

BEFORE THE WORLD TRADE ORGANIZATION

*Indonesia – Measures concerning the Importation of Chicken
Meat and Chicken Products*
(WT/DS484)

First Written Submission of Brazil

Geneva, 22 April 2016

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<i>Argentina – Import Measures</i>	Appellate Body Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015.
<i>Argentina – Import Measures</i>	Panel Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R.
<i>Australia – Apples</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175.
<i>Australia – Apples</i>	Panel Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R, DSR 2010:VI, p. 2371.
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, DSR 2007:IV, p. 1527.
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<i>Canada – Autos</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R,

	WT/DS142/AB/R, DSR 2000:VII, p. 3043.
<i>Canada - Wheat Exports and Grain Imports</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, p. 2817.
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473).
<i>China – Auto Parts</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/R, Add.1 and Add.2 / WT/DS340/R, Add.1 and Add.2 / WT/DS342/R, Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, p. 119.
<i>China - Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261.
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295.
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295.
<i>EC - Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243.

<p><i>EC – Approval and Marketing of Biotech Products</i></p>	<p>Panel Reports, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i>, WT/DS291/R / WT/DS292/R / WT/DS293/R / Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847</p>
<p><i>EC – Bananas III</i></p>	<p>Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i>, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591 Panel Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i>, WT/DS27/R/ECU (Ecuador) / WT/DS27/R/GTM, WT/DS27/R/HND (Guatemala and Honduras) / WT/DS27/R/MEX (Mexico) / WT/DS27/R/USA (US), adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695 to DSR 1997:III, p. 1085.</p>
<p><i>EC – Bananas III</i></p>	<p>Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i>, WT/DS27/RW2/ECU, adopted 11 December 2008, as modified by Appellate Body Report WT/DS27/AB/RW2/ECU, DSR 2008:XVIII, p. 7329.</p>
<p><i>EC-Seal Products</i></p>	<p>Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i>, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014.</p>
<p><i>EC and certain member States – Large Civil Aircraft</i></p>	<p>Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i>, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7.</p>
<p><i>India - Autos</i></p>	<p>Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i>, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201.</p>
<p><i>India – Quantitative Restrictions</i></p>	<p>Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i>, WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, p. 1799.</p>

<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391.
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<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5.
<i>Peru – Agricultural Products</i>	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R and Add.1, adopted 31 July 2015.
<i>Peru – Agricultural Products</i>	Panel Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/R and Add.1, adopted 31 July 2015, as modified by Appellate Body Report WT/DS457/AB/R.
<i>Thailand – Cigarettes (Philippines)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
<i>Turkey - Rice</i>	Panel Report, <i>Turkey – Measures Affecting the Importation of Rice</i> , WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, p. 2151.
<i>US – Animals</i>	Panel Report, <i>United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina</i> , WT/DS447/R and Add.1, adopted 31 August 2015.
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012, DSR 2012: XI, p. 5751.
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55.

<i>US-Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299.
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909.
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837.

GATT Panel Report

<i>Canada – Fira</i>	Panel Report, <i>Canada – Administration of the Foreign Investment Review Act</i> , adopted 7 February 1984, BISD 30s/140.
<i>Japan – Semi-conductors</i>	GATT Panel Report, <i>Japan – Trade in Semi-Conductors</i> , L/6309, adopted 4 May 1988, BISD 35S/116

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Abbreviation	Full Form
AoA	Agreement on Agriculture
ABPA	Brazilian Association of Animal Protein
AI	Avian Influenza
API	Approval of Import
<i>Codex Alimentarius</i>	<i>Codex Alimentarius</i> Commission
CCA	Consultative Committee of Agriculture
CLQ	Chicken leg quarter
CVA	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
CZI	International Animal Health Certificate
DGLS	Director General of Livestock Services
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
DSB	Dispute Settlement Body
FAO	Food and Agriculture Organization of the United Nations
GATT 1994	General Agreement on Tariffs and Trade 1994
GCC	Cooperation Council for the Arab States of the Gulf
HACCP	Hazard Analysis and Critical Control Point
HCPs	Halal Critical Points
HPAI	High Pathogenic Avian Influenza
HS	Harmonized System
ILA	Agreement on Import Licensing Procedures
JAKIM	Department of Islamic Development in

	Malaysia
LPAI	Low Pathogenic Avian Influenza
MAPA	Ministry of Agriculture, Livestock and Food Supply of Brazil
MDM	Mechanically deboned meat
MoA Regulation	Regulation of the Ministry of Agriculture
MoT Regulation	Regulation of the Ministry of Trade
NAMPA	National Meat Processor Association Indonesia
OECD	Organization for Economic Co-Operation and Development
OIE	World Organization for Animal Health
OIE Code	The Terrestrial Animal Health Code of the OIE
SIF	Federal Inspection Service
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
SPS Committee	Committee on Sanitary and Phytosanitary Measures established under the SPS Agreement
SRP	Indonesian Customs Registration
STCs	Specific Trade Concerns
TBT Agreement	Agreement on Technical Barriers to Trade
UBABEF	Brazilian Poultry Association
WTO	World Trade Organization
WHO	World Health Organization

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BRA-01	Ministry of Agriculture Regulation 58/Permentan/PK.210/11/2015
BRA-02	Detailed Study on the Indonesian Chicken Market
BRA-03	Ministry of Trade Regulation 05/M-DAG /PER/1/2016
BRA-04	OECD Review of Agricultural Policies: Indonesia 2012
BRA-05	OECD-FAO Agricultural Outlook 2014-2023
BRA-06	Statistical Yearbook of Indonesia - 2015
BRA-07	International average price for chicken meat - Trade Map data
BRA-08	Ministry of Agriculture Regulation 20/Permentan/OT.140/4/2009
BRA-09	Relevant correspondences between NAMPAs and ABPAs
BRA-10	Ministry of Agriculture Regulation 50/Permentan/OT.140/9/2011
BRA-11	Indonesia: NAMPAs urge allowance of MDM imports
BRA-12	Ministry of Trade Regulation 24/M-DAG/PER/9/2011
BRA-13	Minutes of the Third Meeting of Consultative Committee on agriculture (CCA) between the Ministry of Agriculture of the Republic of Indonesia and the Ministry of Agriculture, Livestock and Food Supply of Federative Republic of Brazil
BRA-14	Minutes of the Fourth Meeting of Consultative Committee on agriculture (CCA) between the Ministry of Agriculture of the Republic of Indonesia and the Ministry of Agriculture, Livestock and Food Supply of Federative Republic of Brazil
BRA-15	Chapters 5.10.4, 10.4 and 10.9 of the OIE Terrestrial Code
BRA-16	Minutes of the Fifth Meeting of Consultative Committee on agriculture (CCA) between the Ministry of Agriculture of the Republic of Indonesia and the Ministry of Agriculture, Livestock and Food Supply of Federative Republic of Brazil
BRA-17	SPS Committee Documents (G/SPS/R/56, G/SPS/R/43, G/SPS/R/62)

BRA-18	Specific Trade Concern presented in October 2013 before the SPS Committee
BRA-19	Brazil - Letter from Ambassador Marcos Galvão to Ambassador H.E. Triyono Wibowo
BRA-20	Indonesia - Answers related to the 5.8, SPS request
BRA-21	Brazilian Production Chain
BRA-22	Normative Instruction 17/2004 of MAPA
BRA-23	Contingency Plan for Avian Influenza and Newcastle Disease of MAPA
BRA-24	Normative Instruction 27/2008 of MAPA
BRA-25	Normative Instruction 28/2008 of MAPA
BRA-26	Brazilian Programs for Animal Health
BRA-27	PVS Evaluation Report of Veterinary Services of Brazil, 2007
BRA-28	PVS Evaluation Follow-up report 2014
BRA-29	Law of the Republic of Indonesia Number 18/2009 on Husbandry and Animal Health
BRA-30	Law of the Republic of Indonesia Number 41/2014 – regarding amendment to Law number 18 of 2009 regarding animal husbandry and animal health
BRA-31	Law of the Republic of Indonesia Number 18/2012 concerning food (“Food Law”)
BRA-32	Law of the Republic of Indonesia Number 7/2014 concerning trade (“Trade Law”)
BRA-33	Law of the Republic of Indonesia Number 19/2013 concerning the Protection and Empowerment of Farmers (“Farmers Law”)
BRA-34	Ministry of Agriculture Regulation 139/Permentan/PD/410/12/2014
BRA-35	Ministry of Trade Regulation 70/M-DAG/PER/9/ 2015
BRA-36	Ministry of Trade Regulation 27/M-DAG/PER/5/2012
BRA-37	Ministry of Trade Regulation 54/M-DAG/PER/10/2009

BRA-38	Ministry of Trade Regulation 48 /M-DAG/PER/7/2015
BRA-39	Decree of the Minister of Finance 454/KMK.04/2002
BRA-40	Ministry of Trade Regulation 87/M-DAG/PER/10/2015
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BRA-42	Ministry of Trade Regulation 46 /M-DAG/PER/8/2013
BRA-43	Brazilian Veterinary Certificates for poultry (2009) and turkey and duck (2010) proposed by Brazil to Indonesia
BRA-44	Letter of ABPA informing the average deadlines necessary to conclude an export process of chicken meat and chicken products from Brazil to Indonesia
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BRA-47	Rabobank Industry Note #451, "Time to Hatch a Plan for Indonesia Poultry", July 2014

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I. INTRODUCTION

1. For the past years Indonesia has implemented layer-upon-layer of a complex and intricate trade regulation that imposes several restrictions on the importation of Brazilian chicken meat and chicken products. As a matter of fact, the combined effect of different trade, sanitary, and import licensing measures adopted by Indonesia has effectively prevented Brazilian exports of chicken meat and chicken products from entering the Indonesian market, in a manner inconsistent with Indonesia's obligations under the WTO Agreements.

2. Brazil does not dispute the right of any WTO Member to adopt trade regulations in order to achieve legitimate trade policy objectives. Yet, a fundamental requirement of the WTO is that such measures shall be applied in a non-discriminatory manner and shall not represent a disguised restriction on international trade, taking into consideration the specific set of rights and obligations established by the Covered Agreements.

3. In spite of Brazil's efforts to obtain access to its exports of chicken meat and chicken products¹ in the Indonesian market since 2009, Indonesia has systematically failed to fulfill its obligations under the WTO in this regard. First of all, not all types of chicken meat and chicken products are allowed to be imported into the country. The Indonesian regulations do not encompass all HS Codes for *Gallus domesticus* species, excluding several forms of chicken meat and chicken products from entering the Indonesian market.

4. Secondly, the Indonesian regulations establish that the Indonesian government shall prioritize domestic food production and national food reserve over imports, as well as restrict imports of chicken meat and chicken products to cases in which there are "shortages" in the domestic production, as defined by the Indonesian government.

5. Thirdly, there is a restriction related to the "intended uses", under which no imports are authorized for other uses than those previously allowed by the Indonesian legislation (hotels, restaurants, catering, industries, and other particular purposes).² Thus, it is not allowed to sell the imported products in question in "wet markets" (traditional markets), which are estimated to correspond to 70% of the poultry market in Indonesia.³

¹ The products concerned in the present dispute are referred by the following HS codes of the *Gallus Domesticus* species: 0207.11 (Not cut in pieces, fresh or chilled); 0207.12 (Not cut in pieces, frozen); 0207.13 (Cuts and offal, fresh or chilled); 0207.14 (Cuts and offal, frozen) and; 1602.32 (Other prepared or preserved meat, meat offal or blood of poultry of heading 01.05 of fowls of the species *Gallus domesticus*).

² MoA Regulation 58/2015 (Articles 31(1) and 31(2)). (Exhibit BRA-01)

³ According to a report from a local expert in Indonesia, "around 70% of poultry (native chicken, broiler chicken, duck and others) are distributed via traditional (wet) markets. ...The reason for this is that traditional (wet) markets are still the first choice for consumers in Indonesia to obtain basic staple foods at a relatively cheap price." It is important to mention that even if Indonesia decides to authorize imports of chicken meat and chicken products, which is not currently the case, the imports would not be able to be sold in wet markets, as there are restrictions in place and those imports are only authorized to meet the

6. Fourthly, Indonesia adopts a complex, non-transparent and arbitrary import licensing regime, which unduly restricts imports of chicken meat and chicken products.

7. Fifthly, despite the fact that the Brazilian products comply with all the sanitary and technical requirements established by Indonesian law and international standards, Indonesia never presented any reasonable explanation for the ongoing delay of 7 years to undertake and complete the sanitary procedures required to import chicken meat and chicken products to Indonesia, failing to clearly indicate within a reasonable period of time under which sanitary requirements Brazilian chicken meat and chicken products could be exported to the country.

8. Brazil considers that the combined effects of those measures impose a general ban on the Brazilian exports of chicken meat and chicken products. Moreover, some of them discriminate between imported and domestic products. None of these measures are consistent with Indonesia's WTO obligations.

9. In light of the above, Brazil submits that the set of measures adopted by Indonesia to regulate trade and imports of chicken meat and chicken products, combined and individually, are in breach with the provisions of the General Agreement on Tariffs and Trade 1994 – GATT 1994 (Articles III:4 e XI:1), the Agreement on Agriculture - AoA (Article 4.2), the Agreement on the Application of Sanitary and Phytosanitary Measures – SPS Agreement (Article 8 and Annex C) and the Agreement on Import Licensing Procedures – ILA (Article 3.2).

II. PROCEDURAL BACKGROUND

10. On 16 October 2014, Brazil requested consultations with Indonesia pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes – DSU, Article XXII of GATT 1994, Article 11 of the SPS Agreement, Article 6 of ILA, Article 14 of the Agreement on Technical Barriers to Trade – TBT Agreement and Article 19 of the AoA concerning certain measures imposed by Indonesia on the importation of chicken meat and chicken products.

11. The consultations took place on 15-16 December 2014 in Geneva. Unfortunately, the consultations failed to settle the dispute and confirmed Brazil's assumptions that several of the measures adopted by Indonesia are inconsistent with WTO rules.

12. Therefore, on 15 October 2015, Brazil requested the establishment of a panel pursuant to Articles 6 of the DSU, Article XXIII of GATT 1994, Article 11 of the SPS Agreement, and Article 14 of the TBT Agreement, Article 6 of the ILA, and Article 19 of the AoA. The DSB considered this request (as amended by a corrigendum of 27 October 2015) at its meetings on 28 October 2015 and again on 25 November 2015, and established the panel to examine this dispute on its Special meeting on 3 December 2015.

needs of "hotels, restaurants, caterings, industries, and other particular purposes. (LACEY, Simon et al. **Detailed Study on the Indonesian Chicken Market**. p. 29). (Exhibit BRA-02)

III. FACTUAL BACKGROUND

13. In this section Brazil will indicate what are the products at issue in the present dispute (Subsection A), as well as how the Indonesian market of such products is structured and works (Subsection B). Brazil will then provide information on the Brazilian attempts to have access to the Indonesian market (Subsection C) and on the Brazilian production structure and export performance (Subsection D). Finally, Brazil will briefly describe some of the laws and regulations through which Indonesia restricts the imports for chicken meat and chicken products from Brazil (Subsection E).

A. The products at issue

14. In this dispute, Brazil challenges several measures adopted by Indonesia that affect the importation and the domestic marketing of imported chicken meat and chicken products. The products at issue in this dispute, to which Indonesia has applied several prohibiting or restricting measures in violation of the WTO Agreements, are referred by the following HS codes of the *Gallus Domesticus* species, as follows:

- **02.07. Meat and edible offal, of the poultry of heading 01.05, fresh, chilled or frozen:**
 - Of fowls of the species *Gallus domesticus*:
 - 0207.11 (Not cut in pieces, fresh or chilled);
 - 0207.12 (Not cut in pieces, frozen);
 - 0207.13 (Cuts and offal, fresh or chilled);
 - 0207.14 (Cuts and offal, frozen) and;
- **16.02 Other prepared or preserved meat, meat offal or blood:**
 - Of poultry of heading 01.05:
 - 1602.32 (Of fowls of the species *Gallus domesticus*).

15. From the above-mentioned HS codes, only HS 0207.11 (Not cut in pieces, fresh or chilled) and HS 0207.12 (Not cut in pieces, frozen) are legally allowed to be imported into Indonesia according to the Indonesian regulations, and even so subject to several restrictions.⁴

B. Indonesia's chicken market: trade data and statistics

16. As the fourth most populous country in the world, with a population of around 254.5 million people (2014),⁵ Indonesia is an important market for agricultural products. According to the 2012 Review of Agricultural Policies of Indonesia,

⁴ MoA Regulation 58/2015 (Appendix II) (Exhibit BRA-01) and MoT Regulation 5/2016 (Appendix IV) (Exhibit BRA-03).

⁵ The World Bank. Data. Indonesia. Available online at: < <http://data.worldbank.org/country/indonesia> >.

published by the Organization for Economic Co-Operation and Development (OECD), the consumption of agricultural products in the country is increasing and agricultural activity has become one of the strategic sectors of Indonesia's economy.⁶

17. With an average value of agricultural production of US\$ 66 billion in 2007-09, Indonesia is also the world's 10th largest agricultural producer. It is the world's most important palm oil producer, the second largest natural rubber producer, and the third largest rice producer.⁷ The chicken industry in Indonesia, which comprises large, medium, small and individual producers, has steadily increased since 2010. According to the most recent official data published by Indonesia, the number of total broiler production from 2010 to 2014 was the following: (i) 2010: 1,214,339 tons; (ii) 2011: 1,337,911 tons; (iii) 2012: 1,400,470 tons; (iv) 2013: 1,497,874 tons; and (v) 2014: 1,524,907 tons.⁸

18. As stated in a recent report from a local expert on the structure and conditions of the Indonesian chicken market production and distribution chains is:

Primarily comprised of two major companies, Indonesian integrators [*large commercial operations that control the Indonesian value chain*] often have their own independent processes that oversee the feed, production, distribution, and event retail sales of their broiler meat (whole and in parts). Indonesian chicken integrators dominate the overall broiler chicken production, distribution and retail market. Together, JAPFA – Comfeed Indonesia and Chareon Pokphand Indonesia dominate a majority of the total broiler industry. Reports vary on the proportion they control, however it includes anywhere from 50% to 58% to 65% of overall broiler production market share. Together with a few others, they reportedly maintain invested assets of US\$ 42.22 billion. Indeed, the entire industry relies heavily on these two integrators as they also control the "financial, physical and human resources to import and process the genetic and raw feed material base to the industry and to develop technology..."⁹

... Aside from broiler chickens, the industry has historically maintained a significant number of 'kampong chicken' [*village/small-scale breeding*] farms. These farms raise smaller chicken that generally digest feed consisting of locally available material. ...When organized, kampong chicken production tends to maintain its own production and distribution channels that are distinct from broiler production.¹⁰

⁶ OECD (2012). *OECD Review of Agricultural Policies: Indonesia 2012*, OECD Publishing. Available online at: <<http://www.oecd.org/publications/oecd-review-of-agricultural-policies-indonesia-2012-9789264179011-en.htm>>. (Exhibit BRA-04)

⁷ OECD (2012). *OECD Review of Agricultural Policies: Indonesia 2012*, OECD Publishing. Pages 19-20.

⁸ Indonesian Ministry of Agriculture Official Data 2014 (Statistik Peternakan dan Kesehatan Hewan 2014). Available at: LACEY, Simon et al. **Detailed Study on the Indonesian Chicken Market**, Annex 8, p. 145. (Exhibit BRA-02)

⁹ LACEY, Simon et al. **Detailed Study on the Indonesian Chicken Market**. pp. 10-11. (Exhibit BRA-02)

¹⁰ *Idem*. p. 12.

19. Due to the imposition of a variety of restrictive measures towards imports,¹¹ Indonesia's poultry meat¹² consumption, however, remains very low, representing a *per capita* consumption of around 7.4 kg per year in 2013,¹³ while the average *per capita* consumption of poultry meat in the world was estimated in 13.2 kg/year in the same year.¹⁴ According to the latest data available from FAO, compared to other Asian countries the consumption of poultry meat in Indonesia was low, as described by the following chart:

Table 1

2009 Food Supply Quantity (kg/capita/yr), Selected Countries			
	Bovine Meat	Eggs	Poultry Meat
Australia	38.7	5.8	38.4
Brunei Darussalam	4.9	13.4	53.0
Cambodia	5.4	1.5	2.3
Indonesia	2.2	4.5	6.0
Malaysia	5.6	12.1	38.3
Philippines	4.4	4.4	10.0
Thailand	2.9	10.4	11.6
Vietnam	4.3	3.3	10.2

Source: FAOSTAT|© FAO Statistics Division 2013.

20. With regard to chicken meat consumption alone, according to the data available in the "Statistical Yearbook of Indonesia – 2015", the average yearly *per capita* consumption of chicken meat has remained around 4-4.5 kg during 2012 and 2013, what demonstrates that the domestic consumption is even lower for chicken meat and chicken products in Indonesia.¹⁵

21. Prices of chicken meat and chicken products, on its turn, remain comparatively high in relation to international standards. According to the data provided by the Indonesian Central Agency on Statistics (*Badan Pusat Statistik*), in the "Statistical Yearbook of Indonesia - 2015", the prices of chicken meat, on average, were USD 3.15/kg in 2011, USD 3.12/kg in 2012, USD 2.75/kg, and USD 2,77 in 2014.¹⁶ In

¹¹ The OCDE report (OECD Review of Agricultural Policies: Indonesia 2012) emphasizes some of the trade policy instruments currently put in practice by the Indonesian government, some of which reflect the issues that will be discussed in the present panel, such as: sanitary measures, import licensing regime and import bans. (Exhibit BRA-04)

¹² Including the meat of "fowls of the species *Gallus domesticus*", "turkey", "duck" and "geese".

¹³ Rabobank Industry Note #451, **Time to Hatch a Plan for Indonesia Poultry**, July 2014. (Exhibit BRA-47)

¹⁴ OECD/FAO (2014). OECD-FAO Agricultural Outlook 2014-2023. Page 295. Available at: <https://www.embrapa.br/documents/1024963/1025740/OECD-FAO_Agricultural_Outlook_2014-2023/20082926-0f88-4159-970a-2a1c65795c47>. (Exhibit BRA-05)

¹⁵ The Report indicates that the weekly consumption of chicken meat in Indonesia both in 2013 e 2014 were respectively 0.078 e 0.086. Therefore, the yearly consumption calculation required the multiplication of these numbers to 52 weeks, which represents 4.05 kg/year (2013) and 4.47 kg/year (2014). Statistical Yearbook of Indonesia - 2015, Badan Pusat Statistik. Available at: <http://www.bps.go.id/website/pdf_publicasi/Statistik-Indonesia-2015.pdf>. (Exhibit BRA-06)

¹⁶ The prices used herein were taken from the publication "Statistical Yearbook of Indonesia - 2015" Available online at: <http://www.bps.go.id/website/pdf_publicasi/Statistik-Indonesia-2015.pdf>. Table "12.2 - National Retail Prices of Selected Commodities (rupiahs), 2010-2014" is located on page 438,

contrast, the average international price for chicken meat was: (i) USD 1.93/kg in 2011; (ii) USD 1.99/kg in 2012; (iii) USD 2.00/kg in 2013; and (iv) USD 1,83/kg in 2014.¹⁷ A comparison of these numbers indicates that Indonesian buyers and consumers paid, on average from 2011 to 2014, a price 52% higher for locally produced chicken meat.

22. This is due in large part to the fact that the Indonesian chicken market remains isolated from the international market. Indeed, the importation of chicken meat and chicken products by Indonesia has been insignificant over the past years. From 2005 to 2008, imports of HS codes for the products under 0207.11, 0207.12, 0207.13, 0207.14 and 1602.32 occurred at low levels,¹⁸ as indicated below. After 2009, the introduction of the Indonesian measures challenged in the present dispute, which will be described in detail in Section IV.A, have restricted the importation of these products, as shown by the following tables:

Table 2

Imports of chicken meat and chicken products by Indonesia for the past 10 years

List of supplying markets for a product imported by Indonesia

Product: 0207.11 Fowls (*Gallus domesticus*), whole, fresh or chilled.

Exporters	Imported value in 2005	Imported value in 2006	Imported value in 2007	Imported value in 2008	Imported value in 2009	Imported value in 2010	Imported value in 2011	Imported value in 2012	Imported value in 2013	Imported value in 2014
World	1065	2884	0	365	0	0	0	0	0	0
Swaziland	40	190	0	0	0	0	0	0	0	0
France	35	119	0	0	0	0	0	0	0	0
Netherlands	53	70	0	0	0	0	0	0	0	0
Singapore	815	2375	0	0	0	0	0	0	0	0
Sweden	44	56	0	0	0	0	0	0	0	0
Switzerland	79	74	0	0	0	0	0	0	0	0
United States of America	0	0	0	365	0	0	0	0	0	0

Source: ITC calculations based on BPS-Statistics Indonesia statistics since January, 2014 and ITC calculations based on UN COMTRADE statistics until January, 2014. Unit: US Dollar thousand.

showing, among other information, the price of a kilogram of chicken meat. The prices of chicken meat in rupiahs were: 28.639,42 rupiahs in 2011; 30.198,67 rupiahs in 2012, 33.458,08 rupiahs in 2013; and 34.534,50 rupiahs in 2014. To convert between currencies, the average annual value of the rupiah against the dollar was used: 9068/1 in 2011; 9670/1 in 2012; 12189/1 in 2013; and 12440/1 in 2014. These data are available in the same publication. They are shown in table "11.1.14 - Selected Foreign Exchange Middle Rates Against Rupiah at Bank of Indonesia and Prices of Gold in Jakarta (rupiahs), 2009-2014" on page 411. (Exhibit BRA-06).

¹⁷ Trade Map, Market Analysis and Research, International Trade Centre (ITC). Available at: <www.trademap.org>. (Exhibit BRA-07).

¹⁸ The calculation used the average price for each year for the following HS Codes: 0207.11 (Not cut in pieces, fresh or chilled); 0207.12 (Not cut in pieces, frozen); 0207.13 (Cuts and offal, fresh or chilled); 0207.14 (Cuts and offal, frozen) and; 1602.32 (Other prepared or preserved meat, meat offal or blood of poultry of heading 01.05 of fowls of the species *Gallus domesticus*).

