price restricts imports. Consistent with its objective of prohibiting imports when domestic supply is deemed sufficient to satisfy domestic demand, Indonesia expressly prohibits beef imports in circumstances where the domestic price of secondary beef cuts falls below a certain level. In addition to prohibiting imports in these circumstances, the measure also restricts imports at other times by leaving importers unable to predict if, or when, importation of bovine products will be prohibited. Indonesia has implicitly acknowledged that the beef reference price constitutes a quantitative restriction, and seeks to justify the measure solely on the basis of Article XX.<sup>36</sup>

### **III. INDONESIA'S IMPORT LICENSING REGIME FOR HORTICULTURAL PRODUCTS**

28. Indonesia's import licensing regime for horticultural products is similar in many respects to that for animals and animal products. Specifically, it replicates, with some differences, the following components:

- Limited application windows and validity periods,
- Fixed License Terms,
- 80 percent Realisation Requirement,
- Restrictions on use, sale and distribution, and
- Reference prices (for chillis and shallots).

29. In order to expedite this hearing, New Zealand will not repeat why each of these measures is inconsistent with Indonesia's WTO obligations. We will respond to Indonesia's specific rebuttal points, measure by measure, in our second written submission.

30. Indonesia also applies the following three restrictions specific to horticultural products:

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<sup>36</sup> Indonesia's first written submission, para. 167.

### ***1. Restrictions based on harvest periods***

31. Restrictions based on Indonesian harvest periods. Certain horticultural products cannot be imported during Indonesian domestic harvest seasons. The measure protects domestic Indonesian horticultural products by eliminating imported competition at certain times of the year.

### ***2. Storage and capacity requirements***

32. Storage and capacity requirements also restrict imports. Indonesia requires that horticultural importers *own* cold storage facilities and limits total imports during a six-month validity period to an importer's certified storage capacity. Indonesia's assertions that these requirements are a "food safety measure" are unfounded.<sup>37</sup> Importers can easily provide cold storage without *owning* the facilities. Furthermore the requirement that importers must own storage capacity sufficient to store the entire quantity of horticultural products imported over a six-month period assumes that importers have zero turnover of products. The objective of this measure is actually to limit imports.

### ***3. Six month since harvest requirement***

33. The six-month-since-harvest requirement also restricts imports. Indonesia prohibits the importation of horticultural products that have been harvested more than six months previously. If an importer violates this requirement, it will not be granted an RIPH for one year.<sup>38</sup> Here again, Indonesia contends that the measure is applied for "reasons of food safety"<sup>39</sup> and implies that, by being stored in New Zealand or the United States, horticultural products are less safe. However, Indonesia has not demonstrated that the storage systems of the Complainants are inadequate or inferior to those in Indonesia. In fact, Indonesia already requires that importers provide a health certificate issued by the exporting country confirming that such products conform to the relevant Indonesian food safety standards at the time of exportation.<sup>40</sup>

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<sup>37</sup> Indonesia's first written submission, paras. 86 and 148.

<sup>38</sup> *MOA 86/2013*, Article 14 (Exhibit JE-15).

<sup>39</sup> Indonesia's first written submission, paras. 88 and 151.

<sup>40</sup> *MOT 16/2013* Articles 21-22 (Exhibit JE-8).

34. As with animals and animal products, Indonesia recently introduced a new regulation on horticultural products. This new regulation, *MOT Regulation 71/2015*, does not alter the essential requirements with which importers must comply for the importation of horticultural products. Indeed it is more explicit that "imports of horticultural products are restricted" and that total import quantities are determined at an annual "Coordination Meeting".<sup>41</sup>

#### **IV. DISCUSSION OF SPECIFIC ISSUES RAISED IN INDONESIA'S FIRST WRITTEN SUBMISSION**

35. New Zealand will now address four key overarching rebuttal points raised in Indonesia's first written submission. These issues are: *First*, the appropriate legal standard for a quantitative restriction; *Second*, the role of private actors; *Third*, that Indonesia's measures are necessary for legitimate purposes pursuant to Article XX of the GATT 1994; and *Fourth*, that Indonesia's import licensing regime is "automatic" and outside the disciplines of Article 4.2 of the Agreement on Agriculture.

