Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products

(DS484)

Third Party Executive Summary of
the United States of America

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EXECUTIVE SUMMARY OF U.S. THIRD PARTY WRITTEN SUBMISSION

I. INDONESIA'S IMPORT LICENSING MEASURES ARE INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994 AND ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

1. Indonesia's import licensing regime for animals and animal products imposes impermissible "restrictions" and "prohibitions" within the meaning of Article XI:1 of the GATT 1994. "Restriction," as used in Article XI:1, refers to "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation," i.e., "to something that has a limiting effect." "Prohibition" refers to a "legal ban on the trade or importation of a specified commodity." Thus, Article XI:1 establishes a "general ban on import or export restrictions or prohibitions" other than duties, taxes, or other charges. Article XI:1 does not require a complaining party to demonstrate quantitatively that a measure has adversely impacted the overall volume of imports. The Appellate Body affirmed this interpretation in *Argentina – Import Measures*, finding that a measure's limitation on action or limiting condition on importation "need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effect can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context."

2. Indonesian regulation MOT 46/2013, as amended, and MOA 139/2014, as amended, list all the types of animals and animal products "that can be imported" into Indonesia. Numerous types of animals and animal products are not listed in the appendices to these regulations, including chicken cuts and parts (frozen and fresh or chilled). Applications for Recommendations or Import Approvals to import animals or animal products that are not listed in the appendices of *both* regulations will not be granted. And importers are prohibited from importing animals and animal products not specified on a valid Recommendation and Import Approval. Indonesia's positive list of animals and animal products that can be imported, and its consequent ban on importation of any products not included on that list, thus constitutes a "prohibition" in breach of Article XI:1 of the GATT 1994.

3. Indonesia also requires, as a condition for importation, that animals and animal products be imported only for certain specific uses. This restriction varies in scope depending on the product at issue, but for all imported products, the permitted uses do not include retail sale in traditional Indonesian markets, where Indonesians purchase the vast majority of their meat. Specifically, importers of the animal products listed in Appendix II to MOT 46/2013 and MOA 139/2014 (non-bovine animals, meat, and offal) are only eligible to obtain a Recommendation from the Ministry of Agriculture if they indicate on their application a permitted use, including sale in manufacturing, hotels, restaurants, catering, or other limited purposes, or for sale in modern markets (i.e., supermarkets and convenience stores, but not in traditional markets). Thus, Indonesia impermissibly precludes importers from importing non-bovine animals, meat, and offal for commercially important purposes. The use requirements are, therefore, a limitation on action or limiting condition on importation constituting a "restriction" in breach of Article XI:1.

4. Next, Indonesia's application window and validity period requirements create a period of several weeks at the end of one validity period and the beginning of another during which products *cannot* be exported to Indonesia. Specifically, Import Approvals are issued four times a year for a single three-month validity period and can be applied for only during the month preceding the start of a period; they cannot be submitted in advance. Further, Import Approvals

are not issued until after the import period has begun, and exporters cannot ship until they receive the approval. Moreover, all animals and animal products imported during a validity period must arrive in Indonesia and clear customs prior to the end of the period. This means that exporters must stop accepting orders and shipping to Indonesia up to several weeks before the end of the period, depending on the time it takes to transport products to a port, ship them to Indonesia, and clear customs. Consequently, depending on their origin, there is a window of time of up to several weeks at the end of each period when Indonesian importers seeking to import animals or animal products are *precluded* from doing so due to the structure of the application window and validity period requirements. These requirements are a limitation on action or limiting condition on importation, and therefore constitute a "restriction" in breach of Article XI:1 of the GATT 1994.