List of supplying markets for a product imported by Indonesia

Product: 0207.12 Fowls (*Gallus domesticus*), whole, frozen.

Exporters	Imported value in 2005	Imported value in 2006	Imported value in 2007	Imported value in 2008	Imported value in 2009	Imported value in 2010	Imported value in 2011	Imported value in 2012	Imported value in 2013	Imported value in 2014
World	223	1524	6777	2811	347	0	0	0	30	0
Australia	0	0	1	0	0	0	0	0	0	0
Brazil	0	0	3464	963	0	0	0	0	0	0
France	0	227	327	53	0	0	0	0	0	0
Malaysia	0	0	0	0	0	0	0	0	30	0
Netherlands	0	42	36	0	0	0	0	0	0	0
Singapore	199	1255	2863	824	21	0	0	0	0	0
Switzerland	24	0	0	0	0	0	0	0	0	0

Source: ITC calculations based on BPS-Statistics Indonesia statistics since January, 2014 and ITC calculations based on UN COMTRADE statistics until January, 2014. Unit: US Dollar thousand.

List of supplying markets for a product imported by Indonesia

Product: 0207.13 Fowls (*Gallus domesticus*), cuts & offal, fresh/chilled.

Exporters	Imported value in 2005	Imported value in 2006	Imported value in 2007	Imported value in 2008	Imported value in 2009	Imported value in 2010	Imported value in 2011	Imported value in 2012	Imported value in 2013	Imported value in 2014
World	27	0	0	0	0	0	0	0	0	0
Singapore	27	0	0	0	0	0	0	0	0	0

Source: ITC calculations based on BPS-Statistics Indonesia statistics since January, 2014 and ITC calculations based on UN COMTRADE statistics until January, 2014. Unit: US Dollar thousand.

List of supplying markets for a product imported by Indonesia

Product: 0207.14 Fowls (*Gallus domesticus*), cuts & offal, frozen.

Exporters	Imported value in 2005	Imported value in 2006	Imported value in 2007	Imported value in 2008	Imported value in 2009	Imported value in 2010	Imported value in 2011	Imported value in 2012	Imported value in 2013	Imported value in 2014
World	2136	22	312	5085	3512	238	29	35	3	2
Belgium	0	0	0	0	0	0	0	6	3	2
Brazil	46	0	191	0	0	0	0	0	0	0
France	98	0	92	155	0	0	0	0	0	0
Malaysia	3	4	0	69	13	70	29	29	0	0
Singapore	1989	18	29	1551	1012	168	0	0	0	0
United States of America	0	0	0	3310	2487	0	0	0	0	0

Source: ITC calculations based on BPS-Statistics Indonesia statistics since January, 2014 and ITC calculations based on UN COMTRADE statistics until January, 2014. Unit : US Dollar thousand.

List of supplying markets for a product imported by Indonesia

Product: 1602.32 Fowl (*Gallus domesticus*) meat, prepared/preserved.

Exporters	Imported value in 2005	Imported value in 2006	Imported value in 2007	Imported value in 2008	Imported value in 2009	Imported value in 2010	Imported value in 2011	Imported value in 2012	Imported value in 2013	Imported value in 2014
Malaysia	57	34	42	63	47	14	0	0	99	74
Belgium	0	0	0	0	0	0	0	0	12	7
Korea, Republic of	0	1	0	0	0	0	0	0	0	0
Denmark	0	22	12	0	0	0	0	0	0	0
France	185	365	369	93	0	0	0	0	0	0
Italy	0	0	1	0	0	0	0	0	0	0
Japan	1	0	0	0	0	0	0	0	0	0
Netherlands	0	0	0	19	0	0	0	0	0	0
Singapore	27	0	11	4	0	0	0	2	1	0
Thailand	1	0	0	0	0	0	0	0	0	0
United States of America	0	0	2	0	0	0	0	58	0	0

Source: ITC calculations based on BPS-Statistics Indonesia statistics since January, 2014 and ITC calculations based on UN COMTRADE statistics until January, 2014. Unit: US Dollar thousand.

23. The tables presented above demonstrate the direct impacts of the Indonesian measures, which have effectively restricted and even prohibited the importation of chicken meat and chicken products into Indonesia since 2009. Brazilian exports of chicken meat and chicken products were completely banned from Indonesia after that year.¹⁹

C. Brazilian attempts to have access to the Indonesian market

24. Since 2009, Brazil has attempted through different channels to obtain access to the Indonesian chicken products market without success. Between 2009 and 2011, the Brazilian Association of Animal Protein (ABPA)²⁰ made several attempts to explore opportunities of business for Brazilian chicken products in Indonesia.²¹

¹⁹ MoA Regulation 20/2009 (Exhibit BRA-08) have established several requirements for the importation of carcass, meat and/or offal from abroad, as follows: (i) for fowl meat, only whole carcass and MDM were formally allowed to be imported (as they were in the positive list of the products authorized to be imported in the Regulation), but not chicken cuts; (ii) a discretionary Import Approval from the Ministry of Agriculture was required; (iii) the business units in the country of origin should be accredited by the Indonesian authorities; (iv) a sanitary certificate should be issued for such transaction, among others. Moreover, Law 18/2009 (Law Husbandry and Animal Health) established that "import of animal or livestock and animal product from overseas shall be made if domestic animal products and supply or livestock is insufficient to fulfill the need for the people consumption" (Article 36(4)). Furthermore, this Law required that any person importing animal product should be obliged to obtain a license for import from the relevant Minister on trade (Article 59(1)). These measures officially implemented in 2009 Indonesia's intention to impede the importation of chicken meat and chicken products. (Exhibit BRA-08).

²⁰ ABPA was created in March 2014 by the merger of the Brazilian Poultry Association (UBABEF), the Brazilian Eggs Institute (Instituto Ovos Brasil) and the Brazilian Pork Association. Thus, before March 2014, the Brazilian chicken private sector was represented by UBABEF.

²¹ The relevant correspondences between ABPA and NAMPA are presented by Brazil in Exhibit BRA-09. The relevant MoA Regulations in force between 2009 and 2011 concerning the importation of chicken

25. At that time, the Brazilian Association representatives indicated to the National Meat Processor Association of Indonesia (NAMPA)²² that they were ready to export chicken meat and chicken products, turkey, and duck to Indonesia.

26. In October 2009, NAMPA informed the Brazilian Association that it had received the Indonesian Government's approval to import "only" chicken mechanically deboned meat (MDM) from Brazil.²³ According to NAMPA, for that it would be necessary to follow several bureaucratic steps, since the importation of MDM was subject to the verification of the Indonesian Veterinary Government Authority and to the scrutiny of the Director General of Livestock Services (DGLS).

27. Still according to NAMPA, there were some conditions to be fulfilled by Brazil in order to be able to export MDM to Indonesia: (i) the products shall be free from the Highly Pathogenic Avian Influenza (HPAI), also known as "the Avian flu"; (ii) the products shall be halal; and (iii) the Indonesian DGLS shall approve the exporting facilities.²⁴

28. In response, the Brazilian exporters confirmed that Brazil had "no problem to fulfill the Indonesian specification for MDM"²⁵ and reaffirmed their interest in making every effort to export the product,²⁶ as it was considered a first step in their commercial strategy to gain access to the Indonesian market.

29. Notwithstanding, and although NAMPA insisted that local supply of MDM could not meet the needs of Indonesia's demands,²⁷ the process to obtain the official import approval from the Indonesian government did not progress.²⁸ The required authorizations were never granted by the Indonesian authorities and according to NAMPA there was no further governmental justification for this refusal.

30. By the end of 2010, the President of NAMPA informed ABPA in their regular communications that the Indonesian association was unable to obtain the required official authorizations. By that time, Indonesia was about to adopt a new Agricultural Regulation, which would only allow the importation of duck and turkey carcass (not

meat and chicken products were MoA Regulation 20/2009, replaced by MoA Regulation 50/2011. (Exhibit BRA-10).

²² The profile of NAMPA is available online at: < <http://www.nampa-ind.com/>>.

²³ According to the e-mail sent by NAMPA representatives on 7 October 2009, NAMPA informed ABPA that the Indonesian Government had authorized NAMPA to import chicken MDM from Brazil, although the importation was restricted to further processing use. (Exhibit BRA-09).

²⁴ According to the e-mail from 02/11/2010 from the President of NAMPA, the condition that must be filled to import chicken MDM into Indonesia was the following: "the country is free from Avian Flu, and the products must be halal, the establishment must get the approval from Indonesia DGLS, which mean Indonesia officer will have to audit at site". (Exhibit BRA-09).

²⁵ Exhibit BRA-09.

²⁶ Exhibit BRA-09.

²⁷ As published by international news: "Indonesia: NAMPA urges allowance of MDM imports". Available online at: < <http://www.worldpoultry.net/Broilers/Processing/2011/12/Indonesia-Nampa-urges-allowance-of-MDM-imports-WP009749W/>>. (Exhibit BRA-11).

²⁸ It should be highlighted that in all relevant correspondences referring to the negotiations with NAMPA, remarkably between 2010 and 2011, the processors' association acknowledged that the DGLS would not allow the importation of whole chicken and chicken leg quarter (CLQ), or any other part of chicken meat. (Exhibit BRA-09).

chicken) and, therefore, the Association would not be able to obtain such authorization.²⁹

31. In October 2011, the referred new pieces of legislations (Ministry of Trade Regulation No. 24/M-DAG/PER/9/2011 and Ministry of Agriculture Regulation No. 50/PERMENTAN/OT.140/9/2011) came into force and effectively banned all imports of chicken meat and chicken products, including whole chicken and MDM. MoA Regulation 50/2011 excluded chicken from the definition of poultry, reinforcing the restrictions already imposed by MoA Regulation 20/2009.³⁰

32. Subsequently, the communications between the two associations acknowledged that due to MoA Regulation 50/2011 the DGLS would not allow the importation of whole chicken and chicken leg quarter (CLQ), or any other part of chicken meat.^{31and32}

33. Indeed, Article 1(3) of MoA Regulation 50/2011 defines that poultry carcass “is part of the body of a duck or turkey slaughtered in halal and proper manner, its feather removed, its offals and abdominals extracted, its head, neck, and both feet removed so it is safe, worthy, and fit for human consumption”. By excluding chicken of the definition of poultry, Indonesia explicitly banned the importation of chicken meat and chicken products into the Indonesian territory not only *de facto*, but also in law.

34. In parallel with the private sector negotiations between 2009 and 2010, bilateral meetings were held by the two Governments. In those opportunities, Brazil provided detailed information regarding the Brazilian poultry industry to Indonesia. The Governments of Brazil and Indonesia discussed this topic in different meetings of the Consultative Committee of Agriculture (CCA), a bilateral committee established by the Governments of Brazil and Indonesia.

35. In the Third Meeting of the CCA, held in Matarm, Weat Nusa Tenggara, Indonesia, on 4-5 May 2009, both governments discussed the conditions for obtaining access to Indonesia's poultry market and the Brazilian interest in exporting chicken products to the country.³³ Thus, Brazil officially presented to the Indonesian authorities a proposal of health certificate for fresh poultry meat³⁴ based on the guidelines of the World Organization for Animal Health's Terrestrial Code (OIE Terrestrial Code), especially Article 5.10.4 (“Model veterinary certificate for international trade in

²⁹ Exhibit BRA-09.

³⁰ Ministry of Trade Regulation No. 24/M-DAG/PER/9/2011 (Exhibit BRA-12); Ministry of Agriculture Regulation No. 50/PERMENTAN/OT.140/9/2011 (Exhibit BRA-10); MoA Regulation 20/2009 (Exhibit BRA-08).

³¹ Exhibit BRA-09.

³² It is noteworthy that at that time two Brazilian exporters filled the Indonesia forms to export turkey MDM to Indonesia as suggested by NAMPA (Exhibit BRA-09). However, no answer from the Indonesian Government was received so far.

³³ Between 4-5 May, 2009, the 3rd Meeting of the Consultative Committee on Agriculture (CCA) was held in Matarm, Weat Nusa Tenggara, Indonesia (Exhibit BRA-13). The 4th Meeting of the CCA took place in São Paulo, on 15-16 September 2010 (Exhibit BRA-14).

³⁴ Brazilian veterinary certificate proposals for poultry meat (2009) and for turkey and duck (2010). (Exhibit BRA-43).

products of animal origin), Article 10.4 ("Infection with Avian Influenza Virus"), and Article 10.9 ("Infection with Newcastle Disease Virus").³⁵

36. No official answer was ever received from the Indonesian Government with regard to the proposal presented. At present, it remains unclear to Brazil which are the sanitary reasons of the Indonesian authorities for not approving the Brazilian Health Certificates by the Indonesian authorities.

37. During the Fourth Meeting of the CCA between Brazil and Indonesia, held in São Paulo on 15-16 September 2010, the Indonesian authorities indicated that they would evaluate the "possibility of opening" the chicken market. However, they pointed out that Indonesia was "self-sufficient"³⁶ in these products (chicken), and therefore they would "prioritize" the imports of turkey and duck meat, which were never allowed as well.³⁷

38. On the occasion, Brazilian authorities were informed that a sanitary inspection mission would be sent to the country in the near future. Indonesia, however, never sent any mission nor gave any justification as to the reason the mission was not sent. Moreover, the health certificates proposed by Brazil that would enable the imports of chicken meat and chicken products were never approved.³⁸ No plausible explanation for the import ban of Brazilian exports was ever presented by Indonesia either.

39. Brazil raised several Specific Trade Concerns (STCs) under the auspices of the WTO Committee on Sanitary and Phytosanitary Measures (SPS Committee)³⁹ over the past years regarding the Indonesian restrictive legislation and failure to grant access to the Brazilian chicken meat and chicken products exports. Indonesia has never provided a satisfactory and WTO-consistent answer to Brazil's concerns.

³⁵ OIE Terrestrial Code, Chapters 5.10.4, 10.4 and 10.9 (2012). (Exhibit BRA-15).

³⁶ The report on the minutes of the 4th meeting was signed on 16th September 2010 (Exhibit BRA-14) by Mr. Yusni Emilia Harahap, who was at that time the Assistant Minister of Agriculture for Institutional Relations and International Cooperation of the Republic of Indonesia. According to the report, "The Indonesian side informed that even though it is self-sufficient, it is possible to evaluate the possibility of opening the market to Brazilian chicken. Indonesia will prioritize the evaluation of imported turkey and duck meat and then will evaluate the imports of chicken meat." Even though, according to the minutes of the 4th Meeting, Indonesia stated that the formal acceptance of the Health Certificate for turkey and duck would be presented in mid-October 2010, this never happened.

³⁷ Two Brazilian exporters filled the Indonesian forms to export turkey MDM to Indonesia, but no answer from the Indonesian government was received so far. It is noteworthy that at that time two Brazilian exporters filled the Indonesia forms to export turkey MDM to Indonesia as suggested by NAMPA (Exhibit BRA-09). However, no answer from the Indonesian Government was received so far.

³⁸ On 25-26 May 2011, during the 5th Meeting of the CCA between Brazil and Indonesia the Indonesian authorities tried to explain the restrictions for chicken meat and chicken products imports, by suggesting a connection of the prohibition with the cases of Avian Influenza that since 2004 have "devastated the Indonesian chicken farm and community-based chicken farm", disregarding the fact that Brazil has never had any single case of Avian Influenza. The minutes of this Meeting, however, indicated that the Indonesian authorities would send a Mission to inspect the production facilities for turkey and duck before the end of 2011, what has never happened. (Exhibit BRA-16).

³⁹ In October 2006 (G/SPS/R/43), January 2009 (G/SPS/R/56) and May 2011 (G/SPS/R/62) (Exhibit BRA-17). October 2013 Specific Trade Concern - STC (Exhibit BRA-18).

40. In light of this, in July 2014 Brazil presented a formal request based on Article 5.8 of the SPS Agreement,⁴⁰ and required information on the following aspects: (i) whether the importation of poultry meat was allowed into Indonesia; (ii) the existence of a risk assessment regarding Brazilian poultry; (iii) whether the approval procedures for the Health Certificate for Brazilian poultry were based on the relevant scientific standards, guidelines or recommendations; (iv) the scientific reasons behind the then five-year delay in the approval procedures of the health certificate for Brazilian poultry; and (v) the details on how the above-mentioned approval procedures were in accordance with Article 8 and Annex C of the SPS Agreement.

41. In its response,⁴¹ Indonesia did not provide a satisfactory clarification on the reasons why the Brazilian products were not allowed into Indonesia, limiting itself to point out to several Indonesian legislations that would apply to imports of animal products.⁴² Indonesia also failed to present any sanitary reasons to justify why the necessary approval procedures – the approval of the Health Certificates and the Inspection Mission to Brazil – that would enable the Brazilian products to be imported have never been undertaken. In fact, Indonesia confirmed that no risk assessment for the Brazilian chicken meat and chicken products had ever been carried out.

42. According to Indonesia, the "delay" (actually an absence of response) for the approval of the Brazilian proposal of Veterinary Health Certificate was due to an allegedly Brazilian failure "to comply with the existing procedures and technical regulations" related to halal information,⁴³ which indicates that Indonesia clearly mixed sanitary and other technical requirements, in a manner inconsistent with the SPS Agreement. It is noteworthy that Brazil would have no difficulty in meeting Indonesia's halal requirements. In fact, the major destinations of the Brazilian exports of chicken meat and chicken products have been the Muslim countries for many years, with Brazilian production fully complying with the requirements of halal slaughtering adopted by different Muslim consumer countries, including those that adopt higher standards than the *Codex Alimentarius*.

D. The Brazilian production structure and export performance

⁴⁰ Article 5.8 of the SPS Agreement states: "When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure". (Exhibit BRA-19).

⁴¹ Indonesia's response to Request by Brazil pursuant to Article 5.8 of the SPS Agreement. (Exhibit BRA-20).

⁴² According to Indonesia in its response to Brazil's information request under Article 5.8 of the SPS Agreement, the following regulations should be followed by Brazil: (i) Indonesia National Standard 3924:2009; (ii) MoA Decree n. 306/1994; (iii) MoA Decree n. 381/2005; and (iv) MoA Regulation n. 139/2014. All the requirements established by these regulations – which are described in Annex 1 of this submission – are followed by Brazil. Despite the fact that Brazil follows all of them and that Indonesia has never indicated which are the sanitary requirements not fulfilled by Brazil, some of them are clearly not related to sanitary aspects, such as "slaughtering in accordance with Islamic Law". (Exhibit BRA-20)

⁴³ Indonesia's response to question 3 of Brazil's information request under Article 5.8 of the SPS Agreement. (Exhibit BRA-20).

43. In Brazil's view, there is no reasonable justification for Indonesia to ban the Brazilian exports in question. Brazil is the world's second largest producer of chicken meat and chicken products and one of the major exporters of those products. In 2015, the Brazilian production of chicken meat reached 13.1 million tons⁴⁴, while total exports reached 4.04 million tons. Brazil is also the major halal exporter in the world⁴⁵ having exported 2.078 million tons of halal chicken meat and chicken products in 2015.

44. The Brazilian chicken industry operates under optimal sanitary conditions⁴⁶ and is one of the most technologically advanced in the world. The permanent surveillance performed by the Ministry of Agriculture, Livestock and Food Supply (MAPA)⁴⁷ in the production facilities – through the “National Plan for the Control of Residues and Contaminants” – also guarantees that the Brazilian production of chicken complies with international regulations and fulfills the requirements established by the *Codex Alimentarius* as well as those from the importing countries. Due to the strict controls established by the National Plan for Avian Influenza and Newcastle Disease⁴⁸ developed by MAPA and the continuous efforts by Brazilian producers/processors in the poultry sector to ensure the safety of their production, Brazil has never registered a single case of Avian Influenza and had no case of Newcastle disease since 2006.

45. The export of live animals or animal products from Brazil is subject to the fulfillment of a set of specific requirements regulated by MAPA⁴⁹ through the

⁴⁴ More information on the Brazilian export performance and trade data is available in Annex 2 of this Submission (ANNEX 2 – “Brazilian Chicken World Exports”).

⁴⁵ Historically, Brazil began to export halal chicken meat through shipments to the Middle East in the mid-1970s. The first halal shipment was sent to Saudi Arabia and Kuwait in 1975. Exporting companies are currently equipped and trained to perform halal slaughtering. The major destinations for the Brazilian exports of halal chicken in 2015 were the following countries: (i) Saudi Arabia (789,303 tons); United Arab Emirates (303,738 tons); (iii) Kuwait (121,615 tons); (iv) Egypt (69,567 tons); (v) Yemen (42,613 tons); (vi) Oman (83,385 tons); (vii) Qatar (80,297 tons); (viii) and Iraq (53,589 tons), among others.

⁴⁶ The integrated production system developed in Brazil since the 1960s enabled the establishment of a highly mechanized production chain, harmonizing the activity of producers and slaughterhouses. It is estimated that 90% of the Brazilian poultry industry is under the integrated system between producers and slaughterhouses/processors. The integration enables a permanent support to farmers, with technical advice by agronomists, veterinarians, and rural technicians, as well as vaccines and constant veterinary monitoring. (Exhibit BRA-21).

⁴⁷ All poultry meat produced in Brazil under the scope of the Federal Inspection Service (SIF) of the Ministry of Agriculture is produced without the use of hormones and preservatives. The use of hormones in chicken farming is prohibited by that Ministry as expressed in Normative Instruction 17, from June 2004. (Exhibit BRA-22)

⁴⁸ The Brazilian Avian Health Coordination of the Animal Health Department of MAPA has put in place a ‘Contingency Plan for Avian Influenza and Newcastle Disease’ contemplates attention procedures and episode-cutting measures of Avian Influenza and Newcastle disease in order to provide a basic reference document for the Federal Superintendence of Agriculture, Livestock and Supply (SFAs), State Veterinary Services (SVEs), poultry farmers and interested public in general on the actions to be performed by the Official Veterinary Service, as a measure to prevent and control the spread of agents of these diseases in domestic poultry flocks.” Available online at: <http://www.agricultura.gov.br/arq_editor/file/PNSA/Plano%20de%20Conting%C3%Aancia%20-%20Vers%C3%A3o%201_4.pdf> (Exhibit BRA-23).

⁴⁹ Firstly, any company interested in exporting must register its products in the Federal Inspection Service (SIF) of MAPA, which attests their compliance with health, technical and legal regulations and establishes the applicable rules and procedures for the production process. After obtaining the registry certification, the company must apply for a general export authorization to a specific department of the Ministry of Agriculture, the Department of Inspection of Animal Origin Products of the Secretariat of

Secretariat of Agricultural Defense, which sets the conditions and implements the surveillance of the production of goods of animal origin to be exported and is responsible for attesting their quality and safety.⁵⁰ In addition, MAPA – together with the regional Agriculture Secretaries of each one of the 26 States and the Federal District of Brazil – performs extensive surveillance over the Brazilian sanitary and health standards required by the importing country.

46. The prevention and control systems in Brazil have been positively evaluated by the OIE⁵¹ in its PVS Evaluation Follow-Up report from 2014,⁵² which indicated that the veterinary service in Brazil “actively works with interested parties such as exporters and export organizations” and “implements and maintains equivalence and other types of sanitary agreements, as appropriate, with trading partners”.⁵³

47. This background information demonstrates that the Brazilian products clearly meet all the sanitary conditions⁵⁴ in order to export chicken meat and chicken products to Indonesia. By not having performed the requested inspection missions, Indonesia is in no position to challenge this statement. It is evident that a country should not be allowed to contest the sanitary conditions of an exporting country if it indefinitely delays examination of submitted evidence and inspection missions. The only reason for Indonesia to prohibit and/or restrict the importation of chicken meat and chicken products from Brazil is the country's interest in protecting the domestic production implemented by a deliberate decision to impede the access of importers to its chicken market, through the adoption of restrictive and WTO-inconsistent measures.

E. Indonesia's Laws and Regulations Governing the Importation of Chicken Meat and Chicken Products

Agricultural Defense. The lists of establishments authorized by this Department to export are composed of qualified international trade companies. The general list of exporting establishments refers to the list of establishments which fully meet the national law and are entitled to export animal products to third countries. The specific lists of exporting establishments refer to the lists of establishments which fully meet the national law and are authorized to export animal products to countries or blocks of countries. They have to follow specific health requirements, established by MAPA Regulations (*Instrução Normativa*) n. 27/2008 (Exhibit BRA-24) and 28/2008. (Exhibit BRA-25)

⁵⁰ The Ministry of Agriculture, Livestock and Supply (MAPA) has taken effective actions to ensure attention to animal health in coordination with different levels of government. In this sense, the Ministry issued a series of legal acts to facilitate the organization of animal health programs. They are ordinances, regulatory and service instructions regulating the programs with integral attention to animal health. The Brazilian Programs for Animal Health (*Programas Nacionais de Saúde Animal do Brasil*) aim to set guidelines and institutional responsibilities, in order to create conditions to protect the health of the national herd and prevent harm to public health. This publication brings together key legal acts that guide this process for the period of 1934 until 2008. Available online at:

<http://www.agricultura.gov.br/arq_editor/file/Aniamal/Manual%20de%20Legisla%C3%A7%C3%A3o%20-%20Sa%C3%BAde%20Animal%20-%20low.pdf>. (Exhibit BRA-26).

⁵¹ PVS Evaluation Follow-Up report 2014, page. 133. (Exhibit BRA-28).

⁵² PVS Evaluation Report of the Veterinary Services of Brazil, 2007. World Organization for Animal Health. (Exhibit BRA-27).

⁵³ PVS Evaluation Follow-Up report 2014, p. 125. (Exhibit BRA-28).

⁵⁴ Sanitary conditions indicated by Indonesia in the Response to the Request by Brazil pursuant to Article 5.8 of the SPS Agreement (Exhibit BRA-20). See Annex I of this Submission (Indonesian Requirements for the Importation of chicken meat and chicken products).

