BEFORE THE WORLD TRADE ORGANIZATION

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

(WT/DS484)

Second Written Submission of Brazil

Geneva, 02 September 2016

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US – Section 337	Panel Report, *United States - Section 337 of the Tariff Act of 1930*, adopted 7 November 1989, (L/6439 - 36S/345).

TABLE OF ABBREVIATIONS

Abbreviation	Full Form
AoA	Agreement on Agriculture
CDIAL	Islamic Dissemination Centre for Latin America
DJAI	Advance Sworn Import Declaration (Declaración Jurada Anticipada de Importación)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FAMBRAS	Federation of Muslims Associations in Brazil
GATT 1994	General Agreement on Tariffs and Trade 1994
HS	Harmonized System
ILA	Agreement on Import Licensing Procedures
MoA Regulation	Regulation of the Ministry of Agriculture
MoT Regulation	Regulation of the Ministry of Trade
OECD	Organization for Economic Co-Operation and Development
OIE	World Organization for Animal Health
OIE Code	The Terrestrial Animal Health Code of the OIE
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
SPS Committee	Committee on Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
WTO	World Trade Organization
WHO	World Health Organization

LIST OF EXHIBITS

BRA-48	Ministry of Agriculture Regulation 34/Permentan/PK210/7/2016
BRA-49	Ministry of Trade Regulation 37/M-DAG/PER/5/2016
BRA-50	Decree Letter of Majelis Ulama Indonesia Regarding the List of Approved Foreign Halal Certification Body Nr. D-736/MUI/VIII/2016
BRA-51	Halal Slaughter Technique

I. INTRODUCTION

1. In its previous submissions, Brazil has established that the facts of this dispute are very simple. In 2009, Indonesia decided to shut its domestic market for imports of chicken meat and chicken products in pursuit of a misguided self-sufficiency policy. Since then, not a single chicken has entered Indonesia's market.

2. Brazil has also established that, in enacting its import ban, Indonesia has resorted to a series of different written and unwritten measures. Firstly, Indonesia imposes a general prohibition on the importation of chicken. This is a single, self-standing, unwritten, overarching measure independent of its constitutive elements, which, in itself, violates Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Secondly, Indonesia makes use of a variety of written laws and regulations that act as quantitative import restrictions. These are also in violation of both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement of Agriculture. Thirdly, Indonesia's import licensing regime also constitutes an additional layer of complexity in Indonesia's burdensome and maze-like import procedures. Such features of this regime are also in violation of Article 3.2 of the Agreement on Import Licensing Procedures ("ILA"). Fourthly, Indonesia's legislation not only restricts products at the border, but discriminates between domestic and foreign like products when (and if) they manage to reach the local market. This aspect of Indonesia's regime is in violation of Article III:4 of the GATT 1994. Finally, if all this was not enough, Indonesia has also failed to provide a response to Brazil's proposal for an "International Veterinary Certificate" regarding the products at issue in this dispute. This "undue delay" is in violation of Article 8 of and Annex C(1)(a) of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"). None of these measures can be justified under any of the exceptions contained in the WTO Agreements, most relevantly Article XX of the GATT 1994.

3. As its defence strategy, Indonesia has persistently maintained that its halal requirements, and not its self-sufficiency policy, are root cause of all these trade-restrictive measures. Brazil has never questioned the right of Indonesia to require that the products being imported comply with its halal rules. Brazil is ready to implement and certify its compliance with whatever halal rule Indonesia deems adequate. Yet halal has never been the issue in this dispute. The real issue is clearly trade protectionism, if we are to call a spade a spade.

4. In this second written submission, Brazil will endeavour to dispel some of the misinformation Indonesia has brought into these proceedings. In particular, Brazil will explain that:

i. Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture are not mutually exclusive. Indonesia's import restrictions can, and indeed do, violate both of them simultaneously;

ii. Indonesia's non-automatic import licensing regime does not comply with Article 3.2 of the ILA. There is no *permissible* measure such procedures are meant to implement. Moreover, even if there were, these trade-restrictive procedures do not comply with the requirements under Article 3.2 of the ILA;

iii. Different aspects of the same measure can violate both Article XI:1 and Article III:4 of the GATT 1994. Indonesia's intended use requirement and halal labelling provisions violate both.