##### ***1. Legal standard for a quantitative import restriction***

36. Indonesia asserts in its submission that in order to constitute a "quantitative restriction", a measure must impose an "absolute limit" on imports.<sup>42</sup> This is a mischaracterisation of the relevant legal test. Multiple panels, and the Appellate Body, have confirmed that the test for whether a measure constitutes a quantitative restriction is whether it has a "limiting effect" on importation.<sup>43</sup> 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.<sup>44</sup>

37. 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, create uncertainties for importers, affect investment plans or make importation prohibitively costly.<sup>45</sup>

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<sup>41</sup> *MOT 71/2015*, Articles 2(1) and 3 (Exhibit JE-12).

<sup>42</sup> Indonesia's first written submission, see for example paras. 54, 55, 110.

<sup>43</sup> Appellate Body Reports, *China – Raw Materials*, para. 319; and *Argentina – Import Measures*, para. 5.217.

<sup>44</sup> Panel Report, *India – Autos*, para. 7.270.

<sup>45</sup> Panel Reports, *Argentina – Import Measures*, para. 6.454; and *Colombia – Ports of Entry*, para. 7.240.

38. Indonesia also repeatedly asserts that its measures have no "adverse impact on trade flows".<sup>46</sup> Although the Complainants have demonstrated that the trade impact of Indonesia's regime is severe, 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".<sup>47</sup>

39. 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.

***2. The measures challenged in this dispute are maintained by the Indonesian government, not private actors***

40. A second over-arching rebuttal point is that Indonesia seeks to characterise restrictions as resulting purely from the "decisions of private actors".<sup>48</sup> However, simply because private actors have the ability to make limited decisions about their import needs, does not immunise Indonesia's measures from challenge. Private actors can only operate within the confines of Indonesia's regulations and, as the Complainants have demonstrated, Indonesia's regulations constrain the actions of private actors which necessarily has a limiting effect on imports. To be clear, the measures challenged in this dispute are not the commercial decisions of private actors. Rather, the challenged measures are those reflected in Indonesia's laws and regulations. Those measures prevent importers from making ordinary commercial decisions and serve to limit imports.

41. The Complainants' position is supported by the jurisprudence. Panels have confirmed that measures which required importers to voluntarily accept certain conditions in order to

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<sup>46</sup> See for example, Indonesia's first written submission, paras. 55, 78, 80, 84, 93, 141 and 161.

<sup>47</sup> Appellate Body Report, *Argentina – Import Measures*, para. 5.217.

<sup>48</sup> Indonesia's first written submission, paras. 52, 67, 69, 74, 101, 102, 104, 119, 138.

import goods constituted governmental measures falling within the scope of Article XI:1.<sup>49</sup> Here, the limiting effect of Indonesia's measures derives not from autonomous decisions of private actors, but from the trade restrictive framework within which Indonesia requires them to operate.

### ***3. Indonesia's measures are not justified under Article XX of the GATT***

42. Indonesia's first written submission raises several arguments, expressed "in the alternative" to Indonesia's primary defences, that its measures are within one or more of the general exceptions included in Articles XX(a), (b) or (d) of the GATT 1994. Indonesia accepts it has the burden of proving that its measures are necessary to achieve those objectives.<sup>50</sup> It must do so in accordance with the two-tier test that is well established in WTO jurisprudence.<sup>51</sup>

#### **(a) Indonesia's defences under Article XX(a) – "necessary to protect public morals"**

43. First, Indonesia claims that its prohibitions and restrictions on the use, sale and distribution of imported products, are necessary to protect public morals under Article XX(a).<sup>52</sup>

44. In relation to animals and animal products, Indonesia argues that its prohibitions on sale in traditional open-air markets are necessary to "prevent consumer deception regarding whether certain food products are Halal".<sup>53</sup> The risk of this occurring is perceived to arise because there is no widely-used product labelling system in place in those markets.<sup>54</sup>

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<sup>49</sup> Panel Reports, *Argentina – Import Measures*, para. 6.177; and *India – Autos*, paras 7.252 – 7.253.