48. Indonesia's import regime for chicken meat and chicken products is established by the application of several laws, decrees and regulations. As will be described below, these rules are grounded on the basic premise that imports of chicken meat and chicken products shall only take place when the domestic supply is not sufficient, resulting in a complete ban of Brazilian exports of the products at issue.

1. Laws

1.1 Law 18/2009

49. Law 18/2009 ("Law on Husbandry and Animal Health"),⁵⁵ as amended by Law 41/2014,⁵⁶ provides for the implementation of husbandry and animal health in all territories of the Republic of Indonesia to protect and improve the quality of animal resources, to suffice the need for animal-origin food, to protect Indonesia from any threat to the health or lives of human beings, animals, plants and the environment, and to provide legal security to businesses that carry out activities in the field of husbandry and animal health.

50. Brazil does not dispute that WTO Members have the right to regulate the sanitary and health conditions of animal-origin food consumed within its territory. In doing so, however, they cannot rely on measures which amount to an import ban and/or complex and burdensome administrative import procedures that would result in unnecessary obstacles to trade.

51. This is exactly what Law 18/2009 does. The process for obtaining import approvals to import animal and animal-origin food in Indonesia derives from the text of Law 18/2009. Article 59 establishes the requirements for obtaining approval to import animal and animal origin food in Indonesia: (i) authorization from different agencies, depending on the type of products; and (ii) recommendation from the relevant Minister, usually the Minister of Trade and/or Agriculture. The procedures for obtaining import recommendations and/or approvals are largely subject to the discretion of the Indonesian authorities. Moreover, Article 36(4) provides that imports of animal or animal products should only be authorized if domestic animal products and "supply or livestock are insufficient to fulfill the needs for the people consumption".

1.2 Law 18/2012

52. Law 18/2012 ("Food Law")⁵⁷ complements Law 18/2009 and establishes the basic provisions regarding food quality control, food safety, food security, food shortage, food aid, consumer protection, nutrition, packaging/labelling, and processing/handling. More specifically, Article 36(1) provides that the importation of food is only permissible "if the domestic Food Production is insufficient and/or cannot be produced domestically".

53. In Brazil's view, some requirements established by Law 18/2012 amount to an import ban due the "self-sufficiency" requirement and accords discriminatory treatment

⁵⁵ Exhibit BRA-29.

⁵⁶ Exhibit BRA-30.

⁵⁷ Exhibit BRA-31.

to imported products as they determine that the Indonesian government shall prioritize domestic production in detriment to imports.

1.3 Law 7/2014

54. Law 7/2014 (“Trade Law”)⁵⁸ aims to enhance national economic growth and the competitiveness of national products and business, and regulates the following subjects, among others: domestic trade, foreign trade, border trade, standardization, trade protection and safeguards, export development, national trade committee, monitoring and investigations.

55. Two provisions of the Trade Law raise a particular concern as they grant discretionary power to Indonesian authorities to restrict international trade, based on the sufficiency of the domestic production, as defined by the Government. Article 26(3) states that “to ensure the supply and stable prices of essential goods, the Minister shall determine price policy, stock and logistics management, as well as export and import management.” Article 38(1), on its turn, establishes that “the government shall regulate foreign trade through policies and controls of export and import” and that the foreign trade control shall include “licensing, standards, prohibitions and restrictions”, which contributes to make Indonesia licensing procedures more burdensome and opaque.

1.4 Law 19/2013

56. Law 19/2013 (“Farmers Law”)⁵⁹ regulates the Protection and Empowerment of Farmers and deals with farming organization in Indonesia, reinforcing some of the trade distortive aspects of Laws 18/2009 and 18/2012. This Law reaffirms the priority given by Indonesian authorities to the development of the domestic production and to domestic over imported products, confirming some of the trade-distortive aspects of Laws 18/2009 and 18/2012 regarding the products at issue. Indeed, Article 30 of Law 19/2013 states that “every person is prohibited from importing Agricultural Commodities when the availability of domestic Agricultural Commodities is sufficient for consumption and/or Government food reserves”.

2. Regulations and Decrees

57. Besides the above-mentioned laws, there are several regulations and decrees issued by the Minister of Agriculture (Minister of Agriculture Regulation or “MoA Regulation”), the Minister of Trade (Minister of Trade Regulation or “MoT Regulation”) and Minister of Finance (Minister of Finance Decree or “MoF Decree”) prohibiting or restricting the importation of chicken meat and chicken products into Indonesia’s territory.

58. Brazil understands that some of the relevant Indonesian Regulations in the present dispute were replaced in the past 4-5 months, which only contributed to reinforce the opacity of Indonesia’s trade regulations, making it particularly difficult for Brazil to determine exactly which provision related to the import and trade of chicken

⁵⁸ Exhibit BRA-32.

⁵⁹ Exhibit BRA-33.

meat is actually in force in Indonesia. To the best of Brazilian knowledge, the main Regulations and Decree which are relevant to the present dispute are:

- a) MoA Regulation 58/2015 (which replaced MoA Regulation 139/2014);
- b) MoT Regulation 70/2015 (which replaced MoT Regulation 27/2012);
- c) MoT Regulation 48/2015 (which replaced MoT Regulation 54/2009);
- d) MoT Regulation 05/2016 (which replaced MoT Regulation 46/2013);
- e) MoT Regulation 87/2015 (which replaced MoT Regulation 83/2012);
- f) MoF Decree 454/2002.

2.1 MoA Regulation 58/2015

59. At the end of 2015, MoA Regulation 58/2015⁶⁰ replaced MoA Regulation 139/2014,⁶¹ providing for the importation of carcass,⁶² meat, and/or the processed products thereof into the territory of the Republic of Indonesia. MoA 58/2015 establishes a general prohibition regarding the importation of chicken meat "cut into pieces" and "other prepared or preserved meat, meat offal of poultry of fowls of the species *Gallus domesticus*"⁶³ (hereinafter "other prepared or preserved chicken meat"), as they are not included in the positive list of products that may be imported into Indonesia of the Appendix II.⁶⁴

60. Moreover, this MoA Regulation establishes that those limited HS codes authorized to be imported into Indonesia could only be imported if they were destined to some "intended uses", such as: "hotels, restaurants, catering, industries, and other particular purposes" (Article 31). The MoA Regulation also imposes restrictions on the transportation of imported products by requiring direct transportation from the country of origin to the destination ports in Indonesia (Article 20).

61. MoA Regulation 58/2015 provides for the regulation of Indonesia's complex and non-transparent licensing regime for the importation of animal products. As previously mentioned, the import licensing procedures require several overlapping authorization steps and one of them is to obtain MoA Import Recommendations (before obtaining MoT Import Approvals⁶⁵). This MoA Regulation determines limited (and short) windows for submitting MoA Recommendation applications, which consist of only one

⁶⁰ Exhibit BRA-01.

⁶¹ Exhibit BRA-34.

⁶² According to Article 1.2 of MoA Regulation 58/2015, "poultry carcass is the body part of healthy poultry that have been slaughtered in halal and correct manner, feathers plucked, eviscerated, and head, neck and both legs removed." (Exhibit BRA-01).

⁶³ HS Code 1602.32 comprises several products, among others: hamburgers, sausages, nuggets.

⁶⁴ This "positive list" only allows the importation of the products under the HS codes referring to chicken "not cut in pieces", fresh or chilled and frozen (HS Codes 0207.11 and 0207.12).

⁶⁵ MoT Import Approvals are issued by the Minister of Trade.

month 3 times a year: April, August and December.⁶⁶ These MoA Import Recommendations are only valid for 4 months⁶⁷ and cannot be used for the importation of animals and animal products in subsequent periods, as they are deemed to expire at the end of the validity period.

62. Once issued, MoA Recommendations specify the type, country of origin, port of entry, and the intended use of the products that each importer may purchase during the relevant validity period and will not be subject to any change. Pursuant to MoA Regulation 58/2015, the specific imports covered by those Recommendations will not be allowed to enter into Indonesia's market if the importer fails to comply with these specifications.

2.2 MoT Regulation 70/2015

63. MoT Regulation 70/2015⁶⁸ replaced MoT Regulation 27/2012,⁶⁹ which provided for the Import Identification Number (API), a requirement for the importers to be authorized to import, and further details the provisions related to the API. The API is the identity number of the importer in Indonesia. According to Article 2 of MoT Regulation 70/2015: “import can only be done by importers possessing API”.

64. Pursuant to Article 3 of this current regulation, API as defined in Article 2 shall consist of: (i) General API (API-U)⁷⁰, and (ii) Producer API (API-P).^{71and72} All importers owing an API are required to “re-register at issuing agency every five (5) years from the date of issuance”.⁷³

2.3 MoT Regulation 48/2015

65. MoT Regulation 48/2015⁷⁴ defines the general provisions for the import sector. This Regulation establishes that only importers who hold an Importer Identity Number (API) may conduct import activities in Indonesia. With regard to chicken imports, besides the requirement to have an API, two other regulations – MoF Decree

⁶⁶ MoA Regulation 58/2015, Article 22(1). (Exhibit BRA-01).

⁶⁷ Article 30 of MoA Regulation 58/2015 defines that the validity periods of the Recommendation are: (i) first period shall enter into force as of 1st of January up to 30th of April; (ii) second period shall enter into force as of 1st of May up to 30th of August; (iii) third period shall enter into force as of 1st of September up to 31st of December. (Exhibit BRA-01).

⁶⁸ Exhibit BRA-35.

⁶⁹ Before MoT Regulation 27/2012 (Exhibit BRA-36) come into force, MoT Regulation 54/2009 (Exhibit BRA-37) already provided on the necessity to hold an API.

⁷⁰ According to Article 4 of MoT Regulation 70/2015: “API-U, as defined in Article 3 letter a, is only granted to companies that import certain goods for trading purposes”. (Exhibit BRA-35).

⁷¹ Article 5 of MoT Regulation 70/2015 defines that: “(1) API-P, as defined in Article 3 letter b, is only awarded to companies that import goods to be used itself as capital goods, raw materials, auxiliary materials, and / or materials to support the production process. (Exhibit BRA-35).

⁷² Article 7 of MoT Regulation 70/2015 establishes that “(1) Each importer can only have one type of API. (2) API applies to any import activity in all regions of Indonesia”. (Exhibit BRA-35).

⁷³ Article 10(1), MoT Regulation 70/2015. (Exhibit BRA-35).

⁷⁴ Exhibit BRA-38.

454/2002⁷⁵ and MoT Regulation 87/2015⁷⁶ (which recently replaced MoT 83/2012⁷⁷) – establish additional cumulative requirements for the importer registration.

2.4 MoT Regulation 05/2016

66. On 28 January 2016, the Indonesian Ministry of Trade issued MoT Regulation 05/2016,⁷⁸ replacing MoT Regulation 46/2013⁷⁹ and introducing changes with regard to the application and validity of MoT Import Approvals, as will be explained below. MoT Regulation 05/2016 maintains, however, most of the import and export restrictions imposed by the previous regulations. Article 7(2) establishes that "the type of Animal and Animal Product that can be imported shall be as per Appendices II, III, and IV forming integral part hereof."

67. Indeed, MoT Regulation 05/2016⁸⁰ contains a prohibition on the importation of chicken meat "cut in pieces" and "other prepared or preserved chicken meat". The only HS codes described for chicken included in the positive list of products that may be imported into Indonesia – contained in Appendix IV ("Type of Animals and Animal Products that can be imported and which import approvals is not subject to determination of period") – are those referring to chicken "not cut in pieces", fresh or chilled and frozen (HS codes 0207.11 and 0207.12).⁸¹ In other words, the new MoT Regulation reinforces the prohibition for the importation of chicken cuts and other prepared or preserved chicken meat.

68. As for the few chicken products not forbidden to be imported, MoT Regulation 05/2016 establishes that, after obtaining a MoA Import Recommendation according to the provisions of MoA Regulation 58/2015 mentioned above, importers may submit applications for a MoT Import Approval. Although there is no specific time window for submitting the application for this Import Approval⁸², Article 12(1) of MoT Regulation 05/2016 establishes that the validity period of the MoT Import Approval will be the same of the MoA Import Recommendation to which it is related,⁸³ which will be at most 4 months, depending on the remaining period for the MoA Import Recommendation.

69. Pursuant to MoT Regulation 05/2016, if importers fail to comply with the amount, type, business unit, and/or country of origin registered in the MoT Import Approval, the products should be re-exported.⁸⁴

⁷⁵ Exhibit BRA-39.

⁷⁶ Exhibit BRA-40.

⁷⁷ Exhibit BRA-41.

⁷⁸ Exhibit BRA-03.

⁷⁹ Exhibit BRA-42.

⁸⁰ Exhibit BRA-03.

⁸¹ MoT Regulation 05/2016, Annex 4, items 29 and 30. (Exhibit BRA-03).

⁸² MoT Regulation 05/2015, Article 11(3). (Exhibit BRA-03).

⁸³ MoT Regulation 05/2016, Article 12(1). (Exhibit BRA-03).

⁸⁴ Article 27(2) of MoT Regulation 05/2016: "Animals and / or animal products imported that does not comply with amount, type, business unit, and/or country of origin registered at import approval and/or not in accordance with the provisions of this Ministerial Regulation should be re-exported." MoT Regulation 46/2013 already contained this provision under Article 30(2). (Exhibit BRA-03)

2.5 MoT Regulation 87/2015

70. The recently adopted MoT Regulation 87/2015⁸⁵ replaced MoT Regulation 83/2012⁸⁶ and provides for the importation of "certain" products in Indonesia, which are subject to additional trade restrictions, such as specific seaports, land ports and airports of destination for the importation of these products,⁸⁷ and to verification or tracing of technical import covering specific data and information.⁸⁸

71. According to this Regulation, "certain products" are products with "restricted importation" into Indonesia. This category of products includes, among others, food and beverage products. The list of products subject to this "special" treatment may vary at any time.

2.6 MoF Decree 454/2002

72. The MoF Decree 454/2002⁸⁹ on importer registration establishes that, besides the requirement of having an API, importers of chicken meat and chicken products into Indonesia must also require another registration before the Director General of Customs and Excise, which is an additional requirement for importers before obtaining a MoA Import Recommendation or a MoA Import Approval.

⁸⁵ Exhibit BRA-40.

⁸⁶ Exhibit BRA-41.

⁸⁷ MoT Regulation 87/2015, Article 4. (Exhibit BRA-40).

⁸⁸ MoT Regulation 87/2015, Article 6, 7 and 8. (Exhibit BRA-40).

⁸⁹ Exhibit BRA-39.

IV. LEGAL ARGUMENT

A. The measures at issue

1. Introduction

73. The prohibitions and restrictions imposed by Indonesia on Brazilian exports of chicken meat and chicken products are mainly implemented through a general restriction stemming from the combined operation of a set of different instruments based on the application of laws and regulations mentioned in the previous section, as well as through the application of specific individual measures which are in themselves WTO-inconsistent. In this section, Brazil will describe both the general measure and the individual measures separately.⁹⁰

2. The general prohibition on the importation of chicken meat and chicken products

74. Brazil considers that the combined interaction of several different individual measures challenged in the present dispute constitute an overarching measure that is on its own a violation of the Covered Agreements, regardless of the specific impact of each of its constitutive elements. As such, it should be scrutinized by the Panel independently of and in addition to the analysis of claims regarding individual measures as “part of a holistic analysis”, as indicated by the Appellate Body in *Argentina – Import Measures*.⁹¹ In Brazil's view, even if one of the specific measures at stake in the present dispute could be deemed to be justified under WTO law, which could hardly be the case, the combined effects of the individual measures would still result in restrictive policies inconsistent with the Covered Agreements.

75. Brazil would like to draw the Panel's attention to the fact that all the individual measures at stake in the current dispute were conceived to implement an official trade policy based on the overriding objective of restricting imports to protect domestic production. As the Appellate Body has recognized in *Argentina - Import Measures*, when different measures are framed for the fulfillment of a single overriding objective, the combined operation of these measures can be considered a single, self-standing measure whose consistency with the WTO agreements must be carefully scrutinized in order to effectively solve the dispute before a Panel.⁹²

⁹⁰ Brazil understands that the challenged measures – both the general and most of the individual ones – are not SPS or TBT measures as defined in the respective Agreements. Indonesia itself has not characterized them as SPS or TBT measures, which was confirmed during the preparation of this submission. Brazil has addressed these measures accordingly. In the event, however, that Indonesia argues that the challenged measures are SPS or TBT, Brazil reserves its rights to develop claims based on the SPS and the TBT Agreements later in these proceedings and in line with the request for establishment of the Panel.

⁹¹ Appellate Body Report, *Argentina – Import Measures*, para. 5.126.

⁹² According to the Appellate Body, “the precise content of the TRRs [the overarching measure in that case] measure coincides neither with the content of the individual TRRs nor with that of the “managed trade” policy or its underlying objectives (import substitution and deficit reduction). Rather, *the content of the single measure consists of the combined operation of the individual TRRs as one of the tools that*

76. In the present case, Indonesia has put in place a set of measures which resulted in a *de jure* and a *de facto* prohibition on the importation of chicken meat and chicken products from Brazil. These measures are founded on the premise that the importation of animal products should be made only if domestic animal production were insufficient to fulfill the needs for the people's consumption. This restrictive overarching framework operates through the combined effect of several measures which impede imports of chicken meat and chicken products from Brazil in a manner inconsistent with Indonesia's WTO obligations, as follows:

- Prohibition on the importation of types of chicken meat and chicken products which are not included in Indonesia's positive list of permitted imports;
- Requirement related to the "insufficiency of local production", to be defined under the discretion of the Indonesian authorities, before chicken meat and chicken products are authorized to be imported;
- Additional restrictions regarding the importation of essential and strategic goods, which include chicken meat and chicken products, thus generating uncertainty and lack of predictability that adversely affect trade flows;
- Restrictions on the use of imported chicken meat and chicken products, restricting the commercial opportunities for exporters to Indonesia;
- Intricate and restrictive procedures for import licensing in Indonesia, which create unnecessary obstacles to trade, prohibiting the importation of chicken meat and chicken products;
- Undue delay in the undertaking of the sanitary procedures required to allow Brazilian exports of chicken meat and chicken products into Indonesia.

2.1 The positive list of permitted products for importation

77. Indonesia's regulations⁹³ only allow the importation of products contained in "positive lists" of products authorized to be imported. Therefore, animals and animal products not contained in both lists are subject to an import ban. This prohibition will be further detailed in Section IV.A.3.1.

78. With regard to the products at issue in the present dispute, the Appendices of both regulations only contemplate the HS codes for chicken referred to as "not cut in pieces, fresh or chilled and frozen".⁹⁴ Since the HS codes for chicken meat "cut into pieces"⁹⁵ and for "other prepared or preserved chicken meat"⁹⁶ are not included in the

Argentina uses to implement the "managed trade" policy". (Appellate Body Report, Argentina – Import Measures, para. 5.130 (emphasis and bracketed phrase added).

⁹³ MoA Regulation 58/2015 (Exhibit BRA-01) and MoT Regulation 05/2016 (Exhibit BRA-03).

⁹⁴ HS Codes 0207.11 and 0207.12.

⁹⁵ HS Codes 0207.13 and 0207.14.

⁹⁶ HS Code 1602.32. Brazil clarifies that before the enactment of MoA Regulation 58/2015 (Exhibit BRA-01) and of MoT Regulation 05/2016 (Exhibit BRA-03) (both currently in force), the MoA and MoT Regulations which regulated the importation of animal and animal products were MoA Regulation 139/2014 (Exhibit BRA-34) and MoT Regulation 46/2013 (Exhibit BRA-42), and they reflected

positive list established by those regulations, they simply cannot be imported into Indonesia.

79. This prohibition encompasses a large portion of chicken meat and chicken products traditionally exported by Brazil, reaching more than 55% of these exports in 2015. Indonesia's positive list of allowed imports of these specific products severely impacts Brazil's trade interests and has no ground in WTO Law.

2.2 The domestic insufficiency requirement

80. Indonesia only allows imports of animal and animal products, including the products at issue, when domestic production is not deemed sufficient to satisfy domestic food demand. Law 18/2009 specifically establishes that "import of animal or livestock and animal product from overseas shall be made if domestic animal products and supply or livestock is insufficient to fulfill the need for the people consumption" (Article 36(4)).

81. Thus, as per Law 18/2009, the lack of "sufficiency" of local production is currently a "requirement" for the importation of animal or livestock and animal products to Indonesia. Moreover, the matter of whether domestic production is sufficient to satisfy domestic food demand is completely under the discretion of Indonesian authorities. It should also be recalled that the "sufficiency" of the production of a product *vis-à-vis* its demand is not independent of the prices at which those products are offered, which in turn are affected by the existence or not of imports, given the effects of competition.

82. In the analysis of the specific circumstances in which imports of chicken meat and chicken products could be authorized, the Indonesian authorities are bound by Law 18/2012 ("Food Law"). This law clearly indicates that in the case of "staple food", which encompasses chicken meat and chicken products,⁹⁷ Indonesia's government should always prioritize domestic food production over food imports that should only be authorized as an exception. Indeed, pursuant to Article 36 of the Law:

Article 36

- (1) Food Import can only be implemented if domestic Food Production is not sufficient and/or cannot be produced domestically.
- (2) Staple Food Import can only be implemented if domestic Food Production and National Food Reserve are not sufficient.

controversial approaches with regard to "other processed chicken products". While MoT Regulation 46/2013 encompassed the HS Code for "other processed chicken products" (1602.32) in its positive list (in the Appendix) and theoretically "allowed" the importation of the product, the same HS Code was not comprised in the positive list of MoA Regulation 139/2014. Currently, however, there is no doubt that the product covered by HS Code 1602.32 is not allowed to be imported into Indonesia, as this HS Code is not encompassed by the positive lists in the Appendices of both regulations in force, the MoA Regulation 58/2015 and MoT Regulation 05/2016.

⁹⁷ Chicken meat and chicken products are considered as "staple food" by Law 18/2012 (Exhibit BRA-31) and as "essential good" by Law 7/2014 (Exhibit BRA-32). In both cases, the definition establishes a restrictive treatment for the imported goods.

(3) Sufficiency of domestic Staple Food Production and Government Food Reserve is determined by minister or government institution with the task of executing governmental orders in the Food sector.

83. The ultimate effect of these measures has been basically to prevent any import of Brazilian chicken meat and chicken products into Indonesia since 2009.

2.3 Restrictions on the importation of essential goods

84. Indonesia also contemplates additional limitations on the importation of products qualified as "essential or strategic goods"⁹⁸. According to Article 25(1) of Law 7/2014, Indonesia's government shall control the availability of those goods "in adequate quantities, of good quality, and at affordable prices." Essential or strategic goods are respectively those "goods that concern the life of many people and are in high demand, as well as a supporting factor of public welfare, such as [...] chicken" and "goods that have a strategic role in the smooth running of national development"⁹⁹.

85. This provision means that the Indonesian Government may impose additional restrictions on the importation of such goods. The control of prices and quantities may also be implemented in accordance with Article 26(3) of Law 7/2014, should the Indonesian authorities understand that imports may affect the national production of strategic goods.

86. The large margin of discretion of the Indonesian authorities to confer a different treatment to imported chicken meat and chicken products, including prohibitions and/or restrictions to their importation in order to prioritize domestic products, is one of the major concerns of Brazil. This measure not only causes a high degree of unpredictability to international trade flows, but it also virtually allows Indonesian authorities to impede importation at any time, and for no specific reason.

2.4 Restrictions on the use of imported chicken meat and chicken products

87. Even if imports of chicken meat and chicken products were exceptionally authorized, which is not currently the case, Article 31(1) of MoA Regulation 58/2015 states that the mentioned products could only be destined to "hotels, restaurants, caterings, industries, and other particular purposes",¹⁰⁰ thus limiting the conditions for the use – and consequently to the importation – of the products at issue. In no case, however, imported chicken meat and chicken products can be sold in the "wet markets", the traditional markets in Indonesia which encompass around 70% of the total Indonesia's market. No such restriction exists or is applied to like domestic chicken meat and chicken products.

⁹⁸ See footnote 97.

⁹⁹ Law 7/2014, Explanatory notes to Article 25. (Exhibit BRA-32)

¹⁰⁰ According to Article 31(2) of MoA Regulation 58/2015 (Exhibit BRA-01), "other prepared or preserved chicken meat", besides the alternatives of use established in Article 31(1), is also allowed to be sold in modern markets, such as big supermarket chains, an option not available to other chicken meat and chicken products.

88. Indonesia's regulations could not be clearer. Article 29 of MoA Regulation 58/2015 establishes that in order to obtain a Recommendation from the Minister of Agriculture to import (MoA Import Recommendation), one of the import requirements of the Indonesian licensing regime, the importer must necessarily indicate the “intended uses” for the products to be imported. Failure in complying with this requirement is subject to several sanctions, such as the revocation of the Recommendation, the denial of the next Recommendation application and the possibility of revocation of the MoT Import Approval.¹⁰¹

89. As a result, the imports of chicken meat and chicken products are severely limited in Indonesia to only some channels of trade and distribution, thus restricting commercial opportunities for Brazilian exporters and unduly affecting trade flows.

2.5 Indonesia’s restrictive import licensing procedures

90. The complex and burdensome Indonesian import licensing regime operates to avoid importation and to protect domestic production. Several administrative steps must be fulfilled before the trade operation can actually occur. Some of them, as the applications for MoA Import Recommendations, for instance, can only be submitted by the importers during a narrow time window of one month (the month preceding the beginning of its validity period). These Recommendations are valid for a short period of time (4 months) and can be revoked or suspended at any time if the importer does not comply with the different requirements established in this Regulation.¹⁰²

91. Similar restrictions are also found in the procedures to obtain a MoT Import Approval during the short period of validity of the MoA Import Recommendation. The conditions to obtain a MoA Recommendation and a MoT Import Approval are also of great concern for Brazil. In order to be authorized to import, importers must commit to requirements related to the country of origin, the type/category of carcass, meat, and/or the processed product, the veterinary public health technical requirement (letter of recommendation from provincial livestock services office), the designation of the specific port of discharge, and the intended use,¹⁰³ among others. There is no possibility of requesting for an amendment or modification of these terms after the MoA Import Recommendation or the MoT Import Approval are granted.¹⁰⁴

92. As a whole, the Indonesia import licensing regime clearly restricts the imports of chicken meat and chicken products in order to protect domestic production in a manner inconsistent with WTO law.