5. Indonesia also limits the imports of animals and animal products to products of the type, quantity, country of origin, and port of entry listed on the Recommendations and Import Approvals granted at the beginning of that period. Importation of any animals and animal products without permits covering their type, quantity, country of origin, and port of entry is prohibited. But once an import period begins, importers cannot apply for new permits to import different or additional products, or for products shipping from, or into, a new location. Thus imports are strictly limited to the products specified on outstanding permits. Importers that do not comply with this requirement are subject to sanctions, including revocation of their Recommendations and ineligibility for future Recommendations and revocation of their Import Approvals, and any goods not in compliance with the requirement will be re-exported at the importer's expense. Once a period begins, therefore, importers cannot make changes based on market or other developments that may be necessary to meet current demand, whether because certain products are no longer needed, because new or additional products are needed due to the unavailability or insufficiency of the original orders, or even due to changed circumstances regarding the importer itself. The type, quantity, country of origin, and port of entry requirement imposed through Recommendations and Import Approvals is, therefore, a limitation on action or limiting condition on importation, and thus constitutes a "restriction" within the meaning of Article XI:1.

6. Finally, Indonesia's domestic insufficiency requirement explicitly places a limiting condition on imports by conditioning all importation of animals and animal products on the insufficiency of domestic products to meet Indonesian consumers' needs. The requirement thus severely limits the opportunities for importation, in that imported products are given market access only if, and to the extent that, domestic supply is deemed insufficient to satisfy domestic needs. The lack of transparency and predictability in the implementation of the domestic insufficiency requirement itself has an additional limiting effect on imports. Therefore, the requirement is a "restriction" within the meaning of Article XI:1 of the GATT 1994.

7. For the same reasons these measures breach Article XI:1 of the GATT 1994, they also breach Article 4.2 of the Agreement on Agriculture.

8. Indonesia's import licensing restrictions for animals and animal products are "measures of the kind which have been required to be converted into ordinary customs duties" within the meaning of Article 4.2 of the Agreement on Agriculture. Footnote 1 to Article 4.2 provides that such measures include, *inter alia*, "quantitative import restrictions," "minimum import prices,"

and "similar border measures" other than ordinary customs duties. Where a measure constitutes a "prohibition or restriction" (other than duties, taxes or other charges) in breach of Article XI:1 of the GATT 1994, that measure also would run afoul of the prohibition in Article 4.2 on Members maintaining agricultural measures of the kind listed in footnote 1. The United States considers that Indonesia's import licensing measures therefore breach Article 4.2 for the same reasons they breach Article XI:1 of the GATT 1994. When a measure concerning agricultural products has been found inconsistent with Article XI:1 of the GATT 1994, previous panels have found that the measure would also be inconsistent with Article 4.2 of the Agreement on Agriculture.

II. A COMPLAINANT NEED NOT SHOW THAT A MEASURE DOES NOT FALL WITHIN AN ARTICLE XX EXCEPTION TO DEMONSTRATE A BREACH UNDER ARTICLE 4.2

9. Footnote 1 of Article 4.2 of the Agreement on Agriculture provides that the scope of Article 4.2 does not extend to measures maintained under "general, non-agriculture-specific provisions of the GATT 1994," which include Article XX. Indonesia asserts that to make a *prima facie* case that a challenged measure is inconsistent with Article 4.2, the complainant bears the burden to show that a measure does not fall within one of the exceptions of Article XX.

10. In the United States' view, adopting Indonesia's interpretation would render a successful Article 4.2 claim nearly impossible. Taking Indonesia's interpretation to its logical conclusion means that a complainant must present arguments and evidence to prove a negative; that is, none of the measures at issue are maintained under the ten sub-articles of Article XX or under other general, non-agricultural-specific provisions of the GATT 1994 or of the other WTO multilateral trade agreements. Indeed, Indonesia has not cited to any previous panel or Appellate Body reports that found that the complainant must prove that a measure is not maintained under Article XX or any other WTO provision in its Article 4.2 *prima facie* case. In fact, the panel in *India – Quantitative Restrictions* indicated that it is the respondent who must prove that the exceptions in footnote 1 apply. Such an interpretation is also consistent with previous panel and Appellate Body findings indicating more generally that the party that invokes a justification under Article XX of the GATT 1994 bears the burden to demonstrate that the inconsistent measures come within its scope.

11. In any event, the United States notes that the Panel need not reach Indonesia's novel legal interpretations, because Brazil has raised claims under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. If the Panel begins its analysis with Article XI:1, followed by an examination of Indonesia's defenses under Article XX, and if the Panel were to find that each measure breaches Article XI:1 and that Indonesia has made out an affirmative defense for any measure, then the Panel would not need to reach the issue raised by Indonesia under footnote 1 to Article 4.2 at all because that provision would not apply.

