WORLD TRADE ORGANIZATION

WT/DS477/AB/R
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9 November 2017

(17-6051)

INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS

AB-2017-2

Report of the Appellate Body

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ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
co-complainants	New Zealand and the United States
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
Import Licensing Agreement	Agreement on Import Licensing Procedures
New Zealand's Panel Request	Request for the Establishment of a Panel by New Zealand, WT/DS477/9
Panel	Panel in these proceedings
Panel Report	Panel Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/R, WT/DS478/R
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRIMs Agreement	Agreement on Trade-Related Investment Measures
United States' Panel Request	Request for the Establishment of a Panel by the United States, WT/DS478/9
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

CASES CITED IN THIS REPORT

Short title	Full case title and citation
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
Australia – Apples	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
Canada – Renewable Energy / Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
Chile – Price Band System (Article 21.5 – Argentina)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
China – Rare Earths	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
Colombia – Textiles	Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R and Add.1, adopted 22 June 2016
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bananas III	Panel Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU *(Ecuador)* / WT/DS27/R/GTM, WT/DS27/R/HND *(Guatemala and Honduras)* / WT/DS27/R/MEX *(Mexico)* / WT/DS27/R/USA *(US)*, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695 to DSR 1997:III, p. 1085
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031

Short title	Full case title and citation
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
EC – Seal Products	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
Peru – Agricultural Products	Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012: XI, p. 5751
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6481
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

WORLD TRADE ORGANIZATION
APPELLATE BODY

Indonesia – Importation of Horticultural Products, Animals and Animal Products

Indonesia, *Appellant*
New Zealand, *Appellee*
United States, *Appellee*

Argentina, *Third Participant*
Australia, *Third Participant*
Brazil, *Third Participant*
Canada, *Third Participant*
China, *Third Participant*
European Union, *Third Participant*
Japan, *Third Participant*
Korea, *Third Participant*
Norway, *Third Participant*
Paraguay, *Third Participant*
Singapore, *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *Third Participant*

AB-2017-2

Appellate Body Division:

Bhatia, Presiding Member
Graham, Member
Ramírez-Hernández, Member

1 INTRODUCTION

1.1. Indonesia appeals certain issues of law and legal interpretations developed in the Panel Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*[1] (Panel Report).

1.2. On 18 March 2015, New Zealand[2] and the United States[3] (the co-complainants) each requested the establishment of a panel pursuant to Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) concerning 18 measures imposed by Indonesia on the importation of horticultural products, animals and animal products. On 20 May 2015, pursuant to the requests of the co-complainants, a single Panel was established to consider these complaints.[4]

[1] WT/DS477/R, WT/DS478/R, 22 December 2016.
[2] Request for the Establishment of a Panel by New Zealand, WT/DS477/9 (New Zealand's Panel Request).
[3] Request for the Establishment of a Panel by the United States, WT/DS478/9 (United States' Panel Request).
[4] Panel Report, para. 1.3 (referring to the Minutes of the DSB Meeting held on 20 May 2015, WT/DSB/M/361).

1.3. The 18 measures challenged by the co-complainants comprise: (i) discrete elements of Indonesia's import licensing regime for horticultural products (Measures 1 through 8)[5]; (ii) Indonesia's import licensing regime for horticultural products as a whole (Measure 9)[6]; (iii) discrete elements of Indonesia's import licensing regime for animals and animal products (Measures 10 through 16)[7]; (iv) Indonesia's import licensing regime for animals and animal products as a whole (Measure 17)[8]; and (v) the requirement whereby importation of horticultural products, animals and animal products depends upon Indonesia's determination of the sufficiency of domestic supply to satisfy domestic demand (Measure 18).[9]

[5] The discrete elements of Indonesia's import licensing regime for horticultural products challenged by the co-complainants are set out in the Panel Report as follows:

- Measure 1 (limited application windows and validity periods) – a combination of limited application windows and six-month validity periods of the import recommendations obtained from the Ministry of Agriculture and the import approvals obtained from the Ministry of Trade (para. 2.33. See also para. 2.11);
- Measure 2 (periodic and fixed import terms) – the requirement to import horticultural products only within the terms of the import recommendations and import approvals (para. 2.35);
- Measure 3 (80% realization requirement) – the requirement that registered importers of fresh horticultural products import at least 80% of the quantity of each type of product specified on their import approvals for every six-month validity period (para. 2.37);
- Measure 4 (harvest period requirement) – the requirement that the importation of horticultural products takes place prior to, during, and after the respective domestic harvest seasons within a certain time period (para. 2.39);
- Measure 5 (storage ownership and capacity requirements) – the requirement that importers must own their storage facilities with sufficient capacity to hold the full quantity requested on their import application (para. 2.41);
- Measure 6 (use, sale and distribution requirements for horticultural products) – the requirements that limit the use, sale, and distribution of the imported products (para. 2.43);
- Measure 7 (reference prices for chillies and fresh shallots for consumption) – the implementation of a reference price system by the Ministry of Trade on imports of chillies and fresh shallots for consumption (para. 2.45); and
- Measure 8 (six-month harvest requirement) – the requirement that all imported fresh horticultural products have been harvested less than six months prior to importation (para. 2.48).

[6] Panel Report, para. 2.49.

[7] The discrete elements of Indonesia's import licensing regime for animals and animal products challenged by the co-complainants are set out in the Panel Report as follows:

- Measure 10 (prohibition of importation of certain animals and animal products, except in emergency circumstances) – the prohibition on the importation of certain bovine meat, offal, carcass, and processed products as well as of certain non-bovine and processed products (para. 2.50);
- Measure 11 (limited application windows and validity periods) – a combination of requirements, including the prohibition on importers from applying for import recommendations and import approvals outside four one-month periods, the provision that import approvals are valid for only the three-month duration of each quarter, and the requirement that importers are only permitted to apply for import recommendations and import approvals in the month preceding the start of the relevant quarter (para. 2.52);
- Measure 12 (periodic and fixed import terms) – the requirement to import only animals and animal products within the terms of the import recommendations and import approvals, the prohibition of importing types/categories of carcasses, meat, and/or their processed products other than as specified in import approvals and import recommendations, and the prohibition from requesting changes to the elements specified in the import recommendations once they have been issued (para. 2.54);
- Measure 13 (80% realization requirement) – the requirement whereby registered importers must import at least 80% of each type of product covered by their import approvals every year (para. 2.56);
- Measure 14 (use, sale, and distribution of imported bovine meat and offal requirements) – certain requirements that limit the use, sale, and distribution of imported animals and animal products, including bovine meat and offal (para. 2.58);
- Measure 15 (domestic purchase requirement) – the requirement imposed upon importers of large ruminant meats to absorb local beef (para. 2.60); and
- Measure 16 (beef reference price) – the implementation of a reference price system on imports of certain animals and animal products (para. 2.62).

[8] Panel Report, para. 2.64.

[9] Panel Report, para. 2.65.

1.4. The Panel enumerated the 18 measures at issue using the following table[10]:

A. IMPORT LICENSING REGIME FOR HORTICULTURAL PRODUCTS	
DISCRETE ELEMENTS OF THE REGIME:	
Measure 1	Limited application windows and validity periods
Measure 2	Periodic and fixed import terms
Measure 3	80% realization requirement
Measure 4	Harvest period requirement
Measure 5	Storage ownership and capacity requirements
Measure 6	Use, sale and distribution requirements for horticultural products
Measure 7	Reference prices for chillies and fresh shallots for consumption
Measure 8	Six-month harvest requirement
REGIME AS A WHOLE:	
Measure 9	Import licensing regime for horticultural products *as a whole*
B. IMPORT LICENSING REGIME FOR ANIMALS AND ANIMAL PRODUCTS	
DISCRETE ELEMENTS OF THE REGIME:	
Measure 10	Prohibition of importation of certain animals and animal products, except in emergency circumstances
Measure 11	Limited application windows and validity periods
Measure 12	Periodic and fixed import terms
Measure 13	80% realization requirement
Measure 14	Use, sale and distribution of imported bovine meat and offal requirements
Measure 15	Domestic purchase requirement
Measure 16	Beef reference price
REGIME AS A WHOLE:	
Measure 17	Import licensing regime for animals and animal products *as a whole*
C. SUFFICIENCY REQUIREMENT	
Measure 18	Sufficiency of domestic production to fulfil domestic demand

1.5. Additional factual aspects of this dispute are set forth in greater detail in paragraphs 2.1 through 2.66 of the Panel Report.

1.6. Before the Panel, New Zealand and the United States claimed that the 18 measures imposed by Indonesia are inconsistent with Article XI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 4.2 of the Agreement on Agriculture. Specifically, they claimed that the following measures are inconsistent with these provisions: (i) Indonesia's import licensing regime for horticultural products, both when viewed as a single measure and when its components are viewed as individual measures; (ii) Indonesia's import licensing regime for animals and animal products, both when viewed as a single measure and when its components are viewed as individual measures; and (iii) Indonesia's import restrictions based on the sufficiency of domestic production.[11] Moreover, the co-complainants claimed that Measures 6, 14, and 15 are inconsistent

[10] Panel Report, para. 2.32. (emphasis original)

[11] Panel Report, paras. 3.1.a-3.1.c (referring to New Zealand's Panel Request, pp. 1-7; first written submission to the Panel, para. 435) and para. 3.3 (referring to United States' Panel Request; first written submission to the Panel, para. 395; second written submission to the Panel, para. 242).

with Article III:4 of the GATT 1994.[12] Finally, to the extent that these measures are subject to the disciplines of the Agreement on Import Licensing Procedures (Import Licensing Agreement), the co-complainants claimed that Measures 1 and 11 are inconsistent with Article 3.2 of the Import Licensing Agreement[13], or, alternatively, with Article 2.2(a) of that Agreement.[14]

1.7. Indonesia requested the Panel to reject the co-complainants' claims in their entirety.[15] In particular, Indonesia argued that the measures at issue are not inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.[16] In addition, Indonesia raised defences under Article XX(a), (b), and (d) of the GATT 1994 with respect to the claims of violation under Articles XI:1 and III:4 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.[17] Indonesia also invoked Article XI:2(c)(ii) of the GATT 1994 as a defence with respect to the claims of violation under Article XI:1 of the GATT 1994 concerning Measures 4, 7, and 16.[18]

1.8. In the Panel Report, circulated to Members of the World Trade Organization (WTO) on 22 December 2016, the Panel addressed as a preliminary matter the issue of the order of analysis of the co-complainants' claims. The Panel considered that Article XI:1 of the GATT 1994 is the provision that deals specifically with quantitative restrictions, and thus decided to commence its examination of the co-complainants' claims with Article XI:1 of the GATT 1994, rather than under Article 4.2 of the Agreement on Agriculture.[19] The Panel added that, if the measures were to be justified under Article XX of the GATT 1994, it would not need to analyse the claims under Article 4.2 of the Agreement on Agriculture. This is because footnote 1 to Article 4.2 of the Agreement on Agriculture excludes from the scope of this provision those "measures maintained … under other general, non-agriculture-specific provisions of GATT 1994".[20] In this context, the Panel noted Indonesia's argument that, because the co-complainants had failed to provide evidence that the challenged measures are not justified under Article XX, the "Panel [could not], as a matter of law, rule in the complainants' favor under Article 4.2".[21] The Panel, however, considered that it was for Indonesia, not the co-complainants, to establish the defence under Article XX of the GATT 1994.[22]

1.9. Turning to its analysis under Article XI:1 of the GATT 1994, the Panel disagreed with Indonesia that Article XI:2(c)(ii) of the GATT 1994 excludes Measures 4, 7, and 16 from the scope of Article XI:1. Rather, the Panel considered that "Indonesia [could not] rely upon Article XI:2(c)(ii) of the GATT 1994 to exclude Measures 4, 7 and 16 from the scope of Article XI:1 of the GATT 1994 because, with respect to agricultural measures, Article XI:2(c) has been rendered inoperative by Article 4.2 of the Agreement on Agriculture."[23]

[12] Panel Report, paras. 3.1.d-3.1.e (referring to New Zealand's Panel Request, pp. 3 and 5-6, fns 7, 12, and 14; first written submission to the Panel, para. 435) and fn 241 to para. 3.3. See also para. 7.834.

[13] Panel Report, para. 3.1.f (referring to New Zealand's Panel Request, pp. 2 and 4, fns 5 and 8; first written submission to the Panel, para. 435) and para. 3.4 (referring to United States' Panel Request, pp. 2 and 4, fns 5 and 8; first written submission to the Panel, paras. 384 and 394).

[14] Panel Report, para. 3.1.f (referring to New Zealand's response to Panel question No. 5) and fn 241 to para. 3.3.

[15] Panel Report, para. 3.6 (referring to Indonesia's first written submission to the Panel, para. 189; second written submission to the Panel, para. 278).

[16] Panel Report, paras. 7.69-7.72, 7.100, 7.119-7.121, 7.141-7.143, 7.164-7.165, 7.186-7.187, 7.208-7.209, 7.232-7.233, 7.251-7.255, 7.282-7.284, 7.307-7.309, 7.336, 7.361-7.362, 7.382-7.383, 7.411-7.414, 7.435, 7.458-7.464, and 7.487. The Panel observed that most of Indonesia's arguments under Article XI:1 of the GATT 1994 applied *mutatis mutandis* to the claims under Article 4.2 of the Agreement on Agriculture. (Ibid., para. 7.831)

[17] Panel Report, para. 7.27.

[18] Panel Report, paras. 7.27 and 7.58 (referring to Indonesia's second written submission to the Panel, paras. 197, 199, and 203).

[19] Panel Report, paras. 7.32-7.33.

[20] Panel Report, para. 7.33 (quoting fn 1 to Article 4.2 of the Agreement on Agriculture).

[21] Panel Report, para. 7.34 (quoting Indonesia's second written submission to the Panel, para. 38).

[22] Panel Report, para. 7.34.

[23] Panel Report, para. 7.60.

1.10. The Panel made the following findings with respect to the co-complainants' claims under Article XI:1 of the GATT 1994:

a. Measures 1 through 7, 9, and 11 through 17 are inconsistent with Article XI:1 because, by virtue of their design, architecture, and revealing structure, they constitute a restriction having a limiting effect on importation[24];

b. Measures 8 and 10 are inconsistent with Article XI:1 because, by virtue of their design, architecture, and revealing structure, they constitute a prohibition on importation[25]; and

c. Measure 18 is inconsistent *as such* with Article XI:1 because, by virtue of its design, architecture, and revealing structure, it constitutes a restriction having a limiting effect on importation.[26]

1.11. Having reached these findings under Article XI:1 of the GATT 1994, the Panel addressed Indonesia's defences under Article XX of the GATT 1994 and found that:

a. Indonesia had failed to demonstrate that Measures 1, 2, and 3 are justified under Article XX(d) of the GATT 1994[27];

b. Indonesia had failed to demonstrate that Measure 4 is justified under Article XX(b) of the GATT 1994[28];

c. Indonesia had failed to demonstrate that Measures 5 and 6 are justified under Article XX(a), (b), and (d) of the GATT 1994[29];

d. Indonesia had failed to demonstrate that Measure 7 is justified under Article XX(b) of the GATT 1994[30];

e. Indonesia had failed to demonstrate that Measure 8 is justified under Article XX(b) of the GATT 1994[31]; and

f. Indonesia had failed to demonstrate that Measures 9 through 18 are justified under Article XX(a), (b), or (d) of the GATT 1994, where appropriate.[32]

1.12. In light of these findings, the Panel declined to rule on the co-complainants' claims under Article 4.2 of the Agreement on Agriculture because "its findings pertaining to the inconsistency of Measures 1 through 18 with Article XI:1 of the GATT 1994 and the absence of justification under Articles XX(a), (b) or (d) of the GATT 1994 ensure the effective resolution of this dispute."[33] The Panel equally declined to rule on New Zealand's claims under Article III:4 of the GATT 1994 and the co-complainants' claims under Article 3.2 of the Import Licensing Agreement because its earlier findings in respect of the relevant measures ensure the effective resolution of this dispute.[34] The Panel further declined to rule on the United States' claims under Article III:4 of the

[24] Panel Report, para. 8.1.b.i. See also paras. 7.92, 7.112, 7.134, 7.156, 7.179, 7.200, 7.227, 7.270, 7.327, 7.349, 7.375, 7.398, 7.428, 7.451, and 7.478.

[25] Panel Report, para. 8.1.b.ii. See also paras. 7.243 and 7.299.

[26] Panel Report, para. 8.1.b.iii. See also para. 7.501. Having reached this finding, the Panel declined to rule on whether Measure 18 is also inconsistent *as applied* with Article XI:1 of the GATT 1994.

[27] Panel Report, para. 8.1.c.i. See also paras. 7.586, 7.595, and 7.606.

[28] Panel Report, para. 8.1.c.ii. See also para. 7.636.

[29] Panel Report, para. 8.1.c.iii. See also paras. 7.661, 7.683, 7.693, 7.721, 7.743, and 7.751.

[30] Panel Report, para. 8.1.c.iv. See also para. 7.777.

[31] Panel Report, para. 8.1.c.v. See also para. 7.828.

[32] Panel Report, para. 8.1.c.vi. See also paras. 7.829-7.830.

[33] Panel Report, para. 8.2. See also para. 7.833.

[34] With respect to New Zealand's claims under Article III:4 of the GATT 1994, the Panel declined to rule because its findings pertaining to the inconsistency of Measures 6, 14, and 15 with Article XI:1 of the GATT 1994 and the absence of justification under Article XX(a), (b), or (d) of the GATT 1994 ensure the effective resolution of this dispute. (Panel Report, para. 8.3) Concerning the co-complainants' claims under Article 3.2 of the Import Licensing Agreement, the Panel declined to rule because its findings pertaining to the inconsistency of Measures 1 and 11 with Article XI:1 of the GATT 1994 ensure the effective resolution of this dispute. (Ibid., para. 8.4). See also paras. 7.839-7.840, 7.845-7.846, 7.850-7.851, and 7.870-7.871.

GATT 1994[35] and the co-complainants' claims under Article 2.2(a) of the Import Licensing Agreement because the United States and the co-complainants, respectively, "[had] failed to make a *prima facie* case".[36]

1.13. In accordance with Article 19.1 of the DSU, and having found that Indonesia acted inconsistently with its obligations under Article XI:1 of the GATT 1994 with respect to Measures 1 through 18, the Panel recommended that the Dispute Settlement Body (DSB) request Indonesia to bring its measures into conformity with its obligations under the GATT 1994.[37]

1.14. On 17 February 2017, Indonesia notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal[38] and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review[39] (Working Procedures).

1.15. On 7 March 2017, New Zealand and the United States each filed an appellee's submission.[40] On 9 March 2017, Norway notified its intention to appear at the oral hearing as a third participant.[41] On 10 March 2017, Australia, Brazil, Canada, and the European Union each filed a third participant's submission.[42] On the same day, Argentina, Japan, Korea, Paraguay, Singapore, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu each notified its intention to appear at the oral hearing as a third participant.[43] Subsequently, China also notified its intention to appear at the oral hearing as a third participant.[44]

1.16. On 13 April 2017, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision.[45] The Chair of the Appellate Body explained that this was due to a number of factors, including the enhanced workload of the Appellate Body in 2017, scheduling difficulties arising from appellate proceedings running in parallel with an overlap in the composition of the Divisions hearing the appeals, the number and complexity of the issues raised in this and concurrent appellate proceedings, together with the demands that these concurrent appeals place on the WTO Secretariat's translation services, and a shortage of staff in the Appellate Body Secretariat. On 18 October 2017, the Chair of the Appellate Body informed the Chair of the DSB that the Report in these proceedings would be circulated no later than 9 November 2017.[46]

1.17. On 30 June 2017, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Chair of the Appellate Body had notified the Chair of the DSB of the Appellate Body's decision to authorize Appellate Body Member Mr Ricardo Ramírez-Hernández to complete the disposition of this appeal, even though his second term of office was due to expire before the completion of the appellate proceedings.

1.18. The oral hearing in this appeal was held on 28-29 August 2017. The participants and five third participants (Argentina, Australia, Brazil, Japan, and Norway) made opening statements. The participants and five third participants (Australia, Brazil, Canada, the European Union, and

[35] The Panel distinguished between New Zealand's and the United States' claims under Article III:4 of the GATT 1994. In the absence of any argumentation by the United States, the Panel found that the United States had failed to make a *prima facie* case with respect to its claims under Article III:4. (Panel Report, paras. 7.834 and 8.5) By contrast, as set out in fn 34 above, with respect to New Zealand's claims under Article III:4, the Panel declined to rule because its findings pertaining to the inconsistency of the measures at issue with Article XI:1 of the GATT 1994 and the absence of justification under Article XX(a), (b), or (d) of the GATT 1994 ensure the effective resolution of this dispute. (Ibid., para. 8.3)

[36] Panel Report, para. 8.5. See also paras. 7.834-7.835 and 7.852-7.853.

[37] Panel Report, para. 8.7.

[38] WT/DS477/11; WT/DS478/11.

[39] WT/AB/WP/6, 16 August 2010.

[40] Pursuant to Rule 22 of the Working Procedures.

[41] Pursuant to Rule 24(2) of the Working Procedures.

[42] Pursuant to Rule 24(1) of the Working Procedures.

[43] Pursuant to Rule 24(2) of the Working Procedures.

[44] Pursuant to Rule 24(4) of the Working Procedures.

[45] WT/DS477/12; WT/DS478/12.

[46] WT/DS477/13; WT/DS478/13.

Japan) responded to questions posed by the Members of the Appellate Body Division hearing the appeal. The participants and a third participant (Japan) made closing statements.

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.[47] The Notice of Appeal, and the executive summaries of the participants' claims and arguments are contained in Annexes A and B of the Addendum to this Report, WT/DS477/AB/R/Add.1, WT/DS478/AB/R/Add.1.

3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the third participants that filed a written submission (Australia, Brazil, Canada, and the European Union) are reflected in the executive summaries of their written submissions provided to the Appellate Body[48], and are contained in Annex C of the Addendum to this Report, WT/DS477/AB/R/Add.1, WT/DS478/AB/R/Add.1.

4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised by Indonesia in this appeal:

a. whether the Panel erred in finding that Article XI:1 of the GATT 1994 deals more specifically with quantitative restrictions on agricultural products than Article 4.2 of the Agreement on Agriculture, and, accordingly, whether the Panel erred in considering the co-complainants' claims under Article XI:1 of the GATT 1994 rather than under Article 4.2 of the Agreement on Agriculture;

b. whether the Panel erred in determining that Indonesia bears the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture;

c. whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU:

   i. by failing to conduct an objective assessment of the applicability of Article 4.2 of the Agreement on Agriculture; and

   ii. by failing to conduct an objective assessment of which party bears the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture;

d. in the event that the Appellate Body finds that the Panel did not err in considering the co-complainants' claims under Article XI:1 of the GATT 1994, rather than under Article 4.2 of the Agreement on Agriculture, whether the Panel erred in concluding that Article XI:2(c) of the GATT 1994 has been rendered "inoperative" by Article 4.2 of the Agreement on Agriculture[49]; and

e. whether the Panel erred in finding that Indonesia had failed to demonstrate that Measures 9 through 17 are justified under Article XX(a), (b), or (d) of the GATT 1994.

[47] Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

[48] Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

[49] In its Notice of Appeal, Indonesia specifies that this claim is made in the alternative, that is, "[i]f the Panel were correct that Article XI:1 of the GATT 1994 is the agreement that deals specifically with quantitative import restrictions on agricultural products". (Indonesia's Notice of Appeal, Section IV, p. 2)

5 ANALYSIS OF THE APPELLATE BODY

5.1. We first address Indonesia's claims of error raised on appeal regarding: (i) the Panel's decision on the order of analysis between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture; and (ii) the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture. In so doing, we also address Indonesia's claims that, in ruling on these two issues, the Panel committed errors under Article 11 of the DSU. We then address the alternative claim of error raised by Indonesia with regard to Article XI:2(c) of the GATT 1994. Finally, we examine Indonesia's claim on appeal under Article XX of the GATT 1994.