2.6 Undue delay with regard to the approval of sanitary requirements

93. A WTO importing Member is entitled to submit the importation of animal products to the sanitary and phytosanitary measures it deems necessary to protect

¹⁰¹ MoA Regulation 58/2015, Article 38(e). (Exhibit BRA-01)

¹⁰² MoA Regulation 58/2015, Article 38. (Exhibit BRA-01).

¹⁰³ MoA Regulation 58/2015, Article 23(1) (Exhibit BRA-01), and MoT Regulation 05/2016, Articles 10(2) and 27(2). (Exhibit BRA-03).

¹⁰⁴ MoA Regulation 58/2015, Article 38 (Exhibit BRA-01), and MoT Regulation 05/2016, Article 27(2). (Exhibit BRA-03).

human, animal or plant life or health in its territory. In doing so, however, it shall ensure that those measures are not applied as a means to unjustifiably prohibit and/or restrict international trade. One important aspect under this key obligation relates to predictability. Members have committed under the WTO Agreements to ensure that sanitary procedures are undertaken and completed without undue delay.

94. Since 2009, Brazil has repeatedly demanded – without success – the Indonesian authorities to undertake and complete the sanitary procedures required to allow the Brazilian exports of chicken meat and chicken products to Indonesia. So far no justification for the delay and lack of response has been provided by Indonesia.

95. As mentioned in Section III.C, Indonesia has never approved the veterinary certificates¹⁰⁵ proposed by Brazil nor started the negotiations regarding the definition of the sanitary conditions under which Brazilian chicken meat and chicken products could enter the Indonesian market. In addition, Indonesia has never sent an official inspection mission in order to verify the sanitary conditions of the Brazilian poultry production. Brazil understands that in doing so, Indonesia imposes a disguised restriction on international trade.

96. Moreover, Indonesia has never given any explanation on why it failed to undertake the necessary sanitary procedures to approve Brazilian exports. The lack of response for the past seven years reflects and reinforces the unwillingness of the Indonesian government to allow the importation of chicken meat and chicken products from Brazil.

2.7 Summary

97. The combined effects of the different Indonesian trade, licensing and sanitary measures, as described in this Section, impose a general ban on the Brazilian exports of chicken meat and chicken products and have impeded the Brazilian exports of the products at issue over the past seven years in a manner inconsistent with Indonesia's obligations under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement of Agriculture.

3. Individual measures affecting the importation of chicken meat and chicken products

98. Besides the general prohibition on the importation of chicken meat and chicken products, Indonesia applies different individual restrictive measures inconsistent with the WTO. Some of those measures are an integral part of the general prohibition previously mentioned, but they also constitute in themselves and by their very nature a violation of the covered agreements. In this section, Brazil will detail how these individual measures operate.

¹⁰⁵ Exhibit BRA-43.

3.1 Prohibition on the importation of chicken cuts and other prepared or preserved chicken meat

99. As previously explained, Indonesia's Regulations (MoA Regulation 58/2015 and MoT Regulation 05/2016) only allow the importation of products contained in their Appendices. Animals and animal products not contained therein are subject to an import ban.

100. With regard to the products at issue in the present dispute, MoA Regulation 58/2015 establishes in Articles 7 and 8 that "the types of non-cattle carcass and the processed product thereof ... that can be imported are included in Appendix II ...", which only contemplates HS codes for chicken "not cut in pieces, fresh or chilled and frozen".¹⁰⁶ This is also the case for MoT 05/2016, which establishes in Article 7(2) that the "types of animals and animal products that can be imported are listed in Annex II, III and IV which is an integral part of this regulation". In Annex IV (which refers to chicken meat and chicken products), there are only references to HS codes for chicken "not cut in pieces, fresh or chilled and frozen".¹⁰⁷

101. Thus, as the HS codes for the other products at issue are not described in those Appendices, they cannot be imported into Indonesia. As a consequence, this measure prohibits the importation of chicken meat and chicken product not included in the positive lists, in a manner inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

3.2 Restrictions on the use of imported chicken meat and chicken products

102. As previously explained, Indonesia prohibits the importation of carcass, meat and/or processed products for any other uses than those listed in Articles 31(1) and 31(2) of MoA Regulation 58/2015. This intended use¹⁰⁸ for carcass and meat¹⁰⁹ is limited to "hotels, restaurants, caterings, industries, and other particular purposes" (essentially non-commercial uses)¹¹⁰, which in general corresponds to a small portion of

¹⁰⁶ HS Codes 0207.11 and 0207.12.

¹⁰⁷ HS Codes 0207.13 and 0207.14. MoT Regulation 05/2016, Appendix 4, items 29 and 30. (Exhibit BRA-03).

¹⁰⁸ MoA Regulation 58/2015, Article 31(1): Intended use, as referred to in Article 29 letter j, of carcass and meat, as referred to in Article 8, is for hotels, restaurants, caterings, industries, and other particular purposes; (2) Intended use, as referred to in Article 29 letter j, of the processed product is for hotels, restaurants, caterings, industries, and other particular purposes, as well as for modern market. (Exhibit BRA-01).

¹⁰⁹ According to Attachment II to MoA Regulation 58/2015, this category includes HS codes 02.07.11 (whole chicken, fresh and cold) and 02.07.12 (whole chicken, frozen). (Exhibit BRA-01)

¹¹⁰ MoA Regulation 58/2015, Article 31, paragraph 3: "Other particular purposes as referred to in paragraph (1) includes: (a) gift parcel or grant for the purpose of religious worship, charity, or disaster mitigation management; (b) needs of foreign country representative/international institution and their officials serving their duty in Indonesia; (c) science research and development purposes; (d) samples that are not to be commercially traded (for exhibition purpose) up to 200 (two hundred) kilograms. (Exhibit BRA-01)

the Indonesian market. For processed products, intended uses include the previous ones and also modern markets.¹¹¹

103. Brazil understands that the restrictions imposed by Indonesia on the use, sale and distribution of imported chicken meat and chicken products have a double effect. Not only does it restrict the importation itself of these products, as already indicated in Section IV.A.2.4 above, but it also consists of an internal measure that seriously limits the commercial opportunities for the imported product, once introduced into Indonesia. Since the domestic like products have open and free access to all local markets and distribution channels for consumers in Indonesia, this restriction also imposes a discriminatory treatment. As a result, relevant portions of the Indonesian food market are allocated exclusively for the domestic chicken meat and chicken products.

104. As a means to reinforce this restriction and ensure that importers will not deviate from the limitation on the intended uses, Indonesia has also stipulated strict sanctions in MoA Regulation 58/2015. Article 38 determines that importers that do not follow the intended uses indicated in the MoA Import Recommendation are subject to severe sanctions, as previously mentioned.

105. In practice, any deviation from the intended uses prescribed by MoA Regulation 58/2015 could potentially result in the total exclusion of the importer from the Indonesian market. In Brazil's view, these limitations on the use of imported products find no support on WTO Agreements as they are inconsistent with Articles III:4 and XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

3.3 Indonesia's restrictive import licensing procedures

106. Indonesia imposes several restrictions on the importation of chicken meat and chicken products through its intricate import licensing regime, which comprises several interrelated procedures involving various government agencies. As indicated in IV.A.2.5, the main provisions applicable to obtain an import license for animals and animal products in Indonesia are MoA Regulation 58/2015, MoT Regulation 05/2016, MoF Decree 454/2002, MoT Regulation 48/2015, MoT Regulation 70/2015 and MoT Regulation 87/2015. Based on these provisions, the Indonesian import licensing regime requires the importer to obtain various approvals, authorizations and recommendations, largely granted on the discretion of different authorities.

107. Firstly, in order to be able to perform the regular import activities, the importer will have to obtain an Importer Identification Number (API), which is the first

¹¹¹ "Modern markets" are understood as supermarkets and other modern retail chains. Considering the type of products at issue that could be exported by Brazil to Indonesia (mainly chilled or frozen) and the importance of modern markets (cold storage) for their distribution, it is crucial that the relevant Regulation of the Minister of Agriculture of Indonesia comprise, within the intended uses for chicken meat and chicken products, the possibility of importation of the following products to be traded in modern markets: (i) 0207.11 (Not cut in pieces, fresh or chilled); (ii) 0207.12 (Not cut in pieces, frozen); (iii) 0207.13 (Cuts and offal, fresh or chilled); and (iv) 0207.14 (Cuts and offal, frozen).

requirement for a business operator to become an importer in Indonesia and be authorized to carry out specific imports operation.¹¹²

108. The API is currently regulated by MoT Regulation 70/2015¹¹³. It has a period of validity of five years, after which it has to be renewed. For that, the importer must submit a re-registration to the issuing agency at the latest 30 (thirty) business days after the period of five years.¹¹⁴ MoT Regulation 70/2015 defines two types of API for importers: API-U¹¹⁵ and API-P,¹¹⁶ both issued by the Minister of Trade.¹¹⁷ Each importer can only have one type of API.¹¹⁸ In the case of the importation of chicken meat and chicken products, the importer must obtain an API-U.¹¹⁹

109. According to Indonesian legislation, the issuance of API-U should be automatic, if all the requirements are fulfilled by the importer.¹²⁰ The API-U shall be issued, in principle, within 5 (five) business days as of the receipt of application if it is complete and true.¹²¹

110. The business operator that holds an API-U is constrained to report about the import realization once every 3 months to the Head of Provincial Agency and to the Head of District/Municipal Agency having jurisdiction over the company's domicile¹²². According to Article 29 of MoT Regulation 70/2015, if a company fails to do so then the API-U shall be suspended.

111. Pursuant to Article 31 of MoT Regulation 70/2015, the API-U shall be revoked if it is suspended twice, or if the company fails to perform the obligation to report the import realization (every 3 months) not later than 30 days as of the suspension date,

¹¹² According to Article 3 (1) of MoT regulations 48/2015: “The Import of Goods may only be carried out by the Importer that holds API”. (Exhibit BRA-38).

¹¹³ On September 2015, the Minister of Trade issued MoT Regulation 70/2015 (Exhibit BRA-35), which entered into effect on 1 January 2016 and revoked the previous API regulation, i.e. MoT Regulation No. 27/M-DAG/PER/5/2012. (Exhibit BRA-36).

¹¹⁴ According to Article 10 of MoT Regulation 70/2015: “(1) Importer that holds API must submit the application for re-registration to the issuer agency every 5 (five) years as of the issuance date. (2) The re-registration as referred to in paragraph (1) shall be made at the latest 30 (thirty) business days after the period of 5 (five) years. (Exhibit BRA-35).

¹¹⁵ As established by Article 4 of MoT Regulation 70/2015: “API-U as referred to in Article 3(a) shall only be issued to the company carrying out the import of certain goods for trade purposes”. (Exhibit BRA-35).

¹¹⁶ The API-P is defined by MoT Regulation 70/2015 as: “API-P as referred to in Article 3(b) shall only be issued to the company carrying out the import of goods for own used as capital goods, raw material, auxiliary material, and/or material to support production process”. (Exhibit BRA-35).

¹¹⁷ MoT Regulation 70/2015, Article 12(1). (Exhibit BRA-35).

¹¹⁸ Article 7(1) of MoT Regulation 70/2015. (Exhibit BRA-35)

⁹⁸ As established by Article 11(1) of MoT Regulation 70/2015: “In carrying out the import, the importer that holds API shall comply to the following provisions: a. import ban of goods set forth based on the legislation; b. the imported goods must be in brand-new condition, except for goods that are allowed to be imported in used condition based on the Regulation of Minister; and c. the import restriction and/or provisions on verification or tracing of technical import as set forth based on the Regulation of Minister.” (Exhibit BRA-35)

¹²⁰ The general requirements for obtaining an API-U comprise several documents and data attesting the existence of the company and its tax and business registration before Indonesia's authorities. Available at: <<http://ajconsultants.net/requirements-to-obtain-importer-identification-numb>>.

¹²¹ MoT Regulation 70/2015, Article 20. (Exhibit BRA-35).

¹²² MoT regulation 70/2015, Article 23(3). (Exhibit BRA-35).

submits untrue information or data in the document of application, breaches the provisions in the prevailing legislation in import sector, and abuses the document of import and the letters related to import.

112. These possibilities of suspension and/or revocation of the API-U reinforce the control of the Indonesian authorities over the importation, what directly affects the importation of chicken meat and chicken products, increasing the lack of predictability of the regime and causing restrictions on market access.

113. Secondly, after obtaining an API-U, an importer of chicken products must obtain a MoF Registration¹²³ before the Director General of Customs and Excise, as a requirement for undertaking customs activities related to imports. MoF Decree 454/2002 determines the need to hold a customs registration (SRP) valid in Indonesia's customs areas as a requirement for undertaking customs activities in the importation.

114. Thirdly, once the registration procedures are completed, the importer must apply for a MoA Import Recommendation.¹²⁴ Importers, however, can only apply for MoA Import Recommendations for products included in the list of authorized products to be imported, as provided for in the Appendices of MoA Regulation 58/2015 and MoA Regulation 05/2016. All the products not listed in these Appendices are therefore automatically banned from the Indonesian market, as they cannot be imported without this Recommendation.

115. For the products that can obtain a MoA Import Recommendation, Article 23 of MoA Regulation 58/2015 lists several requirements to be fulfilled by the importer.¹²⁵ Some of them, such as the Veterinary Control Number and the Livestock and Animal Health Registration Certificate or Business License require previous and complex *démarches*, as it is the case of the registration procedures mentioned above. Moreover, in order to obtain a MoA Import Recommendation, an importer must demonstrate, through a "statement letter with stamp duty affixed, accompanied with supporting document of the ownership of cold storage and refrigerated vehicle", and also prove – through an assignment letter or work contract – that it employs a veterinarian with competency in the field of veterinary public health to supervise the imported products.

116. Besides that, importers of chicken meat and chicken products must also submit a letter of recommendation from the provincial livestock services office, which amounts to a certification that the importer has been supervised by the competent authoritative veterinarian.^{126and127} Brazil understands that the provincial livestock services office has discretionary power to issue or not the letter of recommendation.

¹²³ Among the requirements for obtaining the MoF Registration, the importer shall present the following information and data: (i) Deed of establishment with or without amendments; (ii) Tax Identification Number; (iii) Permanent Business Trading License; (iv) Approval from Ministry of Justice; (v) Corporate Registry; (vi) Tax certification; (vii) Import Identity Number (API); and (viii) Office or factory. Available at: <<http://www.angkapengenalimport.com/SRP.html>>.

¹²⁴ MoA Regulation 58/2015, Article 4(3). (Exhibit BRA-01)

¹²⁵ MoA Regulation 58/2015, Article 23. (Exhibit BRA-01)

¹²⁶ MoA Regulation 58/2015, Articles 37(2), 33(2) and 33(1). (Exhibit BRA-01)

¹²⁷ MoA Regulation 58/2015, Article 20(e). (Exhibit BRA-01)

117. Another requirement is the report of import realization from the previous period. The importer shall demonstrate that the transactions carried out during this period met the fixed terms established by previous MoA Import Recommendations related to business units, port of discharge, and type and origin of the goods covered by them.

118. Articles 23 and 29 of MoA Regulation 58/2015 establish also that in order to obtain a Recommendation the importer must necessarily indicate the “intended uses” for the products to be imported, which by itself, as already mentioned, is a requirement that imposes an important restriction on trade.

119. The analysis of applications also involves different layers. Article 24(1) of MoA Regulation 58/2015 establishes that the Head of the Center for Plant Variety Protection and Agricultural Permits (Head of PPVTPP)¹²⁸ shall perform administrative verification with regard to the requirements of Article 23 of the Regulation 58/2015¹²⁹ and provide the acceptance within 1 (one) working day maximum of the request, if all the requirements are fulfilled. In this case, the Head of PPVTPP shall forward the accepted application to the Director General¹³⁰. The Director General shall then perform technical review with regard to the requirements of Article 7 of this MoA Regulation¹³¹ and provide the acceptance response within 3 (three) working days maximum. If all the requirements are fulfilled, the Import Recommendation would be issued.¹³²

120. The issuance of a MoA Recommendation "for meat and processed meat products" is under additional requirements. According to Article 33(1) of the MoA Regulation 58/2015, supervision on the compliance of veterinary public health requirements shall be performed. It is not clear whether the authority responsible for

¹²⁸ MoA Regulation 58/2015, Article 21: "To obtain Recommendation as referred to in Article 4 paragraph (3), applicants shall submit an online application to Director General through the Head of PPVTPP." (Exhibit BRA-01)

¹²⁹ Recommendation Application submitted by Business Player with the requirements: a. Identification Card (KTP) and/or company management identification; b. Taxpayer Identification Number (NPWP); c. Business and Trade License (SIUP); d. Livestock and Animal Health Registration Certificate or Business License ; e. Company's deed of incorporation and the last amendment thereof; f. Veterinary Control Number (NKV); g. Importer Identity Number (API); h. Statement Letter with stamp duty affixed accompanied with supporting document which declare ownership of cold storage and refrigerated vehicle, with the exception of ready-to-eat processed food that do not need cold storage facility as informed on the product label; i. Letter of recommendation from provincial livestock services office; j. Employing veterinarian with competency in the field of veterinary public health, proven by an assignment letter or work contract from company management; k. Report of import realization from the previous period; l. Provide the evidence of local cattle procurement verified by provincial and/or district/municipality livestock services offices of the origin of the cattle; and m. Statement letter with stamp duty affixed declaring the document submitted is correct and valid. (Exhibit BRA-01).

¹³⁰ MoA Regulation 58/2015, Article 4(3): Minister executing governmental affairs in trade sector shall grants the import permit as referred to in paragraph (2), after obtaining Recommendation from Director General on behalf of Minister. (Exhibit BRA-01).

¹³¹ This review encompasses the assessment whether the application properly complies with the requirements related to: the type of carcass, meat and the processed product thereof; the period of storage upon arrival to the territory of Indonesia; the country and business unit of origin; and packaging, labeling, and transportation. (Exhibit BRA-01).

¹³² MoA Regulation 58/2015, Article 25(1) and 25(5). (Exhibit BRA-01).

issuing the MoA Import Recommendation is required to base the decision on the conclusions of the report of the veterinary public health supervisor.¹³³

121. The requirements to obtain a MoA Import Recommendation are far from being the only problem identified in the procedure. Applications for a Recommendation can only be submitted during three time periods a year and within a short window: 1-31 December (of the previous year of the validity of the MoA Import Recommendation); 1-30 April; 1-31 August.¹³⁴

122. Moreover, the validity period of the MoA Import Recommendation is limited to 4 months, forcing the importer to apply for new MoA Import Recommendations three times per year. The validity periods are the following: (i) 1st of January up to 30th of April; (ii) 1st of May up to 30th of August; and (iii) 1st of September up to 31st of December.¹³⁵

123. After the MoA Import Recommendation is issued, no changes or amendments related to the country of origin, business unit of origin, port of discharge, type/category of product are allowed.¹³⁶ Hence, by the time the importers apply for a MoA Recommendation, they need to have all this detailed information already defined, what can hardly be considered reasonable. If the importers, for any reason, modify any of these "fixed license terms", the MoA Regulation 58/2015 establishes that they shall be sanctioned by the "revocation of [his] recommendation" and the "denial of [his] next recommendation application".¹³⁷

124. Last, but not least, after obtaining a MoA Import Recommendation, the importer has to submit a request for the Ministry of Trade to finally obtain a MoT Import Approval, which is required for every import transaction. For that, the importer needs to hold an API-U and present the MoA Recommendation for the specific HS Codes of the products to be imported.¹³⁸ Differently from the procedure for obtaining a MoA Import Recommendation, applications for a MoT Import Approval may be presented at any time.¹³⁹ Yet, since applications for the MoT Import Approval can only be submitted after the MoA Import Recommendation has been issued, in practice these applications are also limited in time.

125. In any case, the time window for imports is drastically reduced in Indonesia since they can only take place during the validity period of both the MoT Import Approval and the MoA Import Recommendation, which is 4 months each at

¹³³ MoA Regulation 58/2015, Articles 37(1) and 25. (Exhibit BRA-01).

¹³⁴ MoA Regulation 58/2015, Article 22(1). (Exhibit BRA-01).

¹³⁵ MoA Regulation 58/2015, Article 30(1). (Exhibit BRA-01).

¹³⁶ MoA Regulation 58/2015, Article 32(a). (Exhibit BRA-01).

¹³⁷ MoA Regulation 58/2015, Article 38. (Exhibit BRA-01).

¹³⁸ MoT Regulation 05/2016, Article 9(2). In the specific case of processed products, which would include "other prepared or preserved chicken meat", if imports come from a country having a risk of the spread of zoonosis, in addition to the requirements described above, the importer must present a Recommendation from the Head of Drug and Food Administration Agency. MoT Regulation 05/2016, Article 10(2)(f). (Exhibit BRA-03).

¹³⁹ MoT Regulation 05/2016, Article 11(3). (Exhibit BRA-03).

maximum.¹⁴⁰ During this short period, the importer must complete the entire import transaction authorized by both documents by loading, shipping, transporting, delivering, and clearing at the customs the imported goods.

126. As it is the case for the MoA Import Recommendation, once the MoT Import Approval is issued, it cannot be modified. According to Article 27(2) of MoT Regulation 05/2016, imports of animal and/or animal products whose quantity, type, business unit, and/or country of origin are not in accordance with the MoT Import Approval shall be immediately re-exported. The importer who fails to comply with the "fixed license terms" of the MoT Import Approval is subject to several sanctions, including the revocation of the Approval and the impossibility of submitting new requests.¹⁴¹ MoT Regulation 05/2016 establishes that if a MoT Import Approval is revoked for any reason, the importer may only re-submit the application for this Import Approval after 1 year of the revocation date.¹⁴²

127. This brief description of the main features of Indonesia's import license procedures suffices to indicate that the regime is not applied in a fair and predictable manner "with a view to prevent trade distortions".¹⁴³ By excluding the possibility of obtaining licenses related to certain chicken products or to certain uses, limiting the application windows and validity periods for MoA Import Recommendations and MoT Import Approvals and establishing complex and non-transparent procedures, the design, structure and application of Indonesia's import licensing procedures have a restrictive effect on the Brazilian exports of the products at issue, creating unnecessary obstacles to trade in a manner inconsistent with Article XI:1 of the GATT 1994, Article 4.2 of the Agreement of Agriculture, and Article 3.2 of the Agreement on Import Licensing Procedures.

3.4 Undue delay with regard to the approval of sanitary requirements

128. According to the Indonesian legislation, an importer must present a valid International Veterinary Certificate during the importation procedures¹⁴⁴, in order to demonstrate the quality and sanity of the animal products to be imported. This requirement is confirmed by Articles 35 and 36 of MoA Regulation 58/2015, which determines that an Authoritative Veterinarian will check "the veterinary certificate and the halal certificate for the required product" in the Indonesian port of destination. Thus, it is not possible to import chicken meat and chicken products into Indonesia without a health certificate approved by the country.

¹⁴⁰ MoA Regulation 58/2015, Article 30(1) (Exhibit BRA-01), and MoT Regulation 05/2016, Article 12(1). (Exhibit BRA-03).

¹⁴¹ For the Indonesian government to implement the controls and supervision on the import transactions, mainly to control the fulfilment of the requirements and the compliance with these "fixed license terms", MoT 05/2016 determines that the company which obtained a MoT Import Approval shall submit a monthly report on the implementation of imports of animal and animal products. If the company fails to submit the report, it shall be subject to sanctions such as the postponement of application for the Import Approval for the subsequent period of 4 months. (Exhibit BRA-03).

¹⁴² MoT Regulation 05/2016, Article 26. (Exhibit BRA-03).

¹⁴³ Article I of the Agreement on Import Licensing Procedures.

¹⁴⁴ MoA Regulation 58/2015, Article 36(4). (Exhibit BRA-01).

129. As mentioned above, since 2009 Brazil has been striving to negotiate with Indonesia the terms of a veterinary certificate for poultry, in order to allow Brazilian exports of those products to enter the Indonesian market. The proposal, based on the international standards applicable,¹⁴⁵ encompasses the sanitary requirements established by Indonesia's legislation.¹⁴⁶ It included in particular the following relevant information that would certify the health conditions of every shipment of Brazilian chicken products to Indonesia, as follows:

- (i) Brazil has been free from Highly Pathogenic Avian Influenza for the previous 6 months;
- (ii) The exported meat was obtained from poultry: (a) found to be free of clinical signs of infectious or contagious diseases to which the species is susceptible; (b) hatched, reared and slaughtered in Brazil; (c) originating from flocks which were not slaughtered to control or eradicate a disease;
- (iii) The birds emanate from premises where no cases of Newcastle disease have occurred during the past six months. The premises are situated in an area in which, within a 10 km radius, no case of Newcastle disease has occurred during the past six months;
- (iv) The meat were derived from animals which received veterinary inspection "ante-mortem" and "post-mortem" and were found to be free from any parasitic, infectious and contagious diseases mentioned in Federal Inspection Regulation of Meat and By-Products, of the Ministry of Agriculture, Livestock and Supply;
- (v) The products were obtained under hygienic conditions in establishments registered at the Ministry of Agriculture, Livestock and Supply (MAPA) where Good Manufacturing Practice (GMP), Standard Operating Procedure (SOP) and Hazard Analysis and Critical Control Points (HACCP) are implemented and systematically audited by the Federal Inspection Service;
- (vi) The meat came from establishments under monitoring by an official residue control program for substances, such as hormones, bacterial growth inhibitors (antibiotics, sulfonamides, etc.) and pesticide residues;
- (vii) The meat is considered wholesome and suitable for human consumption.¹⁴⁷

130. As mentioned in Section III.C of this submission, since 2009, Indonesia has not provided a satisfactory clarification on the sanitary reasons why the Brazilian products were not allowed into Indonesia, nor presented any sanitary justification on why the necessary approval procedures that would enable the Brazilian products to be imported have never been undertaken in due time. As a result, Brazilian chicken products and chicken meet cannot be exported to Indonesia.