III. INDONESIA'S REQUEST FOR A PRELIMINARY RULING

12. A close examination of the panel request suggests that Brazil has presented its claim against Indonesia's "general prohibition" in a manner consistent with Article 6.2 of the DSU. In section I of its panel request, Brazil identified a single measure consisting of seven components, each described narratively in detail. Brazil went on to list the five legal instruments through

which the single measure is maintained below the narrative description. Finally, Brazil listed 15 provisions of the WTO agreements with which it considered the single measure to be inconsistent, including the aspect of each of those provisions Brazil was invoking. That is, the single measure was identified and then connected with each of the WTO provisions with which Brazil claimed that measure to be WTO inconsistent. Thus, Brazil has sufficiently identified the single measure and the legal bases for its claims to bring the matter within the Panel's terms of reference.

13. Questions of whether Brazil has demonstrated that such a measure exists in Indonesia, or whether the identified measure breaches any of the 15 WTO provisions, are substantive issues to be resolved by the Panel on the merits. Identification of the objective of a measure also is not required for purposes of Article 6.2. To the extent the objective of a measure is relevant to the ultimate resolution of a substantive claim, that issue would be resolved by the panel on the merits.

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IV. INDONESIA'S DEFENSES UNDER GATT ARTICLE XX

14. Indonesia first seeks to justify its intended use requirement under Article XX(b) by arguing that it is necessary to protect human life or health. Setting aside the second step of showing compliance with the chapeau to Article XX, to make out preliminarily a defense under Article XX(b), Indonesia must show that two elements of its text are met: (1) that the challenged measure's objective is "to protect human, animal or plant life or health" and (2) that the measure is "necessary" to the achievement of its objective. In the context of an exception for a measure that would otherwise be WTO-inconsistent, a measure may be viewed as "necessary" when it is indispensable, or nearly so.

15. Indonesia specifically asserts that the intended use requirement prevents food spoilage and protects the public health by "ensur[ing] that frozen products are not sold in markets without a proper cold chain." However, Indonesia has offered no evidence – from either the text, structure, or the legislative history of the Ministry of Agriculture and the Ministry of Trade regulations – to show that food safety is, in fact, the objective (or one of the objectives) in pursuit of which the intended use requirements were imposed. Therefore, there would not appear to be an evidentiary basis for the Panel to find that the first element of the Article XX(b) defense has been met. With respect to the "necessary" element, Indonesia has also failed to show how prohibiting the importation of non-beef animal products, including poultry meat and products, for sale in traditional markets contributes to the objective of food safety. Specifically, the intended use requirement in the MOA Regulation at issue only prohibits the sale of *imported* frozen meat in traditional markets; it does not address the sale of *domestic* frozen meat at all.

16. In addition to Article XX(b), Indonesia also attempts to justify the intended use requirement under Article XX(d), arguing that it is necessary to secure compliance with Indonesia's laws on food safety and consumer protection, in particular Law 18/2009 on Animals and Law 8/1999 on Consumer Protection. Although the MOT and MOA regulations "noted" Law 18/2009 and Law 8/1999 in their preambulatory sections, there is no support in the text,

structure, or the legislative history of legal instruments that shows that the intended use requirement was *designed* to secure compliance with the food safety and consumer protection provisions cited by Indonesia.

17. More importantly, Indonesia has failed to show that the intended use requirement is necessary to secure compliance with the legal provisions it identified. With respect to the food safety laws, Indonesia has not explained how barring the importation of poultry products for sale at traditional markets contributes to securing compliance with Articles 58 and 59 of Law 18/2009, which relate to the requirement on the government to regulate animal products for food safety within its authority and the requirement for importers to obtain import permits. And with respect to compliance with the consumer protection law, Indonesia argues that the intended use requirement prevents vendors in traditional markets from selling thawed frozen meat as fresh meat. However, as discussed above, the intended use requirement does not address domestic frozen meat at all, making any contribution to securing compliance with consumer deception provisions negligible.