5.1 The Panel's decision to commence its legal analysis with the claims under Article XI:1 of the GATT 1994

5.2. We begin by addressing Indonesia's claim of error regarding the Panel's decision to commence its legal analysis with the co-complainants' claims raised under Article XI:1 of the GATT 1994, rather than Article 4.2 of the Agreement on Agriculture. Indonesia requests us to reverse the Panel's decision on the order of analysis, as well as its findings that the 18 measures at issue are inconsistent with Article XI:1 of the GATT 1994.[50] In response, New Zealand and the United States request us to reject Indonesia's appeal that the Panel's order of analysis constituted a legal error, and to uphold the relevant findings of the Panel.[51]

5.3. Before the Panel, New Zealand and the United States raised claims with regard to the 18 measures at issue under, *inter alia*, Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.[52] In setting out its order of analysis, the Panel concurred with the panel in *India – Autos*, stating that it is important to consider first whether a particular order is "compelled" by principles of interpretative methodology, "which, if not followed, might constitute an error of law".[53] The Panel also recalled that, in *EC – Bananas III*, the Appellate Body stated that the provision of the agreement that "deals specifically, and in detail" with the measures at issue should be analysed first.[54] The Panel noted that: (i) all 18 measures at issue in this dispute had been challenged under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture; and (ii) New Zealand and the United States had brought identical claims under either provision, namely, that all 18 measures at issue constitute quantitative restrictions. The Panel thus considered that the provision that "deals specifically with quantitative restrictions" is Article XI:1 because Article 4.2 has a "broader scope" and refers to measures other than quantitative restrictions.[55] The Panel thus commenced its assessment with Article XI:1 of the GATT 1994.[56] Having found that all 18 measures are inconsistent with Article XI:1 and that they are not justified under Article XX of the GATT 1994, the Panel then exercised judicial economy with regard to the claims under Article 4.2 of the Agreement on Agriculture.[57]

5.4. In this section, we first address Indonesia's substantive claim on appeal regarding the Panel's sequence of analysis before turning to its claim under Article 11 of the DSU.

[50] Indonesia's appellant's submission, para. 64 (referring to Panel Report, paras. 7.31-7.33, 7.92, 7.112, 7.134, 7.156, 7.179, 7.200, 7.227, 7.243, 7.270, 7.299, 7.327, 7.349, 7.375, 7.398, 7.428, 7.451, 7.478, 7.501, and 8.1.b).

[51] New Zealand's appellee's submission, para. 59; United States' appellee's submission, paras. 18, 68-69, and 205.

[52] Panel Report, para. 7.27.

[53] Panel Report, para. 7.31 (referring to Panel Report, *India – Autos*, para. 7.154).

[54] Panel Report, para. 7.31 (quoting Appellate Body Report, *EC – Bananas III*, para. 204).

[55] Panel Report, para. 7.32.

[56] Panel Report, para. 7.33.

[57] Panel Report, paras. 7.832-7.833.

5.1.1 Whether the Panel erred in assessing the claims regarding the measures at issue under Article XI:1 of the GATT 1994, rather than Article 4.2 of the Agreement on Agriculture[58]

5.5. On appeal, Indonesia submits that the Panel "erred in determining that the provision which dealt specifically with quantitative restrictions was Article XI:1 of the GATT 1994 and, as a result, in assessing the 18 measures at issue under Article XI:1 of the GATT 1994, rather than Article 4.2 of the Agreement on Agriculture."[59] Indonesia further submits that the Panel "erred by not applying Article 21.1 of the Agreement on Agriculture to determine that Article 4.2 of that Agreement was *lex specialis*"[60], so that Article 4.2 should have been applied "to the exclusion of" Article XI:1.[61] For Indonesia, Article 21.1 "does not require a conflict" between the GATT 1994 and the Agreement on Agriculture in order to apply.[62] Rather, the term "subject to" in Article 21.1 means that the Panel should have found that the Agreement on Agriculture prevails over the GATT 1994, because Article XI:1 and Article 4.2 concern the same matter, and Article 4.2 contains specific provisions dealing specifically with the measures at issue from both a substantive and a procedural perspective.[63] Indonesia thus contends that Article 21.1 prevents the cumulative application of Article XI:1 and Article 4.2, even absent a conflict between these two provisions.[64]

5.6. In response, New Zealand and the United States argue that Article 21.1 of the Agreement on Agriculture applies only in the event of conflict between provisions of the Agreement on Agriculture and provisions of the GATT 1994 or other Multilateral Trade Agreements in Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement).[65] In the absence of such conflict between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, the two provisions apply cumulatively[66], and the mere fact that one provision is "more specific" than the other does not mean that the former excludes the application of the latter.[67] Furthermore, New Zealand and the United States assert that panels have a "margin of discretion" in choosing the sequence of their analysis, the limit of which is not based on specificity, but rather on whether the panel's sequence of analysis leads to a "'flawed' substantive analysis".[68] In the present dispute, New Zealand and the United States argue that nothing in the Panel's decision to start its assessment under Article XI:1 instead of Article 4.2 affected the substance of its analysis of the claims presented to it, and that the sequence of analysis was within the Panel's

[58] In this respect, we note that, while Indonesia's claim on appeal is entitled "The Panel Erred in Determining that Article XI:1 of the GATT 1994 is More Specific than Article 4.2 of the Agreement on Agriculture" in its appellant's submission, its arguments on specificity essentially relate to whether "the Agreement on Agriculture would apply to the exclusion of the more general agreements, such as the GATT 1994, to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same matter". (Indonesia's appellant submission, heading II and para. 53 (emphasis original)) Indonesia subsequently reiterated at the oral hearing, both in its opening and closing statements and in response to questioning, that its first ground of appeal addresses whether both agreements can apply cumulatively to the challenged measures, or whether by virtue of Article 21.1 of the Agreement on Agriculture, Article 4.2 of the Agreement on Agriculture applies to the exclusion of Article XI:1 of the GATT 1994 because Article 4.2 contains more specific substantive and procedural rules.

[59] Indonesia's appellant's submission, para. 39.

[60] Indonesia's appellant's submission, para. 62.

[61] Indonesia's appellant's submission, para. 53. (emphasis original)

[62] Indonesia's appellant's submission, para. 53.

[63] Indonesia's opening statement at the oral hearing.

[64] Indonesia argued at the oral hearing that, even if the differences between Article XI:1 and Article 4.2 do not amount to a conflict, the Panel should have applied the specific rules on quantitative import restrictions on agricultural goods under Article 4.2, as required under Article 21.1. (Indonesia's opening statement at the oral hearing)

[65] New Zealand's appellee's submission, paras. 22 and 35-36; United States' appellee's submission, para. 44.

[66] New Zealand's appellee's submission, paras. 28-29; United States' appellee's submission, paras. 41, 51, and 53.

[67] United States' appellee's submission, para. 53.

[68] New Zealand's appellee's submission, paras. 40-41 (quoting Appellate Body Report, *Canada – Autos,* para. 151). See also ibid., para. 43; United States' appellee's submission, paras. 21 and 24.

margin of discretion.[69] New Zealand and the United States further argue that Article 4.2 of the Agreement on Agriculture is not, in any event, more specific than Article XI:1 of the GATT 1994.[70]

5.7. We begin by examining the relationship between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement Agriculture, in light of Article 21.1 of the Agreement on Agriculture. If this examination leads us to reject Indonesia's argument that Article 4.2 applies "to the exclusion of" Article XI:1[71], then we will examine whether, nevertheless, Article 4.2 should have been considered before Article XI:1, and whether the Panel's failure to do so constitutes an error of law.

5.8. Article 21.1 of the Agreement on Agriculture reads:

> The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.

5.9. Article 21.1 does not expressly state that the Agreement on Agriculture excludes the application of the GATT 1994 or other Multilateral Trade Agreements in Annex 1A to the WTO Agreement. Although the text of Article 21.1 does not explicitly refer to the concept of "conflict" as a condition for applying provisions of the Agreement on Agriculture to the exclusion of provisions of other WTO covered agreements, the Appellate Body in *EC – Export Subsidies on Sugar* interpreted Article 21.1 as follows:

> Members explicitly recognized that there may be conflicts between the Agreement on Agriculture and the GATT 1994, and explicitly provided, through Article 21, that the Agreement on Agriculture would prevail to the extent of such conflicts. Similarly, the General interpretative note to Annex 1A to the WTO Agreement states that, "[i]n the event of conflict between a provision of the [GATT 1994] and a provision of another agreement in Annex 1A …, the provision of the other agreement shall prevail to the extent of the conflict." The Agreement on Agriculture is contained in Annex 1A to the WTO Agreement.[72]

5.10. In that case, the Appellate Body read Article 21.1 to mean that the provisions of the Agreement on Agriculture prevailed over an inconsistent footnote in Part IV of the European Communities' Schedule CXL, which is an integral part of the GATT 1994.[73] This is consistent with the approach of the Appellate Body in *EC – Bananas III*, when it found that "the provisions of the GATT 1994 … apply to market access commitments concerning agricultural products, except to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same matter."[74] That sentence, in the context of *EC – Bananas III*, describes situations of conflicts between the GATT 1994 and the Agreement on Agriculture. In that dispute, the question before the Appellate Body was "whether the market access concessions for agricultural products made by the European Communities pursuant to the Agreement on Agriculture prevail over Article XIII of the GATT 1994", pursuant to Article 4.1 and Article 21.1 of the Agreement on Agriculture.[75] The Appellate Body thus assessed whether provisions of the Agreement on Agriculture explicitly "permit Members to act inconsistently with Article XIII of the GATT 1994".[76]

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[69] New Zealand's appellee's submission, paras. 44-45; United States' appellee's submission, paras. 21, and 34-39.

[70] New Zealand's appellee's submission, paras. 47-53; United States' appellee's submission, paras. 62-64.

[71] Indonesia's appellant's submission, para. 53. (emphasis original)

[72] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 221. (italics omitted)

[73] Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 222-226.

[74] Appellate Body Report, *EC – Bananas III*, para. 155. (italics omitted)

[75] Appellate Body Report, *EC – Bananas III*, para. 153. (italics omitted)

[76] Appellate Body Report, *EC – Bananas III*, para. 157. In particular, the Appellate Body stated:

> There is nothing in Articles 4.1 or 4.2, or in any other article of the Agreement on Agriculture, that deals specifically with the allocation of tariff quotas on agricultural products. If the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994, they would have said so explicitly.

(Ibid. (italics omitted))

5.11. Accordingly, the phrase "except to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same matter"[77] identifies instances where a provision of the Agreement on Agriculture conflicts with the GATT 1994 or with other Multilateral Trade Agreements in Annex 1A to the WTO Agreement. In *EC – Bananas III*, that was not the case, and thus, the provisions of the Agreement on Agriculture and the GATT 1994 applied cumulatively.[78]

5.12. Indonesia argues that Article 21.1 of the Agreement on Agriculture: (i) "does not require a conflict between the GATT 1994 and … the Agreement on Agriculture" to apply, but (ii) requires the Agreement on Agriculture to "apply to the exclusion of the more general agreements, such as the GATT 1994, to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same matter."[79] Indonesia's interpretation is not consistent with Article 21.1, as interpreted by the Appellate Body, according to which the provisions of the Agreement on Agriculture prevail in the event of a conflict between provisions of the Agreement on Agriculture and provisions of the GATT 1994 or other Multilateral Trade Agreements in Annex 1A of the WTO Agreement.[80]

5.13. In light of these considerations, we assess next whether Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture are in conflict or whether there is another factor preventing their cumulative application. In so doing, we focus on whether the content of and the relationship between these two provisions permit their cumulative application in this dispute.

5.14. Before the Panel, New Zealand and the United States claimed that all 18 measures at issue constitute quantitative restrictions that are inconsistent with Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994, which both discipline quantitative restrictions.[81] In addition, all 18 measures at issue apply to agricultural products[82], and the co-complainants' claims concern the same matter under either provision, namely, quantitative import restrictions on agricultural goods. In its appellant's submission, Indonesia argued that Article 4.2 imposes "a more specific obligation" than Article XI:1, because Members that are found to act inconsistently with Article 4.2 have to convert their measures into ordinary customs duties, whereas inconsistency with Article XI:1 is remedied through the elimination of the quantitative restriction at issue.[83]

5.15. Although Article 4.2 of the Agreement on Agriculture generally applies to: (i) a broader range of measures; and (ii) a narrower scope of products than Article XI:1 of the GATT 1994; both provisions prohibit Members from maintaining quantitative import restrictions on agricultural products.[84] A measure constituting a quantitative import restriction on agricultural products would therefore be inconsistent with both Article XI:1 and Article 4.2. Such findings of inconsistency would also result in the same implementation obligations under either provision, that is, to bring the measure into conformity with those provisions. The Appellate Body has suggested previously that there is essentially no difference between the obligation in Article XI:1 to eliminate

[77] Appellate Body Report, *EC – Bananas III*, para. 155. (italics omitted)

[78] Appellate Body Report, *EC – Bananas III*, paras. 157-158. See also Appellate Body Report, *US –Upland Cotton*, paras. 547-550.

[79] Indonesia's appellant's submission, para. 53. (emphasis original) Indonesia further submits that such an approach was confirmed by the Appellate Body in *Chile – Price Band System*. (Ibid., paras. 52 and 56) We note, however, that the Appellate Body in *Chile – Price Band System* did not *exclude* the application of Article II:1(b) of the GATT 1994 in favour of Article 4.2 of the Agreement on Agriculture. In that dispute, both provisions applied cumulatively. (Appellate Body Report, *Chile – Price Band System*, para. 190)

[80] Appellate Body Reports, *EC – Export Subsidies on Sugar*, para. 221; *EC – Bananas III*, para. 155.

[81] Panel Report, paras. 3.1.a-3.1.c, 3.3, and 7.32.

[82] We recall that the 18 measures at issue concern Indonesia's import licensing regimes for horticultural products and animals and animal products. (Panel Report, para. 2.32) Indonesia does not dispute that these import licensing regimes fall within the scope of Annex 1 to the Agreement on Agriculture. (Indonesia's appellant's submission, para. 10)

[83] Indonesia's appellant's submission, para. 59.

[84] Article XI:1 of the GATT 1994, which applies to all types of goods, requires the elimination of "prohibitions or restrictions other than duties, taxes or other charges". Article 4.2 of the Agreement on Agriculture, which applies only to agricultural products, requires the elimination of "any measures of the kind which have been required to be converted into ordinary customs duties", including quantitative import restrictions, as footnote 1 thereto provides.

quantitative restrictions and the obligation in Article 4.2 "not [to] maintain, resort to, or revert to" measures covered by Article 4.2.[85]

5.16. To the extent that they apply to the claims challenging the 18 measures at issue as quantitative restrictions, Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture thus contain the same substantive obligations, namely, the obligation not to maintain quantitative import restrictions on agricultural products. Had the Panel decided to commence its analysis with Article 4.2 rather than Article XI:1, it would have, in essence, conducted the same analysis to determine whether the 18 measures at issue are "quantitative import restrictions" within the meaning of footnote 1 to Article 4.2.[86]

5.17. Furthermore, a measure found to be a quantitative import restriction on agricultural products inconsistent with Article XI:1 may potentially be justified under Article XX of the GATT 1994, and the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture also incorporates Article XX of the GATT 1994.[87] To the extent that they apply to the claims regarding the 18 measures at issue in this dispute, Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture are thus subject to the same exceptions under Article XX of the GATT 1994, and, as we determine further below in our analysis, the same burden of proof applies under Article XX, regardless of whether that provision is invoked in relation to Article XI:1 or Article 4.2.[88]

5.18. In light of the above, we consider that Article 4.2 of the Agreement on Agriculture does not apply "to the exclusion of"[89] Article XI:1 of the GATT 1994 in relation to the claims challenging the 18 measures at issue as quantitative restrictions. Both provisions contain the same substantive obligations in relation to these claims and, thus, in these circumstances, they apply cumulatively.[90]

5.1.2 Whether a mandatory sequence of analysis exists between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

5.19. We next examine whether, in the circumstances of this case, there is a mandatory sequence of analysis between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, which, if not followed by the Panel, would amount to an error of law.[91] We recall that the Panel decided to begin its analysis under Article XI:1, because it considered that Article XI:1 is more specific with respect to quantitative restrictions than Article 4.2, which refers also to "measures other than quantitative restrictions".[92]

5.20. Indonesia argues that "the Panel erred in determining that the provision which dealt specifically with quantitative restrictions was Article XI:1 of the GATT 1994 and, as a result, in assessing the 18 measures at issue under Article XI:1 of the GATT 1994, rather than Article 4.2 of the Agreement on Agriculture."[93] According to Indonesia, the Panel should "have concluded that Article 4.2 applies more specifically to the products at issue, i.e. agricultural products."[94]

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[85] In *Chile – Price Band System*, the Appellate Body stated that the conversion into ordinary customs duties of measures within the meaning of Article 4.2 began during the Uruguay Round negotiations, and that, after the signing of the WTO Agreement, "there was no longer an option to replace measures covered by Article 4.2 with ordinary customs duties in excess of the levels of previously bound tariff rates." (Appellate Body Report, *Chile – Price Band System*, para. 206) After the entry into force of the WTO Agreement, Members simply have to "refrain from maintaining, reverting to, or resorting to, measures prohibited by Article 4.2". (Ibid.)

[86] The Panel found that each of the 18 measures at issue is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture, and revealing structure, it constitutes either a restriction having a limiting effect on importation (Measures 1 through 7, 9, and 11 through 18) or a prohibition on importation (Measures 8 and 10). (Panel Report, para. 8.1.b)

[87] See section 5.2.2 below.

[88] See section 5.2.2 below.

[89] Indonesia's appellant's submission, para. 53. (emphasis original)

[90] See also section 5.2 below.

[91] See Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109.

[92] Panel Report, para. 7.32.

[93] Indonesia's appellant's submission, para. 39.

[94] Indonesia's appellant's submission, para. 47. Indonesia further asserts that the Panel's reliance on Article 21.1 of the Agreement on Agriculture to find that "Article XI:2(c) of the GATT 1994 is no longer available with respect to agricultural products" further suggests that Article 4.2 "deals more specifically with quantitative import restrictions than does Article XI:1". (Indonesia's appellant's submission, para. 58 (referring

New Zealand and the United States respond that the structure of Article XI:1 and Article 4.2 shows that no mandatory order of analysis is warranted, and that nothing in the Panel's chosen order of analysis prevented it from undertaking a logical consideration of the claims presented to it, or affected the substance of its analysis under Article XI:1.[95]

5.21. We have concluded above that Article 4.2 of the Agreement on Agriculture does not apply to the exclusion of Article XI:1 of the GATT 1994, and that these two provisions apply cumulatively to the measures at issue in this dispute.[96] The remaining question before us is whether, in the absence of a conflict, the Panel was required to follow a particular sequence in addressing the claims raised under Article 4.2 and Article XI:1.

5.22. In the context of addressing the relationship between different provisions of the covered agreements, the Appellate Body considered in *Canada – Wheat Exports and Grain Imports* that "it is the nature of the relationship between two provisions that will determine whether there exists a mandatory sequence of analysis" and that "[i]n some cases, this relationship is such that a failure to structure the analysis in the proper logical sequence will have repercussions for the substance of the analysis itself."[97] In *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, the Appellate Body also considered that, while "[i]ssues of sequencing may become relevant to a logical consideration of claims under different agreements", nothing in Article III:4 of the GATT 1994, Article 2.1 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement), and Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) "indicate that there is an obligatory sequence of analysis to be followed when claims are made" under such provisions.[98] The Appellate Body further noted that "Japan ha[d] not indicated why commencing the analysis with the SCM Agreement could lead to a different outcome than commencing with the GATT 1994 and the TRIMs Agreement"[99], as the panel had done, and concluded that, "[u]ltimately, the decision in this case as to whether to commence the analysis with the claims under the SCM Agreement or those under the GATT 1994 and the TRIMs Agreement was within the [p]anel's margin of discretion."[100] The Panel in this dispute may have been required to follow a particular sequence between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture if, for instance, addressing Article 4.2 first would have led to a different substantive outcome than commencing the analysis with Article XI:1, as the Panel did.[101]

5.23. We have said above that the obligations of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture are substantively and procedurally the same insofar as they apply to the co-complainants' claims challenging the 18 measures at issue.[102] Indonesia has not explained why starting with an analysis under Article 4.2 would have led to a different substantive outcome. As we see it, the analysis that the Panel would have conducted under Article 4.2 as to whether the measures at issue are prohibited quantitative import restrictions is the same as the analysis that the Panel conducted under Article XI:1. Had the Panel commenced its analysis with Article 4.2, it would have equally examined whether the measures are justified under Article XX, as provided for in the second part of footnote 1 to Article 4.2, and reached the same conclusions as to whether the measures are justified under Article XX.[103] Furthermore, had the Panel commenced its analysis with Article 4.2 and found that the measures at issue are inconsistent with that provision and not justified under Article XX of the GATT 1994, it could have equally chosen to exercise judicial

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to Panel Report, para. 7.59)) We discuss the specific issues pertaining to Article XI:2(c) of the GATT 1994 in section 5.3 below.

[95] New Zealand's appellee's submission, paras. 42-45; United States' appellee's submission, paras. 34-35.

[96] See also Appellate Body Reports, *EC – Export Subsidies on Sugar*, para. 221; *EC – Bananas III*, para. 155.

[97] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109.

[98] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 5.8 and 5.5, respectively.

[99] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.8.

[100] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.8 (referring to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126).

[101] A particular sequence may also have been required for reasons related to judicial economy, if, for example, starting its analysis with Article 4.2, rather than with Article XI:1, would have allowed the Panel to exercise judicial economy under Article XI:1, while the reverse is not true.

[102] See also section 5.2 below.

[103] As we examine in section 5.2.2 below, we do not consider that a different burden of proof applies depending on whether Article XX is invoked in relation to Article XI:1 or Article 4.2.

economy with respect to the claims under Article XI:1. Thus, we do not see how starting the analysis with Article XI:1 rather than with Article 4.2 could constitute "a failure to structure the analysis in the proper logical sequence [that had] repercussions for the substance of the analysis itself".[104]

5.24. We turn now to Indonesia's argument that the Panel should "have concluded that Article 4.2 applies more specifically to the products at issue, i.e. agricultural products", and consider the relative specificity of Article XI:1 of the GATT 1994 in relation to Article 4.2 of the Agreement on Agriculture.[105] We observe that an analysis of the relative specificity of Article XI:1 and Article 4.2 may lead to different conclusions, depending on the weight given to different criteria, such as the product coverage, the types of measures covered, or the specificity of the obligation contained in either provision.[106] As we have said above, commencing the analysis with Article XI:1 rather than with Article 4.2 had no repercussions for the substance of the analysis, and, to the extent that they apply to the 18 measures at issue, Article XI:1 and Article 4.2 impose the same substantive obligation not to maintain quantitative import restrictions on agricultural products. In light of the above, reaching a conclusion as to the relative specificity of either Article XI:1 or Article 4.2 would not be determinative for resolving this dispute.

5.25. Thus, there is no mandatory sequence of analysis between Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994 in this dispute. For the reasons stated above, the decision as to whether to commence the analysis with the claims under Article XI:1 or those under Article 4.2 was within the Panel's margin of discretion.