5. Brazil will also rebut arguments made by the defendant in regard to several aspects of its first written submission and explain why they have no merit, including the defences under Article XX of the 1994.

6. Brazil is confident that this additional layer of clarification and legal analysis will reinforce the conclusion that this case is indeed remarkably simple: Indonesia wants to protect its domestic producers by closing its market of chicken meat and chicken products to foreign suppliers. Fortunately, the rules of the WTO do not allow it to do so.

II. BRAZIL HAS DEMONSTRATED THAT THE GENERAL PROHIBITION ON THE IMPORTATION OF CHICKEN MEAT AND CHICKEN PRODUCTS IS INCONSISTENT WITH INDONESIA'S WTO OBLIGATIONS

A. An unwritten import prohibition of chicken meat and chicken products exists in Indonesia

7. In its more than twenty years, the WTO dispute settlement system has dealt with several instances of measures that do not conform to the typical standard of a written, simple instrument, enacted by the legislative branch of the central government. There have been cases involving measures attributed to the judicial and the executive branches. There have been cases about acts of local or regional authorities. There have been cases relating to complex measures and to ongoing conducts. And there have been many cases where an unwritten measure was challenged. In some of these cases, the measures were found not to exist or to be consistent with WTO rules. In no case, however, has the WTO dispute settlement system found that the "atypical" measure was not subject to dispute resolution under the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") because its content was not clearly established in standard written instrument, enacted by a Member.

8. The scope of measures subject to dispute resolution under the DSU is broad in order to fulfil the system's purpose of providing security and predictability to the multilateral trading system. Indeed, as Brazil recalled in the responses to the Panel's written questions, "in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings"[1] regardless of how the measure is qualified, as article 3.3 of the DSU states that the dispute settlement system addresses "situations" in which a Member considers that any benefit accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another members.[2]

9. In the particular case of unwritten measures, the Appellate Body clarified, in *Argentina – Import Measures*, that there is no additional standard to be met in order for a Panel to examine these types of measures beyond the requirement that "in every WTO dispute, a complainant must establish that the measure it challenges is attributable to the respondent, as well as the precise content of that challenged measure, to the extent that such content is the object of the claims raised." [3]

10. In the present dispute, Brazil has established that the challenged measure is attributable to Indonesia and consists of a general prohibition on the importation of

[1] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.
[2] Appellate Body Report, *Argentina – Import Measures*, para. 5.100.
[3] Appellate Body Report, *Argentina – Import Measures*, para. 5.104.

chicken meat and chicken products. Brazil has specified its content and, as additional evidence of its existence, Brazil has also submitted information on trade flows – or lack thereof – that confirm its effectiveness.

11. This far in the proceedings, Indonesia has not been able to rebut any of the evidences submitted by Brazil demonstrating that no chicken meat and chicken products have entered the Indonesian market due to the general ban challenged by Brazil.[4] Indonesia has limited itself to arguing that Brazil would be required to meet a particularly high evidentiary burden, like the one applied in *Argentina - Import Measures*, in order to demonstrate the existence of the ban, as an unwritten measure. Brazil disagrees. As already confirmed by the Appellate Body, "the constituent elements that must be substantiated with evidence and arguments in order to prove the existence of a measure will be informed by how such measure is described or characterized by the complainants".[5] As clearly described by Brazil,[6] differently from previous unwritten measures brought to dispute resolution in the WTO, Indonesia's unwritten measure stems from the combined operation of different instruments, most of them written legal acts in force in Indonesia[7], which create a maze of restrictions that, combined, result in a general prohibition on the importation of chicken meat and chicken products. In such context, there is little room to question either the existence of these components or how they operate together in preventing imports and protecting the domestic industry, and, in consequence, the existence of the overarching measure itself. Indeed, even the objective of the import ban – the protection of domestic industry through self-sufficiency – can be confirmed through Indonesia's different pieces of legislation.