<sup>50</sup> Indonesia's first written submission, para. 124. See Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997: I, 323 at p16.

<sup>51</sup> Appellate Body Report, *EC-Seals*, para 5.169.

<sup>52</sup> Indonesia's first written submission, paras. 158 – 159, 166, 187, 188.

<sup>53</sup> Indonesia's first written submission, paras. 159 and 166.

<sup>54</sup> Indonesia's first written submission, para. 166.

45. However, the risk identified by Indonesia simply does not arise in relation to imported New Zealand bovine meat and offal. All meat and offal products exported from New Zealand to Indonesia are certified in New Zealand as satisfying halal requirements.<sup>55</sup>

46. New Zealand has an Arrangement with Majelis Ulama Indonesia ("MUI"), Indonesia's top Muslim clerical body, which formally recognises compliance with Indonesia's halal requirements.<sup>56</sup> Also, Overseas Market Access Requirements (OMARs), are contained in an instrument made under New Zealand legislation setting out Indonesia's requirements for exports, for exporters and producers.<sup>57</sup> New Zealand Ministry for Primary Industry veterinarians and certifiers verify that these OMAR halal requirements are met.

47. Indonesian law, in turn, requires animal products to be labelled with the halal certification.<sup>58</sup> Indonesian law also requires that imported animal products with a halal certificate are not shipped in the same container as animal products without a certificate.<sup>59</sup>

48. Accordingly, safeguards within New Zealand law, the agreed processes for New Zealand imports, and Indonesian law all ensure that all bovine meat products exported to Indonesia from New Zealand meet the Indonesian halal standards.

49. In any event, Indonesia has not explained why imported animal products are also prohibited from sale in *modern* markets.<sup>60</sup> No justification for this restriction is offered by Indonesia in respect of Article XX(a).

50. In relation to horticultural products, preventing consumer deception regarding the halal status of such products does not appear to be the true objective of the measure.<sup>61</sup> To New Zealand's knowledge, Indonesia has no halal certification requirements for imported horticultural products. And, as Australia has pointed out in its third party submission,

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<sup>55</sup> Except pig meat, which is never halal. 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).

<sup>56</sup> Arrangement between the New Zealand Ministry for Primary Industries and the Majelis Ulama Indonesia on Halal certification of Halal Animal Products (Exhibit NZL-83).

<sup>57</sup> Indonesia, Halal Requirements for Meat and Meat Products including Processed Meat Products and Gelatine Overseas Market Access Requirements, Part 6 (Exhibit NZL-84).

<sup>58</sup> *Food Law*, Article 97(3)(e) (Exhibit JE-2); *MOT 46/2013*, Article 19(2)(e), (Exhibit JE-21).

<sup>59</sup> Article 20(d), *MOA 58/2015* (Exhibit AUS-1); Article 21, *MOA 139/2014* (Exhibit JE-28).

<sup>60</sup> *MOA 139/2014*, Article 32(1) (Exhibit JE-26).

<sup>61</sup> Compare Indonesia's first written submission, para 187.

Indonesia does not appear to have restricted distributors from selling imported horticultural products in *traditional* markets.<sup>62</sup>

51. Accordingly, Indonesia has not made a *prima facie* case that any of its measures are necessary to protect public morals in terms of Article XX(a).