5.1.3 Whether the Panel failed to make an objective assessment of the applicability of Article 4.2 of the Agreement on Agriculture

5.26. Indonesia claims that the Panel acted inconsistently with Article 11 of the DSU because it failed to make an objective assessment of the applicability of Article 4.2 of the Agreement on Agriculture.[107] Indonesia takes issue with the fact that the Panel addressed the claims under Article XI:1 of the GATT 1994 and the defences under Article XX of the GATT 1994, and then exercised judicial economy with respect to whether the measures at issue comply with Article 4.2 of the Agreement on Agriculture.[108] Indonesia argues that the Panel should have examined the co-complainants' claims under Article 4.2 of the Agreement on Agriculture because it is the more specific provision dealing with quantitative import restrictions on agricultural products.[109] At the oral hearing, Indonesia further clarified that, in its view, the Panel acted inconsistently with Article 11 of the DSU by deciding the case based on the wrong provision, namely, Article XI:1 of the GATT 1994. According to Indonesia, in so doing, the Panel impaired Indonesia's due process rights.[110]

5.27. New Zealand and the United States argue in response that Indonesia does not provide arguments in support of its challenge under Article 11 of the DSU that are separate and independent from the arguments put forward in respect of its substantive claims of legal error.

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[104] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109.

[105] Indonesia's appellant's submission, para. 47.

[106] For instance, the Agreement on Agriculture, which applies only to agricultural products, has a narrower product coverage than the GATT 1994. At the same time, the obligation not to maintain, resort to, or revert to certain types of measures in Article 4.2 of the Agreement on Agriculture applies to more types of measures than Article XI:1 of the GATT 1994, which only addresses quantitative import and export restrictions.

[107] Indonesia submits two claims on appeal under Article 11 of the DSU, namely: (i) that the Panel failed to conduct an objective assessment of the applicability of Article 4.2 of the Agreement on Agriculture; and (ii) that the Panel failed to conduct an objective assessment of which party bears the burden of proof under the second part of footnote 1 to Article 4.2. (Indonesia's appellant's submission, paras. 5 and 106) Indonesia submits both claims with a single request for us to reverse the Panel's conclusions and legal interpretations contained in paragraphs 7.31-7.34 and 7.833 of the Panel Report, and to reverse the Panel's findings in paragraphs 7.92, 7.112, 7.134, 7.156, 7.179, 7.200, 7.227, 7.243, 7.270, 7.299, 7.327, 7.349, 7.375, 7.398, 7.428, 7.451, 7.478, 7.501, 8.1.b, and 8.2 of the Panel Report. (Ibid., paras. 106-107) In this section, we address Indonesia's first claim under Article 11 of the DSU. Indonesia's claim that the Panel failed to conduct an objective assessment of which party bears the burden of proof under the second part of footnote 1 to Article 4.2 is addressed in section 5.2.3 below.

[108] Indonesia's appellant's submission, para. 102.

[109] Indonesia's appellant's submission, paras. 101-104.

[110] Indonesia's opening statement at the oral hearing; response to questioning at the oral hearing.

According to them, Indonesia therefore fails to meet the legal standard under Article 11 of the DSU.[111]

5.28. We recall that, as the Appellate Body has cautioned on several occasions, a claim that a panel has failed to conduct an "objective assessment of the matter before it" under Article 11 of the DSU is "a very serious allegation".[112] Accordingly, it is incumbent on a participant raising a claim under Article 11 to identify specific errors regarding the objectivity of the panel's assessment and "to explain *why* the alleged error *meets* the standard of review under that provision".[113] Importantly, a claim under Article 11 must "stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement."[114]

5.29. We note that, in support of its claim under Article 11 of the DSU, Indonesia essentially reiterates some of the arguments it presented in support of its substantive claim on appeal regarding the Panel's decision to commence its examination of the co-complainants' claims with Article XI:1 of the GATT 1994. Like for its substantive claim, Indonesia argues that Article 4.2 of the Agreement on Agriculture deals more specifically with quantitative import restrictions on agricultural products than Article XI:1 of the GATT 1994.[115] Similarly, both under Article 11 of the DSU and in support of its substantive claim, Indonesia argues that the Panel's reliance on Articles 4.2 and 21.1 of the Agreement on Agriculture to determine that Article XI:2(c)(ii) of the GATT 1994 was rendered "inoperative" demonstrates that Article 4.2 deals more specifically with the measures at issue.[116] We fail to see arguments made by Indonesia in support of its claim under Article 11 of the DSU that are specific, different, or separate from the ones it has submitted in support of its substantive claim of error regarding the Panel's decision to commence its examination with Article XI:1 of the GATT 1994 instead of Article 4.2 of the Agreement on Agriculture. Indonesia's claim under Article 11 of the DSU thus falls short of "stand[ing] by itself and be[ing] substantiated with specific arguments".[117]

5.30. Consequently, we consider that Indonesia has not substantiated its claim under Article 11 of the DSU that the Panel failed to make an objective assessment of the applicability of Article 4.2 of the Agreement on Agriculture.[118] We therefore find that Indonesia has not demonstrated that the Panel acted inconsistently with Article 11 of the DSU in this respect.

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[111] New Zealand's appellee's submission, paras. 10 and 101; United States' appellee's submission, paras. 71, 78, and 81.

[112] Appellate Body Report, *Peru – Agricultural Products*, para. 5.66. See also Appellate Body Reports, *China – Rare Earths*, para. 5.227; *EC – Poultry*, para. 133.

[113] Appellate Body Reports, *China – Rare Earths*, para. 5.178; *EC – Fasteners (China)*, para. 442. (emphasis original) See also Appellate Body Reports, *US – Steel Safeguards*, para. 498; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238.

[114] Appellate Body Reports, *Peru – Agricultural Products*, para. 5.66; *US – Anti-Dumping and Countervailing Duties (China)*, para. 337. See also Appellate Body Reports, *US – Steel Safeguards*, para. 498; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238; *Australia – Apples*, para. 406; *China – Rare Earths*, para. 5.173.

[115] Indonesia's appellant's submission, paras. 63 and 104.

[116] Indonesia's appellant's submission, paras. 58 and 104.

[117] 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).

[118] As briefly set out above, Indonesia argued at the oral hearing that the Panel impaired Indonesia's due process rights by deciding the case based on the wrong provision. According to Indonesia, this distinguishes its claim under Article 11 of the DSU from its substantive claims on appeal. (Indonesia's opening statement at the oral hearing; response to questioning at the oral hearing) We note, however, that this due process argument was raised in support of Indonesia's challenge under Article 11 of the DSU for the first time during the oral hearing, whereas Indonesia raised the same due process concerns in support of its substantive claim under Article 4.2 of the Agreement on Agriculture in its appellant's submission. (Indonesia's appellant's submission, para. 93) Moreover, this argument rests on the assumption that the Panel erred in not finding that Article 4.2 of the Agreement on Agriculture applies to the exclusion of Article XI:1 of the GATT 1994. Above, we concluded that Article 4.2 of the Agreement on Agriculture does not apply to the exclusion of Article XI:1 of the GATT 1994 in this dispute. Therefore, Indonesia's allegation at the oral hearing that the Panel impaired its due process rights by applying Article XI:1 instead of Article 4.2 does not alter our conclusion that Indonesia has not substantiated its claim under Article 11 of the DSU.

5.1.4 Conclusions

5.31. In light of the above, we consider that Article 4.2 of the Agreement on Agriculture does not apply "to the exclusion of"[119] Article XI:1 of the GATT 1994 in relation to the claims challenging the 18 measures at issue as quantitative restrictions. Both provisions contain the same substantive obligations in relation to these claims[120] and, thus, in these circumstances, they apply cumulatively. Moreover, there is no mandatory sequence of analysis between Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994 in this dispute, and the decision as to whether to commence the analysis with the claims under Article XI:1 or those under Article 4.2 was within the Panel's margin of discretion. We also consider that Indonesia has not substantiated its claim under Article 11 of the DSU that the Panel failed to make an objective assessment of the applicability of Article 4.2 of the Agreement on Agriculture.

5.32. We therefore reject Indonesia's claim that the Panel erred in assessing the claims regarding the measures at issue under Article XI:1 of the GATT 1994, rather than Article 4.2 of the Agreement on Agriculture. We also find that Indonesia has not demonstrated that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the applicability of Article 4.2 of the Agreement on Agriculture. Consequently, we uphold the Panel's decision, in paragraph 7.33 of the Panel Report, to commence its examination with Article XI:1 of the GATT 1994.

5.2 Whether the Panel erred in determining that Indonesia bears the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture

5.33. We now turn to Indonesia's claim of error regarding the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture. Indonesia submits that the Panel erred in determining that Indonesia bears the burden of proof under the second part of footnote 1 to Article 4.2.[121] Consequently, Indonesia requests us to reverse the Panel's conclusions and legal interpretations contained in paragraphs 7.34 and 7.833 of the Panel Report. Indonesia also requests us to reverse the Panel's finding in paragraph 8.2 of the Panel Report.[122]

5.34. Before the Panel, Indonesia suggested that, because measures maintained under Article XX of the GATT 1994 fall outside the scope of Article 4.2 of the Agreement on Agriculture by virtue of the second part of footnote 1 to that provision, it is not possible for a complainant to present a *prima facie* case of violation under Article 4.2 without offering any evidence or argumentation that the challenged measure is not justified under Article XX of the GATT 1994.[123] In paragraph 7.34 of its Report, the Panel rejected Indonesia's argument by stating:

> We note that, as indicated above, Indonesia argued that, because the co-complainants have failed to provide evidence that the challenged measures are not justified under Article XX, the "Panel cannot, as a matter of law, rule in the complainants' favor under Article 4.2". We understand Indonesia to be asking the Panel to invert the burden of proof under Article XX of the GATT 1994. As pointed out by New Zealand, it is well established in WTO jurisprudence following the Appellate Body decision in *US – Wool Shirts and Blouses* that the burden of identifying and establishing affirmative defences under Article XX rests on the party asserting the defence. Thus it is for Indonesia, and not the co-complainants, to establish the defence under Article XX of the GATT 1994.[124]

5.35. We note that the Panel did not expressly refer to Article 4.2 of the Agreement on Agriculture when it stated that "it is for Indonesia, and not the co-complainants, to establish the defence under Article XX of the GATT 1994."[125] However, as the Panel's statement was made in the context of addressing Indonesia's argument that the co-complainants must establish that the challenged

[119] Indonesia's appellant's submission, para. 53. (emphasis original)
[120] See also section 5.2 below.
[121] Indonesia's appellant's submission, para. 4.
[122] Indonesia's appellant's submission, para. 95.
[123] Indonesia's second written submission to the Panel, para. 38 (referring to New Zealand's response to Panel question No. 72, para. 127; United States' response to Panel question No. 72, para. 166).
[124] Panel Report, para. 7.34 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, p. 337). (fns omitted)
[125] Panel Report, para. 7.34.

measures are not justified under Article XX in order to present a *prima facie* case of violation under Article 4.2, we understand the above statement as containing an implicit reference to the burden of proof under Article XX of the GATT 1994 in the context of Article 4.2 of the Agreement on Agriculture.

5.2.1 Whether findings in respect of the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture are necessary

5.36. Before turning to the substance of Indonesia's claim on appeal, we note that New Zealand and the United States submit that, if we were to uphold the Panel's findings under Article XI:1 of the GATT 1994, we need not make findings with respect to Article 4.2 of the Agreement on Agriculture, including in relation to the burden of proof, as such findings would not be necessary to resolve the present dispute.[126] The United States contends that, if we were to affirm the Panel's findings under Article XI:1, any findings with respect to the burden of proof under Article 4.2 would not change Indonesia's obligation to implement the Panel's findings and recommendations with respect to Article XI:1.[127]

5.37. We believe that we have to consider Indonesia's claim on appeal regarding the allocation of the burden of proof because this issue is intertwined with the issue of the order of analysis of the claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, and their dispositions. If there is a difference between Article XI:1 and Article 4.2 in terms of the burden of proof with respect to Article XX of the GATT 1994, we would then be required to assess further whether such a difference amounts to a "conflict" within the meaning of Article 21.1 of the Agreement on Agriculture[128] in order to determine whether the Panel erred in applying Article XI:1, and not Article 4.2, to the challenged measures. In addition, if there is such a difference between Article XI:1 and Article 4.2, we would also be required to assess whether starting the analysis with Article XI:1, rather than with Article 4.2, resulted in a "failure to structure the analysis in the proper logical sequence [that had] repercussions for the substance of the analysis itself".[129] In view of these considerations, we proceed to address the substance of Indonesia's claim.[130]

5.2.2 Whether the Panel erred in allocating to Indonesia the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture

5.38. Indonesia claims that the Panel erred in allocating to Indonesia the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture. Indonesia observes that, while the first part of footnote 1 to Article 4.2 describes "the *type of measures* that are subject to the obligation to be converted into ordinary customs duties"[131], the second part of footnote 1 provides that measures maintained under "*certain exceptions* such as 'general, non-agriculture-specific provisions of GATT 1994'", including Article XX of the GATT 1994, are not inconsistent with Article 4.2.[132] Accordingly, in Indonesia's view, a party presenting a claim under Article 4.2 is required to establish that the measure "is of the kind that falls within the scope of this provision" by addressing *both* the first and second parts of footnote 1 to Article 4.2.[133]

5.39. New Zealand and the United States respond that the Panel correctly found that the burden of proof under Article XX of the GATT 1994 falls on Indonesia, including in the context of footnote 1 to Article 4.2 of the Agreement on Agriculture.[134] They argue that it is well established

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[126] New Zealand's appellee's submission, para. 90 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, pp. 339-340); United States' appellee's submission, paras. 112 and 114-120.

[127] United States' appellee's submission, paras. 119.

[128] We have observed in section 5.1 above that Article 21.1 of the Agreement on Agriculture excludes the application of the provisions of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement, including the GATT 1994, to the extent that those provisions are in *conflict* with the provisions of the Agreement on Agriculture.

[129] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109.

[130] We note that Indonesia's claim regarding the burden of proof is consistent with Articles 17.6 and 17.12 of the DSU, which provide that the Appellate Body is to consider the "issues of law covered in the panel report and legal interpretations developed by the panel" that are raised on appeal.

[131] Indonesia's appellant's submission, para. 77. (emphasis original)

[132] Indonesia's appellant's submission, para. 78. (emphasis original)

[133] Indonesia's appellant's submission, para. 84. (emphasis original) See also para. 82.

[134] New Zealand's appellee's submission, para. 65; United States' appellee's submission, para. 113.

in WTO jurisprudence that Article XX of the GATT 1994 is in the nature of an affirmative defence, with respect to which the respondent bears the burden of proof[135], and that there is no basis for Indonesia to argue that the nature of Article XX as an affirmative defence is changed in the context of Article 4.2 of the Agreement on Agriculture.[136]

5.40. We begin by recalling the text of Article 4.2, including footnote 1, of the Agreement on Agriculture. Article 4.2 reads:

> *Article 4*
>
> *Market Access*
>
> ...
>
> 2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties[1], except as otherwise provided for in Article 5 and Annex 5.
>
> _____
>
> [1] These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

5.41. Article 4.2 prohibits Members from maintaining, resorting to, or reverting to "measures of the kind which have been required to be converted into ordinary customs duties", subject to certain exceptions under Article 5 and Annex 5 to that Agreement. The first part of footnote 1 to Article 4.2 contains an "illustrative list"[137] of the categories of measures prohibited under Article 4.2, which refers to, *inter alia*, "quantitative import restrictions". The second part of footnote 1 provides that "measures" within the meaning of Article 4.2 do not include measures maintained under "balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement". Article XX of the GATT 1994 is one of the "other general, non-agriculture-specific provisions of GATT 1994". As such, a Member is prohibited under Article 4.2 from maintaining, resorting to, or reverting to a measure that falls within any of the categories of measures listed in the first part of footnote 1, such as "quantitative import restrictions", *provided* such measure is not maintained under any of the "provisions" mentioned in the second part of footnote 1, such as Article XX of the GATT 1994.[138]

5.42. With respect to the burden of proof under Article XX of the GATT 1994 referred to in the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture, we recall the general principle that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[139] We also note that it has been well established through WTO jurisprudence that Article XX of the GATT 1994 is an *affirmative defence*, with respect to which the respondent bears the burden of establishing a *prima facie* case.[140] In this context, the Appellate Body has stated that Article XX is one of the "exceptions" from obligations under certain other provisions of the GATT 1994, rather than a positive rule establishing obligations in itself.[141] Accordingly, the question before us is whether the allocation of the burden of proof as it applies under Article XX of the GATT 1994 is changed by virtue of the incorporation of this provision into Article 4.2 of the Agreement on Agriculture through the reference contained in the second part of footnote 1 to that provision.

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[135] New Zealand's appellee's submission, para. 73 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, p. 337); United States' appellee's submission, para. 124.
[136] New Zealand's appellee's submission, para. 78; United States' appellee's submission, para. 126.
[137] Appellate Body Report, *Chile – Price Band System*, para. 187. See also paras. 209 and 219.
[138] See Appellate Body Report, *Chile – Price Band System*, para. 221 and fn 196 thereto.
[139] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 335.
[140] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, p. 337.
[141] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, p. 337.

5.43. We observe first that Article 4.2 of the Agreement on Agriculture and footnote 1 thereto do not contain any express indication that Article XX of the GATT 1994 is no longer an affirmative defence when it is applied through the reference in the second part of footnote 1. Nor does Article 4.2 or footnote 1 expressly provide that the complainant bringing a claim under this provision must establish that the challenged measure is *not* maintained under Article XX of the GATT 1994 or under any of the other "provisions" referred to in the second part of footnote 1. In particular, the phrase "but not" in the second part of footnote 1, read in conjunction with the word "include" in the first part of footnote 1, makes clear that "measures" prohibited under Article 4.2 *do not include* measures maintained under one of the "provisions" mentioned in the second part of footnote 1. This phrase, however, is neutral as to the allocation of the burden of proof under these "provisions", including under Article XX.

5.44. Indonesia argues that, because measures maintained under "general, non-agriculture-specific provisions", such as Article XX of the GATT 1994, are not subject to the obligation under Article 4.2 of the Agreement on Agriculture, a party presenting a claim under Article 4.2 is required to establish that the measure "is of the kind that falls within the scope of this provision"[142] by demonstrating "both elements" in footnote 1[143], namely, the requirements of both the first and second parts of footnote 1. We acknowledge that "measures" within the meaning of Article 4.2 *do not include* measures maintained under one of the "provisions" mentioned in the second part of footnote 1. The second part of footnote 1 may thus be seen as relating to the *scope* of Article 4.2. We do not, however, agree that such characterization necessarily gives decisive guidance as to the allocation of the burden of proof under the second part of footnote 1. In fact, the Appellate Body has cautioned that the characterization of a particular provision as a "derogation limiting the scope", such as Articles III:8(a) and XI:2(a) of the GATT 1994, "does not pre-determine the question as to which party bears the burden of proof with regard to the requirements stipulated in the provision".[144]

5.45. We also note Indonesia's argument that Article XX of the GATT 1994 cannot be an "exception" in the context of Article 4.2 of the Agreement on Agriculture, because the drafters used "special language" such as "exceptions" or "exemptions" when they intended to import *exceptions* from the GATT 1994 into the other covered agreements.[145] The mere presence or absence of words such as "exceptions" or "exemptions", however, is not dispositive of the allocation of the burden of proof under a particular provision. The reverse of what Indonesia asserts could also be true because, if the drafters of Article 4.2 had intended to modify the nature of Article XX of the GATT 1994 as an *affirmative defence*, they could have used explicit language to that effect, instead of using phrases such as "but not" and "general, non-agriculture-specific *provisions*" in the second part of footnote 1.[146]

5.46. In light of the above, we fail to see a textual basis for the proposition that the burden of proof under Article XX of the GATT 1994 is shifted to the complainant by virtue of the incorporation of this provision into the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture. Rather, given that footnote 1 to Article 4.2 incorporates Article XX by reference without modifying the nature of this provision as an affirmative defence, it would follow that the burden of proof under Article XX remains with the respondent in the context of Article 4.2. This is consistent with the general principle that "the burden of proof rests upon the party, whether complaining or defending, who asserts the *affirmative* of a particular claim or defence."[147] While the complainant challenging a measure under Article 4.2 is required to demonstrate that the measure falls within the categories of measures prohibited under Article 4.2, it is the respondent who benefits from a showing that the measure *additionally* satisfies the requirements of Article XX and therefore is not prohibited under Article 4.2.

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[142] Indonesia's appellant's submission, para. 84. (emphasis original)

[143] Indonesia's appellant's submission, para. 82. (emphasis omitted)

[144] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.56. The Appellate Body further recalled that, "in *China – Raw Materials*, the Appellate Body distinguished between 'exceptions' (such as the general exception of Article XX) and limitations of the scope of an obligation (such as Article XI:2(a))." (Ibid., fn 491 thereto (referring to Appellate Body Reports, *China – Raw Materials*, para. 334))

[145] Indonesia's appellant's submission, para. 86 (referring to Article 3 of the TRIMs Agreement and Article 24.7 of the Agreement on Trade Facilitation).

[146] Emphasis added.

[147] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 335. (emphasis added)

5.47. We recall that, in *US – Clove Cigarettes*, the Appellate Body found[148] that "the burden of proof in respect of a particular provision of the covered agreements *cannot* be understood in isolation from the overarching logic of that provision, and the function which it is designed to serve."[149] Indonesia has not explained how and to what extent the reference in the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture modifies the overarching logic and function of Article XX of the GATT 1994. We recall in this regard that the Appellate Body has stated that Article XX "contains provisions designed to permit important state interests … to find expression".[150] Paragraphs (a) to (j) of Article XX "comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character".[151] The *chapeau* of Article XX, in turn, "embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand".[152] In our view, the overarching logic and function of Article XX of striking a balance between Members' obligations and rights remain the same in the context of Article 4.2 of the Agreement on Agriculture, as it recognizes Members' rights to pursue certain legitimate policy objectives as juxtaposed to their obligation to liberalize trade by converting certain market access barriers into ordinary customs duties.[153]

5.48. Finally, we note that Indonesia suggests that the allocation of the burden of proof under the second part of footnote 1 should be informed by certain other provisions of the covered agreements, which, according to Indonesia, "convert exceptions under Article XX of the GATT 1994 into positive obligations, thereby shifting the burden of proof to the complainant".[154] According to Indonesia, Articles 2.2 and 2.4 of the Agreement on Technical Barriers to Trade (TBT Agreement) are among such provisions.[155]

5.49. We disagree that Articles 2.2 and 2.4 of the TBT Agreement are relevant to the interpretation of the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture in terms of the burden of proof under Article XX of the GATT 1994 referred to therein. As an initial matter, we do not find a textual basis to characterize Article 2.2[156] or Article 2.4[157] of

[148] In the context of examining the allocation of the burden of proof under Article 2.12 of the Agreement on Technical Barriers to Trade (TBT Agreement).

[149] Appellate Body Report, *US – Clove Cigarettes*, para. 286. (emphasis original)

[150] Appellate Body Report, *US – Gasoline*, p. 30, DSR 1996:I, p. 28.

[151] Appellate Body Report, *US – Shrimp*, para. 121. (emphasis original)

[152] Appellate Body Report, *US – Shrimp*, para. 156.

[153] In *Chile – Price Band System*, the Appellate Body noted that the overall objectives of the Agreement on Agriculture as stated in the preamble of that Agreement include "the establishment of strengthened and more operationally effective GATT rules and disciplines", and implementing "specific binding commitments" in the area of market access. (Appellate Body Report, *Chile – Price Band System,* para. 196 (quoting Preamble to the Agreement on Agriculture)) The Appellate Body further stated that "Article 4 of the Agreement on Agriculture is appropriately viewed as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products." (Ibid., para. 201 (italics omitted)) Allocating the burden of proof under the second part of footnote 1 to the complainant would be at odds with the above objectives because it would *weaken*, rather than *strengthen*, the prohibition of quantitative import restrictions under Article 4.2, as compared to the prohibition of quantitative restrictions under Article XI:1 of the GATT 1994.