12. Brazil does not challenge the fact that in disputes where the components of an unwritten measure included informal guidelines from the government and commitments imposed verbally on private agents and were not based on the application of different laws and written regulations, the evidentiary burden was clearly more challenging, as non-official sources of evidence had to be collected in order to establish, in the first place, that the components of the alleged measure existed. In this dispute, however, the legal acts formally adopted by Indonesia themselves provide evidence enough of the existence of the measure. Its precise content is crystal-clear and its attribution to Indonesia is self-evident.

[4] Brazil is aware that there have been marginal and very sporadic imports of some types of chicken products in some periods after 2009, as contained in Table 2 of Brazil's first written submission. Brazil understands, however, that these negligible amounts of imports, particularly when compared to the annual volume of imports up to 2009, are not sufficient to override that fact there is a general prohibition imposed by Indonesia on the importation of chicken meat and chicken products.
[5] Appellate Body Report, *Argentina – Import Measures*, para. 5.108.
[6] Brazil's first written submission, para. 73-76.
[7] The only exception is Indonesia's omission relating to the approval of the sanitary certificate.

13. Indonesia also insists that Brazil has not explained how the elements of the import ban operate together so as to be understood as parts of a larger measure. Here again Indonesia seems to ignore the fact that, in these circumstances, Brazil was simply required to point to the legal acts adopted by Indonesia to make its case. Indonesia's approach to its objective of promoting self-sufficiency by means of an unwritten import ban has been blunt. Each individual element of the general ban constitutes a layer of trade-restrictiveness that operates either to decrease the attractiveness of Indonesia's market for this class of products or to increase the cost or the risk for the exporter intending to have access to this market. The exclusion of types of chicken meat and chicken products from Indonesia's positive list of permitted imports and the restrictions on the use of imported chicken meat and chicken products fall within the first category (decreased opportunities). The other four elements – discretionary authorization to import based on the "insufficiency of local production", discretionary authorization to import "essential and strategic goods", intricate and burdensome import licensing regime, and the undue delay in undertaking sanitary procedures – fall within the second category (increased costs and risks). Put together, these different layers form a thick, virtually impenetrable barrier to imports of any amount of chicken meat and chicken products from any source in the world, as the trade data confirms. It operates as an independent, overarching measure, different from its individual components, and continues to subsist even if some of its elements are changed or removed.

14. As Brazil has demonstrated, this import ban violates Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. In the following section, Brazil will rebut arguments made by Indonesia relating to the inconsistency of the measure with these WTO rules.

B. The general prohibition on the importation of chicken meat and chicken products is simultaneously inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

i. Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture are not mutually exclusive

15. In its first written submission, Indonesia develops the argument that Brazil is barred from challenging the import ban simultaneously under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. According to Indonesia, as these disciplines establish different obligations, the principle of *lex specialis derogat legi generali* should be followed.

16. Indonesia's arguments in this matter have no legal grounds. Indonesia requests the panel to apply a legal principle that only relevant in cases where conflict of rules exists. The difference between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture is essentially one of scope (of products and types of

measures). There is no conflict there. In the present case, there is rather a complementarity as the products subject to the dispute are covered by the GATT 1994 and the Agreement on Agriculture, and the type of measure challenged (quantitative import restriction) is also covered by both Agreements. Therefore, and contrary to what Indonesia is trying to convey, the obligations under these two provisions are not mutually exclusive. Indonesia's import ban falls squarely in an intersection of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. In this situation, there is no conflict to be resolved by reference to Article 21.1 of the Agreement on Agriculture, which is no more than an expression of the principle established in the General Interpretative Note to Annex 1A. As Brazil recalled in the first meeting with the Panel, a Member can and should be able to comply with both provisions.

17. Indonesia also argues that, in the case of Article 4.2 of the Agreement on Agriculture, the complainant has the burden not only to establish a *prima facie* violation of Article 4.2, but also to prove a negative – i.e., that the challenged measure is *not* justified under Article XX of the GATT 1994 or any other general, non-agriculture specific provision of GATT 1994. Here again, Indonesia's argument has no merits.

ii. Indonesia has not established that the measure can be justified under Article XX of the GATT 1994 or any other exception under WTO law

18. In its first written submission, Indonesia made no serious attempt to justify the import ban under any paragraph of Article XX of the GATT 1994 (or any other exception under WTO law). Instead, it argued that in order to demonstrate a violation of Article 4.2 of the Agreement on Agriculture, the complainant has the burden to establish that the measure is *not* justified under Article XX of the GATT 1994 ("or other general, non-agriculture-specific provisions of the GATT 1994").