¹⁴⁵ As mentioned in Section III.C above, the proposals presented by Brazil to Indonesia authorities were based on the guidelines of the World Organisation for Animal Health's Terrestrial Code (OIE Terrestrial Code), especially Article 5.10.4 ("Model veterinary certificate for international trade in products of animal origin), Article 10.4 ("Infection with Avian Influenza Virus"), and Article 10.9 ("Infection with Newcastle Disease Virus").(Exhibit BRA-15).

¹⁴⁶ See footnote 42. As already mentioned, Brazil follows all those requirements, even those that are clearly not related to sanitary aspects.

¹⁴⁷ Minutes of the 3rd Meeting of the Consultative Committee on Agriculture (CCA) between the Ministry of Agriculture of the Republic of Indonesia and the Ministry of Agriculture, Livestock and Food Supply of the Federative Republic of Brazil. (Exhibit BRA-13).

131. In failing to undertake and complete these approval procedures for the past seven years, without any reasonable justification, Indonesia has in fact impeded the importation of Brazilian chicken meat and chicken products in a manner inconsistent with Article 8, Annex C 1 (a) of the SPS Agreement.

3.5 Restrictions on the transportation of imported products

132. The imports of chicken meat and chicken products in Indonesia are also subject to transportation requirements inconsistent with WTO obligations. According to Article 20(a) of MoA Regulation 58/2015, the transportation of carcass, meat and/or processed products shall be “conducted directly from the country of origin to the port of discharge within the territory of Indonesia”. Thus, if the transportation is not direct, or, by any reason, a stop in a third country or port during the transportation is necessary before the arrival at the port of destination, then the products will not be allowed to be imported into Indonesia. Products will be refused, even in the case of *force majeure* events that may deviate the shipment to a third-country port for transit.

133. There is no sanitary or other justification for this measure, as carriers and vessels may stop in a third country before reaching the port of destination and still maintain the highest levels of security and quality of the imported product, as the containers are sealed in the country of origin and only opened in the country of destination, even in the case of transshipment in a third country or port.

134. In the case of Brazil, this restriction would have a clear limiting effect. Due to the long distance there is no departure of frequent carriers or vessels to carry products straight to Indonesia.¹⁴⁸ The vessels need at least one stop in a third country or port before going to the indicated port of entry in Indonesia.

135. Even if it were possible to export products directly to Indonesia, this non-stop transportation requirement would impose unnecessary additional transportation costs. In Brazil’s view, this is an excessive requirement that constitutes a restriction to international trade in violation of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

3.6 Discriminatory implementation of halal labelling requirements for imported chicken meat and chicken products and "like" domestic products

136. Indonesia requires that all products that enter, circulate and are traded in the country must be certified halal.¹⁴⁹ To ensure that the product for sale in Indonesia is halal-certified, Indonesia demands that all food products, including chicken meat and chicken products, are adequately labelled halal on the product’s packaging.¹⁵⁰ This legal requirement applies indistinctively to both imported and like domestic products.

137. However, the implementation of this requirement carried out by Indonesian authorities is clearly discriminatory. For imported products, MoA Regulation 58/2015 requires that chicken meat and chicken products comply with the labelling requirements

¹⁴⁸ Exhibit BRA-45.

¹⁴⁹ Law 33/2014, Article 4. (Exhibit BRA-46).

¹⁵⁰ *Ibid.* Article 38. (Exhibit BRA-46).

before importing is authorized.¹⁵¹ Domestic products, however, are not subject to these strict control procedures.

138. Indeed, while Indonesia is very stringent with the surveillance and implementation of halal labelling by imported products, this surveillance is poorly performed with regard to like domestic products. According to the study from a local expert, "domestic producers, particularly in the wet market, do not generally attach any label or food packaging (i.e. do not follow the requirements stipulated by the relevant laws and regulations)".¹⁵² In addition, the study also informs that only rarely does the Indonesian supervision authority check compliance with the halal labelling requirement in wet markets and non-official slaughterhouses.¹⁵³

139. Brazil takes no issue with regard to the fulfillment of the halal certification and labelling, as required by the Indonesian legislation. However, it is concerned with the fact that Indonesia accords treatment less favourable to imported products when compared to the surveillance and implementation of this specific requirement (i.e. halal labelling) by like domestic products. Brazil submits that this discriminatory treatment is inconsistent with Indonesia's obligation under Article III:4 of the GATT 1994.

B. Legal claims

140. Brazil submits that the general measure and the individual measures described above are inconsistent with various provisions of the WTO Agreements as they unduly impose trade restrictions, discriminatory treatment and sanitary barriers. Brazil will address each of these claims separately.

141. Given the complexity and imbrication of the different measures at issue and the broad scope of the restrictions imposed by Indonesia through the combined effect of these different measures, Brazil would like to ask the Panel to carefully examine each of the claims raised in this submission and to refrain from exercising judicial economy, in order to avoid a partial solution of the matter before it.

1. Claims related to border measures which create trade restrictions

142. As mentioned above in Sections IV.A.2 and IV.A.3, Indonesia adopts several measures which prohibit and/or restrict the importation of the products at issue. These measures, combined and individually, impose a general ban on the Brazilian chicken imports in a manner inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Indonesia's import licensing procedures also amount to a non-automatic licensing regime whose application and administration causes trade-restrictive effects on imports in violation of Article 3.2 of the Agreement on Import Licensing Procedures.

¹⁵¹ MoA Regulation 58/2015, Articles 7 and 19. (Exhibit BRA-01).

¹⁵² Exhibit BRA-02, p. 40-41.

¹⁵³ *Ibid.* p. 41.

1.1. Relevant legal standards

(a) Article XI:1 of the GATT 1994

143. Article XI:1 of the GATT 1994 establishes that:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

144. Article XI:1 of the GATT 1994 encompasses “prohibitions” or “restrictions” which are made effective through “quotas”, “import or export licenses” or any “other measures”.¹⁵⁴ According to the Panel in *India – Quantitative Restrictions*, “the text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions ‘other than duties, taxes or other charges’. [...] The scope of the term ‘restriction’ is also broad, as seen in its ordinary meaning, which is ‘a limitation on action, a limiting condition or regulation’”.¹⁵⁵

145. Brazil is of the view that any “prohibition” or “restriction” on the importation can be considered a violation of Article XI:1 of the GATT 1994, as long as it may have “limiting effects on the importation” of products of other Members.¹⁵⁶ With regard to the term “no prohibition”, the Panel in *Brazil – Retreaded Tyres* concluded that the term means that “Members shall not forbid the importation of any product of any other Member into their markets”.¹⁵⁷ The Appellate Body in *China – Raw Materials* has added that a prohibition is a “legal ban [...] on the importation of a specified commodity.”¹⁵⁸ Thus, if a measure – other than duties, taxes or other charges – impedes or bans the importation of any product from another Member, there is a prohibition in the sense of Article XI:1.

146. The term “restrictions” is related to any measure that has a “limiting effect” on the importation, exportation, or sale for export of any product destined for another WTO Member. In light of the broad scope of Article XI:1,¹⁵⁹ the fact that a specific measure does not totally prevent the imports from entering the market or does not encompass the application of prohibited additional duties does not mean *per se* that there is no violation of that provision. The Appellate Body has indicated that the scope of Article

¹⁵⁴ The expression “other measures” in Article XI:1 of GATT 1994 has been interpreted broadly as including any measure that has a limiting effect on trade. (Appellate Body Reports, *Argentina – Import Measures*, para. 6.363).

¹⁵⁵ Panel Report, *India – Quantitative Restrictions*, para. 5.129.

¹⁵⁶ Appellate Body Reports, *Argentina – Import Measures*, para. 6.363.

¹⁵⁷ Panel Report, *Brazil – Retreaded Tyres*, para. 7.11.

¹⁵⁸ Appellate Body Report, *China – Raw Materials*, para. 319.

¹⁵⁹ Panel Reports, *Argentina – Import Measures*, para. 6.251; *Colombia – Ports of Entry*, para. 7.223; *India – Quantitative Restrictions*, para. 5.128; *India – Autos*, para. 7.264.

XI:1 includes measures through which a prohibition or restriction is produced or becomes operative.¹⁶⁰

147. Likewise, a violation of Article XI:1 may occur even when there is no specific threshold established limiting imports or exports. A Member's regulation establishing, directly or indirectly, a "positive list" of the products allowed to be imported or exported or certain binding "intended uses" for those products would, in this sense, qualify as a quantitative restriction, particularly if the importation of the products which do not fulfill these requirements are prohibited.

148. Article XI:1 hinders prohibitions or restrictions to imports through basically any means. A number of panels have considered the reference to "other measures" in the provision as a "broad residual category"¹⁶¹ which encompasses different types of measures instituted or maintained by a WTO Member with the ability to prohibit or restrict the importation of products. According to the GATT Panel in *Japan – Semiconductors* "other measures" under Article XI:1 have a comprehensive meaning and refers to "*all measures* instituted or maintained by a contracting party prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges".¹⁶² (*emphasis added*).

149. This broad category would encompass unwritten measures as well. In *Argentina – Import Measures* the Panel found that the Trade-Related Requirements (TRRs measure) – imposed by Argentina through the combined effect of different measures – fell within the meaning of "other measures" that prohibit or restrict importation, as provided for in Article XI:1 of the GATT 1994.¹⁶³

150. In the current dispute, Brazil contends that Indonesia violates the obligation under Article XI:1 of the GATT 1994 both through a general import ban as well as through several individual measures that prohibit or restrict the importation of Brazilian chicken meat and chicken products into Indonesia.

(b) Article 4.2 of the Agreement on Agriculture

151. Article 4.2 of the Agreement on Agriculture provides that:

Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties [footnote 1], except as otherwise provided for in Article 5 and Annex 5.¹⁶⁴

152. Footnote 1 of the Agreement on Agriculture states that:

These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export

¹⁶⁰ Appellate Body Report, *Argentina – Import Measures*, para. 5.218.

¹⁶¹ Panel Reports, *Argentina – Hides and Leather*, para. 11.17; *Colombia – Ports of Entry*, para. 7.227; *Argentina – Import Measures*, para. 6.246.

¹⁶² Panel Report, *Japan – Semi-conductors*, para. 104.

¹⁶³ Panel Report, *Argentina – Import Measures*, para. 6.248.

¹⁶⁴ Neither Article 5 nor Annex 5 are applicable to this dispute.

restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947...

153. According to the Appellate Body, this provision establishes that Members “must not continue to apply measures covered by Article 4.2 from the date of entry into force of the WTO Agreement” (“maintain”),¹⁶⁵ “must not introduce new measures ‘of the kind’ that it has not had in place in the past” (“resort to”),¹⁶⁶ and “may not, at some later stage after the entry into force of the WTO, re-enact measures prohibited by Article 4.2 (“revert to”).¹⁶⁷

154. The footnote 1 of Article 4.2 provides examples of these measures required to be converted into ordinary customs duties,¹⁶⁸ which include “quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties ...”.

155. The Appellate Body in *Chile – Price Band System* indicated that an “inconsistency with Article 4.2 can be established when it is shown that a measure is a border measure similar to one of the measures explicitly identified in footnote 1”.¹⁶⁹ For the current dispute, Brazil finds relevant the guidance of previous jurisprudence on the scope of the following terms: “quantitative import restrictions”, “discretionary import licensing”, and “similar border measures other than ordinary customs duties”.

156. With regard the meaning of “quantitative import restrictions” in footnote 1 of Article 4.2, the Panel in *Turkey – Rice* considered that measures that affect the quantities of product that can be imported undoubtedly qualify as a quantitative import restriction, even when this effect is caused by the “lack of transparency and lack of predictability” of a Member’s measure which “are liable to restrict the volume of imports”,¹⁷⁰ as confirmed by the Appellate Body in *Chile – Price Band System*.¹⁷¹

¹⁶⁵ Appellate Body Report, *Chile – Price Band System*, para. 212.

¹⁶⁶ Appellate Body Report, *Chile – Price Band System*, footnote 187.

¹⁶⁷ Appellate Body Report, *Chile – Price Band System*, footnote 187.

¹⁶⁸ According to the Appellate Body in *Chile – Price Band System*, “the wording of footnote 1 to the Agreement on Agriculture confirms our interpretation. The footnote imparts meaning to Article 4.2 by enumerating examples of ‘measures of the kind which have been required to be converted’, and which Members must not maintain, revert to, or resort to, from the date of the entry into force of the WTO Agreement. Specifically, ... the use of the word ‘include’ in the footnote indicates that the list of measures is illustrative, not exhaustive.” (Appellate Body Report, *Chile – Price Band System*, para. 209).

¹⁶⁹ Appellate Body Report, *Chile – Price Band System*, para. 171.

¹⁷⁰ The Panel in *Turkey – Rice* concluded that “in the present dispute, the challenged measure does not affect the level of duties, but rather the quantities of product that can enter the Turkish market. We find, however, that the features of “lack of transparency and lack of predictability” that result from Turkey’s decision to deny or fail to grant Certificates of Control to import rice outside of the tariff rate quota are similar to those observed by the Appellate Body Report in *Chile – Price Band System*. Even without any systematic intention to restrict the importation of rice at a certain level, the lack of transparency and of predictability of Turkey’s issuance of Certificates of Control to import rice is similarly liable to restrict the volume of imports. (Panel Report, *Turkey – Rice*, para. 7.120).

¹⁷¹ Appellate Body Report, *Chile – Price Band System*, para. 234.

157. The expression "discretionary import licensing" was interpreted by the Panel in *Turkey – Rice* as encompassing "the discretionary use by authorities in an importing country of the concession, or refusal to grant, a particular document which is necessary for the importation of a good, as an instrument to administer trade."¹⁷² Thus, the standard to be assessed is whether there is discretion by the authorities to grant or to refuse a particular document which is necessary for the importation of a good, as an instrument to administer trade.

158. As for the third element (similar border measures other than ordinary customs duties), the Appellate Body in *Chile – Price Band System* explained that an inconsistency with Article 4.2 can be established when it is possible to identify border measures¹⁷³ similar¹⁷⁴ to the measures explicitly identified in footnote 1,¹⁷⁵ as follows:

... we are of the view that inconsistency with Article 4.2 can be established when it is shown that a measure is a border measure similar to one of the measures explicitly identified in footnote 1. A separate analysis of whether, or an additional demonstration that, the measure is "other than ordinary customs duties" may also be undertaken to confirm such a finding. However, these are not indispensable for reaching a conclusion on the categories listed in footnote 1.

159. Thus, to constitute a "similar border measure" for the purpose of footnote 1 of Article 4.2, it is only necessary that the measure at stake be similar to one of those explicitly identified in footnote 1, such as a "quantitative import restriction" or a "discretionary import licensing".

160. According to the Appellate Body in *Chile – Price Band System*, the border measures listed in footnote 1 of Article 4.2 all "have in common the object and effect of restricting the volumes, and distorting the prices of imports of agricultural products in ways different from the ways that ordinary customs duties do".¹⁷⁶ As the function of Article 4.2 and footnote 1 is "to enhance market access for agricultural products",¹⁷⁷ any measure which has the object and effect of restricting market access, limiting import volumes and distorting the prices of imports for agricultural products would be inconsistent with Article 4.2 of the Agreement on Agriculture.

161. In the current dispute, Brazil contends that Indonesia violates the obligation under Article 4.2 of the Agreement of Agriculture both through a general import ban as

¹⁷² According to the Panel in *Turkey – Rice*, "... we find that the discretionary use by authorities in an importing country of the concession, or refusal to grant, a particular document which is necessary for the importation of a good, as an instrument to administer trade, in this case can be safely characterized as a practice of 'discretionary import licensing' under footnote 1 to Article 4.2 of the Agreement on Agriculture. (Panel Report, *Turkey – Rice*, para. 7.133).

¹⁷³ The Panel in *Peru – Agricultural Products* understood "border measures" as those measures applied only to imported products and enforced at the border. (Panel Report, *Peru – Agricultural Products*, para. 7.315).

¹⁷⁴ The concept of "similar" in footnote 1 of Article 4.2 of the Agreement on Agriculture was interpreted as "having a resemblance or likeness" (Appellate Body Report, *Peru - Agricultural Products*, para. 5.144) or "having characteristics in common". (Appellate Body Report, *Chile – Price Band System*, para. 163).

¹⁷⁵ Appellate Body Report, *Chile – Price Band System*, para. 171.

¹⁷⁶ Appellate Body Report, *Chile – Price Band System*, para. 227.

¹⁷⁷ Appellate Body Report, *Chile – Price Band System* (21.5), para. 215.

well as through several individual measures that prohibit or restrict the importation of Brazilian chicken meat and chicken products into Indonesia.

(c) Article 3.2 of the Agreement on Import Licensing Procedures

162. Article 1.1 of the ILA defines import licensing as the administrative procedures through which a business operator submits an import application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member.

163. According to the Panel in *EC – Bananas III*, two requirements must be met for an administrative procedure to be within the scope of Article 1.1 of ILA: (i) the procedures should require the submission of an application or other documentation to the relevant administrative body; and (ii) the submission of an application or other documentation shall be a prior condition for importation into the customs territory of the importing Member.¹⁷⁸

164. Article 1.2 of the ILA provides the general principle that should inform any licensing procedure: it establishes that "Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 ... with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures".

165. This principle is also confirmed by Article 1.3 of ILA, which establishes a requirement that the rules for import licensing shall be neutral in "application and administered in a fair and equitable manner".

166. The ILA regulates two types of licensing procedures: automatic and non-automatic. The Agreement defines automatic import licensing as a procedure where "approval of the application is granted in all cases",¹⁷⁹ which means that the administrative authorities have no discretion to decide whether to grant or not the license. There shall be no restriction to apply – and obtain – an import license in this case, as this type of import licensing procedure is mainly used for statistical purposes.

167. A non-automatic licensing regime is defined by exclusion as an "import licensing not falling within the definition contained in paragraph 1 of Article 2",¹⁸⁰ which means that in this case the importing country has the discretion to grant or not the import license. Normally, non-licensing procedures are used when there is a restrictive condition in place on the imports of the covered goods, such as tariff rate quotas (TRQs), which gives rise to imports controls. Although the ILA does not address the consistency of this underlying restriction, it clearly establishes that Members are required to have WTO-consistent justification for administrative controls of imports.

¹⁷⁸ Panel Report, *EC – Bananas III*, paras. 7.148-7.149.

¹⁷⁹ ILA, Article 2.1.

¹⁸⁰ ILA, Article 3.1.

168. Besides complying with the general principles established in Articles 1.2 and 1.3, each type of licensing procedures must comply with additional specific provisions. Article 3.2 of the ILA provides in relation to non-automatic licensing that:

Non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction. Non-automatic licensing procedures shall correspond in scope and duration to the measure they are used to implement, and shall be no more administratively burdensome than absolutely necessary to administer the measure.

169. Brazil understands that this provision provides that Members shall not establish licensing procedures that impose additional restrictions to those already caused by the underlying measure it implements. According to the Appellate Body in *EC – Poultry*, in order to assess a violation of Article 3.2, two important elements have to be taken into account: a "decline in market share" and a "causal relationship between the licensing procedures and the trade distortion". That is, it is necessary to explain "how the licensing procedure caused the decline in market share" and to submit "any persuasive evidence that ... falling market share could ... be viewed as constituting trade distortion attributable to the licensing procedure."¹⁸¹

170. Moreover, Article 3.2 of ILA requires that the non-automatic licensing procedures shall not be more administratively burdensome than absolutely necessary to administer the measure they are used to implement. Thus, the determination of this "measure" is crucial for the assessment of whether it is more burdensome or not than necessary in the context of this provision. As it will be seen below, Indonesia's import licensing regime is more burdensome than necessary and has trade restrictive effects, in violation of Article 3.2 of ILA.

1.2 Legal analysis

(a) The general prohibition on the importation of chicken meat and chicken products is a border restriction inconsistent with the obligations of Indonesia under the WTO Agreements

171. The general prohibition on the importation of chicken meat and chicken products imposed by Indonesia, as described in Section IV.A.2, is a "prohibition or restriction other than duties, taxes or other charges" on importation within the meaning of Article XI:1 of the GATT 1994 and is also a "quantitative import restriction" or a "similar border measure other than ordinary customs duties" in the sense of Footnote 1 of Article 4.2 of the Agreement on Agriculture. This general prohibition violates the obligations under both of the previous provisions. In this section, Brazil will address each of these violations separately.

¹⁸¹ Appellate Body Report, *EC – Poultry*, paras. 126-127.

(i) Indonesia's general prohibition on the importation of chicken meat and chicken product is inconsistent with Article XI:1 of the GATT 1994

172. Brazil submits that the combined effects of the measures adopted by Indonesia in relation to chicken meat and chicken products qualify as "a general proposition, concerted action or practice" inconsistent with Indonesia's WTO obligations susceptible to be challenged in WTO dispute settlement proceedings as recognized by the Appellate Body in *EC and certain member States – Large Civil Aircraft*. According to the Appellate Body in that dispute, for an unwritten measure to be challenged, it has to be identified as clearly as possible in the panel request.¹⁸²

173. In the current dispute, Brazil has clearly indicated in its panel request¹⁸³ all the elements that compose the "general prohibition on the importation of chicken meat and chicken products": (i) a prohibition of imports of chicken meat and chicken products that are not included in Indonesia's "positive list" of permitted imports; (ii) a requirement to establish the "insufficiency of local production", as defined by the Indonesia authorities, before imports of the chicken products can be authorized; (iii) additional restrictions regarding the importation of basic and strategic goods, such as chicken meat and chicken products, thus generating uncertainty and lack of predictability that adversely affect trade flows; (iv) restrictions on the use of imported chicken meat and chicken products, restricting the commercial opportunities for exporters to Indonesia; (v) rules for import licensing procedures which creates unnecessary obstacles to trade, prohibiting the importation of chicken meat and chicken products; and (vi) undue delay in undertaking the sanitary procedures required to allow Brazilian exports of chicken meat and chicken products into Indonesia.

174. As previously indicated in this submission, those measures are framed in such a way as to fulfill the same overriding objective as described in the jurisprudence of *Argentina - Import Measures*,¹⁸⁴ and are imposed through the combined effect of different restrictions on the importation of chicken meat and chicken products to implement Indonesia's official trade policy of "self-sufficiency".

175. As further detailed in Section IV.A.2.1, Indonesia excludes the possibility of importation of chicken "cut in pieces, fresh or chilled, and froze" and "other prepared or preserved chicken meat", as these products are not listed in the Appendices of MoA Regulation 58/2015 and MoT Regulation 5/2016, which establish an exhaustive list of products that are authorized to be imported. Based on these provisions, importers are not able to obtain a MoA Import Recommendation or a MoT Import Approval for "chicken cuts" and for "other prepared or preserved chicken meat", which are both a legal prerequisite to be able to import in Indonesia. Ultimately, without these two documents, importers are simply not allowed to import these products.

176. In addition, for the few products that are authorized to be imported, the Indonesian regulations provide that imports can only be made if domestic animal

¹⁸² Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 792.

¹⁸³ Request for the Establishment of a Panel by Brazil, *Indonesia – Measures concerning the Importation of Chicken Meat and Chicken Products*, WT/DS484/8, Section I.

¹⁸⁴ Panel Report, *Argentina – Import Measures*, para. 6.248.

products and supply is insufficient to fulfill the need for the people's consumption, as defined by the Indonesian authorities.¹⁸⁵ In the case of "staple food", which encompasses chicken meat and chicken products, Law 18/2012 states clearly that imports should only be authorized as an exception.¹⁸⁶

177. The importation of chicken meat and chicken products is also limited by the restrictions imposed on the use of such products. MoA Regulation 58/2015 limits the importation only for specific intended uses, namely for "hotels, restaurants, caterings, industries, and other particular purposes",¹⁸⁷ which correspond to a very limited part of the Indonesian market. The import licensing regime in Indonesia also contributes to reinforce the general ban on imports of chicken meat and chicken products as it creates unnecessary obstacles to trade, prohibiting and/or restricting the importation of these products.

178. Finally, by not concluding the sanitary import approvals procedures required by Indonesian legislation to allow Brazilian exports of chicken meat and chicken products, Indonesia precludes any possibility of such exports to occur, reinforcing the import ban imposed on Brazilian products.¹⁸⁸

179. Combined, the above-mentioned measures constitute "prohibitions or restrictions other than duties, taxes or other charges made effective through quotas, import or export licenses or other measures" within the meaning of Article XI:1 of the GATT 1994. Since 2009, these combined measures have had a "limiting effect" on Brazilian exports of chicken meat and chicken products and have affected the competitive opportunities available for the Brazilian products,¹⁸⁹ as demonstrated in the tables in Section III.D above.

180. Indonesia has relentlessly created several obstacles to impede the importation of the products at issue through a comprehensive assortment of combined measures which established an institutional and procedural "wall" that has totally banned the importation of Brazilian chicken meat and chicken products. Brazil understands that all these measures reflect Indonesia's general policy objective of protecting the local production of chicken meat and chicken products in order to achieve self-sufficiency.

181. In *Argentina – Import Measures* the Panel and the Appellate Body dealt with a similar situation.¹⁹⁰ Thus, Brazil understands that the Panel could find reliable guidance in that dispute. In its examination, that Panel established a framework of analysis in order to assess whether Argentina's unwritten measure had a limiting effect on imports and were affecting the competitive opportunities protected by Article XI:1 of the GATT 1994. Firstly, it established that the measure at issue restricted market access. Secondly, that it created uncertainty as to an applicant's ability to import. Thirdly, the Panel

¹⁸⁵ Law 18/2009, Article 36(4). (Exhibit BRA-29).

¹⁸⁶ Law 18/2012, Article 36(2). (Exhibit BRA-31).