[154] Indonesia's appellant's submission, para. 88.

[155] Indonesia's appellant's submission, paras. 88-89. Indonesia also refers to Article 5.6 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and Article 11.6(b) of the Agreement on Trade Facilitation, both of which contain language similar to that of Article 2.2 of the TBT Agreement.

[156] Article 2.2 of the TBT Agreement provides:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

[157] Article 2.4 of the TBT Agreement provides:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for

the TBT Agreement as "convert[ing] exceptions under Article XX of the GATT 1994 into positive obligations"[158], as neither of these provisions contains a specific reference to Article XX. In addition, although Articles 2.2 and 2.4 both refer to certain "legitimate objectives"[159] that are similar to those mentioned in the paragraphs of Article XX, the mere reference to such "legitimate objectives" in Article 2.2 or Article 2.4 does not provide relevant context for interpreting Article 4.2 of the Agreement on Agriculture in terms of the burden of proof under Article XX referred to in the second part of footnote 1 thereto. Specifically, with respect to Article 2.2 of the TBT Agreement, the Appellate Body has found that "Article 2.2 does *not* prohibit measures that have *any* trade-restrictive effect", but only "restrictions on international trade that exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective".[160] As such, Article 2.2 is a positive rule establishing an obligation in itself. This is quite different from the function of the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture, which is to *exempt* certain measures from the prohibition of market access barriers set out in the first part of footnote 1.

5.50. Further, with respect to Article 2.4 of the TBT Agreement, we recall that, in *EC – Sardines,* the Appellate Body pointed to the "conceptual similarities" between, on the one hand, Articles 3.1 and 3.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and, on the other hand, the first and second parts of Article 2.4 of the TBT Agreement.[161] As the Appellate Body had found in *EC – Hormones*, the right of a Member to establish its own level of sanitary protection under Article 3.3 of the SPS Agreement is an "autonomous right", and "a Member may decide to set for itself a level of protection different from that implicit in the international standard, and to implement or embody that level of protection in a measure not 'based on' the international standard."[162] Accordingly, and given the "conceptual similarities" between Article 3.3 of the SPS Agreement and the second part of Article 2.4 of the TBT Agreement, the second part of Article 2.4 recognizes an "autonomous right" of a Member to set its own level of protection, rather than setting forth an *exception* or *exemption* from a (non-existent) general obligation to use relevant international standards. Thus, the second part of Article 2.4 of the TBT Agreement is dissimilar to the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture.

5.51. In sum, Article 4.2 of the Agreement on Agriculture and footnote 1 thereto, read in their relevant context, do not suggest that the nature of Article XX of the GATT 1994 as an *affirmative defence* is modified by virtue of the incorporation of this provision into Article 4.2 by the reference contained in the second part of footnote 1. We therefore reject Indonesia's claim that the Panel erred in allocating to Indonesia the burden of proof under Article XX of the GATT 1994 as referenced in the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture.

5.2.3 Whether the Panel failed to make an objective assessment of which party bears the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture

5.52. Having rejected Indonesia's claim under Article 4.2 of the Agreement on Agriculture, we note that Indonesia brings a separate but related claim that the Panel acted inconsistently with Article 11 of the DSU because it failed to make "an objective assessment of which party bears the burden of proof with respect to the second element of footnote 1 to Article 4.2 of the Agreement on Agriculture."[163] Indonesia argued at the oral hearing that, in allocating to Indonesia the burden of proof under Article XX of the GATT 1994 referred to in the second part of footnote 1 to

their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

[158] Indonesia's appellant's submission, para. 88.

[159] The third sentence of Article 2.2 of the TBT Agreements makes clear that "legitimate objectives" include: "national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment".

[160] Appellate Body Report, *US – Tuna II (Mexico)*, para. 319. (emphasis added) See also Appellate Body Report, *US – Clove Cigarettes*, para. 171.

[161] Appellate Body Report, *EC – Sardines*, para. 275.

[162] Appellate Body Report, *EC – Hormones*, paras. 104 and 172.

[163] Indonesia's appellant's submission, paras. 5 and 105.

Article 4.2, the Panel impaired Indonesia's due process rights.[164] New Zealand argues in response that Indonesia fails to substantiate independently this claim under Article 11 of the DSU, as it is solely based on Indonesia's challenge to the legal standards applied by the Panel.[165] According to New Zealand, Indonesia's claim must therefore fail.[166] We note that, in its appellee's submission, the United States does not separately address this claim by Indonesia. However, at the oral hearing, the United States reiterated the argument it put forward with respect to Indonesia's first claim under Article 11 of the DSU addressed in section 5.1.3 above, namely, that Indonesia fails to put forward under Article 11 of the DSU any arguments that are separate from or additional to the arguments it puts forward with respect to its substantive legal appeals.[167]

5.53. We recall that the Appellate Body has cautioned on several occasions that a claim that a panel has failed to conduct an "objective assessment of the matter before it" under Article 11 of the DSU is "a very serious allegation".[168] Accordingly, it is incumbent on a participant raising a claim under Article 11 to identify specific errors regarding the objectivity of the panel's assessment and "to explain *why* the alleged error *meets* the standard of review under that provision".[169] Importantly, a claim under Article 11 must "stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement".[170]

5.54. We note that, in its appellant's submission, Indonesia has not put forward any specific arguments in support of its claim that the Panel acted inconsistently with Article 11 of the DSU because it failed to make an objective assessment of which party bears the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture. Indonesia states, without more, that "[t]he Panel … did not conduct an objective assessment of which party bears the burden of proof with respect to the second element of footnote 1 to Article 4.2".[171] We do not consider that this mere statement is sufficient to show that the Panel failed to comply with its duties under Article 11 of the DSU.

5.55. Consequently, we consider that Indonesia has not substantiated its claim under Article 11 of the DSU that the Panel failed to conduct an objective assessment of which party bears the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture.[172] We therefore find that Indonesia has not demonstrated that the Panel acted inconsistently with Article 11 of the DSU in this respect.

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[164] Indonesia's opening statement at the oral hearing; response to questioning at the oral hearing.

[165] New Zealand's appellee's submission, para. 101.

[166] New Zealand's appellee's submission, paras. 101 and 110.

[167] United States' response to questioning at the oral hearing; appellee's submission, para. 83.

[168] Appellate Body Reports, *Peru – Agricultural Products*, para. 5.66; *China – Rare Earths*, para. 5.227; *EC – Poultry*, para. 133.

[169] Appellate Body Reports, *China – Rare Earths*, para. 5.178; *EC – Fasteners (China)*, para. 442. (emphasis original)

[170] Appellate Body Reports, *Peru – Agricultural Products*, para. 5.66; *US – Anti-Dumping and Countervailing Duties (China)*, para. 337. See also Appellate Body Reports, *US – Steel Safeguards*, para. 498; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238; *Australia – Apples*, para. 406; *China – Rare Earths*, para. 5.173.

[171] Indonesia's appellant's submission, paras. 5 and 105-106.

[172] As briefly set out above, Indonesia argued at the oral hearing that, in allocating to Indonesia the burden of proof under Article XX of the GATT 1994 referred to in the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture, the Panel impaired Indonesia's due process rights. According to Indonesia, this distinguishes its claim under Article 11 of the DSU from its substantive claims on appeal. (Indonesia's opening statement at the oral hearing; response to questioning at the oral hearing) We note, however, that this due process argument was raised in support of Indonesia's challenge under Article 11 of the DSU for the first time during the oral hearing, whereas Indonesia raised the same due process concerns in support of its substantive claim under Article 4.2 in its appellant's submission. (Indonesia's appellant's submission, para. 93) Moreover, this argument rests on the assumption that the Panel erred in determining that Indonesia bears the burden of proof under the second part of footnote 1 to Article 4.2. Above, we have rejected Indonesia's substantive claim that the Panel erred in allocating to Indonesia the burden of proof under Article XX of the GATT 1994 referred to in the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture. Therefore, Indonesia's allegation at the oral hearing that the Panel impaired its due process rights by incorrectly allocating the burden of proof to Indonesia under the second part of footnote 1 to Article 4.2 does not alter our conclusion that Indonesia has not substantiated its claim under Article 11 of the DSU.

5.2.4 Conclusions

5.56. For the reasons stated above, Article 4.2 of the Agreement on Agriculture and footnote 1 thereto, read in their relevant context, do not suggest that the nature of Article XX of the GATT 1994 as an *affirmative defence* is modified by virtue of its incorporation into the second part of footnote 1 to Article 4.2. We thus find that the burden of proof under Article XX remains with the respondent even when Article XX is applied through the reference in the second part of footnote 1 to Article 4.2. In addition, we consider that Indonesia has not substantiated its claim under Article 11 of the DSU that the Panel failed to conduct an objective assessment of which party bears the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture.

5.57. Accordingly, we uphold the Panel's finding, in paragraph 7.34 of the Panel Report, that the burden of proof under Article XX of the GATT 1994 referred to in the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture rests on Indonesia. With respect to Indonesia's request to reverse the Panel's finding in paragraphs 7.833 and 8.2 of the Panel Report[173], which pertains to the Panel's exercise of judicial economy with respect to Article 4.2 of the Agreement on Agriculture, Indonesia has not explained how the alleged error by the Panel in connection with the allocation of the burden of proof under the second part of footnote 1 to Article 4.2 leads to the conclusion that the Panel erred in exercising judicial economy. In any event, as we have found that the burden of proof under Article XX of the GATT 1994 remains with the respondent also in the context of Article 4.2 of the Agreement on Agriculture and footnote 1 thereto, we see no reason to disturb the Panel's decision to exercise judicial economy with respect to the co-complainants' claims under Article 4.2 of the Agreement on Agriculture. Thus, we reject Indonesia's request to reverse the Panel's finding in paragraphs 7.833 and 8.2 of the Panel Report.

5.3 Indonesia's alternative claim that the Panel erred in finding that Article XI:2(c) of the GATT 1994 has been rendered "inoperative" by Article 4.2 of the Agreement on Agriculture

5.58. We now turn to Indonesia's alternative claim of error that, if we were to find that the Panel did not err by addressing the claims under Article XI:1 of the GATT 1994, rather than the claims under Article 4.2 of the Agreement on Agriculture, then the Panel erred in finding that Article XI:2(c) of the GATT 1994 has been rendered "inoperative" by Article 4.2 of the Agreement on Agriculture.[174]

5.59. Before the Panel, Indonesia argued that, even if the Panel were to find that Measure 4 (harvest period requirement), Measure 7 (reference prices for chillies and fresh shallots for consumption), and Measure 16 (beef reference price) are inconsistent with Article XI:1 of the GATT 1994, they are nonetheless "justified" under Article XI:2(c)(ii) of the GATT 1994 because they are necessary to remove a temporary surplus of certain horticultural products, animals and animal products in Indonesia's domestic market.[175] New Zealand and the United States responded that Article XI:2(c)(ii) is no longer available with respect to agricultural products following the entry into force of the Agreement on Agriculture, because Article XI:2(c) does not qualify as an exception to the prohibition under Article 4.2 of the Agreement on Agriculture of "measures of the kind which have been required to be converted into ordinary customs duties".[176]

5.60. In paragraph 7.60 of its Report, the Panel agreed with New Zealand and the United States, and found that Indonesia cannot rely upon Article XI:2(c)(ii) of the GATT 1994 to exclude Measure 4, 7, or 16 from the scope of Article XI:1 of the GATT 1994 because Article XI:2(c) has been rendered "inoperative" with respect to agricultural measures by Article 4.2 of the Agreement on Agriculture.[177]

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[173] Indonesia's appellant's submission, paras. 95 and 107.
[174] Indonesia's appellant's submission, para. 109.
[175] Indonesia's second written submission to the Panel, para. 252. See also Panel Report, para. 7.58 (referring to Indonesia's second written submission to the Panel, paras. 197, 199, 203, and 252-257).
[176] Panel Report, para. 7.59 (referring to New Zealand's response to Panel question No. 114; United States' response to Panel question No. 114).
[177] Panel Report, para. 7.60.

5.61. In its appeal, Indonesia claims that the Panel erred in finding that Article XI:2(c) of the GATT 1994 has been rendered "inoperative" by Article 4.2 of the Agreement on Agriculture[178], and requests us to reverse the Panel's conclusion contained in paragraph 7.60 of the Panel Report.[179]

5.3.1 Whether the Appellate Body should decline to rule on Indonesia's alternative claim on appeal

5.62. Before turning to the substance of Indonesia's alternative claim on appeal, we note that the United States submits that we need not reach a finding with respect to this claim.[180] The United States argues that making findings on the interpretation of Article XI:2(c) of the GATT 1994 is not necessary to resolve the present dispute because Indonesia has not requested completion of the legal analysis, and, even if it had, Indonesia did not even attempt to establish before the Panel that its measures are maintained under Article XI:2(c)(ii).[181]

5.63. We observe that Indonesia's appeal concerning the legal status of Article XI:2(c) of the GATT 1994 pertains to "issues of law covered in the panel report and legal interpretations developed by the panel" within the meaning of Article 17.6 of the DSU. We also recall that Article 17.12 of the DSU provides that the Appellate Body "shall address each of the issues raised in accordance with [Article 17.6 of the DSU]". We further note that, while Indonesia has not requested us to complete the legal analysis under Article XI:2(c)(ii), it requests us to reverse the specific legal finding by the Panel because this finding "has systemic implications for all WTO Members", and "[t]he importance of maintaining recourse to Article XI:2(c) is of importance to the Government of Indonesia."[182] New Zealand also requests us to *uphold* this Panel finding[183], despite its observation that Indonesia's appeal is "not material to resolving the dispute" as the essential requirements of Article XI:2(c)(ii) are not satisfied.[184] In addition, while our ruling on Article XI:2(c) may not directly change the recommendations and rulings by the DSB with respect to Article XI:1 of the GATT 1994, the question as to whether Indonesia can in the future invoke Article XI:2(c)(ii) to justify or exempt any compliance measure taken with respect to Measures 4, 7, and 16 could affect the manner in which it can comply with the recommendations and rulings by the DSB.[185]

5.64. In light of the foregoing, we proceed to examine Indonesia's claim on appeal with respect to Article XI:2(c) of the GATT 1994.

5.3.2 Whether the Panel erred in finding that Article XI:2(c) of the GATT 1994 has been rendered "inoperative" with respect to agricultural measures

5.65. We begin our analysis by recalling the Panel's finding. The Panel stated, in paragraph 7.60 of the Panel Report:

> We agree with the co-complainants. As they explained, Article XI:2(c) has been rendered inoperative with respect to agricultural measures by Article 4.2 of the Agreement on Agriculture, which prohibits Members from maintaining, resorting to, or reverting to, "any measures of the kind which have been required to be converted into ordinary customs duties". Footnote 1 to Article 4.2 provides that the only measures that fall outside the scope of this provision are the ones "maintained under balance-of-payment provisions or under other general, non-agriculture-specific provisions or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement". Article XI:2(c) by its terms concerns agricultural products and therefore does not qualify under the exclusion for general, non-agriculture-specific provisions. Therefore, Indonesia cannot rely upon Article XI:2(c)(ii) of the GATT 1994. This is confirmed by Article 21 of the Agreement on Agriculture, which provides that "[t]he provisions of

[178] Indonesia's appellant's submission, para. 109.
[179] Indonesia's appellant's submission, para. 127.
[180] United States' appellee's submission, para. 155.
[181] United States' appellee's submission, paras. 156-158.
[182] Indonesia's appellant's submission, para. 108.
[183] New Zealand's appellee's submission, para. 129.
[184] New Zealand's appellee's submission, para. 128.
[185] We recall that, in *US – Upland Cotton*, the Appellate Body noted that "there may be cases in which it would be useful for us to review an issue, despite the fact that our ruling would not result in rulings and recommendations by the DSB". (Appellate Body Report, *US – Upland Cotton*, para. 510)

> GATT 1994", including Article XI:2(c)(ii) of the GATT 1994, "shall apply subject to the provisions of this Agreement". Accordingly, we conclude that Indonesia cannot rely upon Article XI:2(c)(ii) of the GATT 1994 to exclude Measures 4, 7 and 16 from the scope of Article XI:1 of the GATT 1994 because, with respect to agricultural measures, Article XI:2(c) has been rendered inoperative by Article 4.2 of the Agreement on Agriculture.[186]

5.66. Thus, the Panel considered that the types of measures permitted under Article XI:2(c) of the GATT 1994 are not exempted from the prohibition of market access barriers on agricultural products under Article 4.2 of the Agreement on Agriculture because "Article XI:2(c) by its terms concerns agricultural products and therefore does not qualify under the exclusion for general, non-agriculture-specific provisions" within the meaning of footnote 1 to Article 4.2. The Panel then recalled Article 21.1 of the Agreement on Agriculture, and found that Article XI:2(c) has been rendered "inoperative" with respect to agricultural measures because, by virtue of Article 21.1, the provisions of the GATT 1994 "shall apply subject to" the provisions of the Agreement on Agriculture.

5.67. In its appeal, Indonesia claims that the Panel's interpretation that Article XI:2(c) of the GATT 1994 has been rendered "inoperative" with respect to agricultural products is in error. Indonesia argues that the Panel "focused on the wrong element of footnote 1 [to Article 4.2 of the Agreement on Agriculture]"[187] in reaching its conclusion that Article 4.2 does not allow for the types of derogations set out in Article XI:2(c). According to Indonesia, Article XI:2(c) does not concern the *second* part of footnote 1 to Article 4.2 because it is "not an exception captured by the second element of this footnote 1".[188] Rather, Article XI:2(c) "defines" the term "quantitative import restrictions" in the *first* part of footnote 1.[189] Indonesia notes in this context that the phrase "quantitative import restrictions" in the first part of footnote 1 is not defined in the Agreement on Agriculture.[190] Accordingly, this phrase "must … be interpreted by referring, *inter alia*, to its relevant context, in particular Article XI (i.e. its paragraphs 1 and 2) of the GATT 1994".[191] Indonesia observes that a measure falling under one of the subparagraphs of Article XI:2 of the GATT 1994, including Article XI:2(c)(ii), "is not disciplined as a quantitative import restriction within the meaning of Article XI:1 of the GATT 1994".[192] Therefore, measures satisfying the requirements of Article XI:2(c)(ii) should also fall outside "quantitative import restrictions" in the first part of footnote 1 to Article 4.2 of the Agreement on Agriculture.[193]

5.68. New Zealand and the United States, on their part, submit that the Panel did not err in finding that Article XI:2(c) of the GATT 1994 has been rendered "inoperative" by Article 4.2 of the Agreement on Agriculture.[194] They agree with the Panel that measures falling under Article XI:2(c) are not exempted from the prohibition of market access barriers under Article 4.2 because Article XI:2(c) applies specifically to *agricultural* and fisheries products, and thus does not qualify as a "general, non-agriculture-specific provision[]" within the meaning of the second part of footnote 1 to Article 4.2.[195]

5.69. As such, the core issue before us is whether the coverage of the prohibition of "quantitative import restrictions" under Article 4.2 of the Agreement on Agriculture extends to the kinds of measures referred to in Article XI:2(c) of the GATT 1994.

5.70. Article 4.2 of the Agreement on Agriculture prohibits Members from maintaining, resorting to, or reverting to "any measures of the kind which have been required to be converted into ordinary customs duties". The first part of footnote 1 to Article 4.2 illustrates the categories of measures which have been required to be converted into ordinary customs duties, including "quantitative import restrictions". The term "quantitative import restrictions" is not defined in the

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[186] Panel Report, para. 7.60.
[187] Indonesia's appellant's submission, para. 120.
[188] Indonesia's appellant's submission, para. 120.
[189] Indonesia's appellant's submission, para. 120.
[190] Indonesia's appellant's submission, para. 123.
[191] Indonesia's appellant's submission, para. 123.
[192] Indonesia's appellant's submission, para. 122.
[193] Indonesia's appellant's submission, para. 122.
[194] New Zealand's appellee's submission, para. 114; United States' appellee's submission, paras. 159 and 163.
[195] New Zealand's appellee's submission, para. 123; United States' appellee's submission, para. 161.

Agreement on Agriculture. However, a plain reading of the term "quantitative import restrictions" suggests that it refers to any *restriction* on the *importation* of an agricultural product[196] that is related to its *quantity*. In addition, because "quantitative import restrictions" in footnote 1 to Article 4.2 are among "measures of the kind which have been required to be converted into *ordinary customs duties*"[197], the term "quantitative import restrictions" does not include ordinary customs duties.

5.71. Furthermore, as context for interpreting the prohibition of "quantitative import restrictions" under Article 4.2 of the Agreement on Agriculture, we note that Article XI of the GATT 1994 sets out a prohibition of *quantitative restrictions*. Article XI provides, in relevant part:

> *Article XI*
>
> *General Elimination of Quantitative Restrictions*
>
> 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member.
>
> 2. The provisions of paragraph 1 of this Article shall not extend to the following:
>
> ...
>
> (c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:
>
> ...
>
> (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; ...

5.72. Article XI of the GATT 1994 governs the elimination of *quantitative restrictions* generally.[198] In particular, paragraph 1 "lays down a general obligation to eliminate quantitative restrictions", and "prohibits Members to institute or maintain prohibitions or restrictions other than duties, taxes, or other charges, on the importation, exportation, or sale for export of any product destined for another Member".[199] Paragraph 2 of Article XI, in turn, provides that "[t]he provisions of paragraph 1 of this Article shall not extend to" the types of measures stipulated in subparagraphs 2(a) to 2(c). As relevant in this appeal, Article XI:2(c)(ii) exempts from the obligation under Article XI:1 those import restrictions on agricultural and fisheries products that are necessary to the enforcement of certain governmental measures which operate to remove a temporary surplus of certain domestic products. The Appellate Body has stated that the word "quantitative" in the title of Article XI "informs the interpretation of the words 'restriction' and 'prohibition' in Article XI:1 and XI:2", and accordingly, this provision "covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported".[200]

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[196] Article 2 of the Agreement on Agriculture provides: "This Agreement applies to the products listed in Annex 1 to this Agreement, hereinafter referred to as agricultural products."

[197] Emphasis added.

[198] See Appellate Body Reports, *China – Raw Materials*, para. 320; Panel Reports, *China – Raw Materials*, para. 7.912.

[199] Appellate Body Reports, *Argentina – Import Measures*, para. 5.216.

[200] Appellate Body Reports, *China – Raw Materials*, para. 320.

5.73. As noted above, Indonesia alleges that, because the term "quantitative import restrictions" in the first part of footnote 1 to Article 4.2 of the Agreement on Agriculture is not defined in that Agreement, this term must be informed by *both* Article XI:1 and XI:2 of the GATT 1994[201], such that measures satisfying the conditions of Article XI:2(c), among others, are excluded from "quantitative import restrictions" in the first part of footnote 1.[202]

5.74. As we have already stated in section 5.1, Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994 contain essentially the same prohibitions of *quantitative restrictions* as far as the importation of agricultural products is concerned. We therefore agree that the term "quantitative import restrictions" in the first part of footnote 1 to Article 4.2 should be interpreted in light of the prohibition of quantitative restrictions under Article XI:1.