**(b) Indonesia's defences under Article XX(b) – "necessary to protect human, animal or plant life or health"**

52. Second, Indonesia claims that several of its measures can be justified under Article XX(b). New Zealand will address each claim in its second written submission. In relation to animals and animal products, Indonesia invokes Article XX(b) in respect of five measures.<sup>63</sup> Three of these are justified solely by reference to being an "integral part of Indonesia's food safety and security plan", one has no elaboration at all, and one is allegedly justified on the basis of "threat to the population caused by food scarcity". Indonesia also invokes Article XX(b) in respect of seven of its measures for horticultural products.<sup>64</sup> Several of these defences are unelaborated or simply refer to "Indonesia's food safety and security plan". No further details have been provided. The remainder refer to concerns about food spoilage leading to disease. The lack of detail provided by Indonesia underpinning these Article XX(b) defences makes it difficult for New Zealand to respond in any depth, beyond the inescapable conclusion that Indonesia has failed to make a *prima facie* case.

53. One concern of Indonesia relates to what it describes as the "extremely high risk of unsafe food handling that would result" if New Zealand animals and animal products were permitted to be sold in traditional Indonesian markets.<sup>65</sup>

54. But an arbitrary ban on the sale of imported frozen meat in traditional markets is not justified by such a concern. New Zealand meat is no less safe than fresh Indonesian meat sold at such markets. Indeed, it is likely to be safer. New Zealand is the third largest beef exporter in the world. The majority of New Zealand beef exports globally are frozen. New Zealand meat processing and preparation processes up to export follow the highest sanitary standards

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<sup>62</sup> Australia's third party submission, para. 94.

<sup>63</sup> Indonesia's first written submission, paras. 167, 168, 169, 170, 188.

<sup>64</sup> Indonesia's first written submission, paras. 148, 153, 154, 155, 160, 161, 162, 187.

<sup>65</sup> Indonesia's first written submission, para. 109.

in accordance with the CODEX Code of Hygienic Practice for Meat, and good operating practice.<sup>66</sup> These processes are regulated by the New Zealand Ministry for Primary Industries. This means that New Zealand meat, exported globally, does not pose sanitary risks to human health.

55. Nor is it apparent that Indonesia has evaluated less trade-restrictive measures than an absolute ban on sales in traditional markets. One of many examples could be for Indonesia to require vendors of imported meat at traditional markets to ensure that refrigeration was provided up to point of sale. Another possible measure would be to regulate appropriate thawing of meat before sale.

56. With respect to horticultural products, New Zealand also has a stringent food safety control system which meets Indonesia's requirements.<sup>67</sup> In response to Indonesia's specific food safety concerns about storage of products with long shelf lives, such as apples and onions, New Zealand already has highly-regarded storage practices for long-life products.

**(c) Indonesia's defences under Article XX(d) – necessary to secure compliance with laws or regulations...including those relating to customs enforcement**

57. Third, Indonesia also claims that several of its measures can be justified under Article XX(d). The overall theme in Indonesia's first written submission in relation to its defence is that its restrictions are necessary for "customs enforcement".<sup>68</sup>

58. In *Korea – Various Measures on Beef*, the Appellate Body held that, in order to establish provisional justification under Article XX(d), a Member has the burden of demonstrating two elements: "First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be 'necessary' to secure such compliance".<sup>69</sup>

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<sup>66</sup> CODEX Code of Hygienic Practice for Meat, CAC/RCP 58-2005.

<sup>67</sup> Letter dated 31 December 2014 from Ministry of Agriculture to New Zealand Embassy Jakarta (Exhibit NZL-85); and Provision of Ministry of Agriculture of Republic of Indonesia Number 1323/Kpts/PP.340/12/2014 About Recognition of Fresh Food of Plant Origin from New Zealand (Exhibit NZL-86).

<sup>68</sup> Indonesia's first written submission, paras. 136, 140, 145, 149, 160. In paragraph 170 it identifies the Article XX(d) exception but does not give any further explanation of the nexus between the licensing regime as a whole and Article XX(d).

<sup>69</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

59. Indonesia has failed to identify the specific customs enforcement laws or regulations it claims its restrictions are designed to secure compliance with. Furthermore, Indonesia has provided no information that would allow the Panel to assess whether such laws or regulations are themselves consistent with the GATT 1994, or to what extent the restrictions are "necessary" to secure compliance with such laws or regulations.

