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.

____

LIST OF ANNEXES

ANNEX A

NOTICE OF APPEAL

Contents		Page
Annex A-1	Indonesia's Notice of Appeal	A-2

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

Contents		Page
Annex B-1	Executive summary of Indonesia's appellant's submission	B-2
Annex B-2	Executive summary of New Zealand's appellee's submission	B-6
Annex B-3	Executive summary of the United States' appellee's submission	B-10

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

Contents		Page
Annex C-1	Executive summary of Australia's third participant's submission	C-2
Annex C-2	Executive summary of Brazil's third participant's submission	C-3
Annex C-3	Executive summary of Canada's third participant's submission	C-4
Annex C-4	Executive summary of the European Union's third participant's submission	C-5

ANNEX A

NOTICE OF APPEAL

Contents		Page
Annex A-1	Indonesia's Notice of Appeal	A-2

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.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

Contents		Page
Annex B-1	Executive summary of Indonesia's appellant's submission	B-2
Annex B-2	Executive summary of New Zealand's appellee's submission	B-6
Annex B-3	Executive summary of the United States' appellee's submission	B-10

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,

---

[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

---

[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]

---

[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]

[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, <u>Indonesia's argument that the Agreement on Agriculture is more "specific" is incorrect</u>. 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

____

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

Contents		Page
Annex C-1	Executive summary of Australia's third participant's submission	C-2
Annex C-2	Executive summary of Brazil's third participant's submission	C-3
Annex C-3	Executive summary of Canada's third participant's submission	C-4
Annex C-4	Executive summary of the European Union's third participant's submission	C-5

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.