5.75. With respect to the relationship between Article 4.2 of the Agreement on Agriculture and Article XI:2(c) of the GATT 1994, however, we observe that there is no express language in Article XI of the GATT 1994 that suggests that the derogations under Article XI:2(c) are relevant not only to the prohibition under Article XI:1 but also to the prohibition under Article 4.2. On the contrary, the opening clause of Article XI:2 clearly states that the derogations set out in subparagraphs 2(a) to 2(c) concern "paragraph 1 of this Article". Article 4.2 and footnote 1 thereto also do not expressly indicate whether the prohibition of "quantitative import restrictions" under this provision is subject to the derogations under Article XI:2(c). In particular, the second part of footnote 1 provides that "measures" prohibited under Article 4.2 do not include measures maintained under "balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement". Article XI:2(c) is clearly not a "balance-of-payments provision[]".[203] Article XI:2(c) also does not qualify as a "general, non-agriculture-specific provision[]" because it is "agriculture-specific" in the sense that its application is limited to "*agricultural* or fisheries product" in express terms.[204] As such, there is no basis in the text of Article 4.2 or footnote 1 to conclude that measures maintained under Article XI:2(c) fall outside the prohibition of "quantitative import restrictions" under this provision. Indeed, if the drafters of the Agreement on Agriculture had intended to exempt from the prohibition of market access barriers under Article 4.2 measures maintained under Article XI:2(c) of the GATT 1994, they could have done so by, for example, adding a reference to Article XI:2(c) in, or omitting the phrase "general, non-agriculture-specific" from, the second part of footnote 1.

5.76. Furthermore, while Article XI:2 of the GATT 1994 provides that "[t]he provisions of paragraph 1 of this Article shall not extend to" the kinds of "[i]mport restrictions" mentioned in subparagraph 2(c), these "[i]mport restrictions" are not disqualified from being *quantitative restrictions*. As noted above, the Appellate Body has explained that the word "quantitative" in the title of Article XI of the GATT 1994 informs the interpretation of the words "prohibitions" and "restrictions" in both Article XI:1 and Article XI:2.[205] In this light, the reference to "[i]mport restrictions" in Article XI:2(c) is clearly a reference to a certain specified class of measures that fall within *quantitative (import) restrictions*, but are exempted from the *prohibition* under Article XI:1 because they are necessary to the enforcement of certain governmental measures. While it is the function of Article XI:2(c) to carve out certain quantitative restrictions from the *prohibition* contained in Article XI:1, this does not change the fact that they are quantitative restrictions. This confirms the interpretation that the term "quantitative import restrictions" in footnote 1 to Article 4.2 of the Agreement on Agriculture is broad enough to encompass *both* quantitative (import) restrictions falling under Article XI:1 *and* "[i]mport restrictions" referred to in Article XI:2(c) of the GATT 1994.

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[201] Indonesia's appellant's submission, para. 123.

[202] Indonesia's appellant's submission, para. 122.

[203] The term "balance-of-payments provisions" has been recognized as referring to, *inter alia*, Articles XII and XVIII:B of the GATT 1994. (See e.g. preamble to the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 (in Annex 1A to the WTO Agreement); preamble to the Declaration on Trade Measures Taken for Balance-of-Payments Purposes (GATT document L/4904 adopted on 28 November 1979, BISD 26S, pp. 205-209))

[204] Emphasis added. Indonesia does not dispute that Article XI:2(c) of the GATT 1994 does not qualify as a "provision[]" mentioned in the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture. (See Indonesia's appellant's submission, para. 120)

[205] Appellate Body Reports, *China – Raw Materials*, para. 320.

5.77. Lastly, we note that Indonesia's interpretation of footnote 1 to Article 4.2 of the Agreement on Agriculture and Article XI:2(c) of the GATT 1994 relies on the distinction between a *limitation of scope* and an *exception*. For example, Indonesia asserts that the "common feature" of measures falling within the second part of footnote 1 is that they are *inconsistent* with GATT obligations but justified under GATT *exceptions*, such as Articles XII, XVIII, XIX, and XX of the GATT 1994.[206] According to Indonesia, because Article XI:2(c) is a "scope" provision and not an "exception", whether or not this provision detracts from the obligation under Article 4.2 is not a question under the *second* part of footnote 1, but rather a question that concerns the interpretation of the *first* part of footnote 1.[207] Indonesia also appears to consider that the fact that Article XI:2(c) concerns the "scope" of the prohibition of *quantitative restrictions* under Article XI:1 should inform the definition of "quantitative import restrictions" in the first part of footnote 1 to Article 4.2.[208]

5.78. We disagree that the distinction between a *limitation of scope* and an *exception* is dispositive of the issue before us. As we have already explained, while Article XI:2(c) of the GATT 1994 limits the scope of the *obligation* under Article XI:1 of the GATT 1994, this provision does not define the scope of the *notion* of quantitative restrictions itself, because the term "[i]mport restrictions" in Article XI:2(c), read in light of the word "quantitative" in the title of Article XI, is a reference to a certain class of *quantitative (import) restrictions*. This confirms the interpretation that the term "quantitative import restrictions" in the first part of footnote 1 to Article 4.2 of the Agreement on Agriculture covers the kinds of measures referred to in Article XI:2(c). In addition, regardless of how we characterize Article XI:2(c), nothing in the text of Article XI suggests that Article XI:2(c) limits not only the scope of the obligation under "paragraph 1 of this Article" but also the scope of the obligation under Article 4.2. Nor does the text of Article 4.2 or footnote 1 suggest that the prohibition of quantitative import restrictions under this provision is subject to the carve-outs set out in Article XI:2(c). On the contrary, the second part of footnote 1 clearly indicates that, while measures maintained under "general, non-agriculture-specific *provisions*"[209] of the GATT 1994, such as Article XX, are excluded from the obligation under Article 4.2, measures maintained under agriculture-specific "provisions" of the GATT 1994, including Article XI:2(c), do not qualify for such derogations. This conclusion is not dependent on whether Article XI:2(c) is a limitation of scope of, or an exception from, the obligation under Article XI:1, as the second part of footnote 1 uses the word "provisions" and does not distinguish between a "limitation of scope" and an "exception".

5.79. In light of the foregoing, we disagree with Indonesia that agricultural measures maintained under Article XI:2(c) of the GATT 1994 are not "quantitative import restrictions" within the meaning of the first part of footnote 1 to Article 4.2 of the Agreement on Agriculture. We therefore find that the prohibition of "quantitative import restrictions" under Article 4.2 extends to the kinds of quantitative import restrictions carved out from the prohibition under Article XI:1 of the GATT 1994 by virtue of Article XI:2(c). As a consequence, Members cannot maintain quantitative import restrictions on agricultural products that satisfy the requirements of Article XI:2(c) of the GATT 1994 without violating Article 4.2 of the Agreement on Agriculture. This is because the prohibition of "quantitative import restrictions" under Article 4.2 does not allow for the kind of derogations recognized under "agriculture-specific" provisions such as Article XI:2(c) of the GATT 1994.

5.80. We recall in this regard that Article 21.1 of the Agreement on Agriculture provides that the provisions of the GATT 1994 "shall apply subject to" the provisions of that Agreement. The Appellate Body has stated that "Members explicitly recognized that there may be conflicts between the Agreement on Agriculture and the GATT 1994, and explicitly provided, through Article 21, that the Agreement on Agriculture would prevail to the extent of such conflicts."[210] There *is* a conflict[211] between Article XI:2(c) and Article 4.2 because quantitative import restrictions on agricultural products that fall within the permission under the former provision cannot be maintained without violating the latter provision. Therefore, in accordance with Article 21.1 of the

[206] Indonesia's appellant's submission, para. 121.
[207] See Indonesia's appellant's submission, paras. 116 and 120.
[208] Indonesia's appellant's submission, para. 123.
[209] Emphasis added.
[210] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 221. (italics omitted)
[211] In the context of interpreting Article 1.2 of the DSU, the Appellate Body has defined "conflict" as "a situation where adherence to the one provision will lead to a violation of the other provision". (Appellate Body Report, *Guatemala – Cement I*, para. 65) See also Panel Reports, *EC – Bananas III*, para. 7.159.

Agreement on Agriculture, Article XI:2(c) cannot be applied to justify or exempt measures that fall within the prohibition of quantitative import restriction under Article 4.2.

5.81. The Panel further stated that, by virtue of Article 21.1 of the Agreement on Agriculture, "Indonesia cannot rely upon Article XI:2(c)(ii) of the GATT 1994 to exclude Measures 4, 7 and 16 from *the scope of Article XI:1 of the GATT 1994* because, with respect to agricultural measures, Article XI:2(c) has been rendered *inoperative* by Article 4.2 of the Agreement on Agriculture."[212] By referring to "the scope of Article XI:1 of the GATT 1994", the Panel apparently considered that Indonesia cannot rely on Article XI:2(c) not only with respect to the co-complainants' claims under Article 4.2 of the Agreement on Agriculture, but also with respect to their claims under Article XI:1 of the GATT 1994.

5.82. We note that Indonesia has not demonstrated that Measures 4, 7, and 16 satisfy all the elements of Article XI:2(c)(ii) of the GATT 1994[213], and thus the Panel's findings of inconsistency of these measures with Article XI:1 of the GATT 1994 remain undisturbed. We also recall that Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture contain essentially the same substantive obligations as far as the elimination of quantitative import restrictions on agricultural products is concerned. As such, the Panel's findings that Measures 4, 7, and 16 are *quantitative restrictions* on the importation of agricultural products inconsistent with Article XI:1 would, without requiring much more, lead to the conclusion that these measures also fall within the prohibition of quantitative import restrictions under Article 4.2 and the first part of footnote 1 thereto.[214] Accordingly, and because Article XI:2(c) cannot be invoked to justify or exempt measures falling within the prohibition of Article 4.2, Indonesia cannot maintain, resort to, or revert to Measures 4, 7, or 16 regardless of whether Article XI:2(c) is being invoked by Indonesia in relation to Article XI:1 or Article 4.2.

5.83. We further note that, while Article 21.1 of the Agreement on Agriculture governs the relationship between Article 4.2 of the Agreement on Agriculture and Article XI:2(c) of the GATT 1994, it does not necessarily follow that Article 21.1 affects the *internal* relationship between Article XI:1 and XI:2(c) of the GATT 1994, in the sense that Article 21.1 precludes Members from relying on Article XI:2(c) not only *vis-à-vis* claims under Article 4.2 but also *vis-à-vis* claims under Article XI:1 of the GATT 1994. In any event, our finding that Indonesia cannot rely on Article XI:2(c) to justify or exempt its measures with respect to the prohibition of quantitative import restrictions under Article 4.2 would provide sufficient guidance for the purpose of resolving the present dispute, including in relation to the implementation by Indonesia of the recommendations and rulings by the DSB.

5.3.3 Conclusions

5.84. For the reasons stated above, we disagree with Indonesia that agricultural measures maintained under Article XI:2(c) of the GATT 1994 are not "quantitative import restrictions" within the meaning of the first part of footnote 1 to Article 4.2 of the Agreement on Agriculture. We therefore find that the prohibition of "quantitative import restrictions" under Article 4.2 extends to measures satisfying the requirements of Article XI:2(c). We further find that, by virtue of Article 21.1 of the Agreement on Agriculture, Article XI:2(c) of the GATT 1994 cannot be relied upon to justify or exempt quantitative import restrictions that are inconsistent with Article 4.2 of the Agreement on Agriculture. In addition, the Panel's findings that Measures 4, 7, and 16 are

[212] Panel Report, para. 7.60. (emphasis added)

[213] In its appellant's submission, Indonesia explains that "[t]o fall within the scope of Article XI:2(c)(ii), a measure must fulfil the following relevant conditions: (i) it must be an import restriction; (ii) on any agricultural or fisheries product, (iii) imported in any form, (iv) necessary to the enforcement of governmental measures; (v) operating to remove a temporary surplus of the like domestic product; (vi) by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level." (Indonesia's appellant's submission, para. 118 (fns omitted)) However, before the Panel, Indonesia did not, among others, identify the specific governmental measures which operate to remove the temporary surplus of a domestic product, or demonstrate that the surplus has been made available to domestic consumers free of charge or at discounted prices. (See Indonesia's second written submission to the Panel, paras. 197, 199, 203, and 252-257)

[214] We note our earlier conclusion that Article XX of the GATT 1994 can be invoked in relation to both the prohibition of quantitative restrictions under Article XI:1 of the GATT 1994 and the prohibition of quantitative import restrictions under Article 4.2 and the first part of footnote 1 of the Agreement on Agriculture, and that the same allocation of the burden of proof under Article XX applies.

quantitative restrictions on the importation of agricultural products inconsistent with Article XI:1 of the GATT 1994 would lead to the conclusion that these measures also fall within the prohibition of quantitative import restrictions under Article 4.2. This conclusion does not change regardless of whether Article XI:2(c) is being invoked by Indonesia in relation to Article XI:1 or Article 4.2.

5.85. Accordingly, we uphold the Panel's finding, in paragraph 7.60 of the Panel Report, to the extent that it states that, by virtue of Article 21.1 of the Agreement on Agriculture, Article XI:2(c) of the GATT 1994 cannot be relied upon to justify or exempt measures falling within the prohibition of quantitative import restrictions under Article 4.2 of the Agreement on Agriculture.

5.4 Indonesia's claim under Article XX of the GATT 1994

5.86. We now turn to Indonesia's claim on appeal that the Panel erred in finding that Indonesia had failed to demonstrate that Measures 9 through 17 are justified under Article XX of the GATT 1994. Indonesia takes issue with the fact that the Panel assessed whether Measures 9 through 17 met the requirements of the *chapeau* of Article XX, without first examining whether these measures were provisionally justified under the applicable paragraphs of Article XX. According to Indonesia, in so doing, the Panel failed to follow the well-established sequence of analysis under Article XX for determining whether measures are justified.[215] On this basis, Indonesia requests us to reverse the Panel's conclusions in paragraphs 7.824, 7.826, 7.827, and 7.829 of the Panel Report, as well as the Panel's findings in paragraphs 7.830 and 8.1.c[216], insofar as these conclusions and findings pertain to Measures 9 through 17.[217] Should we reverse these findings by the Panel, as Indonesia requests us to do, Indonesia submits that there are "insufficient factual findings on the record" in respect of Measures 9 through 17 for us to complete the legal analysis under Article XX.[218]

5.87. We first set out briefly the Panel's conclusions and findings under Article XX of the GATT 1994, prior to addressing the order of analysis under that provision.

5.4.1 The Panel's conclusions and findings

5.88. Before the Panel, Indonesia raised a number of defences under Article XX(a), (b), and (d) of the GATT 1994 in respect of Measures 1 through 17, which the Panel decided to address in turn, starting with Measure 1.[219] In assessing these defences, the Panel recalled that "the assessment of a claim of justification under Article XX involves a two-tiered analysis in which a measure must (i) be provisionally justified under one of the subparagraphs of Article XX … and then (ii) analysed under the *chapeau* of Article XX."[220] Addressing Measures 1 through 7 in turn, the Panel found that Indonesia had failed to demonstrate that any of these measures are *provisionally* justified under Article XX(a), (b), or (d). Having reached these findings, the Panel refrained from analysing these measures under the *chapeau* of Article XX, and found that Indonesia had failed to demonstrate that any of these measures are justified under Article XX(a), (b), or (d).[221]

5.89. Turning to Measure 8, the Panel equally found that Indonesia had failed to demonstrate that this measure is provisionally justified under Article XX(b), but considered that this particular finding could be appealed.[222] The Panel observed that, if that were the case, "the Appellate Body [would] need sufficient facts on the record to address any argument under the *chapeau* of

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[215] Indonesia's appellant's submission, para. 129.
[216] Indonesia's appellant's submission, para. 160.
[217] Indonesia's response to questioning at the oral hearing.
[218] Indonesia's appellant's submission, para. 161.
[219] Panel Report, para. 7.520. The Panel provided an overview of Indonesia's defences under Article XX(a), (b), and (d) of the GATT 1994 in respect of Measures 1 through 17 in a table at paragraph 7.519 of its Report. We note that, while Indonesia had also raised a defence under Article XX(b) in respect of Measure 18, the Panel dismissed this defence on a preliminary basis because Indonesia had failed to make a *prima facie* defence. (Ibid., para. 7.517)
[220] Panel Report, para. 7.561 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.169, in turn referring to Appellate Body Reports, *US – Gasoline*, p. 22, DSR 1996:I, p. 20; *US – Shrimp*, paras. 119-120; *US – Gambling*, para. 292). See also paras. 7.618 and 7.648.
[221] Panel Report, paras. 7.585-7.586, 7.594-7.595, 7.605-7.606, 7.635-7.636, 7.660-7.661, 7.682-7.683, 7.692-7.693, 7.720-7.721, 7.742-7.743, 7.750-7.751, and 7.776-7.777.
[222] Panel Report, para. 7.804.

Article XX".[223] The Panel therefore decided to "assume *arguendo*" that Measure 8 is provisionally justified and to "examine whether Measure 8 is applied in a manner consistent with the *chapeau* of Article XX."[224] However, given that Indonesia had conflated its arguments under the *chapeau* of Article XX[225], the Panel proceeded to examine "whether Indonesia's import licensing regimes for horticultural products and animals and animal products as a whole, including the individual measures therein, are applied in a manner consistent with the *chapeau*, with respect to all three relevant subparagraphs of Article XX of the GATT 1994."[226] Thus, rather than focusing exclusively on Measure 8, the Panel addressed Measures 1 through 17 under the *chapeau* of Article XX and found that "Indonesia ha[d] failed to demonstrate that its import licensing regimes for horticultural products and animals and animal products as a whole, and the individual measures therein, including Measure 8, are applied in a manner consistent with the *chapeau* of Article XX".[227] On this basis, the Panel found that Indonesia had failed to demonstrate that Measure 8 is justified under Article XX(b).[228]

5.90. Finally, the Panel turned to Measures 9 through 17. In essence, the Panel recalled that Indonesia had failed to demonstrate that these measures are applied in a manner consistent with the *chapeau* of Article XX and observed that compliance with the *chapeau* is a necessary requirement in order for a measure to find justification under this provision.[229] For this reason, the Panel refrained from continuing its analysis of Indonesia's defences under Article XX(a), (b), or (d) for Measures 9 through 17[230], and found that "Indonesia ha[d] failed to demonstrate that Measures 9 through 17 are justified under Articles XX(a), (b) or (d) of the GATT 1994, as appropriate."[231] Thus, whereas the Panel assessed first whether Measures 1 through 8 are provisionally justified under Article XX(a), (b), or (d), the Panel assessed Measures 9 through 17 only under the *chapeau* of Article XX, and, on this sole basis, dismissed Indonesia's defences in respect of these measures.

5.4.2 The order of analysis under Article XX of the GATT 1994

5.91. As briefly set out above, Indonesia claims that the Panel erred in finding that Indonesia had failed to demonstrate that Measures 9 through 17 are justified under Article XX(a), (b), or (d) of the GATT 1994 because the Panel assessed these measures only under the *chapeau* of that provision and did not examine whether these measures are provisionally justified under the relevant paragraphs of Article XX.[232] According to Indonesia, Article XX requires panels to assess first, whether the measure at issue is provisionally justified under the relevant paragraphs of Article XX and, second, whether the provisionally justified measure complies with the requirements of the *chapeau* of Article XX.[233] Indonesia submits that the Panel erred by not following this "mandatory sequence" in respect of Measures 9 through 17.[234] In addition, Indonesia submits that "the Panel's failure to structure its analysis in the mandatory sequence had repercussions for the substance of its analysis."[235]

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[223] Panel Report, para. 7.804.
[224] Panel Report, para. 7.804.
[225] Indonesia argued that its import licensing regimes for horticultural products and animals and animal products "as a whole" are applied in a manner consistent with the *chapeau* of Article XX of the GATT 1994, "without making any relevant distinctions between the individual measures at issue" and by "conflat[ing] all three defences under subparagraphs (a), (b) and (d) of Article XX of the GATT 1994". (Panel Report, para. 7.805 (fn omitted))
[226] Panel Report, para. 7.805.
[227] Panel Report, para. 7.827.
[228] Panel Report, para. 7.828.
[229] Panel Report, para. 7.829.
[230] Panel Report, para. 7.829.
[231] Panel Report, para. 7.830.
[232] Indonesia's appellant's submission, paras. 129 and 150 (referring to Panel Report, paras. 7.829-7.830).
[233] Indonesia's appellant's submission, para. 140 (referring to Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, p. 20).
[234] Indonesia's appellant's submission, para. 151 (referring to Appellate Body Report, *US – Shrimp*, paras. 119-120 and 122) and para. 152.
[235] Indonesia's appellant's submission, para. 153 (referring to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109). Moreover, Indonesia argues that the legal error committed by the Panel was "linked to its examination of 'Indonesia's import licensing regimes for horticultural products and animals and animal products' as a whole". (Ibid., para. 156 (quoting Panel Report, para. 7.806))

5.92. In contrast, New Zealand and the United States take the view that analysing a measure under the *chapeau* without first assessing it under the applicable paragraphs of Article XX is not *per se* a reversible legal error.[236] Rather, according to them, it is only ground for reversal if it causes a panel's conclusion to be substantively wrong.[237] In the instant case, New Zealand and the United States consider that the Panel conducted a substantively correct analysis of the *chapeau* of Article XX, and there is thus no basis for reversing the Panel's finding under Article XX in respect of Measures 9 through 17.[238]

5.93. We recall that Article XX of the GATT 1994 provides, in relevant part[239]:

> *Article XX*
>
> *General Exceptions*
>
> 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 Member 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, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices; ...

5.94. Members can resort to Article XX as an exception to justify measures that would otherwise be inconsistent with GATT obligations. Article XX is made up of two main parts: (i) ten paragraphs, which enumerate the various categories of "governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization"[240]; and (ii) the *chapeau*, which imposes additional disciplines on measures that have been found to be provisionally justified under one of the paragraphs of Article XX.[241]

5.95. The *chapeau* and the paragraphs of Article XX contain independent requirements that must be satisfied for a measure to be justified. Specifically, the *chapeau* of Article XX serves the purpose of ensuring that provisionally justified measures under one of the paragraphs are not applied in such a way as would constitute an abuse of the exceptions of Article XX.[242] The *chapeau* does so by requiring that measures not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or

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According to Indonesia, in light of the principle of *jura novit curia*, the Panel was not "driven" to follow Indonesia's approach of assessing the regimes "as a whole" under the *chapeau* of Article XX of the GATT 1994. (Ibid., para. 158) In this context, Indonesia reiterates that the Panel should have examined whether Measures 9 through 17 were provisionally justified under the relevant paragraphs of Article XX. (Ibid., para. 159)

[236] New Zealand's appellee's submission, paras. 139 and 145; United States' appellee's submission, para. 178.

[237] New Zealand's appellee's submission, para. 138; United States' appellee's submission, para. 179.

[238] New Zealand's appellee's submission, paras. 153 and 186; United States' appellee's submission, para. 204.

[239] As set out above, Indonesia invoked paragraphs (a), (b), and (d) of Article XX of the GATT 1994 to justify its measures at issue in this dispute.

[240] Appellate Body Report, *US – Gasoline*, p. 17, DSR 1996:I, p. 16.

[241] Appellate Body Reports, *EC – Seal Products*, para. 5.296.

[242] See e.g. Appellate Body Reports, *US – Gasoline*, p. 22, DSR 1996:I, p. 21; *US – Shrimp*, para. 156; *EC – Seal Products*, para. 5.297.

a disguised restriction on international trade". Accordingly, the function of the *chapeau* of Article XX is "to prevent abuse of the exceptions specified in the paragraphs of that provision"[243], and to ensure that a balance is struck between the right of a Member to invoke an exception under Article XX and the substantive rights of other Members under the GATT 1994.[244]

5.96. It follows from the relationship between the *chapeau* of Article XX and the paragraphs thereof that Article XX sets out a two-tier test for determining whether a measure that would otherwise be inconsistent with GATT obligations can be justified under that provision. This test involves, first, an assessment of whether the measure falls under at least one of the ten exceptions listed in the paragraphs of Article XX, and, second, an assessment of whether the measure satisfies the requirements of the *chapeau* of that provision. This sequence reflects the fact that considering first the measure at issue under the applicable paragraphs of Article XX provides panels with the necessary tools to assess that measure under the *chapeau* of Article XX. In particular, in the analysis under the applicable paragraph, panels determine whether the objective of the measure at issue is one that is protected under the paragraphs of Article XX. If the measure is found to be provisionally justified under one of the paragraphs of Article XX, that objective is then relevant in assessing the measure under the *chapeau*. Other elements of the analysis under the applicable paragraphs of Article XX might be relevant in assessing a measure under the *chapeau*.