¹⁸⁷ Besides these intended uses, only "other prepared or preserved chicken meat" would be allowed to be sold in modern markets, such as big supermarket chains, an option not available to other chicken meat and chicken products.

¹⁸⁸ MoA Regulation 58/2015, Articles 23(1)(d), 23(1)(f), 35 and 36. (Exhibit BRA-01).

¹⁸⁹ Panel Report, *Colombia – Ports of Entry*, para. 7.236.

¹⁹⁰ *Argentina – Measures affecting the Importation of Goods*, DS438/DS444/DS445.

concluded that the measure prevented companies to import as much as they desired or needed without regard to their export performance. And, finally, that it imposed a significant burden on importers that was unrelated to their normal importing activity.¹⁹¹

182. The Indonesian general prohibition on Brazilian imports of chicken meat and chicken products meets all these criteria. As already explained, Indonesia only authorizes the importation of products specifically referred to in a "positive list" that does not include all the products at issue. And, even so, this importation shall only take place in case of insufficiency of local production and for very specific intended uses, which clearly restrict market access conditions. Market access to Brazilian chicken meat and chicken products are also limited by the fact that Indonesia has unduly delayed the approval of a health certificate that would allow Brazilian exports.

183. Additionally, imports of chicken meat and chicken products are subject to a set of restrictive import licensing procedures – such as limited (and short) application windows for the MoA Import Recommendation and limited validity periods for both MoA Import Recommendations and MoT Import Approvals, as well as "fixed license terms" for both – that have created uncertainty to importers and imposed on them a significant burden which is unrelated to other importing controls, making importations extremely difficult. As a consequence, these measures undoubtedly have negative effects on the competitive opportunities in the market, which, according to the Panel in *Colombia - Ports of Entry*, are protected by Article XI:1.¹⁹²

184. For the above mentioned reasons, the general prohibition on imports as a result of the combined interaction of Indonesian measures is inconsistent with Article XI:1 of the GATT 1994.

(ii) Indonesia's general prohibition on the importation of chicken meat and chicken product is inconsistent with Article 4.2 of the Agreement on Agriculture

185. All the products at issue in the present dispute are undoubtedly covered by the Agreement of Agriculture.¹⁹³ In Section IV.A.2, Brazil explained that the combined effects of several restrictive measures adopted by Indonesia impose a general prohibition on the importation of chicken meat and chicken products. As demonstrated above, this general prohibition encompasses the following elements: (i) a prohibition of importation of chicken cuts and other prepared or preserved chicken meat; (ii) the requirement of "insufficiency of local production" for the authorization of importation of chicken products; (iii) a different treatment to imported chicken meat and chicken products; (iv) restrictions on the use of imported chicken meat and chicken products; (v) a discretionary and non-transparent import licensing regime; and (vi) the undue delay on the approval of Veterinary Certificates.

¹⁹¹ Panel Report, *Argentina – Import Measures*, para. 6.474.

¹⁹² Panel Report, *Colombia – Ports of Entry*, para. 7.274-7.275.

¹⁹³ HS Codes 0207.11, 0207.12, 0207.13, 0207.14 and 1602.32 are encompassed by the products list in Annex 1 of the AoA, which comprises HS Chapters 1 to 24 less fish and fish products.

186. In Section IV.B.1.2.(a)(i), Brazil has demonstrated that this general prohibition violates Article XI:1 of GATT 1994. The Panels in *India – Quantitative Restrictions*¹⁹⁴ and *Korea – Various Measures on Beef*¹⁹⁵ established that a measure that had been found to violate Article XI:1 was also to be considered in violation of Article 4.2 of the Agreement of Agriculture, to the extent it applies to agricultural products. Based on this understanding, Brazil submits that the Indonesia's general prohibition on the importation of chicken meat and chicken products is also inconsistent with Article 4.2 of the Agreement on Agriculture.

187. Should the Panel in this dispute opt to carry an independent analysis of Article 4.2, Brazil contends that the general prohibition clearly imposes a "quantitative import restriction" or a "similar border measure other than ordinary customs duties" within the meaning of that provision. Combined, these measures have "the object and effect of restricting the volumes, and distorting the prices of imports of agricultural products in ways different from the ways that ordinary customs duties do"¹⁹⁶ in the sense of the Appellate Body's understanding in *Chile – Price Band System*. Due to this general restriction, Brazil has not been able to export chicken meat and chicken products to Indonesia since 2009.

188. In the case Indonesia's general prohibition on the importation of chicken meat and chicken products are not found by the Panel to constitute a "quantitative import restriction", they still constitute a "similar border measure other than ordinary customs duties" within the meaning of footnote 1 of Article 4.2 of the AoA, as they have "characteristics in common with a quantitative import restriction"¹⁹⁷ and limit opportunities for importation of the products at issue.

189. As the quantitative restrictions imposed by Indonesia's general prohibition under Article XI:1 of the GATT 1994 and Article 4.2 of the AoA are the same, Brazil incorporates, *mutatis mutandis*, into this Section the legal arguments put forward in Section IV.B.1.2.(a)(i), related to the violation of Article XI:1, which clearly demonstrates that this general prohibition is also inconsistent with the agricultural market access obligation established in Article 4.2 of the AoA.

(b) The individual measures adopted by Indonesia to restrict the importation of chicken meat and chicken products are each a border restriction inconsistent with the obligations of Indonesia under the WTO Agreements

190. As explained in detail in Section IV.A.3, besides imposing a general prohibition on the imports of chicken meat and chicken products, Indonesia adopts several individual measures that, by themselves, imposes a border restriction inconsistent with Article XI:1 and Article 4.2. Brazil will address each of them below.

¹⁹⁴ Panel Report, *India – Quantitative Restrictions*, paras. 5.241-5.242.

¹⁹⁵ Panel Report, *Korea – Beef*, para. 762.

¹⁹⁶ Appellate Body Report, *Chile – Price Band System*, para. 227.

¹⁹⁷ Appellate Body Report, *Chile – Price Band System*, para. 163.

(i) Indonesia's individual measures on the importation of chicken meat and chicken product are inconsistent with Article XI:1 of the GATT 1994

(1) The prohibition on the importation of chicken cuts and other prepared or preserved chicken meat is inconsistent with Article XI:1 of the GATT 1994

191. As mentioned in Section VI.B.3.a, only products listed in the Appendices of both MoA Regulation 58/2015 and MoT Regulation 05/2016, which do not include chicken cuts and prepared and preserved chicken meat, can be imported into the country. This positive list amounts to a “legal prohibition” on the importation of non-listed products in violation of Article XI:1 of the GATT 1994.

192. Article XI:1 covers any measures which institute or maintain a "prohibition or restriction other than duties, taxes or other charges on the importation of any product". The impossibility of importation of the products not listed in Indonesia’s relevant regulations imposes an import ban within the meaning of that provision.

193. This measure is clearly a "legal prohibition" on importation, as it does not allow any imports of chicken meat and chicken products not included in the positive list. As a consequence, chicken cuts and other prepared or preserved chicken meat are legally excluded from the possibility of importation, without any WTO-consistent justification. Through this positive list, Indonesia maintains a prohibition other than “duties, taxes or other charges” equivalent to a zero quota.

194. This measure prohibits the access of Brazilian chicken cuts and other prepared or preserved chicken meat into Indonesia market in a manner inconsistent with Article XI:1.

(2) The restrictions on the use of imported chicken meat and chicken products are inconsistent with Article XI:1 of the GATT 1994

195. According to Indonesia's legislation, the chicken meat and chicken products that can be imported into Indonesia can only be destined to very specific uses. As previously demonstrated, this measure restricts the access of imported chicken meat and chicken products to the most important consumer markets in Indonesia, adversely affecting the competitive opportunities of the exported products.

196. This restriction is clearly established in Indonesia's legislation. The MoA Import Recommendation and the related MoT Import Approval would only be granted if the importer commits to those limited uses indicated in MoA Regulation 58/2015. Breaches in terms of the intended uses are heavily sanctioned and can entail the revocation of the MoA Import Recommendation, denial of the next applications, and even permanent revocation of the possibility to apply for new authorizations.¹⁹⁸

¹⁹⁸ MoA Regulation 58/2015, Article 38. (Exhibit BRA-01).

197. This measure has an important "limiting effect" on imports that fell squarely in the ambit of Article XI:1. As recognized by the Panel in *Colombia – Ports of Entry* any measures that have "implications on the competitive situation of an importer", creating uncertainties, affecting investment plans or restricting market access for imports¹⁹⁹ is under the scope of this provision.

198. As the Panel in *China – Raw Materials* established, to be considered a restriction it is not even necessary that the measure has an actual impact on trade flows. The very potential to limit trade is sufficient to constitute a restriction within the meaning of Article XI:1,²⁰⁰ which is basically the case here. Moreover, since this restriction is not applied for domestic products, by its very design and structure, this measure prevents "whole chicken, fresh or frozen" to have the same competitive opportunities than those granted to the domestic like products, constituting a restriction in the sense of Article XI:1.²⁰¹

199. The limitation on the intended uses established in the Indonesian legislation, as well as the sanctions imposed for breaches of the original intended uses registered in the MoA Import Recommendation, impose a limiting condition which adversely affects the market access conditions to imported products, in a manner inconsistent with the obligation under Article XI:1 of the GATT 1994.

**(3) Indonesia's restrictive import licensing procedures are
inconsistent with Article XI:1 of the GATT 1994**

200. As explained in Section IV.A.3.3, Brazil has identified several elements of the Indonesian import licensing regime which impose unduly restrictions on the importation of chicken meat and chicken products, particularly through (i) the prohibition of applying for licenses to the importation of chicken cuts and other prepared or preserved chicken meat due to their exclusion of the "positive lists" of the products allowed to be imported; (ii) the requirements related to the intended uses of imported chicken meat and chicken products; (iii) the limited (and short) application periods and validity periods of the MoA Import Recommendation and MoT Import Approvals; and (iv) the fixed license terms.

201. Brazil has already demonstrated in two subsections above the inconsistency with Article XI:1 of the restrictions listed in items (i) and (ii). Now, Brazil will address the negative effects on the competitive opportunities for imports²⁰² of the limited application and validity periods of the MoA Import Recommendations and the MoT Import Approvals, and of their fixed terms.

¹⁹⁹ Panel Report, *Colombia – Ports of Entry*, para. 7.240.

²⁰⁰ Panel Report, *China – Raw Materials*, para. 7.1081.

²⁰¹ According to the Panel in *EC – Bananas III (21.5)*, "in the context of Article XI and other non-discrimination provisions of the GATT 1994, it has been found that GATT disciplines on the use of restrictions are not meant to protect "trade flows", but rather the "competitive opportunities of imported products". (Panel Report, *EC – Bananas III (21.5)*, para. 7.677).

²⁰² Panel Report, *Colombia – Ports of Entry*, para. 7.243.

*The limited application windows and validity periods of the MoA
Import Recommendation and the MoT Import Approvals*

202. Indonesia imposes limited (and short) application windows for importers to obtain authorization to import. Indeed, importers can only apply for a MoA Import Recommendation, which is one of the various requirements of its complex licensing regime, three times a year during one-month application windows.²⁰³ Since the validity period itself of the Recommendations is also very limited (only 4 months),²⁰⁴ the system forces the importer to apply for new MoA Import Recommendations three times per year, at every new application window.

203. The limiting effect of this measure is clear. Importers can only request a MoT Approval – required for every import transaction²⁰⁵ – after obtaining a MoA Recommendation and have to conclude the entire import transaction – packaging, loading, shipping, transporting, delivering, and clearing at the customs the imported goods – within the short validity period of the MoA Import Recommendation, as the validity of the MoT Approval is tied to that of the recommendation. If not, the products to be imported will be subject to re-exportation from Indonesia.²⁰⁶

204. Even with little factual evidence on how this system operates in practice, due to the *de facto* import ban on Brazilian chicken meat and chicken products that has prevented any exports from Brazil since 2009, there is no doubt that the "design and structure" of the limited application windows and validity periods can have restricting effects on imports of the products at issue.

205. The limited application windows restrict imports in, at least, two different ways. Firstly, importers are not allowed to submit an application whenever a business opportunity occurs. They have to wait for the next available window. Moreover, as the terms of the recommendations are fixed, the importers are required every time to determine in advance the terms of the import transactions (including the quantity, products, country of origin and port of entry) they intend to carry out in the period, what clearly affects business decisions, and limits the time periods that importers can apply for new transactions.

206. Secondly, the system prevents, in practice, exports to enter into the Indonesian market during the beginning of each validity period, as import transactions will be carried out only after the issuance of the MoA Import Recommendation and the MoT Import Approval.

²⁰³ MoA Regulation 58/2015, Article 22(1): "Business Player, State Owned Enterprise (SOE) and Regional Government Owned Enterprise (ROE) must submit a Recommendation Application on 1st -31st of December of the preceding year, on 1st - 30th of April, and on 1st - 31st of August of the current year." (Exhibit BRA-01).

²⁰⁴ MoA Regulation 58/2015, Article 30(1): "The validity period of the Recommendation as referred to in Article 29 letter (i) shall be performed in three periods within one year as follows: (a) First period shall enter into force as of 1st of January up to 30th of April; (b) Second period shall enter into force as of 1st of May up to 30th of August; (c) Third period shall enter into force as of 1st of September up to 31st of December." (Exhibit BRA-01).

²⁰⁵ MoT Regulation 05/2016, Article 9(2). (Exhibit BRA-03).

²⁰⁶ MoT Regulation 05/2016, Article 27. (Exhibit BRA-03).

207. As shipments have to reflect exactly the terms of both the Import Recommendation and the Import Approval, exporters can only start preparing the product, proceed with specific packaging, labelling and shipping operations after the Import Approval is issued, that is, after the commencement of the short 4-month validity period. Needless to say that all these preparatory stages before shipment take time. As a consequence, exports cannot reach Indonesia at the beginning of the each time window.

208. In the case of Brazilian exports, this would have a particular limiting effect, as the whole export procedures of chicken meat and chicken products from Brazil to Indonesia are estimated to take in average 100 days, limiting the time window to have access to the Indonesian market to basically twenty days.²⁰⁷ Moreover, exporters will not be able to dispatch more than one shipment of the products at issue at each validity period.

209. In sum, exporters and importers of Brazilian chicken meat and chicken products will need to deal with a "dead zone" comprising most of the 4-month validity period during which no Brazilian product could enter the Indonesian market. Considering that this situation will occur at every of the three validity periods, this measure constitutes a severe restriction on the volume of Brazilian exports which could take place over the course of a year. Consequently, the operation of Indonesia's import licensing regime have, by its design and structure, important negative effects on the competitive opportunities available for importers of Brazilian products, contrary to the obligation under Article XI:1 of the GATT 1994.

The fixed license terms

210. The limiting effect of Indonesia's import licensing procedures is aggravated by the fact that the terms of both the MoA Import Recommendation and the MoT Import Approval are fixed. As mentioned in Section IV.A.3.3, after those documents are issued, no changes or amendments on their terms are allowed.²⁰⁸ Hence, by the time the importers apply for both a Recommendation and an Approval, all information related to the covered transactions need to be precisely defined in advance, what is not in accordance with market practices.²⁰⁹ The importer who fails to comply with these "fixed license terms" is subject to several sanctions²¹⁰, including the impossibility of submitting new import requests.²¹¹

211. Import licenses in Indonesia will be refused at the entry port for any variation of quantity, type, business unit, and/or country of origin related to the product from those

²⁰⁷ Exhibit BRA-44.

²⁰⁸ MoA Regulation 58/2015, Article 32(a). (Exhibit BRA-01).

²⁰⁹ MoA Regulation 58/2015, Article 38. (Exhibit BRA-01).

²¹⁰ For the Indonesian government to implement the controls and supervision on the import transactions, mainly to control the fulfilment of the requirements and the compliance with these "fixed terms", MoT 05/2016 determines that the company which obtained a MoT Import Approval shall submit a monthly report on the implementation of imports of animal and animal products. If the company fails to submit the report, it shall be subject to sanctions such as the postponement of application for the Import Approval for the subsequent period of 4 months. (Exhibit BRA-03).

²¹¹ MoT Regulation 05/2016, Article 26. (Exhibit BRA-03).

designated on the MoT Approval,²¹² even those consistent with normal commercial practice. As importers are not entitled to submit any request for adjustments in the terms of the licensing to respond to new business opportunities during the validity period, this requirement also impedes the importers to have the necessary flexibility to respond to changes in market conditions, thereby imposing a severe limitation on imports.

212. Based on the findings in *Argentina – Import Measures*, Brazil submits that these aspects of the import licensing regime (limited application windows and validity periods, and fixed license terms) violate Article XI:1 because they (a) unduly restrict market access for Brazilian products; (b) create uncertainty as to an applicant's ability to import, which depends on the issuance of the import licenses to take all other necessary steps related to importation and also carry them out within the short 4-month validity period; and (c) impose a significant burden on importers that is unrelated to their normal importing activity.²¹³

213. Therefore, Brazil submits that Indonesia's import licensing regime as a whole is inconsistent with Article XI:1 of the GATT 1994.

**(4) The restrictions on the transportation of imported
chicken meat and chicken products are inconsistent with
Article XI:1 of the GATT 1994**

214. Indonesia also imposes a WTO-inconsistent restriction on trade through requirements related to transportation of chicken meat and chicken products. As described in Section IV.B.3.e above, Article 20(a) of MoA Regulation 58/2015 requires that the transportation of carcass, meat and/or processed products shall be "conducted directly from the country of origin to the port of discharge within the territory of Indonesia". If the transportation is not straight to Indonesia or, by any reason (including *force majeure* events), it is necessary to stop in a third country or port before it arrives at the Indonesian port of destination, then the products will not be allowed to be imported into Indonesia.

215. There is no sanitary or any other justification for this measure, as the carriers may pass by third countries or ports before arriving at the indicated port of entry in Indonesia, maintaining the highest levels of security and quality of the product to be imported. As previously mentioned the containers are sealed in the country of origin and only opened in the country of destination, even in the case of transshipment in a third country or port.

216. This measure has a clear "limiting effect" on the importation of the products at issue. For countries like Brazil that are very distant from Indonesia, this requirement amounts to a virtual ban to Brazilian products because, as mentioned before, there are no direct vessel lines from Brazil straight to Indonesian ports.²¹⁴

217. Even if it were possible to export products from Brazil directly to Indonesia, this direct transportation requirement would largely increase the transportation costs of the

²¹² MoT Regulation 05/2016, Article 27(2). (Exhibit BRA-03).

²¹³ Panel Report, *Argentina – Import Measures*, para. 6.474.

²¹⁴ Exhibit BRA-45.

Brazilian product and thus "discourage importation" which, according to the findings of the Panel in *Argentina – Import Measures*,²¹⁵ is inconsistent with Article XI:1 of GATT 1994.

(ii) Indonesia's individual measures on the importation of chicken meat and chicken product are inconsistent with Article 4.2 of the Agreement on Agriculture

(1) Indonesia's prohibition on the importation of chicken cuts and other prepared or preserved chicken meat is a quantitative import restriction or similar border measure inconsistent with Article 4.2 of the Agreement on Agriculture

218. As mentioned in Section VI.B.3.a, animal and animal products not listed in the Appendices of MoA Regulation 58/2015 and MoT Regulation 05/2016 are not allowed to be imported into Indonesia. This import ban encompasses chicken cuts and other prepared or preserved chicken meat, which are covered by the Agreement on Agriculture. The fact that Indonesia's legislation establishes a "positive list" of products allowed to be imported in the relevant appendices of its legislation, amounts to "quantitative import restriction" or a "similar border measure other than ordinary customs duties" and is inconsistent with Article 4.2 of the Agreement on Agriculture.

219. This measure undoubtedly contributes "to restrict the volume of imports" to limit the quantities of the product that can be imported.²¹⁶ In the present case, this measure has prevented all imports of Brazilian chicken cuts and other prepared or preserved chicken meat, which constitutes the extreme type of "quantitative import restriction" prohibited by Article 4.2.

220. As already demonstrated, this restriction is also inconsistent with Article XI:1 of the GATT 1994. As a consequence, according to the Panel in *India – Quantitative Restrictions*, to the extent the restriction applies to agricultural products, the measure also constitutes a violation of Article 4.2 of the AoA.²¹⁷ Therefore, Brazil submits that the prohibition on the importation of chicken cuts and other prepared or preserved chicken meat is inconsistent with Article 4.2 of the AoA.

221. Should the Panel in this dispute opt to carry out an independent analysis of Article 4.2, Brazil contends that this measure clearly imposes a "quantitative import restriction" or a "similar border measure other than ordinary customs duties" within the meaning of that provision, as it has "the object and effect of restricting the volumes, and distorting the prices of imports of agricultural products in ways different from the ways

²¹⁵ The Panel has added that "the fact that a measure may constitute a restriction on importation within the meaning of Article XI:1 of the GATT 1994 when it acts to discourage importation by penalizing it and making it prohibitively expensive, was analyzed by the panel in *Brazil – Retreaded Tyres*. We agree with the panel's analytic approach in that case. (Panel Report, *Argentina – Import Measures*, para. 6.261).

²¹⁶ Panel Report, *Turkey – Rice*, para. 7.120.

²¹⁷ Panel Report – *India – Quantitative Restrictions*, paras. 5.241-5.242.

that ordinary customs duties do"²¹⁸ in the sense of the Appellate Body's understanding in *Chile – Price Band System*.

222. In the case Indonesia's "positive list" that does not allow the importation of chicken cuts and other prepared or preserved chicken meat is not found to constitute a "quantitative import restriction", it constitutes a "similar border measure other than ordinary customs duties" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture, as it has "characteristics in common with a quantitative import restriction"²¹⁹ and limit the opportunities for importation of chicken cuts and other prepared or preserved chicken meat into Indonesian market.

223. Brazil incorporates, *mutatis mutandis*, into this Section the legal arguments put forward in Section IV.B.1.2.(b)(ii)(1), related to the violation of Article XI:1, which clearly demonstrates that this measure "restricts the volume of imports",²²⁰ "jeopardize market access for agricultural products"²²¹, and, thus, is inconsistent with the agricultural market access obligation established in Article 4.2 of the AoA.

(2) Indonesia's restrictions on the use of imported chicken meat and chicken products is a quantitative import restriction or similar border measure inconsistent with Article 4.2 of the Agreement on Agriculture

224. As mentioned in Section VI.B.3.b, Articles 31(1), 31(2) and 31(3) of MoA Regulation 58/2015 limit the possibility of "intended uses" for the imported products. This measure imposes a severe limitation on the volume of these products that may be imported, critically undermining market access conditions for chicken meat and chicken products as they limit the commercial opportunities for exporters of the products at issue to the Indonesian markets, mainly with respect to the "wet markets", which correspond to around 70% of the Indonesian chicken meat and chicken products.

225. This restriction amounts to a "quantitative import restriction" or a "similar border measure other than ordinary customs duties" and is inconsistent with Article 4.2 of the Agreement on Agriculture, as it contributes "to restrict the volume of imports"²²² by limiting the quantities of product that can be imported, which is in contradiction of the very purposes of Article 4.2 of improving market access to agriculture products.²²³

226. In the case Indonesia's restriction on the use of imported chicken meat and chicken products is not found to be a "quantitative import restriction", it still constitutes a "similar border measure other than ordinary customs duties" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture, as it has "characteristics in

²¹⁸ Appellate Body Report, *Chile – Price Band System*, para. 227.

²¹⁹ Appellate Body Report, *Chile – Price Band System*, para. 163.

²²⁰ Appellate Body Report, *Chile – Price Band System*, para. 227.

²²¹ Appellate Body Report, *Chile – Price Band System* (21.5), para. 215.

²²² Panel Report, *Turkey – Rice*, para. 7.120.

²²³ Appellate Body Report, *Chile – Price Band System*, paras. 214-215.

common with a quantitative import restriction"²²⁴ and limits the opportunities for importation of chicken meat and chicken products.

227. Brazil incorporates, *mutatis mutandis*, into this Section the legal arguments put forward in Section IV.B.1.2.(b)(ii)(2), related to the violation of Article XI:1, which clearly demonstrates that this measure “restricts the volume of imports”,²²⁵ “jeopardize market access for agricultural products”²²⁶, and, thus, is inconsistent with the agricultural market access obligation established in Article 4.2 of the AoA.

**(3) Indonesia's import licensing procedures for chicken meat
and chicken products are inconsistent with Article 4.2 of the
Agreement of Agriculture**

228. As explained in Section IV.A.3.3, Brazil has identified several elements of the Indonesian import licensing regime which constitute restrictions on the importation of chicken meat and chicken products, particularly (i) the prohibition of applying for licenses to the importation of chicken cuts and other prepared or preserved chicken meat due to their exclusion of the "positive lists" of the products allowed to be imported; (ii) the requirements related to the intended uses of imported chicken meat and chicken products; (iii) the limited (and short) application windows and validity periods of the MoA Import Recommendation and MoT Import Approvals; (iv) the fixed license terms; and (v) discretionary import licensing requirements.

229. Brazil has already demonstrated that those restrictions are a violation of Article XI:1 of the GATT 1994. As they apply to products covered by the Agreement on Agriculture, Brazil submits, based on the jurisprudence of the Panel in *India – Quantitative Restrictions* that they also violate Article 4.2 of AoA.

230. Those restrictions clearly operate as a quantitative restriction in the sense of footnote 1 of Article 4.2 of the Agreement of Agriculture, as they represent a severe restriction on the volume of Brazilian exports²²⁷, in blatant contradiction to the main objective of the Agreement of Agriculture, as they do not fulfill the function to "enhance market access for agricultural products".²²⁸

231. Brazil incorporates, *mutatis mutandis*, into this Section the legal arguments put forward in Section IV.B.1.2.(b)(ii)(3), related to the violation of Article XI:1, which clearly demonstrates that this measure “restricts the volume of imports”,²²⁹ “jeopardize market access for agricultural products”²³⁰, and, thus, is inconsistent with the agricultural market access obligation established in Article 4.2 of the AoA.

