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:

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Ujal Singh Bhatia
Presiding Member

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Thomas Graham
Member

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Ricardo Ramírez-Hernández
Member

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