5.97. The Appellate Body set out the sequence of analysis under Article XX for the first time in *US – Gasoline*[245] and has, since then, recalled that sequence in a number of its reports.[246] In *US –Shrimp*, the Appellate Body highlighted that this sequence "reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX".[247] As the Appellate Body stated, "[t]he task of interpreting the *chapeau* so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it

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[243] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227 (referring to Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, p. 21).

[244] Appellate Body Reports, *EC – Seal Products,* para. 5.297 (referring to Appellate Body Report, *US – Shrimp*, para. 156). See also para. 5.301.

[245] In *US – Gasoline*, the Appellate Body stated:

> In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.

(Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, p. 20)

[246] In *US – Shrimp* and *Dominican Republic – Import and Sale of Cigarettes*, the Appellate Body quoted the paragraph of the report in *US – Gasoline* setting out the sequence of analysis under Article XX. (Appellate Body Reports, *US – Shrimp*, para. 118; *Dominican Republic – Import and Sale of Cigarettes*, para. 64 (both quoting Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, p. 20)) In *Brazil – Retreated Tyres*, the Appellate Body recalled:

> the analysis of a measure under Article XX of the GATT 1994 is two-tiered. First, a panel must examine whether the measure falls under at least one of the ten exceptions listed under Article XX. Secondly, the question of whether the measure at issue satisfies the requirements of the chapeau of Article XX must be considered.

(Appellate Body Report, *Brazil – Retreated Tyres*, para. 139 (referring to Appellate Body Reports, *US – Gasoline*, p. 22, DSR 1996:I, p. 20; *Dominican Republic – Import and Sales of Cigarettes*, para. 64; *US –Shrimp*, para. 149)) In the same vein, in *EC – Seal Products*, the Appellate Body found:

> As established in WTO jurisprudence, the assessment of a claim of justification under Article XX involves a two-tiered analysis in which a measure must first be provisionally justified under one of the subparagraphs of Article XX, before it is subsequently appraised under the chapeau of Article XX.

(Appellate Body Reports, *EC – Seal Products*, para. 5.169 (referring to Appellate Body Reports, *US – Gasoline*, p. 22, DSR 1996:I, p. 20; *US – Shrimp*, paras. 119 and 120; *US – Gambling*, para. 292)) More recently, in *Colombia – Textiles*, the Appellate Body stated:

> The analysis of a measure under Article XX of the GATT 1994 is two-tiered, such that a panel must first examine whether the measure falls under one of the exceptions listed in the paragraphs of Article XX, before considering the question of whether the measure satisfies the requirements of the *chapeau* of Article XX.

(Appellate Body Report, *Colombia – Textiles*, para. 5.67 (referring to Appellate Body Reports, *US – Gasoline*, p. 22, DSR 1996:I, p. 20; *Dominican Republic – Import and Sale of Cigarettes*, para. 64; *US – Shrimp*, paras. 118-120; *Brazil – Retreaded Tyres*, para. 139))

[247] Appellate Body Report, *US – Shrimp*, para. 119.

remains possible at all, where the interpreter … has not first identified and examined the specific exception threatened with abuse."[248]

5.98. Furthermore, the Appellate Body has recognized that the objective that is found to justify provisionally the measure at issue under a paragraph of Article XX is a relevant consideration to assess whether there is "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" pursuant to the *chapeau* of Article XX. Specifically, in *Brazil – Retreaded Tyres*, the Appellate Body stated that "[t]he assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure."[249] The Appellate Body further noted that it would "have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX."[250]

5.99. In the same vein, in *EC – Seal Products*, the Appellate Body stated that the analysis of whether discrimination is arbitrary or unjustifiable within the meaning of the *chapeau* of Article XX "should focus on the cause of the discrimination, or the rationale put forward to explain its existence".[251] The Appellate Body added that "[o]ne of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX."[252] Moreover, in that case, the Appellate Body stated that, "in determining which 'conditions' prevailing in different countries are relevant in the context of the chapeau, the subparagraphs of Article XX, and in particular the subparagraph under which a measure has been provisionally justified, provide pertinent context."[253] In other words, the relevant "conditions" for the analysis under the *chapeau* are the ones that relate to the particular policy objective under the applicable paragraph of Article XX.[254] The Appellate Body further recalled that the function of the *chapeau* is to maintain the equilibrium between the obligations under the GATT 1994 and the exceptions provided under each paragraph of Article XX. As the Appellate Body considered, this confirms that "the identification of the relevant 'conditions' under the chapeau should be understood by reference to the applicable subparagraph of Article XX under which the measure was provisionally justified and the substantive obligations under the GATT 1994 with which a violation has been found."[255]

5.100. We accept that, depending on the particular circumstances of the case at hand, including the way in which the defence is presented, a panel might be able to identify and analyse the elements under the applicable paragraphs of Article XX that are relevant to assess the requirements of the *chapeau* even when the sequence of analysis under Article XX has not been followed. Therefore, depending on the particular circumstances of the case, a panel that deviates from the sequence of analysis under Article XX might not necessarily, for that reason alone, commit a reversible legal error provided the panel has made findings on those elements under the applicable paragraphs that are relevant for its analysis of the requirements of *chapeau*. However, in light of our analysis above, we consider that the task of assessing a particular measure under the *chapeau* so as to prevent the abuse of the exceptions provided for in Article XX is rendered difficult where the panel has not first identified and examined the specific exception at issue. Following the normal sequence of analysis under Article XX provides panels with the necessary tools to assess the requirements of the *chapeau* in respect of a particular measure. Moreover, a finding that a Member has failed to comply with the requirements of the applicable paragraph of Article XX may not have the same implications regarding implementation as compared to a finding that a Member has failed to comply with the requirements of the *chapeau*.

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[248] Appellate Body Report, *US – Shrimp*, para. 120.
[249] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.
[250] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.
[251] Appellate Body Reports, *EC – Seal Products*, para. 5.303 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226, in turn referring to Appellate Body Reports, *US – Gasoline*; *US – Shrimp*; *US – Shrimp (Article 21.5 – Malaysia)*).
[252] Appellate Body Reports, *EC – Seal Products*, para. 5.306 (referring to Appellate Body Reports, *US – Shrimp*, para. 165; *Brazil – Retreaded Tyres*, paras. 227-228 and 232).
[253] Appellate Body Reports, *EC – Seal Products*, para. 5.300.
[254] Appellate Body Reports, *EC – Seal Products*, para. 5.300.
[255] Appellate Body Reports, *EC – Seal Products*, para. 5.301.

5.4.3 Conclusions

5.101. As discussed above, the normal sequence of analysis under Article XX of the GATT 1994 involves, first, an assessment of whether the measure at issue is provisionally justified under one of the paragraphs of Article XX and, second, an assessment of whether that measure also meets the requirements of the *chapeau* of Article XX. This reflects "the fundamental structure and logic of Article XX".[256] It also comports with the function of the *chapeau* of Article XX, which is "to prevent abuse of the exceptions specified in the paragraphs of that provision"[257], and to ensure that a balance is struck between the right of a Member to invoke an exception under Article XX and the substantive rights of other Members under the GATT 1994.[258] Depending on the particular circumstances of the case, a panel that deviates from the sequence of analysis under Article XX might not necessarily, for that reason alone, commit a reversible legal error provided the panel has made findings on those elements under the applicable paragraphs that are relevant for its analysis of the requirements of the *chapeau*. However, following the normal sequence of analysis under Article XX provides panels with the necessary tools to assess the requirements of the *chapeau*.

5.102. Having made these observations, we note Indonesia's contention that it would not be possible for us to complete the legal analysis to determine whether Measures 9 through 17 are justified under Article XX(a), (b), or (d) of the GATT 1994. According to Indonesia, there are "insufficient factual findings on the record" in respect of Measures 9 through 17 for us to do so.[259] We further note that, even if we were to accede to Indonesia's request on appeal and reverse the Panel's findings and conclusions under Article XX in respect of Measures 9 through 17 without completing the legal analysis, the Panel's findings that these measures are inconsistent with Article XI:1 of the GATT 1994 would remain undisturbed.[260]

5.103. For this reason, we consider that a ruling on Indonesia's claim on appeal under Article XX is unnecessary for the purposes of resolving this dispute. Therefore, we decline to rule on Indonesia's claim on appeal under Article XX of the GATT 1994 and declare the Panel's finding that "Indonesia ha[d] failed to demonstrate that Measures 9 through 17 are justified under Articles XX(a), (b) or (d) of the GATT 1994, as appropriate", in paragraph 7.830 of the Panel Report[261], moot and of no legal effect.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

6.1 The Panel's decision to commence its legal analysis with the claims under Article XI:1 of the GATT 1994

6.2. We consider that Article 4.2 of the Agreement on Agriculture does not apply "to the exclusion of"[262] Article XI:1 of the GATT 1994 in relation to the claims challenging the 18 measures at issue

[256] Appellate Body Report, *US – Shrimp*, para. 119.

[257] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227 (referring to Appellate Body Report, *US –Gasoline*, p. 22, DSR 1996:I, p. 21).

[258] Appellate Body Reports, *EC – Seal Products,* para. 5.297 (referring to Appellate Body Report, *US –Shrimp*, para. 156). See also para. 5.301.

[259] Indonesia's appellant's submission, para. 161. At the oral hearing, New Zealand suggested that completing the legal analysis would contribute to providing sufficiently precise recommendations and rulings for the purposes of implementation. (New Zealand's response to questioning at the oral hearing). For its part, the United States clarified that, should we reverse the Panel's findings under Article XX of the GATT 1994 in respect of Measures 9 through 17, it is not requesting that we complete the legal analysis. Moreover, given the absence of a request for completion by Indonesia, the United States considers that completing the legal analysis would not be necessary in this case. (United States' response to questioning at the oral hearing)

[260] On appeal, the United States notes that Indonesia does not request that we complete the legal analysis and find that any of Indonesia's measures are justified under Article XX of the GATT 1994. According to the United States, "Indonesia's appeal could result in no change to the DSB recommendations and rulings, or Indonesia's obligations regarding implementation, because the findings under Article XI:1 will remain undisturbed." Consequently, the United States submits that it is not necessary for us to consider Indonesia's appeal under Article XX of the GATT 1994. (United States' appellee's submission, paras. 168-169)

[261] See also Panel Report, para. 8.1.c.vi.

[262] Indonesia's appellant's submission, para. 53. (emphasis original)

as quantitative restrictions. Both provisions contain the same substantive obligations in relation to these claims[263] and, thus, in these circumstances, they apply cumulatively. Moreover, there is no mandatory sequence of analysis between Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994 in this dispute, and the decision as to whether to commence the analysis with the claims under Article XI:1 or those under Article 4.2 was within the Panel's margin of discretion. We also consider that Indonesia has not substantiated its claim under Article 11 of the DSU that the Panel failed to make an objective assessment of the applicability of Article 4.2 of the Agreement on Agriculture.

a. Therefore, we reject Indonesia's claim that the Panel erred in assessing the claims regarding the measures at issue under Article XI:1 of the GATT 1994, rather than Article 4.2 of the Agreement on Agriculture.

b. In addition, we find that Indonesia has not demonstrated that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the applicability of Article 4.2 of the Agreement on Agriculture.

c. Consequently, we uphold the Panel's decision, in paragraph 7.33 of the Panel Report, to commence its examination with Article XI:1 of the GATT 1994.

6.2 Whether the Panel erred in determining that Indonesia bears the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture

6.3. Article 4.2 of the Agreement on Agriculture and footnote 1 thereto, read in their relevant context, do not suggest that the nature of Article XX of the GATT 1994 as an *affirmative defence* is modified by virtue of its incorporation into the second part of footnote 1 to Article 4.2. In addition, we consider that Indonesia has not substantiated its claim under Article 11 of the DSU that the Panel failed to conduct an objective assessment of which party bears the burden of proof under the second part of footnote 1 to Article 4.2.

a. Therefore, we find that the burden of proof under Article XX of the GATT 1994 remains with the respondent even when Article XX is applied through the reference in the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture.

b. In addition, we find that Indonesia has not demonstrated that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of which party bears the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture.

c. Consequently, we uphold the Panel's finding, in paragraph 7.34 of the Panel Report, that the burden of proof under Article XX of the GATT 1994 referred to in the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture rests on Indonesia.

6.4. With respect to Indonesia's request to reverse the Panel's finding in paragraphs 7.833 and 8.2 of the Panel Report[264], which pertains to the Panel's exercise of judicial economy with respect to Article 4.2 of the Agreement on Agriculture, Indonesia has not explained how the alleged error by the Panel in connection with the allocation of the burden of proof under the second part of footnote 1 to Article 4.2 leads to the conclusion that the Panel erred in exercising judicial economy. In any event, as we have found that the burden of proof under Article XX of the GATT 1994 remains with the respondent also in the context of Article 4.2 of the Agreement on Agriculture and footnote 1 thereto, we see no reason to disturb the Panel's decision to exercise judicial economy with respect to the co-complainants' claims under Article 4.2 of the Agreement on Agriculture.

a. Therefore, we reject Indonesia's request to reverse the Panel's finding in paragraphs 7.833 and 8.2 of the Panel Report.

[263] See also section 6.2 below.
[264] Indonesia's appellant's submission, paras. 95 and 107.

6.3 Indonesia's alternative claim that the Panel erred in finding that Article XI:2(c) of the GATT 1994 has been rendered "inoperative" by Article 4.2 of the Agreement on Agriculture

6.5. We disagree with Indonesia that agricultural measures maintained under Article XI:2(c) of the GATT 1994 are not "quantitative import restrictions" within the meaning of the first part of footnote 1 to Article 4.2 of the Agreement on Agriculture.

a. Therefore, we find that the prohibition of "quantitative import restrictions" under Article 4.2 of the Agreement on Agriculture extends to measures satisfying the requirements of Article XI:2(c) of the GATT 1994.

b. We further find that, by virtue of Article 21.1 of the Agreement on Agriculture, Article XI:2(c) of the GATT 1994 cannot be relied upon to justify or exempt quantitative import restrictions that are inconsistent with Article 4.2 of the Agreement on Agriculture.

6.6. In addition, the Panel's findings that Measures 4, 7, and 16 are *quantitative restrictions* on the importation of agricultural products inconsistent with Article XI:1 of the GATT 1994 would lead to the conclusion that these measures also fall within the prohibition of quantitative import restrictions under Article 4.2 of the Agreement on Agriculture. This conclusion does not change regardless of whether Article XI:2(c) is being invoked by Indonesia in relation to Article XI:1 or Article 4.2.

a. Consequently, we uphold the Panel's finding, in paragraph 7.60 of the Panel Report, to the extent that it states that, by virtue of Article 21.1 of the Agreement on Agriculture, Article XI:2(c) of the GATT 1994 cannot be relied upon to justify or exempt measures falling within the prohibition of quantitative import restrictions under Article 4.2 of the Agreement on Agriculture.

6.4 Indonesia's claim under Article XX of the GATT 1994

6.7. The normal sequence of analysis under Article XX of the GATT 1994 involves, first, an assessment of whether the measure at issue is provisionally justified under one of the paragraphs of Article XX and, second, an assessment of whether that measure also meets the requirements of the *chapeau* of Article XX. This reflects "the fundamental structure and logic of Article XX".[265] It also comports with the function of the *chapeau* of Article XX, which is "to prevent abuse of the exceptions specified in the paragraphs of that provision"[266], and to ensure that a balance is struck between the right of a Member to invoke an exception under Article XX and the substantive rights of other Members under the GATT 1994.[267] Depending on the particular circumstances of the case, a panel that deviates from the sequence of analysis under Article XX might not necessarily, for that reason alone, commit a reversible legal error provided the panel has made findings on those elements under the applicable paragraphs that are relevant for its analysis of the requirements of the *chapeau*. However, following the normal sequence of analysis under Article XX provides panels with the necessary tools to assess the requirements of the *chapeau*.

6.8. Having made these observations, we note Indonesia's contention that it would not be possible for us to complete the legal analysis to determine whether Measures 9 through 17 are justified under Article XX(a), (b), or (d) of the GATT 1994. According to Indonesia, there are "insufficient factual findings on the record" in respect of Measures 9 through 17 for us to do so.[268] We further note that, even if we were to accede to Indonesia's request on appeal and reverse the Panel's findings and conclusions under Article XX in respect of Measures 9 through 17 without

[265] Appellate Body Report, *US – Shrimp*, para. 119.
[266] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227 (referring to Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, p. 21).
[267] Appellate Body Reports, *EC – Seal Products,* para. 5.297 (referring to Appellate Body Report, *US – Shrimp*, para. 156). See also para. 5.301.
[268] Indonesia's appellant's submission, para. 161.

completing the legal analysis, the Panel's findings that these measures are inconsistent with Article XI:1 of the GATT 1994 would remain undisturbed. For this reason, we consider that a ruling on Indonesia's claim on appeal under Article XX is unnecessary for the purposes of resolving this dispute.

a. Therefore, we decline to rule on Indonesia's claim on appeal under Article XX of the GATT 1994 and declare the Panel's finding that "Indonesia ha[d] failed to demonstrate that Measures 9 through 17 are justified under Articles XX(a), (b) or (d) of the GATT 1994, as appropriate", in paragraph 7.830 of the Panel Report[269], moot and of no legal effect.

6.5 Recommendation

6.9. The Appellate Body recommends that the DSB request Indonesia to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 12th day of October 2017 by:

_____
Ujal Singh Bhatia
Presiding Member

_____
Thomas Graham
Member

_____
Ricardo Ramírez-Hernández
Member

_____

[269] See also Panel Report, para. 8.1.c.vi.

WORLD TRADE ORGANIZATION

WT/DS477/AB/R/Add.1
WT/DS478/AB/R/Add.1

9 November 2017

(17-6042)

Original: English

INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS

AB-2017-2

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to C to the Report of the Appellate Body circulated as document WT/DS477/AB/R and WT/DS478/AB/R, and is an integral part that Report.

The Notice of Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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ANNEX A

NOTICE OF APPEAL

ANNEX A-1

INDONESIA'S NOTICE OF APPEAL*

Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 20 of the Working Procedures for Appellate Review, Indonesia hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretation covered in the Panel Report entitled *Indonesia — Importation of Horticultural Products, Animals and Animal Products* (WT/DS477/R, WT/DS478/R), which was circulated on 22 December 2016 (the "Panel Report"). Pursuant to Rules 20(1) and 21(1) of the Working Procedures for Appellate Review, Indonesia is simultaneously filing this Notice of Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submission to the Appellate Body, Indonesia appeals, and requests the Appellate Body to modify or reverse legal interpretations leading to the legal findings and conclusions of the Panel, with respect to the following errors contained in the Panel Report:[1]

I. The Panel's findings and conclusions under Article XI:1 of the GATT 1994

The Panel erred in law in finding that Article XI:1 of the GATT 1994 deals more specifically with quantitative import restrictions on agricultural goods than Article 4.2 of the Agreement on Agriculture. In particular, the Panel failed to apply the principle of *lex specialis derogat lege generali* as reflected in Article 21.1 of the Agreement of Agriculture.

Indonesia, therefore, requests the Appellate Body to reverse the Panel's conclusions and the Panel's legal interpretations contained in paragraphs 7.31-7.33 of the Panel Report. In addition, Indonesia requests the Appellate Body to reverse the Panel's findings in paragraphs 7.92, 7.112, 7.134, 7.156, 7.179, 7.200, 7.227, 7.243, 7.270, 7.299, 7.327, 7.349, 7.375, 7.398, 7.428, 7.451, 7.478, and 7.501 as well as paragraph 8.1.b of its Report.

II. The Panel's findings and conclusions under Article 4.2 of the Agreement on Agriculture

The Panel further erred in law in allocating the burden of proof to Indonesia under the second element in footnote 1 to Article 4.2 of the Agreement on Agriculture. To make a *prima facie* case under Article 4.2 of the Agreement on Agriculture, a complainant must demonstrate both elements set out in footnote 1 to Article 4.2 of that agreement. It must show that the measure at issue is of the type required to be converted into ordinary customs duties, such as a quantitative import restriction, and that it is not maintained under, *inter alia*, any of the public policy exceptions set out in Article XX of the GATT 1994.

Indonesia, therefore, requests the Appellate Body to reverse the Panel's conclusions and the Panel's legal interpretations contained in paragraphs 7.34 and 7.833 of the Panel Report. In addition, Indonesia requests the Appellate Body to reverse the Panel's finding in paragraph 8.2.

* This document, dated 17 February 2017, was circulated to Members as document WT/DS477/11 and WT/DS478/11.

[1] Pursuant to Rule 20(2)(d)(iii) of the Working Procedures for Appellate Review, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Indonesia's right to refer to other paragraphs of the Panel Report in the context of its appeal.

III. The Panel's failure to make an objective assessment under Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)

The Panel failed to conduct an objective assessment of the applicability of the covered agreements or of the conformity of the Indonesian measures at issue with the covered agreements, as required by Article 11 of the DSU. The Panel did not examine the co-complainants' claims under Article 4.2 of the Agreement on Agriculture, which was the applicable agreement. The Panel failed to conduct an objective assessment of the applicability of Article 4.2 of the Agreement on Agriculture and to allocate the proper burden of proof under the second element of footnote 1 to Article 4.2 of the Agreement on Agriculture.

Indonesia, therefore, requests the Appellate Body to reverse the Panel's conclusions and the Panel's legal interpretations contained in paragraphs 7.31-7.34 and 7.833 of the Panel Report. In addition, Indonesia requests the Appellate Body to reverse the Panel's findings in paragraphs 7.92, 7.112, 7.134, 7.156, 7.179, 7.200, 7.227, 7.243, 7.270, 7.299, 7.327, 7.349, 7.375, 7.398, 7.428, 7.451, 7.478, 7.501, as well as paragraphs 8.1.b and 8.2 of its Report.

IV. The Panel's conclusion under Article XI:2(c) of the GATT 1994

Indonesia considers that 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 has systemic implications for all WTO Members. If the Panel were correct that Article XI:1 of the GATT 1994 is the agreement that deals specifically with quantitative import restrictions on agricultural products, Indonesia submits an alternative claim of legal error that the Panel erred in its conclusion under Article XI:2(c) of the GATT 1994.

Indonesia, therefore, requests the Appellate Body to reverse the Panel's conclusion and the Panel's legal interpretation contained in paragraphs 7.59 and 7.60 of the Panel Report.

V. The Panel's findings and conclusions under Article XX of the GATT 1994

With respect to Measures 9 through 17, Indonesia submits that the Panel assessed only the requirements under the chapeau to Article XX of the GATT 1994. It did not assess any of the defences put forward by Indonesia under the applicable subparagraphs of Article XX before making its findings that "Indonesia has failed to demonstrate that Measures 9 to 17 are justified under Article XX(a), (b) or (d) of the GATT, as appropriate".

Indonesia, therefore, requests the Appellate Body to reverse the Panel's conclusions and the Panel's legal interpretations contained in paragraphs 7.824, 7.826, 7.827 and 7.829 of the Panel Report. In addition, Indonesia notes that the above grounds of appeal are without prejudice to the arguments developed in Indonesia's Appellant's Submission.