232. In the case Indonesia's license regime is not found to constitute a “quantitative import restriction”, they still constitute a “similar border measure other than ordinary

²²⁴ Appellate Body Report, *Chile – Price Band System*, para. 163.

²²⁵ Appellate Body Report, *Chile – Price Band System*, para. 227.

²²⁶ Appellate Body Report, *Chile – Price Band System (21.5)*, para. 215.

²²⁷ Appellate Body Report, *Chile – Price Band System*, para. 227.

²²⁸ Panel Report, *Turkey – Rice*, para. 7.136.

²²⁹ Appellate Body Report, *Chile – Price Band System*, para. 227.

²³⁰ Appellate Body Report, *Chile – Price Band System (21.5)*, para. 215.

customs duties” within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture, as they are similar to a quantitative import restriction and therefore a limitation to the opportunities for importation of chicken meat and chicken products in a manner inconsistent with Article 4.2 of the AoA.

233. Indonesia’s licensing procedures also fall squarely into the category of "discretionary import licensing" that, according to footnote 1 of Article 4.2 of the Agreement of Agriculture should not be "maintained or resorted to" by WTO Members. The Panel in *Turkey – Rice* understood that "discretionary import licensing" under this provision encompasses "the discretionary use by authorities in an importing country of the concession, or refusal to grant, a particular document which is necessary for the importation of a good, as an instrument to administer trade".²³¹ Thus, if there is a level of discretion by the importing authorities for the concession or refusal of a document required for importation, then this measure is under the scope of footnote 1 of Article 4.2.

234. As Brazil has not been able to export chicken meat and chicken products to Indonesia since 2009, there is little factual evidence on how this system operates in practice. However, some requirements of the Indonesian import licensing regime, by their very design, encompass "the discretionary use by authorities of the concession or refusal to grant the documents required” for the importation of animal products, such as the requirements related to: (i) a letter of recommendation from provincial livestock services office; and (ii) supervision on the compliance of veterinary public health requirements, both established by MoA Regulation 58/2015.²³²

235. As previously mentioned, in order to obtain a MoA Import Recommendation, importers of chicken meat and chicken products must submit a letter of recommendation from provincial livestock services office, which amounts to a certification that the importer has been supervised by the competent authoritative veterinarian.²³³ As the criteria adopted for the preparation of this report are not fixed, this requirement naturally encompasses a great level of discretion by the Indonesian authorities to prepare this report, as well as for the provincial livestock services office to grant the letter of recommendation.

236. It is noteworthy as well that the issuance of a MoA Recommendation "for meat and processed meat products" also requires that the veterinary public health supervisor issue a report to the Director General and to the Head of Provincial Livestock Services Office regarding the compliance of sanitary requirement. By examining the Indonesian legislation, particularly Article 37(2) of MoA Regulation 58/2015, it is not clear how and under which parameters the veterinary supervisor will assess the compliance of veterinary public health requirements nor whether both the Director General (to grant or deny the MoA Import Recommendation) and the Head of the Provincial Livestock Services Office (to issue the above-mentioned Letter of Recommendation) are bound by the conclusions adopted in this report.

²³¹ *Idem.*

²³² MoA Regulation 58/2015, Articles 23(1)(i), 33 and 37. (Exhibit BRA-01).

²³³ MoA Regulation 58/2015, Articles 37(2), 33(2) and 33(1). (Exhibit BRA-01).

237. Hence, Indonesia's import licensing regime can be considered a "discretionary import licensing" in the sense of the footnote 1 of Article 4.2 of the AoA. If the Panel does not consider these requirements as a "discretionary import licensing" under footnote 1, they may also be considered a "similar border measure other than ordinary customs duties", as they are similar to discretionary import licensing within the meaning of footnote 1 of Article 4.2 of the AoA.

238. For the reasons explained above, Brazil submits that Indonesia's import licensing regime as a whole is inconsistent with Article 4.2 of the Agreement on Agriculture.

(4) Indonesia's transportation requirements for the importation of chicken meat and chicken products are a quantitative import restriction or similar border measure inconsistent with Article 4.2 of the Agreement on Agriculture

239. As described in Section IV.B.3.e, Article 20(a) of MoA Regulation 58/2015 requires that the transportation of carcass, meat and/or processed products shall be "conducted directly from the country of origin to the port of discharge within the territory of Indonesia". This requirement is very restrictive for countries that are very distant from Indonesia.

240. As already explained, Brazilian exports to Indonesia would take at least 100 days²³⁴ and would necessarily pass through third country ports, which functions as port hubs from which exports may be shipped to other countries with all sanitary and security controls. There would be no sanitary or technical risks involved in a non-direct transportation route to Indonesia.

241. This measure clearly operates as a "quantitative import restriction" within the meaning of Article 4.2 as the costs and logistics involved in this direct transportation requirement discourages exports from distant countries, contributing, thus, to limit the quantities of product that can be imported or "to restrict the volume of imports".²³⁵ In the case of Brazil, as already explained in Section IV.B.1.2.(b)(ii)(4), this requirement could not be fulfilled by Brazilian exporters, amounting to a complete ban of imports of Brazilian products in the Indonesian market, which cannot be justified under the Agreement on Agriculture.

242. Brazil incorporates, *mutatis mutandis*, into this Section the legal arguments put forward in Section IV.B.1.2.(b)(ii)(1), related to the violation of Article XI:1, which clearly demonstrates that this measure "restricts the volume of imports",²³⁶ "jeopardize market access for agricultural products"²³⁷, and, thus, is inconsistent with the agricultural market access obligation established in Article 4.2 of the AoA.

²³⁴ Exhibit BRA-44.

²³⁵ Panel Report, *Turkey – Rice*, para. 7.120.

²³⁶ Appellate Body Report, *Chile – Price Band System*, para. 227.

²³⁷ Appellate Body Report, *Chile – Price Band System (21.5)*, para. 215.

243. In the case Indonesia's direct transportation requirement is not found to be a "quantitative import restriction", it still constitutes a "similar border measure other than ordinary customs duties" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture, as it has "characteristics in common with a quantitative import restriction" and limits opportunities for importation of chicken meat and chicken products. Therefore, as "the function of Article 4.2 and footnote 1 is to enhance market access for agricultural products,"²³⁸ the Indonesian direct transportation requirement is inconsistent with the agricultural market access obligation established in Article 4.2 of the Agreement on Agriculture.

(iii) Indonesia's import licensing procedures impose a border restriction inconsistent with the obligations of Indonesia under the Agreement on Import Licensing Procedures

244. In addition of breaching Article XI:1 of the GATT 1994 and Article 4.2 of the AoA, Brazil submits that Indonesia's import licensing regime is also inconsistent with the Agreement on Import Licensing Procedures. In this section, Brazil will demonstrate that procedures for obtaining the MoA Import Recommendation and the MoT Import Approval are within the scope of Article 1.1 of the ILA and that Indonesia's import licensing procedures are non-automatic and inconsistent with Article 3.2 of the ILA.

(1) The procedures for obtaining the MoA Import Recommendation and the MoT Import Approval are within the scope of Article 1.1 of the ILA

245. The Indonesian import licensing procedures are under the scope of Article 1.1 of ILA, as it is composed of "administrative procedures...requiring a submission of an application or other documentation to the relevant administrative body as a prior condition for importation". As described in Section IV.B.1.1(c), the two requirements defined by the Panel in *EC – Bananas III*²³⁹ must be met in order to determine whether the import licensing procedures are within the scope of Article 1.1 of the ILA, as follows: (i) the procedures should require the submission of an application or other documentation to the relevant administrative body; and (ii) the submission of an application or other documentation shall be a prior condition for importation into the customs territory of the importing Member.

246. The Indonesian procedures meet the two criteria. Firstly, as explained in detailed in Section IV.A.3.3, in order to obtain a MoA Import Recommendation and a MoT Import Approval required to perform an import transaction, the importer must, among other steps, submit applications to different administrative bodies.

247. Secondly, the submission of the application and the other required documents for the MoA Import Recommendation and MoT Import Approval are clearly a condition for the importation of the products at issue into Indonesia. Article 4(2) of MoA Regulation 58/2015 establishes that "a business player...in conducting the importation shall be obliged to obtain an import permit from the minister executing governmental

²³⁸ Appellate Body Report, *Chile – Price Band System (21.5)*, para. 215.

²³⁹ Panel Report, *EC – Bananas III*, paras. 7.148-7.149.

affairs in trade sector" (Minister of Trade). In order to obtain such a permit, the importer must previously apply for an Import Recommendation issued by the Ministry of Agriculture. Without these two administrative requirements, no importation can be carried out by the importer. Both applications are, thus, a prior condition for importation within the meaning of Article 1.1 of the ILA.

(2) Indonesia's import licensing regime is a non-automatic procedure inconsistent with Article 3.2 of the ILA

248. Brazil has already established throughout this submission that Indonesia has no grounds in WTO law to restrict, through its import licensing regime, the importation of Brazilian chicken meat and chicken products. But even assuming, *in arguendo*, that the restrictions underlying the procedures were valid, which they are not, Brazil contends that the procedures themselves are in breach of Indonesia's obligations under Article 3.2 of the ILA.

249. As indicated in Section IV.B.1.(c), ILA allows for two types of licensing procedures²⁴⁰: (i) automatic import licensing, in which approvals of the applications are "granted in all cases",²⁴¹ and there is no restriction to apply – and obtain – an import license; and (ii) non-automatic import licensing, defined by exclusion as a regime not falling within the definition of automatic import licensing.²⁴²

250. Accordingly, any licensing procedure that is not granted automatically or is subject to different limitations to apply and obtain a license to import, as in the case of Indonesia, should be considered a non-automatic licensing regime falling under the purview of Article 3.2 of ILA.

251. The specific features of Indonesia's import licensing procedures, such as the limited (and short) application windows for the submission of applications, the "positive list" of products, the "intended use" requirements described at length by Brazil in Section IV.A.3.3, are sufficient to demonstrate that imports recommendations and approvals cannot qualify as an automatic procedure, as they are not "granted in all cases".

252. In this context, and in order to ensure that its licensing regime is consistent with WTO Agreements, Indonesia would have to make sure that the procedures adopted "shall not have trade restrictive effects additional to those caused by the imposition of the restriction". These procedures should also correspond in scope and duration to the measure they are used to implement, and should be "no more administratively burdensome than absolutely necessary to administer the measure", as required by Article 3.2 of the ILA. As already demonstrated, this is not the case. Actually, it is quite the opposite.

253. Firstly, Indonesia's import licensing procedures do have "trade-restrictive or – distortive effects on imports additional to those caused by the imposition of the restriction". Even considering that Indonesia's procedures could be applied to

²⁴⁰ ILA, Article 3.1.

²⁴¹ ILA, Article 2.1.

²⁴² ILA, Article 3.1.

administer legitimate restrictions on imports,²⁴³ by its design, structure and operation the regime imposes restrictions on the importation of Brazilian chicken products and chicken meat far additional than those that would be required to implement the relevant controls and "restrictions" for the purpose of the first sentence of Article 3.2 of ILA.

254. Indeed, as already explained, besides preventing importers from applying for import licenses to products not included in the lists of authorized imports and restricting applications for very limited intended uses, Indonesia's import licensing regime prevents importers from obtaining licenses during most part of the year, due to the limited (and short) application windows established by Indonesia's legislation. Combined with the short validity period of licenses, this particular feature of Indonesia's import licensing regime imposes an unduly additional restriction on trade that severely affects Brazil's export interests.

255. As previously contended, Article 3.2 of the ILA hinders Members from applying non-automatic licensing procedures with additional trade-restrictive – or distortive effects on imports to those caused by the imposition of the restrictions they implement. The above-mentioned restrictions imposed by Indonesia through its licensing procedures are exactly the kind of measures that violate the first sentence of this provision.

256. In line with the conclusions of the Appellate Body in *EC – Poultry*, in order to establish a violation of Article 3.2 of ILA, it is necessary to demonstrate a "causal relationship between the licensing procedures and the trade distortion".²⁴⁴ As it was demonstrated in this submission, the prohibition of the importation of Brazilian chicken meat and chicken products is a "persuasive evidence"²⁴⁵ of the "decline in market share" (actually the complete exclusion of the participation of the Brazilian products from the Indonesian market) in a manner inconsistent with Article 3.2 of the ILA.

257. Secondly, Brazil understands that the declared purposes of the licensing procedures, as established by the relevant Indonesian legislation, do not by themselves correspond to an import control "measure" that could only be implemented and administered through "limited (and short) application windows and validity periods", "positive lists of authorized imports", and "requirements related to the intended uses". Accordingly, as there is no underlying measure that is supposed to be implemented through these specific features of Indonesia's import licensing regime, the procedures do not correspond "in scope and duration" to any "measure" they are supposed to implement as required by the second sentence of Article 3.2.

258. Finally, as already explained, the lack of transparency and predictability of Indonesia's multi-layered import licensing procedures are more administratively

²⁴³According to Article 2 of MoA Regulation 58/2015 the purpose of the procedure is to: (a) protect public health and inner peace, animal health and environmental health; (b) to ensure the compliance of safety, heathy, wholesome and halal requirements whenever required; (c) to guarantee that imported carcass, meat and/or the processed product thereof is free from zoonotic disease and contagious animal disease, chemical harzard, and physical hazard; and (d) to provide smoothness and certainty in the importation of carcass, meat and the processed product. (Exhibit BRA-01).

²⁴⁴ Appellate Body Report, *EC – Poultry*, para. 126.

²⁴⁵ Appellate Body Report, *EC – Poultry*, para. 126.

burdensome than necessary to administer import procedures. Again, even assuming *in arguendo* that the controls were justified, the operation of the procedures is far from being simple, neutral in application and administered in a fair and equitable manner as required by Article 1 and 3.2 of the ILA.

259. On the contrary, as it was clear from the description of the relevant legislation, the only objective to be achieved by the above-mentioned requirements is to protect the domestic chicken market from imports. In several Indonesian Laws and Regulations, as indicated in Section IV.A.2, Indonesia establishes the context for its trade policy with regard to the products at issue. It is clear from this legal framework that Indonesia only allows imports when the domestic production is not deemed sufficient to satisfy the domestic food demand,²⁴⁶ and should always prioritize the domestic food production over food import.²⁴⁷ These principles inform the structure, the design and the operation of Indonesia's import licensing procedures that is applied and administered in a manner inconsistent with its obligations under Article 3.2 of the ILA.

2. Claims related to discriminatory treatment

260. Besides adopting several border restrictions that affects Brazilian exports of the products at issue, Indonesia accords a treatment less favourable to Brazilian chicken meat and chicken products imports than "like" domestic products, through restrictions on the intended uses for imported products and through the implementation of halal labelling requirements, which are inconsistent with Article III:4 of the GATT 1994.

2.1 Relevant legal standard: Article III:4 of the GATT 1994

261. Article III:4 of the GATT 1994, in relevant part, provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

262. This provision enshrines the basic national treatment obligation which states that internal measures must not be applied so as to afford protection to domestic production. Viewed as a cornerstone of the WTO multilateral trading system²⁴⁸, it encompasses the obligation for WTO Members to provide equality of competitive opportunities for both imported and like domestic products²⁴⁹.

263. The Appellate Body in *Korea – Various Measures on Beef* provided a reliable guidance to determine the existence of a violation of Article III:4. It ruled that three elements must be satisfied: (i) the imported and domestic products at issue must be "like products"; (ii) the measure at issue must be a "law, regulation, or requirement affecting

²⁴⁶ Law 18/2009, Article 36(4). (Exhibit BRA-31).

²⁴⁷ Law 18/2012, Article 36(2). (Exhibit BRA-32).

²⁴⁸ Panel Report, *United States – Subsidies on Upland Cotton*, para. 7.1073.

²⁴⁹ Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 126; Appellate Body Report, *EC – Seal Products*, para. 5.82.

their internal sale, offering for sale, purchase, transportation, distribution or use"; and (iii) the imported products are accorded "less favourable" treatment than that accorded to like domestic products.²⁵⁰

264. In what regards the first element, there is a reiterated understanding in WTO jurisprudence that if origin is the only factor distinguishing between imported and domestic products, there is no need to conduct a full likeness analysis using the traditional criteria set out in the GATT panel report in *Border Tax Measures*.²⁵¹ In these cases, in which the foreign origin of the imported product is the sole distinctive element, the imported and domestic products are considered to be "like" for purposes of Article III:4, and the Panel need not go over the details of the competitive relationship between them.

265. As for the second element, it is necessary to assess whether it falls within the scope of Article III:4. Initially, it must be established whether the measure at issue could be viewed as a "law, regulation or requirement". In general, panels have agreed on the definition of "regulation" as any provision which is mandatory and applies across the board.²⁵² However, the core of the analysis of a violation of the obligation of Article III:4 will rely only on the laws, regulations and requirements which "affect" the specific transactions, activities and uses mentioned in the provision.²⁵³ Thus, the word "affecting" is central to the analysis because it makes the link between the type of government actions (laws, regulations and requirements) and the transactions, activities and uses (internal sale, offering for sale, purchase, transportation, distribution or use) relating to the like imported and domestic products in the marketplace.²⁵⁴

266. The Appellate Body has ruled that the word "affecting" has a broad scope of application and interpreted it as a measure which has "an effect on" something.²⁵⁵ This understanding indicates that any law, regulation and requirement at issue that has "an effect on" the internal sale, offering for sale, purchase, transportation, distribution or use of the like products falls within the scope of Article III:4. Additionally, the word "affecting" has also been interpreted to cover not only measures which *directly* regulate the specific transactions, activities and uses listed in Article III:4 but also any laws or regulations which might adversely modify the conditions of competition or create incentives or disincentives between the domestic and imported products.²⁵⁶

267. With regard to the third element, the Appellate Body decided that to determine whether or not imported products are treated "less favourably" than like domestic

²⁵⁰ Appellate Body Report, *Korea - Various Measures on Beef*, para. 133.

²⁵¹ Panel Report, *Argentina - Import Measures*, para. 6.274. (citing: Panel Reports, *India - Autos*, para. 7.174; *Canada - Wheat Exports and Grain Imports*, para. 6.164; *Canada - Autos*, para. 10.74; *Turkey - Rice*, paras. 7.214-7.216; *China - Auto Parts*, paras. 7.216-7.217 and 7.235; *China - Publications and Audiovisual Products*, paras. 7.1444-7.1447; and *Thailand - Cigarettes (Philippines)*, paras. 7.661-7.662).

²⁵² Panel Report, *China - Publications Audiovisual Products*, para. 7.1513. Panel Reports, *China - Auto Parts*, para. 7.239 (citing: GATT Panel Report on *Canada - FIRA*, para. 5.5; Panel Report, *India - Autos*, para. 7.181).

²⁵³ Appellate Body Report, *US - FSC (Article 21.5 - EC)*, para. 208.

²⁵⁴ *Idem*.

²⁵⁵ Appellate Body Report, *US - FSC (Article 21.5 - EC)*, para. 209-210.

²⁵⁶ Panel Reports, *China - Auto Parts*, para. 7.251; Panel Report, *China - Publications and Audiovisual Products*, para. 7.1450.

products, it would be necessary to assess whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.²⁵⁷ The purpose of Article III:4 is to ensure that imported products receive equivalent opportunities as those granted to like domestic products. Thus, any less favourable treatment derived from internal measures – law, regulation and requirement – affecting the "internal sale, offering for sale, purchase, transportation, distribution or use" might fall under the purview of that provision.

2.2 Legal Analysis

(a) The restrictions on the intended uses accord less favourable treatment to Brazilian chicken meat and chicken products imports than to "like" domestic products, in violation of Article III:4 of the GATT 1994

(i) Domestic and imported chicken meat and chicken products are "like" products

268. As indicated above, it is settled in WTO jurisprudence that if the foreign origin of the imported product is the sole distinctive element in relation to the domestic product, they are to be considered "like" for purposes of Article III:4.²⁵⁸ In this case, the Panel would not need to go over the details of the competitive relationship between them using the traditional criteria set out in the GATT panel report on *Border Tax Measures*.

269. As previously detailed, MoA Regulation 58/2015 imposes restrictions on the possible uses of imported chicken meat and chicken products, limiting the use "for hotels, restaurants, caterings, industries, and other particular purposes". As a result, chicken meat and chicken products that can be imported into Indonesia cannot be used distributed or sold in modern and the traditional "wet markets"

270. Indonesia's legislation makes no such restrictions on the uses for domestic chicken meat and chicken products, solely for products of foreign origin. Domestic like products enjoy open and free access to all distribution and retail channels available in the marketplace, including those listed in MoA Regulation 58/2015 as well as the "wet markets".

271. Considering that the origin of products is the only distinguishing element for the imposition of the restrictions on the intended uses contained in MoA Regulation 58/2015, Brazil submits that imported and domestic chicken meat and chicken products are "like" for the purposes of Article III:4 of the GATT 1994. In this case, as stated

²⁵⁷ Appellate Body Report, *Korea - Various Measures on Beef*, para. 137; Appellate Body Report, *US – Tuna II (Mexico)*, para. 214.

²⁵⁸ For example, see Panel Report, *Argentina - Import Measures*, para. 6.274. (citing: Panel Reports, *India - Autos*, para. 7.174; *Canada - Wheat Exports and Grain Imports*, para. 6.164; *Canada - Autos*, para. 10.74; *Turkey - Rice*, paras. 7.214-7.216; *China - Auto Parts*, paras. 7.216-7.217 and 7.235; *China - Publications and Audiovisual Products*, paras. 7.1444-7.1447; and *Thailand - Cigarettes (Philippines)*, paras. 7.661-7.662).

above, the Panel would not need to analyze the details of the competitive relationship between them.

272. However, should the Panel consider it necessary to use the traditional criteria for establishing the likeness of the products, Brazil will carry out its analysis based on the guidance provided by the Appellate Body in *EC – Asbestos*. In this case, the Appellate Body decided that

[T]he four [traditional] criteria comprise four categories of "characteristics" that the products might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.²⁵⁹

273. Initially, it is important to highlight that chicken meat and chicken products are normally homogeneous products, with none or little differentiation on products from different sources. Physically, as required by the first category above, Brazilian and Indonesian chicken meat and chicken products have the same or, at least, very similar physical properties. With respect to the second category, the end-uses are also the same, or, at least, very similar as chicken meat and chicken products – no matter if produced in Brazil or Indonesia – are directed for processing by the food industry and/or, ultimately, food consumption. Regarding the third element, Brazil considers that Indonesian consumers' tastes and habits related to chicken meat and chicken products would be adequately met by the Brazilian products. The fact that Brazil is the one of world's largest exporter of these products, including to most Muslim countries, is reliable evidence that Indonesian consumers, like others in the Muslim world that consume products from Brazil, perceive Brazilian exports as an alternative which satisfies their demand for chicken meat and chicken products in Indonesia. Finally, the last category is related to the tariff classification. In this case, both imported and domestic products are subject to the same HS codes of the *Gallus domesticus* species.²⁶⁰ Therefore, it is clear that Brazilian chicken meat and chicken products are like products entitled to the same treatment in terms of the uses granted in Indonesia to chicken meat and chicken products produced domestically.

(ii) The restrictions are a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, distribution or use

274. To determine whether the measure at issue falls within the scope of Article III:4, it is also necessary to establish whether it corresponds to "laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use". As explained above, "regulation", as a general category of

²⁵⁹ Appellate Body Report, *EC – Asbestos*, para. 101.

²⁶⁰ The products concerned in the present dispute are referred by the following HS codes of the *Gallus Domesticus* species: 0207.11 (whole chicken, not cut into parts, fresh or chilled); 0207.12 (whole chicken, not cut into parts, frozen); 0207.13 (chicken cuts and offal, fresh or chilled); 0207.14 (chicken cuts and offal, frozen) and; 1602.32 (chicken meat, other leftover meat and blood that has been processed or preserved).

governmental action, consists of any provision which is mandatory and applies across the board. In the current case, MoA Regulation 58/2015 is a legislation issued by Indonesia's Ministry of Agriculture, which is mandatory and applies across the board to all importers of chicken meat and chicken products. A brief analysis of the relevant legal text suffices to lead to the conclusion that MoA Regulation 58/2015, as a legal statute, squarely fits within the definition of "laws, regulations and requirements" for the purposes of Article III:4.

275. Therefore, the main remaining issue is to determine whether the restrictions on the intended uses "affect" the internal sale, offering for sale, purchase, transportation, distribution or use of imported products. In Brazil's view, there is no doubt that these restrictions have "an effect on" the internal sale, offering for sale, distribution and use of the Brazilian chicken meat and chicken products in Indonesia and adversely modify the conditions of competition in the Indonesian marketplace in detriment of imported products, favouring like domestic products.

276. Firstly, it affects the uses available for the imported products since it limits them to those listed in MoA Regulation 58/2015 ("for hotels, restaurant, catering, industries and other special needs"), that represent a small proportion of the Indonesia market. Other commercial establishment or end user than those previously referred would not be allowed to use Brazilian chicken meat and chicken products, and, as already indicated above, any deviation could result in harsh sanctions that may result in the total exclusion of the importer in future transactions involving Brazilian products.

277. Secondly, it affects the internal sale and offering for sale of Brazilian chicken meat and chicken products. The limitations imposed by MoA Regulation 58/2015 severely restrict the size of the Indonesian market available for imported products. These restrictions impede direct access to consumers for the Brazilian products through relevant distribution and retail channels, as the "wet markets", which concentrates the majority of sale transactions involving food in Indonesia. Thus, Brazilian products can neither be offered for sale nor sold for consumers in the main relevant distribution channels, adversely pending the balance of commercial opportunities for like domestic products. These restrictions virtually create an exclusive market for domestically produced chicken meat and chicken products, insulating local producers and suppliers from any form of foreign competition.