60. Indeed, at times, Indonesia appears to claim that its measures are necessary to secure compliance with the import licencing regime itself.<sup>70</sup> As New Zealand has demonstrated, Indonesia's import licencing regime is inconsistent with the WTO Agreement, so measures for its compliance would not qualify under Article XX(d).<sup>71</sup>

61. We further note that there is no reference to "customs enforcement" as an objective in Indonesia's laws and regulations themselves – nor has this objective been identified when Indonesia notified the relevant measures to the WTO Import Licensing Committee.

62. For all these reasons, New Zealand considers that Indonesia's Article XX(d) defence does not meet the legal standard required, nor does it comply with the requirement in Article 3.2 of the *DSU* that each party identify relevant legal and factual issues at the earliest opportunity so as to provide other parties, including third parties, an opportunity to respond. Indonesia's opportunity to provide this information was in its first written submission.

#### ***4. Indonesia's import licensing regimes are not "automatic"***

63. Finally, Indonesia has argued that its import licensing regimes are "automatic import licensing procedures" because every application is granted and therefore, "by definition", the regime is excluded from the scope of Article 4.2 of the Agreement on Agriculture.<sup>72</sup> That argument fails on two grounds.

64. First, the measures at issue have *all* been identified by the complainants as quantitative import restrictions, which clearly fall within the scope of the footnote of Article 4.2.

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<sup>70</sup> Indonesia's first written submission, para. 136.

<sup>71</sup> See Panel Report, *China – Auto Parts* at para. 7.296.

<sup>72</sup> Indonesia first written submission, para. 51.

65. Second, none of these measures meet the requirements for "automatic" licensing. Under Article 2.1 of the Agreement on Import Licensing Procedures, automatic import licensing is not only import licensing where approval of the application is granted in all cases, but also where it is administered so as not to have trade-restricting effects. Those effects are deemed to exist – as is the case here – when applications for licences cannot be submitted on any working day. The import licensing procedures are therefore not automatic and do not fall outside the scope of Article 4.2.

## **V. CONCLUSION**

66. Thank you for your attention. For the all reasons outlined today, New Zealand submits that Indonesia's measures are inconsistent with its obligations under the WTO Agreements.

67. We look forward to answering any questions that you may have.

**Table of additional exhibits**

<b>Exhibit No.</b>	<b>Description</b>	<b>Short title</b>
<b>NZL-80</b>	Indonesian Ministry of Trade website, <i>Ministry of Trade Regulation 46/2013</i> available at <a href="http://jdih.kemendag.go.id/id/news/2013/09/30/ketentuan-impor-dan-ekspor-hewan-dan-produk-hewan">http://jdih.kemendag.go.id/id/news/2013/09/30/ketentuan-impor-dan-ekspor-hewan-dan-produk-hewan</a> , accessed 30 January 2016	
<b>NZL-81</b>	Animal Products (Overseas Market Access Requirements for Halal Assurances) Notice (No.3) 2015	
<b>NZL-82</b>	Indonesia, Meat and Meat Products Overseas Market Access Requirements, Part 2.	OMAR-2
<b>NZL-83</b>	Arrangement between the New Zealand Ministry for Primary Industries and the Majelis Ulama Indonesia on Halal Certification of Halal Animal Products	
<b>NZL-84</b>	Indonesia, Halal Requirements for Meat and Meat Products including Processed Meat Products and Gelatine Overseas Market Access Requirements, Part 6.	OMAR-6
<b>NZL-85</b>	Letter dated 31 December 2014 from Ministry of Agriculture to New Zealand Embassy, Jakarta	
<b>NZL-86</b>	Provision of Ministry of Agriculture of Republic of Indonesia Number 1323/Kpts/PP.340/12/2014 About Recognition of Fresh Food of Plant Origin from New Zealand	