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ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX B-1

EXECUTIVE SUMMARY OF INDONESIA'S APPELLANT'S SUBMISSION

I. INTRODUCTION[1]

1. In this dispute, New Zealand and the United States challenged 18 Indonesian measures concerning Indonesia's import licensing regimes for horticultural products and animals and animal products, which fell within the scope of Annex 1 to the Agreement on Agriculture. The co-complainants brought identical claims and made identical arguments that the 18 measures at issue were quantitative restrictions that were inconsistent with both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.[2] The Panel commenced its legal analysis with the claims under Article XI:1 of the GATT 1994,[3] and then exercised judicial economy with respect to all identical claims under Article 4.2 of Agreement on Agriculture.[4] The Panel found in favour of the co-complainants on all their claims that the 18 Indonesian measures at issue were quantitative import restrictions.

2. Indonesia considers that, in arriving at its findings and conclusions, the Panel incorrectly applied principles of treaty interpretation and committed grave errors of law.

II. THE PANEL ERRED IN DETERMINING THAT ARTICLE XI:1 OF THE GATT 1994 IS MORE SPECIFIC THAN ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

3. Indonesia submits that the Panel erred in determining that the provision which dealt specifically with quantitative restrictions was Article XI:1 of the GATT 1994 and, as a result, in assessing the 18 measures at issue under Article XI:1 of the GATT 1994, rather than Article 4.2 of the Agreement on Agriculture.

4. Indonesia submits that the Panel's decision was an error because it did not consider the following aspects: (a) the number of measures covered by a provision is not determinative of whether it regulates quantitative import restrictions on agricultural products in a more specific manner, (b) the product coverage of a provisions may be used to determine whether it regulates quantitative import restrictions on agricultural products in a more specific manner, (c) the GATT 1994 applies "subject to" the Agreement on Agriculture pursuant to Article 21.1 of the Agreement on Agriculture, and, (d) the Agreement on Agriculture deals specifically with quantitative import restrictions on agricultural products.

5. Therefore, Indonesia submits that the Panel's conclusion that the GATT 1994 is the more specific agreement than the Agreement on Agriculture was a legal error. The Panel further erred by not applying Article 21.1 of the Agreement on Agriculture to determine that Article 4.2 of that Agreement was *lex specialis*.

6. For all the above reasons, the Panel erred in law in finding that Article XI:1 of the GATT 1994 deals more specifically with quantitative import restrictions on agricultural goods than Article 4.2 of the Agreement on Agriculture.

7. Indonesia, therefore, requests the Appellate Body to reverse the Panel's conclusions and the Panel's legal interpretations contained in paragraphs 7.31-7.33 of the Panel Report. In addition,

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[1] This Executive Summary contains a total of 1911 words (including footnotes). Indonesia's Appellant's Submission contains a total of 19441 words (including footnotes).

[2] These 18 measures are summarised in Panel Report, *Indonesia – Import Licensing Regimes (New Zealand)(United States)*, para. 2.32. The co-complainants also brought claims under Article 3.2 of the Import Licensing Agreement against measures 1 and 2. New Zealand also brought a claim under Article III:4 of the GATT 1994 against measures 6, 14 and 15.

[3] Panel Report, *Indonesia – Import Licensing Regimes (New Zealand)(United States)*, para. 7.33.

[4] Panel Report, *Indonesia – Import Licensing Regimes (New Zealand)(United States)*, paras. 7.832 and 7.833.

Indonesia requests the Appellate Body to reverse the Panel's findings in paragraphs 7.92, 7.112, 7.134, 7.156, 7.179, 7.200, 7.227, 7.243, 7.270, 7.299, 7.327, 7.349, 7.375, 7.398, 7.428, 7.451, 7.478, and 7.501 as well as paragraph 8.1.b of its Report.

III. THE PANEL ERRED IN DETERMINING THAT INDONESIA BORE THE BURDEN OF PROVING THE SECOND ELEMENT OF FOOTNOTE 1 TO ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

8. In the course of the proceedings, the co-complainants and Indonesia disagreed on the allocation of the burden of proof under the second element of footnote 1 to Article 4.2 of the Agreement of Agriculture. Indonesia considers that in order to make a *prima facie* case under Article 4.2 of the Agreement on Agriculture, a complainant must demonstrate both elements set out in footnote 1 to Article 4.2 of that agreement.

9. The Panel exercised judicial economy on the claims under Article 4.2 of the Agreement on Agriculture.[5] However, it agreed with the co-complainants that the burden of proof under the second element of footnote 1 to Article 4.2 would fall on Indonesia. The Panel's conclusion on the allocation of the burden resulted in legal error. Indonesia submits that the second element of footnote 1 is not *an "exception"*, but rather one of the elements that a complainant has to show in order to make a *prima facie* case of violation under Article 4.2 of the Agreement on Agriculture.

10. Thus, Indonesia appeals the Panel's conclusion that the respondent bears the burden of proof under the second element of footnote 1 to Article 4.2 of the Agreement on Agriculture.[6] It considers that the Panel's conclusion impaired Indonesia's due process rights as the Panel inappropriately shifted the burden of proof under the second element of footnote 1 to Article 4.2 of the Agreement on Agriculture from the complainants to Indonesia.

11. Indonesia, therefore, requests the Appellate Body to reverse the Panel's conclusions and the Panel's legal interpretations contained in paragraphs 7.34 and 7.833 of the Panel Report. In addition, Indonesia requests the Appellate Body to reverse the Panel's findings in paragraphs 8.2.

IV. THE PANEL FAILED 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. Indonesia submits that the Panel did not conduct an objective assessment of the applicability of the covered agreements or of the conformity of the measures at issue with the covered agreements because it did not examine the co-complainants' claims under Article 4.2 of the Agreement on Agriculture. By addressing Article XI:1 of the GATT 1994 alone and exercising judicial economy under the Agreement on Agriculture, the Panel failed to apply Article 4.2 of the Agreement on Agriculture, which was the more specific agreement with respect to quantitative import restrictions on agricultural products. The Panel also did not conduct an objective assessment of which party bears the burden of proof with respect to the second element of footnote 1 to Article 4.2 of the Agreement on Agriculture.

13. Indonesia, therefore, requests the Appellate Body to reverse the Panel's conclusions and the Panel's legal interpretations contained in paragraphs 7.31-7.34 and 7.833 of the Panel Report. In addition, Indonesia requests the Appellate Body to reverse the Panel's findings in paragraphs 7.92, 7.112, 7.134, 7.156, 7.179, 7.200, 7.227, 7.243, 7.270, 7.299, 7.327, 7.349, 7.375, 7.398, 7.428, 7.451, 7.478, 7.501, as well as paragraphs 8.1.b and 8.2 of its Report.

[5] See Panel Report, *Indonesia – Import Licensing Regimes (New Zealand)(United States)*, paras. 7.833 and 8.2.

[6] Panel Report, *Indonesia – Import Licensing Regimes (New Zealand)(United States)*, para. 7.734.

V. IN THE ALTERNATIVE, THE PANEL ERRED IN CONCLUDING THAT ARTICLE XI:2(C) OF THE GATT 1994 HAS BEEN RENDERED INOPERATIVE BY ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

14. Indonesia considers that the Panel's conclusion that Article XI:2(c) has been rendered inoperative by Article 4.2 of the Agreement on Agriculture has systemic implications for all WTO Members.[7] The importance of maintaining recourse to Article XI:2(c) is of importance to the Government of Indonesia.

15. If the Panel were correct that Article XI:1 of the GATT 1994 is the more specific agreement that deals specifically with quantitative restrictions, Indonesia submits that the Panel erred in its legal interpretation that Article XI:2(c) of the GATT 1994 has been rendered inoperative by Article 4.2 of the Agreement on Agriculture. In arriving at its conclusion, the Panel fundamentally misunderstood the role and function of Article XI:2(c) of the GATT 1994. Indonesia considers that Article XI:2(c) of the GATT 1994 is not an "exception" to the obligations under Article XI:1 of the GATT 1994. Rather, it is a "scope" provision, which defines the circumstances under which WTO Members have the right to apply quantitative restrictions, which they would otherwise be required to eliminate.

16. Moreover, Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) provides that "Recommendations and rulings of the DSB cannot add to, or diminish the rights and obligations provided in the covered agreements". The Panel's conclusion that Article XI:2(c) of the GATT 1994 has been rendered inoperative by virtue of Article 4.2 of the Agreement on Agriculture diminishes the rights of WTO Members under the GATT 1994.

17. Indonesia submits that the Panel erred in law in finding that Article XI:2(c) of the GATT 1994 has been rendered inoperative by virtue of Article 4.2 of the Agreement on Agriculture. Indonesia, therefore, requests the Appellate Body to reverse the Panel's conclusion in paragraph 7.60 of the Panel Report.

VI. THE PANEL ERRED IN FINDING THAT INDONESIA FAILED TO DEMONSTRATE THAT MEASURES 9 THROUGH 17 WERE JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994 AS IT DID NOT EXAMINE WHETHER THESE MEASURES WERE PROVISIONALLY JUSTIFIED UNDER THE APPLICABLE SUBPARAGRAPHS

18. The Panel's finding that Indonesia has failed to demonstrate that measures 9 through 17 were justified under Article XX(a), (b) or (d) of the GATT 1994, as appropriate, was in error[8] because the Panel did not examine whether these measures were provisionally justified under the relevant subparagraphs of Article XX of the GATT.

19. The Panel justified its approach by noting that Indonesia submitted its defences under the chapeau with respect to its import licensing regime for horticultural products and animals and animal products as a whole. It stated "we are driven to follow the same approach in our analysis."[9]

20. In the light of the principle of *jura novit curia*, the Panel was not "driven" to follow the same approach as Indonesia. It is the duty of the court itself to ascertain and apply the relevant law in the given circumstances of the case as the law lies within the judicial knowledge of the court.[10] WTO case law provides clear guidance on how panels must approach a respondent's defence under Article XX, including the mandatory sequence of the analysis required by the text and overall

[7] Panel Report, *Indonesia – Import Licensing Regimes (New Zealand)(United States)*, paras. 7.59-7.60

[8] Panel Report, *Indonesia – Import Licensing Regimes (New Zealand)(United States)*, paras. 7.829-7.830 (emphasis added).

[9] Panel Report, *Indonesia – Import Licensing Regimes (New Zealand)(United States)*, paras. 7.569 and 7.805.

[10] See e.g. Appellate Body Report, *EC – Tariff Preferences*, para. 105 and footnote 220 referring to International Court of Justice, Merits, Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), 1974 ICJ Reports, p. 9, para. 17.

structure of this provision. In fact, when it comes to matters of legal interpretation, it is for a panel to develop its own legal reasoning independently of what is put forward by any party.[11]

21. Indonesia submits that the Panel's findings and conclusions with respect to measures 9 through 17 resulted in an error of law. Indonesia, therefore, requests the Appellate Body to reverse the Panel's conclusion in paragraphs 7.824, 7.826, 7.827 and 7.829 and reverse the Panel's findings in paragraphs 7.830 and 8.1.c of the Panel Report.

VII. CONCLUSION

22. For the reasons above, Indonesia requests the Appellate Body to reverse the Panel's specific conclusions and findings as set out above.

[11] See Panel Report, *EC – Export Subsidies*, footnote 437. See also Appellate Body Report, *EC – Hormones*, para. 156 (emphasis added).

ANNEX B-2

EXECUTIVE SUMMARY OF NEW ZEALAND'S APPELLEE'S SUBMISSION

I. INTRODUCTION[1]

1. This dispute concerns a range of prohibitions and restrictions imposed by Indonesia on imports of animals, animal products and horticultural products. Before the Panel, New Zealand argued that the 18 measures at issue constitute quantitative import restrictions that are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

2. The Panel agreed with New Zealand that each of the 18 measures at issue constituted prohibitions or restrictions on importation inconsistent with Article XI:1 of the GATT 1994, that are not justified under Article XX of the GATT 1994.

3. In reaching those conclusions, the Panel made clear factual findings regarding the measures at issue. Specifically, having considered in detail all of the facts on the record, the Panel concluded that:

a. each of the 18 measures at issue prohibits or restricts importation;[2] and

b. the "actual policy objective" behind all of the measures at issue is to "achieve self-sufficiency through domestic production by way of restricting and, at times, prohibiting imports".[3]

4. On appeal, Indonesia challenges the Panel's approach to assessing the measures at issue. For the reasons outlined below and in New Zealand's Appellee Submission, New Zealand considers that each of these grounds of appeal is without merit and should be dismissed.

II. THE PANEL DID NOT ERR BY ANALYSING THE MEASURES AT ISSUE UNDER ARTICLE XI:1 OF THE GATT 1994

5. Indonesia argues that the Panel erred by commencing its analysis of the measures at issue with Article XI:1 of the GATT 1994 rather than Article 4.2 of the Agreement on Agriculture. It alleges that Article 4.2 of the Agreement on Agriculture is the more "specific" provision and applies "to the exclusion of" Article XI:1 of the GATT 1994.

6. However, jurisprudence is clear that where there is no legal conflict between two provisions of the covered agreements, the relevant obligations are *cumulative* and continue to apply concurrently.[4] The obligations contained in Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994 do not conflict, as both can be complied with simultaneously. Thus, both provisions can be read harmoniously and both apply to the measures at issue.[5] That principle is not affected by Article 21.1 of the Agreement on Agriculture.

7. Further, the Panel's decision to commence its analysis under Article XI:1 of the GATT 1994 was within the Panel's "margin of discretion" to structure its order of analysis as it sees fit.[6] The Panel's chosen order of analysis in the present dispute did not affect its substantive analysis of the measures at issue.

8. Indonesia's argument also runs counter to the fact that Article X1:1 deals specifically with quantitative restrictions and the practice of multiple panels that have analysed claims of

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[1] This executive summary contains a total of 2,253 words (including footnotes). New Zealand's Appellee Submission contains a total of 23,176 words (including footnotes).

[2] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.92, 7.112, 7.134, 7.156, 7.179, 7.200, 7.227, 7.243, 7.270, 7.299, 7.327, 7.349, 7.375, 7.398, 7.428, 7.451, 7.478 and 7.501.

[3] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.822.

[4] *See e.g.* Appellate Body Reports, *US – Softwood Lumber IV*, para. 134.

[5] *See e.g.* Appellate Body Report, *Argentina – Footwear (EC)*, para. 81.

[6] *See e.g.* Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.

inconsistency with Article XI:1 of the GATT 1994 before Article 4.2 of the Agreement on Agriculture.

III. THE PANEL DID NOT ERR BY FINDING THAT INDONESIA BEARS THE BURDEN OF PROVING A DEFENCE UNDER ARTICLE XX OF THE GATT 1994

9. 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 quantitative restrictions. Indonesia seeks to introduce what it describes as a "second element" that a complainant must prove in order to establish a violation of Article 4.2 of the Agreement on Agriculture.[7] Indonesia contends that to satisfy the alleged "second element" of Article 4.2, a complainant would need to prove that a challenged measure is not "maintained under [*inter alia*] … other general, non-agriculture-specific provisions of GATT 1994 [such as Article XX]" (second element)."[8]

10. This novel argument represents a substantial departure from settled jurisprudence regarding the legal standard of Article 4.2 of the Agreement on Agriculture. It would also fundamentally change, with respect to agricultural products, the well-established characterisation of Article XX of the GATT 1994 as an affirmative defence.[9]

11. The legal standard under Article 4.2 of the Agreement on Agriculture, including footnote 1, has been considered multiple times by panels and the Appellate Body. In none of the disputes that have considered Article 4.2 of the Agreement on Agriculture, has a panel or the Appellate Body found that a complainant is required to prove that a measure "is not maintained under any of the public policy exceptions set out in Article XX of the GATT 1994" in order to establish a violation of Article 4.2.[10]

12. Indonesia's argument is premised on the notion that Article XX is not an *exception* in the context of Article 4.2 of the Agreement on Agriculture. However, the characterisation of Article XX as an "exception" or "affirmative defence" is well settled in WTO jurisprudence, and Indonesia has not provided any compelling justification for diverging from this well-established principle with respect to quantitative restrictions affecting agricultural products.[11]

13. Further, even if the Appellate Body were to find that the complainants bear a burden of proof under Article XX in the context of Article 4.2 of the Agreement on Agriculture, New Zealand submits that any such burden has been satisfied in the present dispute.

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

14. Indonesia claims that the Panel did not conduct an objective assessment in accordance with Article 11 of the DSU because it failed to examine the complainants' claims under Article 4.2 of the Agreement on Agriculture and "did not conduct an objective assessment of which party bears the burden of proof with respect to the second element of footnote 1 to Article 4.2 of the Agreement on Agriculture".[12]

15. The Appellate Body has confirmed on a number of occasions that a claim that a panel has failed to conduct an "objective assessment of the matter before it" is "a very serious allegation".[13] In light of the seriousness of such a claim, "a challenge under Article 11 of the DSU must 'stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim'".[14]

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[7] Indonesia's Appellant Submission, para. 82 and 84.
[8] Indonesia's Appellant Submission, para. 84.
[9] *See e.g.* Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[10] Indonesia's Appellant Submission, para. 83.
[11] *See e.g.* Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[12] Indonesia's Appellant Submission, para. 105.
[13] Appellate Body Report, *Peru – Agricultural Products*, para. 5.66.
[14] Ibid.

16. Despite this guidance, the grounds on which Indonesia claims the Panel has failed to conduct an "objective assessment of the matter before it" are based exclusively on Indonesia's first and second grounds of appeal: namely, that the Panel erred in law in finding that Article XI:1 of the GATT 1994 is more specific than Article 4.2 of the Agreement on Agriculture;[15] and, that the Panel erred in law by determining that Indonesia bore the burden of proving the second element of footnote 1 to Article 4.2 of the Agriculture Agreement with respect to its Article XX defences.[16]

17. Accordingly, as a threshold matter, Indonesia has failed to independently substantiate its claims under Article 11 of the DSU as distinct from its first and second claims of legal error. As was the case in *Peru - Agricultural Products*, Indonesia's challenge under Article 11 is based solely on Indonesia's challenge to the legal standards applied by Panel, and Indonesia "has not explained the basis for requesting an *additional* examination of the Panel's assessment of the matter before it in the context of an Article 11 claim".[17] Accordingly, Indonesia's claim under Article 11 of the DSU must fail.

18. In any case, for the reasons described in Sections II and III above, New Zealand has demonstrated the Panel's decision to commence its analysis of the measures at issue under Article XI:1 of the GATT 1994 and its allocation of the burden of proof under Article XX defences did not result in legal error.

V. THE PANEL WAS CORRECT THAT ARTICLE XI:2(C) OF THE GATT 1994 HAS BEEN RENDERED INOPERATIVE BY ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

19. Indonesia makes an alternative argument that the Panel erred by concluding that Article XI:2(c) of the GATT 1994 has been rendered inoperative by Article 4.2 of the Agreement on Agriculture. Indonesia contends that Article XI:2(c) is "a 'scope' provision and cannot be properly characterized as an 'exception' to the obligations under Article XI:1."[18] In reliance on this characterisation, Indonesia argues that XI:2(c) "defines the term 'quantitative import restrictions' in the first element of footnote 1 to Article 4.2 of the Agreement on Agriculture."[19]

20. However, GATT and WTO jurisprudence confirms that Article XI:2(c) is an *exception* to the obligation in Article XI:1 of the GATT 1994. Thus, Article XI:2(c) does not define the scope of "quantitative import restriction" in Article 4.2 of the Agreement on Agriculture, because it operates as an exception to the obligation in Article XI:1 of the GATT 1994. Further, even if the Appellate Body were to depart from this established jurisprudence characterising Article XI:2(c) as an exception, the language of footnote 1 to Article 4.2 of the Agreement on Agriculture clearly renders Article XI:2(c) inapplicable to agricultural products covered by the Agreement on Agriculture. Article XI:2(c), by its terms, applies specifically to measures maintained in respect of agricultural products. Measures falling within Article XI:2(c) are therefore not maintained under a "general, non-agriculture-specific provision" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture, as the Panel correctly found.

21. Moreover, this ground of appeal has no bearing on resolving this dispute as Indonesia failed to demonstrate that the elements of an Article XI:2(c)(ii) defence are satisfied in this instance.

VI. THE PANEL DID NOT ERR BY FINDING THAT MEASURES 9 THROUGH 17 ARE NOT JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

22. Indonesia seeks to reverse the Panel's findings that Indonesia failed to demonstrate that Measures 9 - 17 are justified under Article XX of the GATT 1994. Indonesia argues that the Panel's decision to analyse Indonesia's Article XX defences for Measures 9 – 17 under the *chapeau* was a legal error. It argues that the Panel deviated from an allegedly "mandatory sequence" for conducting an Article XX analysis and that this sequence of analysis had "repercussions for the substance" of the Panel's analysis under the *chapeau*.[20]

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[15] Indonesia's Appellant Submission, para. 63.
[16] Indonesia's Appellant Submission, para. 94.
[17] Appellate Body Report, *Peru – Agricultural Products*, para. 5.67 (emphasis original).
[18] Indonesia's Appellant Submission, para. 116.
[19] Indonesia's Appellant Submission, para. 120.
[20] Indonesia's Appellant Submission, paras 142, 145, 151, 152 and 153.

23. However, New Zealand submits that it is insufficient for Indonesia to simply contend that the Panel's order of analysis constituted an error of law in the "abstract".[21] The order of analysis must have had "repercussions for the substance of the analysis itself" leading to "flawed results."[22]

24. In arguing that the Panel in the present dispute erred in law by commencing its Article XX analysis for Measures 9 – 17 with the *chapeau*, Indonesia relies heavily on *US - Shrimp*.[23] In particular, Indonesia implies that the Appellate Body in *US - Shrimp* found that the panel erred in law because it "deviated from the mandatory sequence of analysis under Article XX".[24] However, Indonesia's argument is based on a mischaracterisation of the Appellate Body's decision in that dispute.

25. In *US – Shrimp,* the Appellate Body found that the Panel erred in law because it *misapplied the legal standard under the chapeau* of Article XX.[25] In particular, the panel in *US – Shrimp* did not consider the context provided by the relevant subparagraphs of Article XX when assessing the measure at issue, and thus committed legal error.[26]

26. In the present dispute, the sequence of analysis applied by the Panel in respect of Measures 9 – 17 under Article XX did not have "repercussions for the substance" of its analysis and did not lead to "flawed results".[27] Indeed, the Panel correctly analysed each of Indonesia's measures under the *chapeau*, following the approach approved by the Appellate Body in *US – Shrimp*. In particular, the Panel conducted its assessment of the measures at issue under the *chapeau* in light of the policy objectives contained in the subparagraphs of Article XX.[28]

VII. CONCLUSION

27. For the reasons outlined above, and as elaborated in New Zealand's Appellee Submission, New Zealand respectfully requests that the Appellate Body reject each of Indonesia's appeal claims, and uphold the Panel's findings, conclusions and legal interpretations.

[21] Appellate Body Report, *US – Cool (Article 21.5 – Canada and Mexico),* para. 5.206.
[22] *See e.g.* Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109.
[23] Indonesia's Appellant Submission, paras. 141, 142, 151 and 152.
[24] Indonesia's Appellant Submission, para. 151.
[25] Appellate Body Report, *US – Shrimp*, paras. 121 and 122.
[26] Appellate Body Report, *US – Shrimp*, paras. 121 and 116.
[27] *See e.g.* Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109.
[28] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.812–7.829.

ANNEX B-3

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION

I. INTRODUCTION

1. As the Panel report makes clear, the measures at issue fall woefully short of meeting Indonesia's obligations under the WTO Agreement. Indeed, Indonesia does not even attempt to argue on appeal that any of the measures at issue is consistent with its WTO obligations. Instead, Indonesia seeks to undermine the Panel's analysis based on spurious, technical legal arguments. It is, therefore, an unfortunate and injudicious use of the resources of the parties and the Appellate Body that Indonesia has brought this appeal.