(iii) The restrictions accord less favourable treatment to imported products than "like" domestic products

278. The "less favourable treatment" has been extensively interpreted by GATT and WTO panels and the Appellate Body. In general, it has been decided that the term refers to the "alteration of the competitive opportunities in the market of the regulating Member to the detriment of imported products vis-à-vis domestic like products".²⁶¹ Or, in other words, a less favourable treatment occurs when the measure at issue modifies

²⁶¹ Appellate Body Report, *US – Clove Cigarettes*, para. 176.

the conditions of competition and provides for like domestic products a *competitive advantage* in the market over like imported products.²⁶²

279. Brazil considers that the findings and rulings in *Korea – Various Measures on Beef* provide important guidance for the current dispute. In that case, the Appellate Body confirmed the Panel's finding that the dual retail system for imported and domestic beef was inconsistent with the requirements of Article III:4 because it modified the conditions of competition in the Korean food market in detriment of imported products. The creation of a dual system, which required retailers to choose between the sale of imported or of domestic beef, resulted in the sudden cutting off of access to normal distribution outlets, virtually excluding imported beef from the retail distribution channels through which domestic beef had normal and uninterrupted access to Korean consumers.²⁶³ More importantly, the main consequence of these restrictions, according to the Appellate Body, was "the imposition of a drastic reduction of commercial opportunity to reach, and hence to generate sales to, the same consumers served by traditional retail channels for domestic beef".²⁶⁴

280. Although related to different products, the findings in *Korea – Various Measures on Beef* is illustrative of the adverse impact on the conditions of competition caused by restrictions on the sale, distribution and use of imported products vis-à-vis the treatment granted for like domestic products.

281. Brazil considers that the "less favourable treatment" under the present dispute is even more serious than that in *Korea – Various Measures on Beef*. Due to the restrictions imposed by MoA Regulation 58/2015, even if imports from Brazil were allowed to enter into Indonesia, they could not reach the most important distribution channels in that country, where a great deal of food purchase occurs. Hence, the huge majority of consumers of chicken meat and chicken products in Indonesia would not have access to Brazilian products, what would severely curtail the commercial opportunities for Brazilian exports. These restrictions, as previously explained, do not apply to like domestic products, which have open and free access to all types of consumers, households and distribution retail channels, especially the "wet markets" and, as such, enjoys an immense competitive advantage in relation to imported products.

282. Thus, Brazil understands that different treatment established by MoA Regulation 58/2015 modifies the competitive conditions in favour of domestic chicken meat and chicken products and, as indicated in *Korea – Various Measures on Beef*, drastically reduces "the commercial opportunity [for imported products] to reach, and hence to generate sales to, the same consumers".²⁶⁵

283. Consequently, Indonesia's restrictions on the intended uses, as established by MoA Regulation 58/2015, is inconsistent with Article III:4 of the GATT 1994.

²⁶² Appellate Body Report, *Korea – Various Measures on Beef*, para. 135; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 93.

²⁶³ Appellate Body Report, *Korea – Beef*, para. 145.

²⁶⁴ *Ibid.* para. 145.

²⁶⁵ Appellate Body Report, *Korea – Beef*, para. 145.

(b) The implementation of halal labelling requirements accords less favourable treatment to Brazilian chicken meat and chicken products imports than to "like" domestic products, in violation of Article III:4 of the GATT 1994

284. In this section, Brazil will also refer to the framework set out in *Korea – Various Measures on Beef*²⁶⁶ to determine that Indonesia's implementation of halal labelling requirements for Brazilian chicken meat and chicken products violates the obligation under Article III:4 of the GATT 1994.

(i) Domestic and imported chicken meat and chicken products are "like" products

285. Brazil has already demonstrated in Section IV.B.2.2(a)(i) that, for the purposes of Article III:4, Brazilian and domestic chicken meat and chicken products are to be considered "like" because origin is the only distinguishing feature between the products. As mentioned, this standard is in line with the jurisprudence of different Panels and the Appellate Body.

(ii) The measure at issue is a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, distribution or use

286. MoA Regulation 58/2015 requires that imported chicken meat and chicken products must comply with the halal labelling requirements²⁶⁷, as provided by Law 33/2014. Brazil demonstrated in Section IV.B.2.2(a)(ii) that MoA Regulation 58/2015 is a "law, regulation or requirement" within the meaning of Article III:4. The same reasoning also applies here. The remaining issue is to determine whether this requirement, currently demanded exclusively of imported products, "affect" their internal sale, offering for sale, purchase, transportation, distribution or use

287. As already mentioned, Law 33/2014 provides for a five-year grace period for the full compliance with this requirement. Even though this specific provision is applicable for both imported and domestic halal products, only Indonesian producers can in practice benefit from it. For imported products, MoA Regulation 58/2015 requires that chicken meat and chicken products comply with the labeling requirements before importing is authorized.²⁶⁸ Domestic products, however, are not subject to these strict control procedures before offering for sale in the marketplace.

288. Although Brazil does not take issue with Indonesia's halal labelling requirements, Brazil cannot accept Indonesia's discriminatory treatment towards imported products. Brazil has no doubts that the imposition of these requirements exclusively on imported products has "an effect on" the internal sale, offering for sale, and distribution of Brazilian chicken meat and chicken in Indonesia and adversely modify the conditions of competition in the Indonesian marketplace in detriment of imported products.

²⁶⁶ Appellate Body Report, *Korea - Various Measures on Beef*, para. 133.

²⁶⁷ MoA Regulation 58/2015, Articles 7 and 18. (Exhibit BRA-01).

²⁶⁸ MoA Regulation, Articles 7 and 19. (Exhibit BRA-01).

289. Not requiring that domestic like products comply with halal labelling tilts the balance in favour of local suppliers, since compliance with this specific requirement is an additional mandatory requirement imposed exclusively on imported products. In the current situation, local suppliers, as those in "wet markets", which represent around 70% of the Indonesian consumer market, can offer for sale, sell or distribute chicken meat and chicken products without the halal label, while this option is not available for imported products. In light of this, the implementation of this measure negatively affects²⁶⁹ the competitive opportunities for Brazilian products, as selling imported chicken meat and chicken products without halal label is not an alternative.

(iii) The measure at issue accords less favourable treatment to imported products than "like" domestic products

290. A less favourable treatment, as already discussed in Section IV.B.2.2(a)(iii), occurs when the measure at issue modifies the conditions of competition and provides for like domestic products a *competitive advantage* in the market over like imported products.²⁷⁰

291. Brazil demonstrated in the previous subsection that imported products do not have the same market opportunities available for domestic like products, which can be offered for sale, sold and distributed in Indonesia without the halal label.

292. Actually, as demonstrated in Exhibit BRA-02, Indonesian authorities do not conduct consistent surveillance concerning the implementation of halal labelling by domestic suppliers as carried out on imported products. It is very common for Indonesian consumers to find locally produced chicken meat and chicken products for sale without the halal label. This lack of surveillance by Indonesian authorities is more evident in "wet markets",²⁷¹ although it also occurs in other retail distribution channels such as modern markets.

293. The lack of implementation of halal labelling necessarily offers a competitive advantage for domestic like products since, even if they are not required to attach the halal label to reach Indonesian consumers. This is not the case for imported products. Without a halal label, Brazilian chicken meat and chicken products would not be able access the Indonesian marketplace, even if the production process in Brazil strictly complies with the halal requirements imposed by Indonesia.

3. Claims related to sanitary barriers

294. In this Section Brazil will demonstrate that the undue delay of Indonesia to undertake and complete the procedures to check and ensure the fulfillment of sanitary procedures imposes restrictions on Brazilian chicken meat and chicken products

²⁶⁹ Panel Reports, *China – Auto Parts*, para. 7.251; Panel Report, *China – Publications and Audiovisual Products*, para. 7.1450.

²⁷⁰ Appellate Body Report, *Korea – Various Measures on Beef*, para. 135; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 93.

²⁷¹ See statements and pictures in Annex 6 of the Detailed Study on the Indonesian Chicken Market (Exhibit BRA-02), which clearly demonstrate that non-halal labelled products have open and free access to different retail distribution channels in Indonesia.

inconsistent with the obligations under the Agreement on the Application of Sanitary and Phytosanitary.

3.1 Relevant legal standard: *Article 8 and Annex C(1)(a)*

295. Taking into account the importance of "control, inspection and approval procedures" in the implementation of sanitary and phytosanitary measures, the SPS Agreement deals with the operation of such procedures in Article 8, as follows:

Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement. (emphasis added)

296. By force of Article 8, WTO members are compelled to observe all the provisions of Annex C, and both dispositions are intimately intertwined. The Appellate Body has already stated that Annex C gives shape and content to Article 8, and that a violation of the rules of Annex C necessarily entails a violation of Article 8.²⁷²

297. The most relevant provision of Annex C in the present dispute is Annex C(1)(a), which reads as follows:

"1. Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:
(a) such procedures are undertaken and completed without undue delay ... (emphasis added)

298. The relevant aspects in the interpretation of Annex C (1)(a) to be taken into account in the present dispute are (i) the identification of which are the "procedures designed to check and ensure" a sanitary measure; and (ii) the understanding that the term undue delay does not refer exclusively to a "delay", but also to an absence of formal response from the authorities when certain sanitary procedure was initiated before them.

299. Concerning the first aspect, Brazil contends that the "procedures" is defined in the SPS Agreement in a manner as broad as possible. This interpretation has been upheld in several WTO cases.²⁷³ The main feature to be established when ascertaining whether a certain procedure falls under the purview of Article 8 and Annex C(1)(a) is to determine that it "is aimed at 'checking and ensuring the fulfilment of sanitary or phytosanitary measures', and is undertaken in the context of 'control, inspection, or approval'".²⁷⁴ While Article 8 and Annex C list certain types of procedures as expressly falling within their ambit, the terms "including" in Article 8, and "include, inter alia", in footnote 7 to Annex C, clarify that the lists presented are merely illustrative.

²⁷² Appellate Body Report, *Australia – Apples*, para. 434.

²⁷³ Panel Report, *US – Poultry (China)*, para. 7.363; Appellate Body Report *Australia – Apples*, para. 438; Panel Report, *US – Animals*, para. 7.68

²⁷⁴ Panel Report, *US – Poultry (China)*, para. 7.363.

300. Thus, both Article 8 and Annex C impose obligations on Members with respect to "any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures".

301. Previous WTO jurisprudence, in analyzing the term "procedures" as used in Annex A(1), upheld the understanding that "procedure" has to be interpreted in a wide sense. The panel report in *US-Animals*, stated that "the reference to 'procedures' in the second sentence of Annex A(1) is broad enough to encompass both procedures of general application as well as the specific implementation of a procedure in a particular instance."²⁷⁵

302. On the basis of these elements, the term "approval procedures" in both Article 8 and Annex C can be understood as encompassing "procedures applied to check and ensure the fulfilment of one or more substantive SPS requirements the satisfaction of which is a prerequisite for the approval to place a product on the market"²⁷⁶. The negotiation of an "International Veterinary Certificate" clearly constitutes a pre-marketing approval requirement, as corroborated by the relevant Articles of the Indonesian legislation indicated in the factual background (Arts 35 and 36 of MoA Regulation 58/2015).

303. Concerning the second aspect, Brazil submits that the term "undue delay" does not only refer to a "delay" *stricto sensu*, but also refers to occasions where there is no response at all from a Member's competent authority. This interpretation was clarified by the Panel in *EC – Approval and Marketing of Biotech Products*, which found that the ordinary meaning of the term "delay" is "(a period of) time lost by inaction or inability to proceed".²⁷⁷ (emphasis added)

304. The requirement in Annex C(1)(b) of the SPS also provides context for this interpretation, particularly regarding the necessity for the competent authorities to "promptly examine the completeness of the documentation" and to "inform the applicant in a precise and complete manner of all deficiencies".

305. In *Australia – Apples*, after analyzing the ordinary meaning of the words "undue" and "delay", the Appellate Body decided that Annex C(1)(a) requires Members to ensure that SPS procedures are undertaken and completed with "appropriate dispatch", which, in other words, would represent that "they do not involve periods of time that are unwarranted, or otherwise excessive, disproportionate or unjustifiable".²⁷⁸ Moreover, in *EC–Biotech*, the Panel interpreted that "without undue delay" could adequately mean "without an unjustified loss of time". Both decisions indicate that, although possible in practice, this delay must be reasonable and cannot be unjustified and disproportionate. In the present case, the absence of response naturally represents an unjustified and disproportioned delay in the sense of Article C(1)(a).

²⁷⁵ *US – Animals*, para. 7.40. In this case, the Panel mentioned specifically that it was reiterating an interpretation made previously, in the case *EC – Biotech*, which confirms Brazil's position in the present case.

²⁷⁶ Panel Report, *EC - Approval and Marketing of Biotech Products*, para. 7.424.

²⁷⁷ Panel Report, *EC-Biotech*, para 4.167

²⁷⁸ Appellate Body Report, *Australia – Apples*, para. 437.

306. Brazil considers the conclusions of the Panel in *EC-Biotech* to be very enlightening for the interpretation of the term "undue delay" in Annex C(1)(a). It clearly stated that "[a]lthough Members are in principle allowed to take the time that is reasonably needed to determine with adequate confidence whether their relevant SPS requirements are fulfilled, they are also required to proceed with their SPS approval procedures as promptly as possible. Therefore, a Member is not allowed to freely decide when it will finish the undertaking and completion of the approval procedures. In cases in which there is a delay, the Member should ensure that it is not excessive or unwarranted and its causes are rightfully justified".

3.2 Legal Analysis: The undue delay of Indonesia to negotiate an "International Veterinary Certificate" with Brazil violates Article 8 and Annex C(1)(a)

(a) The lack of response of the Indonesian authorities constitute an undue delay

307. Brazil has clearly demonstrated that (i) the negotiation of the "International Veterinary Certificate" for the importation of chicken meat and chicken products into the Indonesian market is a "procedure designed to check and ensure the fulfillment of sanitary requirements" (more specifically, several requirements); and that (ii) the term "undue delay" refers not only to a delay in the execution of a formality, but also to the lack of response of a competent authority to a sanitary procedure initiated before it.

308. As mentioned above, the rule in Annex C(1)(a) determines that the competent sanitary authority must take the necessary steps to ensure that a sanitary procedure initiated before it is concluded. By not answering to the Brazilian proposal of International Veterinary Certificate for the exportation of chicken meat and chicken products, the Indonesian authorities did not fulfill this obligation and, thus, violated Annex C(1)(a) of the SPS Agreement.

309. Even if the proposal was inaccurate or did not contemplate all the necessary elements required by the Indonesian legislation, Indonesia should have given a proper response to the Brazilian Government, in order to allow for the corrections and additions deemed to be necessary.

310. Brazil is aware that there is no defined deadline in Annex C(1)(a) and that the assessment of "undue delay" should be made on a case-by-case basis. In the present dispute, however, the complete lack of response after seven years of the first proposal, is a clear evidence that Indonesian authorities have unjustifiably delayed the procedures to check and ensure the fulfillment of the sanitary requirements that would allow for the exportation of Brazilian chicken meat and chicken products, in violation of Annex C(1)(a) of the SPS Agreement.

(b) A violation of Annex C(1)(a) necessarily entails a breach of Article 8

311. As already demonstrated, Annex C stems logically from the provision set forth in Article 8 of the SPS Agreement, and defines its shape, content and material scope. As the two provisions are directly intertwined, a breach of Annex C(1)(a) necessarily

entails a violation of Article 8. Thus, the Panel should declare that Indonesia has also violated the rule contained in Article 8.

312. To uphold this interpretation, the Appellate Body has already established in *Australia – Apples* that Annex C of the SPS Agreement gives meaning and content to Article 8²⁷⁹, and a violation to comply with the provisions of Annex C would logically entail a violation of Article 8. Both provisions are violated if a Member does not undertake and complete a SPS approval procedure without undue delay.

313. Once again, Brazil would like to reaffirm that it does not dispute the right of a WTO Member to adopt SPS measures for the protection of human, animal or plant life, based on the level of risk protection it deems appropriate. It is clear, however, that any sanitary measure needs to comply with the SPS Agreement.

314. In order to fulfill the obligations assumed under this Agreement, a Member has to ensure that every sanitary measure is based on scientific principles and is not maintained without sufficient scientific evidence. In addition, the Agreement makes it clear that SPS measures shall be applied only to the extent necessary to protect human, animal or plant life or health so as to avoid that its application results in discriminatory or disguised restriction to trade. As Indonesia has never presented any explanation or scientific justification based on a proper risk assessment for the seven years delay to approve the Brazilian Veterinary Health Certificates, Brazil can only assume that Indonesia has never undertaken a risk analysis to determine whether the Brazilian chicken meat and chicken products meet Indonesia's sanitary standards.

315. As already mentioned, in light of Article 2 and Article 5 of the SPS Agreement, particularly Articles 5.2 and 5.6, Indonesia has no justification to prohibit Brazilian exports of chicken meat and chicken products. Brazil fulfills every single sanitary requirement imposed by the Indonesian legislation. Therefore, it rests clear that this deliberate lack of response to the proposed Veterinary Health Certificates for the past seven years is evidently a disguised restriction to trade which violates Article 8 and Annex C(1)(a) of the SPS Agreement.

V. CONCLUSION

316. For the reasons set out in this submission, Brazil respectfully requests that the Panel find that:

- A. Indonesia's general prohibition on the importation of chicken meat and chicken products is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture;
- B. Indonesia's prohibition on the importation of chicken cuts and other prepared or preserved chicken meat is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture;

²⁷⁹ Appellate Body Report, *Australia – Apples*, para. 434.

- C. Indonesia's restrictions on the use of imported chicken meat and chicken products is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture;
- D. Indonesia's restrictive import licensing procedures is inconsistent with Article XI:1 of the GATT 1994, Article 4.2 of the Agreement on Agriculture, and Article 3.2 of the Agreement on Import Licensing Procedures;
- E. Indonesia's restrictive transportation requirements for imported chicken meat and chicken products is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture;
- F. Indonesia's restrictions on the use of imported chicken meat and chicken products is inconsistent with Article III:4 of the GATT 1994;
- G. Indonesia's implementation of halal labelling requirements is inconsistent with Article III:4 of the GATT 1994.
- H. Indonesia's undue delay with regard to the approval of sanitary requirements is inconsistent with Article 8 and Annex C of the SPS Agreement.

ANNEXES

Annex 1

Indonesian sanitary requirements for importation

In its response, Indonesia stated that imports of chicken meat and chicken products were allowed into the country, provided that some requirements were met. For Indonesia, Brazil should fulfill the requirements established by: (i) MoA Regulation No. 139/2014; (ii) Indonesian National Standard 3924/2009; (iii) MoA Decree No. 557/1987; (iv) MoA Decree No. 306/1994; (v) MoA Decree No. 381/2005.280 These requirements are described in the table below.

Requirement	Legal Basis
<p>- Meeting the standard of quality of carcasses and poultry meat as stipulated in the Indonesian National Standard 3924:2009, whose requirements are: (i) Maximum microbiological quality requirements; (ii) The procedure for sampling which follows ISO 2897:2008; (iii) Physical testing (inspection, palpation, and incision); (iv) Carcasses shall be safely packaged, and the packaging shall not result in irregularities and/or damage on the carcass during storage and transport; (v) Labelling shall contain the following information: the product's name, trademark, veterinary control certificate (NKV), the halal label, date of production, name/address of manufacturer, net weight, storage method; (vi) Storage shall be done in the form of fresh, fresh chilled or frozen in the room or place in accordance with the characteristics of the product.</p>	<p>Indonesian National Standard 3924:2009</p>
<p>- Any poultry slaughtered at a poultry slaughterhouse shall meet the following requirements: (i) Originate from an area free from communicable diseases; (ii) <i>Ante mortem</i> check by a competent officer (simple and laboratory checking); (iii) The poultry was slaughtered under supervision and according to the guidance of a competent officer; (iv) The slaughtering was made according to the procedures of Islamic law.</p> <p>- Slaughtering is made according to Islamic Law as follows: (i) Reciting Bismillah; (ii) Cutting throat; (iii) Cutting way of food; (iv) The chicken handling shall prevent contact of the chicken with the floor and shall prevent contamination of the meat;</p> <p>- The transport of chicken directed to inter/regency municipality, Province or export, shall be equipped with the Statement of Health and Origin of Meat issued by the checking officer, as well as the quarantine requirements;</p> <p>- Cold storage shall meet the following requirements: (i) Made of the anti-rusty materials, non-slip floored, cornered meeting inter-curve wall and easy to clean; (ii) Equipped with significant illumination lamp; (iii) For the transport of chicken taking more than 2 hours with the highest temperature of 10 degree Celsius and for the transport of the frozen chicken with the highest temperature of 15 degrees Celsius; (iv) The chicken room must be closed during the travel.</p> <p>- The place of chicken sold on the market shall: (i) Be separated from the place of selling for other commodities; (ii) In terms of building with water-tight floor, sufficient ventilation, bright wall made of white porcelain and</p>	<p>MoA Decree No. 306/1994</p>

²⁸⁰ Exhibit BRA-20.

<p>equipped with significant illumination lamp; (iii) Be always provided with significant safe water for the purpose of cleaning the place of sales and hand-washing; (iv) Be always in clean condition.</p> <p>- Frozen and fresh chicken sold in the market shall: (i) Be stored in the cold storage with the highest temperature of 15 degrees Celsius and be separated from the storage of other commodities as prohibited by the Islamic religion; (ii) In its offering to the buyer, it shall be placed in the cooler and or refrigerated show box with the appropriate temperature and be equipped with the light whose reflection does not change the meat's original color.</p>	
<p>- Every animal-based food business unit shall have a NKV (Veterinary Control Certificate for Animal-based Food Business Unit), whose requirements are: (i) Administrative requirements: ID Card/Establishment Deed, Domicile Certificate, Business Permit, Tax Payer Identity Number, among others; (ii) Technical requirements: maintaining environmental management control programs, adequate hygiene and sanitation, employees or technical officers with expertise in the Veterinary Public Health field, Good Hygienic and Good Farming Practices; (iii) the business unit willing to export must comply with the requirements set forth in SNI RPH 01-6159-1999 and SNI RPU 01-6160-1999.</p>	<p>MoA Decree No. 381/2005</p>
<p>- The requirements for fully dedicated halal practices are: (i) the halal slaughterhouse shall be supervised by a Halal Certification Agency that is approved and in collaboration with Indonesia's Ulemas Council Assessment Institute for Foods, Drugs and Cosmetics; (ii) the halal slaughterhouse shall implement a halal assurance system, as well as having permanent officers responsible for the implementation of slaughtering, cutting, handling, and processing in a halal manner; and (iii) the halal assurance system shall be conducted on all poultry slaughterhouses in the country of origin [<i>which export to Indonesia</i>], proved by a valid halal certificate; (iv) fully dedicated employees, implementing a halal assurance system that maintains permanent officers responsible for the implementation of slaughtering, cutting, handling, and processing in a halal manner.</p>	<p>MoA Regulation No. 139/2014</p>
<p>- The approval of country/business units will only be granted after a desk review and on site review are completed, and a protocol of importation, which includes a Health Certificate, is approved by the competent authorities of both countries.</p> <p>- Business units are obliged to implement a system of food safety assurance according to international standards that are proven by a certificate of food safety assurance system issued by a competent authority approved internationally;</p> <p>- When appointing the exporting country and business units, the Minister shall take into consideration the results of a risk analysis;</p> <p>- Desk and on site review are steps of the risk analysis, which is conducted through the following stages: (i) determining an acceptable level of protection according to the type of disease; (ii) document examination (desk review) and verification (onsite review) of animal health organization system and animal product safety assurance in the country of origin; (iii) document examination (desk review) and compliance audit (onsite review) of the safety assurance system and halal procedures at the business unit.</p>	<p>MoA Regulation No. 139/2014</p>

Annex 2

Brazilian Chicken World Exports

Brazilian Exports of Chicken Meat and Chicken Products (per Region)

Exports – US Dollar Thousand FOB										
Chicken Meat + Chicken Products		World	America	EU - 27	Africa	Asia	Europe Extra - EU	Middle East	Oceania	
	2015		6,630,394	653,440	506,993	355,722	2,183,431	190,793	2,735,707	4,308
			100%	9,86%	7,65%	5,37%	32,93%	2,88%	41,26%	0,06%
	2014		7,368,205	679,680	609,237	476,652	2,529,255	391,836	2,677,075	4,470
			100%	9,22%	8,27%	6,47%	34,33%	5,32%	36,33%	0,06%
	2013		7,455,935	563,656	650,008	525,332	2,379,014	248,189	3,085,702	40,34
			100%	7,56%	8,72%	7,05%	31,91%	3,33%	41,39%	0,05%

Source: Trade Map/ITC

Brazilian Exports of Whole Chicken (per Region)

Export Destinations – US Dollar Thousand FOB										
Whole Chicken		World	America	EU - 27	Africa	Asia	Europe Extra - EU	Middle East	Oceania	
	2015		2,270,664	336,143	4,716	120,794	57,723	4,265	1,744,030	2,993
			100%	14,80%	0,21%	5,32%	2,54%	0,19%	76,81%	0,13%
	2014		2,431,760	460,179	10,255	188,472	67,335	4,977	1,697,682	2,840
			100%	18,92%	0,42%	7,75%	2,77%	0,20%	69,81%	0,12%
	2013		2,804,730	371,629	18,958	199,258	93,796	13,449	2,104,823	2,817
			100%	13,25%	0,68%	7,10%	3,34%	0,48%	75,05%	0,10%

Source: Trade Map/ITC

Brazilian Exports of Chicken Cuts (per Region)

Export Destinations – US Dollar Thousand FOB									
		World	America	EU - 27	Africa	Asia	Europe Extra - EU	Middle East	Oceania
Chicken Cuts	2015	3,959,699	298,256	160,321	239,918	2,106,523	184,990	967,287	2,404
		100%	7,53%	4,05%	6,06%	53,20%	4,67%	24,43%	0,06%
	2014	4,461,150	200,390	200,373	304,419	2,424,572	386,442	942,017	2,937
		100%	4,49%	4,49%	6,82%	54,35%	8,66%	21,12%	0,07%
	2013	4,199,558	161,003	260,678	356,196	2,238,528	232,736	949,565	2,852
		100%	3,83%	6,21%	8,48%	53,26%	5,54%	22,61%	0,07%

Source: Trade Map/ITC