18. Indonesia also asserts that its positive list requirement, which prohibits the importation of any product not listed in its regulations, is justified under Article XX(d), because it is designed – and necessary – to secure compliance with its laws on halal as well as consumer protection and customs enforcement laws related to halal. Again, however, Indonesia has failed to sufficiently support its defense. The entirety of its argument consists of (1) listing the provisions regarding veterinary certificates, halal certification, and the requirement to provide truthful product information, and (2) concluding that it can be "hardly disputed" that the positive list requirement is designed to secure compliance with those laws. Indonesia has offered only its own characterization of the objective, without evidence or even argumentation in support; this is insufficient to meet its burden under the first element of the Article XX(d) test.

19. With respect to the first element, Indonesia provides no evidence or explanation to show that the positive list is designed to secure compliance with halal and related laws. Even aside from Indonesia's failure to establish the first element, however, Indonesia cannot demonstrate that the positive list is necessary to secure compliance with its law on halal and consumer protection and customs enforcement laws related to halal, because the positive list simply bans the importation of any poultry meat and poultry products not listed in the import licensing regulations, regardless of whether they comply with Indonesia's halal requirements.

20. In seeking to justify the limited application window and validity periods and the fixed license term requirements under Article XX(d), Indonesia appears to have adopted the same approach it took with respect to the positive list requirement. That is, it lists a myriad of food safety, halal, and consumer protection laws, and concludes summarily that "it can hardly be disputed" that its import licensing measures are designed to secure compliance with those provisions. Again, Indonesia has not offered any evidence or explanation from the text, structure, or legislative history on *whether* or *how* these two measures are designed to secure compliance with halal and other legal requirements. Such a showing is clearly insufficient to succeed under the first element of Article XX(d).

21. Indonesia also has failed to explain sufficiently how the limited application window and validity periods and the fixed license term requirements are necessary to secure compliance with

the food safety, halal, and consumer protection provisions it has identified. Instead, Indonesia asserts that these requirements "enable[] government officials to monitor foreign trade" by making the importers reapply for permits periodically. As examples, Indonesia argues that these requirements address the problems of "overstatement of anticipated import volume" and customs enforcement at the various ports of entry. None of these arguments and examples relate to the food safety, halal, and consumer protection provisions that Indonesia cited.

V. THE LEGAL STANDARDS REGARDING BRAZIL'S "GENERAL PROHIBITION" CLAIM

22. The United States would also like to offer initial views on Brazil's identification of a "general prohibition" in Indonesia on the importation of poultry meat and poultry products, as well as the legal standards applicable to Brazil's demonstration of the existence of such a measure.

23. First, with respect to identification, the DSU does not specify in detail the types of measures that complainants may identify in a panel request. The DSU requires that the measure be "taken by another Member" and suggests that a measure would normally be capable of "impair[ing]" "benefits accruing to it directly or indirectly under the covered agreements" and would normally be capable of being withdrawn in the absence of a mutually agreed solution. Once the complainant identifies a specific measure in the panel request, this measure forms part of the "matter" referred to the Dispute Settlement Body under Article 7.1 of the DSU and that the DSB tasks the panel with examining to assist the DSB in carrying out its responsibilities under the DSU.

24. Second, with respect to proving the existence of the challenged measure, the United States recalls that the burden is on the complainant to demonstrate the existence of a measure. This requirement on the complainant is the same whether the measure is written or unwritten. Due to the nature of an unwritten measure, however, a larger volume of evidence may be required to prove the existence of an unwritten measure while a written measure may often be identified solely by reference to its publication.

25. In *Argentina – Import Measures*, the Appellate Body found that a panel should look to "the specific measure challenged and how it is described and characterized by a complainant" to determine "the kind of evidence it is required to submit and the elements it must prove to establish the existence of the measures challenged." The Appellate Body further noted that, in a dispute in which the complainant has characterized the measure as a single, unwritten measure composed of different instruments, the complainant may need to "provide evidence of how different components operate together as part of a single measure and how a single measure exists as distinct from its components."

21. Therefore, the Panel may find that the "general prohibition" challenged by Brazil exists if Brazil brings forward evidence that such a prohibition exists "as distinct from" the individual measures constituting that prohibition, as identified by Brazil in its panel request.