2. We therefore urge the Appellate Body to address only those claims that must be addressed to resolve this matter. It can do so by making one finding only: that the Panel did not err in beginning its analysis with Article XI:1 of the GATT 1994. This finding would resolve the dispute between the parties, and the Appellate Body's analysis can end there.

3. If the Panel's findings under Article XI:1 are upheld, none of Indonesia's additional appeals would alter the consequent recommendation that Indonesia bring each challenged measure into compliance with its obligations. Indonesia's appeals concerning Article 4.2 of the Agreement on Agriculture would have no effect on the DSB recommendations because that provision deals with a separate, independent obligation, the application of which does not affect the findings under Article XI:1. Indonesia's appeals concerning GATT Articles XI:2(c) and XX also would not lead to any substantive change in the Panel's findings. Article XI:2(c) was an unsuccessful defense raised by Indonesia for which it has not requested favorable completion of the analysis, only a finding that the provision still has operational effect. Regarding Article XX, Indonesia challenges the Panel's order of analysis, but does not request the Appellate Body to complete the analysis in its favor because of an admitted lack of sufficient undisputed facts on the record. As Indonesia concedes that it cannot justify the relevant measures under either provision, the findings under Article XI:1 would again remain undisturbed.

4. Indeed, for the outcome of this dispute to change on appeal, the Appellate Body would need to make a series of untenable legal findings that would be inconsistent with the text of the covered Agreements and how they have been interpreted by past panels and the Appellate Body, including that Article XI:1 does not apply to agricultural products and that a complainant bears the burden of proving the absence of an Article XX defense under Article 4.2. Such a result would be particularly disturbing in a dispute involving such a large number of measures that the Panel found to breach a fundamental tenet of the WTO Agreement.

II. THERE IS NO BASIS TO REVERSE THE PANEL'S FINDINGS UNDER ARTICLE XI:1

A. The Panel's Approach Was Not Legal Error

5. The DSU requires the Panel to make such findings as will assist the DSB in making the recommendations provided in the covered agreements, so that the DSB can assist the parties in resolving the dispute. Within this framework, neither the covered agreements nor the DSU imposes on panels any other mandatory rule for how panels should order their analysis of the various provisions or agreements that are necessary for resolution of the dispute.

6. The Appellate Body has found that, "[a]s a general principle, panels are free to structure the order of their analysis as they see fit" and "may find it useful to take account of the manner in which a claim is presented to them." The limitation on this freedom is that panels "must ensure that they proceed on the basis of a properly structured analysis to interpret the substantive provisions at issue." Thus, the limit on panels' discretion is based on the substantive outcome.

7. Panel and Appellate Body reports support this understanding. The panel in *India – Autos* explained that, "other than where a proper application of one provision might be hindered without prior consideration of other issues, the adoption by a panel of a particular order of examination of

discrete claims would rarely lead to any errors of law." Other panels and the Appellate Body have drawn the same conclusion. In *Canada – FIT*, the Appellate Body found there was no mandatory sequence of analysis because the order did not affect the substantive assessment. In *US – FSC*, the Appellate Body found the panel's order of analysis was not legal error, noting: "[t]he *appropriate meaning of both provisions can be established and can be given effect*, irrespective of" the order.

8. Indonesia ignores the rule that panels have discretion with respect to sequence of analysis and suggests that panels must begin with the agreement that is more "specific." None of the reports cited by Indonesia support this argument.

9. In *EC – Bananas III*, the Appellate Body addressed the panel's order of analysis and suggested the panel "should" have begun with the agreement that "deals specifically, and in detail" with the measure at issue. However, the Appellate Body did not determine that the panel's order undermined the integrity of the legal analyses under either provision. Rather, the statement was made in the context of efficiency, as, if the panel had begun its analysis with one claim, "there would have been no need for it to address" the second. Similarly, in *Chile – Price Band System*, the Appellate Body addressed an argument that the panel erred in beginning its analysis under Article 4.2 rather than Article II:1(b). The Appellate Body found that, "[a]s these two provisions … establish distinct legal obligations," the outcome of the dispute "would be the same, whether we begin our analysis" under either.

10. Thus, regardless of whether a certain provision deals more specifically with the measures at issue, an assessment of whether a panel's order of analysis chosen by the panel constitutes legal error must focus on whether that order undermined the integrity of its analysis under any provision. Such was not the case here.

11. Rather, the Panel's decision to begin its assessment with Article XI:1 instead of Article 4.2 did not affect the substance of the Panel's findings under the former provision.

12. First, the structure of Article XI:1 and Article 4.2 shows that no mandatory order of analysis is warranted. Article 4.2 deals with "preventing the circumvention of tariff commitments on agricultural products" by numerous means, including quantitative restrictions, while Article XI:1 addresses "quantitative restrictions" on importation for agricultural products and other products. Thus, Article XI:1 prohibits a subset of measures that are *also* prohibited by Article 4.2. However, neither provision incorporates or necessarily depends on the other. Consequently, the outcome of the analysis under each would be the same regardless of the order.

13. Further, all the panels that have interpreted Article XI:1 and Article 4.2 have found that the provisions are independent, cumulative legal obligations. And panels and the Appellate Body have made findings under each provision separately. Thus, the "appropriate meaning of both provisions can be established and can be given effect" regardless of the order of analysis. Indeed, none of the previous panels that considered claims under both provisions considered that an order of analysis was mandatory. And, before the Panel, no party suggested this was the case.

14. Indonesia's arguments on appeal also do not suggest that the Panel's sequence of analysis had any effect on the substance of its findings under Article XI:1. Indeed, it appears uncontested that this is not the case, in light of Indonesia's description of the two independent "discipline[s]" with "different obligations and different product coverage." Rather, Indonesia claims simply that because Article 4.2 is more "specific" than Article XI:1, the Panel's sequence of analysis is necessarily reversible error. But that argument is wrong.

15. Further, Indonesia's only argument attacking the substance of the Panel's findings under Article XI:1, *i.e.*, the argument that, pursuant to Articles 21.1 and 4.2 of the Agreement on Agriculture, Article XI:1 no longer applies to agricultural products, is incorrect.

16. First, this argument contradicts a foundational WTO principle. Under Article II:2 of the WTO Agreement, the "[a]greements contained in the annexes are all necessary components of the 'same treaty' and they, together, form a single package of WTO rights and obligations." Consequently, "a single measure may be subject, at the same time, to several WTO provisions imposing different disciplines," and "a treaty interpreter must read all applicable provisions of a

treaty in a way that gives meaning to all of them, harmoniously." The interpretative note to Annex 1A makes it clear that a provision of one agreement overrides another only "[i]n the event of conflict" and then only "to the extent of the conflict."

17. Indonesia's argument contradicts these principles because it would render inutile, as to agricultural products, significant provisions of the GATT 1994. Indonesia does not even attempt to provide a rationale for this outcome, as it is undisputed that there is no conflict between the provisions.

18. Second, Article 21.1 of the Agreement on Agriculture offers no support for Indonesia's interpretation. The provision states that the GATT 1994 "shall apply" to agricultural products "subject to" the provisions of the Agreement on Agriculture. Thus it renders no provision of the GATT 1994 inoperative. Rather, it states that, to the extent a provision of the Agreement on Agriculture expressly supersedes a provision of the GATT 1994, the Agreement on Agriculture would prevail. In other respects, both agreements "shall apply" in full.

19. The Appellate Body's statement in *EC – Bananas III* reflects this interpretation. The EU had argued that Article 21.1 confirmed "the 'agricultural specificity'" of the agreement and showed that its rules "supersede[d] the provisions of the GATT 1994." The panel rejected this argument because "giving priority to Article 4.1 . . . does not necessitate, or even suggest, a limitation on the application of Article XIII," because "[t]he provisions are complementary, and do not clash." The Appellate Body agreed, concluding that Article 4 did not deal specifically with the allocation of tariff quotas, and therefore could not conflict with Article XIII of the GATT 1994. Therefore, these findings do not suggest that specificity alone creates a conflict.

20. Third, previous interpretations of substantive provisions of the Agreement on Agriculture also refute Indonesia's argument. Contrary to Indonesia's claim, the Appellate Body in *Chile – Price Band System* did not suggest that Article II of the GATT *no longer applied* to agricultural products by virtue of Article 4.2. In fact, it confirmed that both provisions applied. Also, all previous panels that have examined claims under both Article XI:1 and Article 4.2 have confirmed that Article XI:1 applies to measures also covered by Article 4.2.

21. Finally, the principle of *lex specialis* does not support Indonesia's appeal. Indeed, it is not applicable. The principle is a guide for what rule "ought to be observed . . . where parts of a document are in conflict." Thus, it concerns situations where two provision conflict and so cannot be applied simultaneously. In the present case, there is no such conflict.

22. Additionally, Indonesia's argument that the Agreement on Agriculture is more "specific" is incorrect. Due to Indonesia's invocation of defenses under Article XX of the GATT 1994, considerations of efficiency and judicial economy favored beginning with that agreement. Further, Article XI:1 specifically addresses the type of measure at issue, namely prohibitions and restrictions on importation, and Article 4.2 is not more specific.

23. Indonesia's argument that the fact that Article 4.2 has "a broader scope of coverage than Article 4.2" is "not determinative" of which is the more specific provision and that Article 4.2 is more specific as to product coverage does not suggest that the Agreement on Agriculture is more specific than the GATT 1994 for purposes of this dispute or that any mistake in the sequence of analysis would be reversible error. Also, the fact that Article 4.2 rendered Article XI:2(c) of the GATT 1994 inoperative does not suggest that it is more "specific" in this dispute. Indonesia advances no reason why this would be the case. Indonesia's assertion that the obligations under Article 4.2 and Article XI:1 are "different" is also incorrect. The obligation of Article 4.2 is simply to not "maintain, revert to, or resort to measures covered by Article 4.2," and thus is not different than the obligation under Article XI:1.

B. Indonesia's DSU Article 11 Appeal Should Be Rejected

24. Indonesia has failed to allege under Article 11 of the DSU any arguments separate from or additional to those Indonesia put forward with respect to its substantive legal appeals. This alone provides a sufficient basis for the Appellate Body to reject Indonesia's Article 11 appeal. Additionally, Indonesia has adduced no evidence or argument suggesting any alleged error was so egregious as to call into question the objectivity of the Panel's assessment.

25. Indonesia has also not met the standard of Article 11 of the DSU with respect to its claim that the Panel's exercise of judicial economy was inappropriate. Specifically, Indonesia does not allege that the Panel's decision not to address the issues resulted in "only a 'partial resolution of the matter at issue," or that a finding as to the burden of proof under Article 4.2, footnote 1, was necessary for sufficiently precise DSB recommendations and rulings. The Appellate Body report in *Colombia – Textiles* supports the conclusion that the Panel's exercise of judicial economy in this dispute was not in error.

III. THE CHALLENGED MEASURES ARE INCONSISTENT WITH ARTICLE 4.2

26. Article 4.2 of the Agreement on Agriculture covers a range of measures that include quantitative import restrictions and minimum import prices. Past panels and the Appellate Body have confirmed that measures covered by Article 4.2 include those inconsistent with Article XI:1. Here, the findings of the Panel under Article XI:1 establish that each of the challenged measures is also a "quantitative import restriction" or "similar border measure" or a "minimum import price" or "similar border measure" under Article 4.2. Therefore, in the event that the Appellate Body reverses the Panel's findings under Article XI:1, the United States requests that it complete the analysis of the consistency with Article 4.2 of each of the measures, based on the factual findings of the Panel and the uncontested facts on the record.

IV. THE PANEL DID NOT ERR IN ITS ANALYSIS OF ARTICLE 4.2

27. If the Appellate Body upholds the Panel's findings under Article XI:1 of the GATT 1994, it need not make any findings with respect to the burden of proof under the footnote to Article 4.2. The Panel did not err in analyzing Articles XI:1 and XX of the GATT 1994 before considering Article 4.2. Therefore, any findings with respect to the burden of proof of Article 4.2 of the Agreement on Agriculture would not change Indonesia's obligation to implement the findings and recommendations of the Panel with respect to Article XI:1 of the GATT 1994, once they are adopted by the DSB. For this reason alone, the Appellate Body can and should reject Indonesia's appeal concerning the burden of proof under the footnote to Article 4.2.

28. For completeness, the United States notes that, in rejecting Indonesia's burden of proof argument, the Panel correctly interpreted Article 4.2.

29. Indonesia attempted to argue that because *the scope* of Article 4.2 is limited to measures not maintained under Article XX, the burden of proof under *an affirmative defense* necessarily must shift. No such rule exists. Rather, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence." If Indonesia's measures are "maintained" under a general exception, it would be for Indonesia to assert the exception and demonstrate its applicability. Even where a provision excludes certain measures from its scope, that is not dispositive of burden of proof.

30. Indonesia argues that other provisions of the WTO Agreements also "convert exceptions under Article XX of the GATT 1994 into positive obligations," but none of the examples Indonesia identifies is analogous. Further, reversing the burden of proof with respect to the exceptions identified in footnote 1 to Article 4.2 would be inconsistent with the structure and purpose of the Agreement on Agriculture and Article 4.2. Additionally, Indonesia's interpretation would create absurd and infeasible results.

31. Finally, while not necessary to prevail in its claims under Article 4.2, the co-complainants provided substantial evidence and argumentation that none of Indonesia's measure are maintained consistently with Article XX of the GATT 1994.

V. THE PANEL'S FINDING ON ARTICLE XI:2(C) WAS CORRECT

32. Indonesia argues that Article XI:2(c)(ii) of the GATT 1994 remains a viable provision even with the existence of Article 4.2 of the Agreement on Agriculture. Making findings on the interpretation of Article XI:2(c) is not necessary to resolve this dispute because Indonesia has requested only that the Appellate Body reverse the Panel's legal conclusion regarding inoperability of this provision; it has not requested completion of the analysis. And even if it had, Indonesia

failed to address, much less demonstrate, the conditions required to maintain measures under Article XI:2(c). Thus, Indonesia cannot in this appeal obtain findings that Article XI:2(c) applies.

33. For completeness, the United States notes that the Panel did not err when it found with that Article XI:2(c) of the GATT 1994 is not available for Indonesia. The Panel correctly found that Article 4.2 of the Agreement on Agriculture prohibits import restrictions maintained under Article XI:2(c). Because these import restrictions are agriculture-specific, Indonesia cannot rely on the "maintained under other general, non-agriculture-specific provisions of the GATT 1994" limitation to Article 4.2 of the Agreement on Agriculture.

VI. THERE IS NO BASIS TO REVERSE THE PANEL'S FINDING UNDER ARTICLE XX

34. It is not necessary for the Appellate Body to consider Indonesia's appeal concerning the Panel's findings under Article XX. Indonesia does *not* request completion of the analysis and a finding that the Article XX defense is made out with respect to *any* of the challenged measures. Therefore, Indonesia's appeal could result in no change to the DSB recommendations and rulings.

35. Further, the fact that the Panel analyzed the chapeau of Article XX in relation to certain measures without having analyzed the subparagraphs first is not *per se* reversible legal error. Rather, the Panel's findings should be reversed only if its analysis was substantively incorrect.

36. Indonesia misunderstands the Appellate Body report in *US – Shrimp* in this respect. That report found that the subparagraph under which a measure is claimed to be justified is relevant to the chapeau analysis, because the chapeau must be analyzed in light of the specific policy objective identified by the respondent. The Appellate Body did not find that analyzing the chapeau first constitutes legal error that requires reversal.

37. Subsequent reports confirm that the relevant policy objective is relevant to the chapeau analysis because it: (1) provides "pertinent context" for determining the "conditions" that are relevant to assessing whether a measure discriminates; and (2) is a factor in assessing whether discrimination is "arbitrary and unjustifiable."

38. The Panel here correctly analyzed the chapeau with respect to Indonesia's defenses under Articles XX(a), XX(b), and XX(d).

39. For each subparagraph, the Panel considered whether the measures for which Indonesia had asserted defenses discriminated under the chapeau, in light of the objective(s) Indonesia asserted the measures pursued. The Panel found that Indonesia's arguments did not address "discrimination in the sense of the chapeau" at all. The Panel then considered whether the discrimination caused by the measures "can be reconciled with, or is rationally related to" the objective(s) Indonesia asserted each measure pursued and found that the discrimination caused by each of the challenged measures was arbitrary or unjustifiable, in light of those objectives.

40. Additionally, the Panel found that "the actual policy objective behind all these measures is to achieve self-sufficiency ... by way of restricting and, at time, prohibiting imports." This "rationale ... does not relate to the pursuit of or would go against" the objectives of the Article XX subparagraphs.

41. Thus, the Panel appropriately assessed Indonesia's defenses under the chapeau in light of the objectives Indonesia asserted the measures pursued.

VII. CONCLUSION

42. The United States respectfully requests the Appellate Body to reject all of Indonesia's claims on appeal, and uphold the Panel's findings

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ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTICIPANT'S SUBMISSION[1]

1. Australia concurs with the Panel that it is appropriate to consider the consistency of all of Indonesia's measures under Article XI:1 of the GATT 1994, addressing the subject of quantitative restrictions, before considering the consistency of Indonesia's measures with the broader provision in Article 4.2 of the Agreement on Agriculture.

2. The Panel also did not err in determining that Indonesia bore the burden of proving a defence under Article XX of the GATT 1994. WTO jurisprudence confirms that the burden of identifying affirmative defences rests on the party asserting the defence.

3. As a result, Indonesia has not substantiated its claim under Article 11 of the DSU.

4. Article XI:2(c) of the GATT 1994 covers import restrictions of any form, which are tolerated as exceptions to the general prohibition to impose quantitative restrictions. Article 4.2 requires that WTO Members avoid recourse to a series of measures that could come under Article XI:2(c) of GATT. To the extent of the conflict, Article 4.2 of the Agreement on Agriculture renders Article XI:2(c) of the GATT 1994 inoperative.

5. Australia submits that the Panel's analysis of Measures 9 through 17 with the *chapeau* of Article XX had no repercussions in terms of substance. In conducting its analysis under the *chapeau*, the Panel was aware of, and expressly applied, the correct legal standard.

6. Accordingly, Australia respectfully requests that the Panel's findings be upheld.

[1] Total word count (including footnotes) of executive summary = 277 words.

ANNEX C-2

EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION[2]

1. Regardless of the order of analysis adopted by the Panel in this dispute, it is clear that there is no legal conflict between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. The principle of *lex specialis* in Article 21.1 of the Agreement on Agriculture does not apply.

2. The Panel properly interpreted that the burden of proof under Article 4.2 of the Agreement on Agriculture and its footnote 1 lies with the respondent to demonstrate that a quantitative import restriction is justified under any GATT exception. The reversal of the burden of proof for the complainant, as suggested by Indonesia, would run against established WTO jurisprudence and impose an excessive burden on the complainant to make a *prima facie* case under Article 4.2.

3. Brazil agrees in principle that an adequate assessment of a defense under Article XX of the GATT 1994 should follow the two-tier test. This standard of review, however, does not relieve a Member of its burden to substantiate its defense under Article XX so as to provide the Panel with the essential elements for it to carry out its analysis. There is no reason to believe that, in the particular circumstances of this case, the lack of specific reference to the two-tier test by the Panel is tantamount of a flawed analysis.

[2] Word count: 233 words.

ANNEX C-3

EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION[1]

I. THE PANEL DID NOT ERR IN ANALYSING THE MEASURES UNDER GATT ARICLE XI:1 BEFORE ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

1. The Panel did not err by starting its analysis under the GATT 1994, for the following reasons:

- As a general principle, panels are free to structure the order of their analysis as they see fit, unless it would lead to an error of law or affect the substance of the analysis itself. That is not the case here.

- When more than one covered agreement applies, the measure should be first analysed under the agreement that deals specifically and in detail with the matter. In this case, that is the GATT 1994.

- As a matter of efficiency and to facilitate the exercise of judicial economy, it made sense for the Panel to analyse Indonesia's measures under the GATT 1994 first.

- Article 21.1 of the Agreement on Agriculture only becomes relevant in the case of a conflict between a provision in that Agreement and another WTO Agreement. In this case, there is no conflict.

II. THE BURDEN OF PROOF IS ON THE RESPONDENT TO ESTABLISH THAT A MEASURE IS NOT SUBJECT TO ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE BECAUSE IT IS MAINTAINED UNDER GATT ARTICLE XX

2. Where a respondent claims that a measure does not violate Article 4.2 of the Agreement on Agriculture because it is maintained under GATT Article XX, the burden of proof falls on the respondent. Canada is of the view that Indonesia's argument that the burden of proof falls on the complainant would impose an unrealistic burden on complainants and runs contrary to the jurisprudence.

III. THE ANALYSIS UNDER GATT ARTICLE XX IS TWO-TIERED.

3. The jurisprudence is clear that an Article XX analysis must follow a two-step sequence:

a. provisional justification under one of the Article XX subparagraphs; and

b. whether the measure meets the requirements of the chapeau.

[1] Canada's Third Participant Submission contains 3720 words. This Executive Summary contains 365 words (including this footnote).

ANNEX C-4

EXECUTIVE SUMMARY OF THE EUROEPAN UNION'S THIRD PARTICIPANT'S SUBMISSION

A. Indonesia's First ground of appeal

1. Indonesia's line of argument in support of its first ground of appeal rests on a flawed interpretation of Article 21.1 of the *Agreement on Agriculture* (AA).

2. The Appellate Body clarified that pursuant to Article 21.1 AA provisions of the *GATT 1994* can only be set aside to the extent the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter. Even where a provision can be said to be dealing more specifically with a matter than another, in the absence of a conflict, both provisions apply and only the issue of determining the order of analysis remains.

3. The European Union (EU) submits that in determining whether or not a general obligation has to be set aside in favour of a more specific obligation, one must respect the principle of effective and harmonious interpretation, which requires that a treaty interpreter reads all applicable provisions in a way that gives meaning to all of them.

4. To the extent that they have been raised by the co-complainants, Article XI:1 *GATT 1994* and Article 4.2 AA are distinct and "cumulative obligations" and there is no legal conflict between them. Panels have discretion in deciding the order of analysis of parties' claims, unless a particular order is compelled by principles of valid interpretative methodology. The EU sees nothing in these two provisions to indicate that there is an obligatory sequence of analysis to be followed for the claims at issue.

B. Indonesia's Second ground of appeal

5. The EU submits that Footnote 1 to Article 4.2 AA incorporates certain provisions, notably Article XX *GATT 1994*, into the *Agreement on Agriculture* by means of an explicit reference. In so doing it does not alter the allocation of burden of proof under Article XX. This reading is consistent with the interpretation adopted by the Appellate Body in *China – Publications and Audiovisual Products*.

C. Indonesia's Fourth ground of appeal

6. Indonesia argues that Footnote 1 of Article 4.2 AA incorporates the totality of Article XI *GATT 1994* through the concept of "quantitative import restrictions". The EU disagrees.

7. First, the first element of Footnote 1 of Article 4.2 AA refers to quantitative restrictions, not to "prohibited quantitative restrictions". 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 AA.

8. Second, WTO jurisprudence confirms that Article XI:2 and its subparagraphs should be considered as exceptions from the prohibition under Article XI:1.

9. Finally, as confirmed by the panel in *EC – Bananas III*, Article 4.2 AA is a substantive provision in that it prohibits the use of certain non-tariff barriers, subject to certain qualifications. Thus, as provided for in Article 21.1 AA, it prevails over such GATT provisions as Article XI:2(c).

D. Indonesia's Fifth ground of appeal

10. With regard to the relationship between the independent paragraphs and the chapeau of Article XX, the EU recalls that it is well established that an analytical sequence needs to be followed under Article XX, first determining whether the measures can fall within the scope of individual paragraphs, then whether the measures can also satisfy the conditions set out in the chapeau.

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