19. Brazil is puzzled by Indonesia's reasoning. In the paragraph immediately before its claim that Brazil has the burden to prove that the import ban is not justified under Article XX[8], Indonesia quotes an Appellate Body ruling that confirms exactly the opposite, i.e. that the burden to establish an affirmative defence under Article XX belongs to the respondent. Brazil fails to see how the nature of Article XX would be transformed from an affirmative defence (the burden of which lies with the respondent) into something else (whose inexistence the complainant should prove) based on the type of *prima facie* violation that has been established.

20. Brazil is not aware of a single instance, in more than 20 years of WTO litigation and almost 70 years of dispute settlement including the GATT years, where the burden of proof under Article XX has been reversed from the responding party to the

[8] Indonesia's first written submission, paras. 69-70.

complainant. More broadly, Brazil ignores examples of panels or the Appellate Body requiring from a party – either party – to prove a negative, as Indonesia suggests Brazil is required to do. The reason is simple: it is a general principle of law that the party arguing the affirmative of a proposition has the burden to prove the basis and content of such proposition.

21. Article 4.2 of the Agreement on Agriculture requires the complainant to establish that the respondent maintains a measure of the kind which has been required to be converted into ordinary customs duties, such as, *inter alia*, quantitative import restrictions. It would be then to the respondent to demonstrate that the relevant measure is not maintained under any GATT exception. In the present dispute, Brazil has established that Indonesia maintains restrictions on imports of chicken meat and chicken products covered by Article 4.2 of the Agreement on Agriculture. Indonesia has never argued, much less demonstrated, that this measure is justified under Article XX of the GATT 1994 or any other general, non-agriculture-specific provisions of the GATT 1994, and Brazil has no information to the effect that this might be the case.

C. Conclusion

22. In conclusion, Brazil has established that Indonesia adopts a general prohibition on the importation of chicken meat and chicken products that violates Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture and has not been justified under Article XX of the GATT 1994.

III. BRAZIL HAS DEMONSTRATED THAT INDONESIA ADOPTS SEVERAL INDIVIDUAL MEASURES THAT AFFECT THE IMPORTATION OF CHICKEN MEAT AND CHICKEN PRODUCTS IN A MANNER INCONSISTENT WITH WTO OBLIGATIONS

A. The restriction on the use of imported chicken meat and chicken products ("the intended use requirement")

i. The different aspects of the intended use requirement are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, as a border measure, and with Article III:4 of the GATT 1994, as an internal measure

1. A measure can have different aspects that can be found to be inconsistent with both Article XI:1 and Article III:4 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

23. As previously explained, Indonesia's legislation requires that chicken meat and chicken products of foreign origin may only be imported and sold for certain intended uses, restricting access and trade opportunity to Brazilian chicken in a manner inconsistent with Article XI:1 of the GATT, Article 4.2 of the Agreement on Agriculture and with Article III:4 of the GATT.

24. This intended use (or purpose of usage) requirement provided for in both MoA Regulation 34/2016 and MoT Regulation 05/2016, as amended by MoT Regulation 37/2016, affect the competitive conditions of imports of chicken meat and chicken products in different ways. Indeed, as some of Indonesia's measures amount to quantitative prohibitions and/or restrictions to imports of Brazilian chicken, they entail a violation of both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Indonesia's intended use requirement, however, not only limits the importation of chicken meat and chicken products at the border; it also restricts their distribution, offering for sale and sale in the internal market. Therefore, Brazil submits that it also consists of a violation of Article III:4 of the GATT 1994.

25. In other words, as further discussed in the next section, the challenged measure affects not only the entry into the market – and, in this sense, it is clearly a border measure – but also the competitive opportunities within Indonesia's marketplace after these products have been cleared from customs procedures, operating as an internal measure.[9] It follows that, due to Indonesia's restrictions on the intended uses for chicken meat and chicken products, even if imports from Brazil were allowed into Indonesia,

[9] Brazil's oral statement at the first meeting of the Panel, paras. 45-46.

they would not be allowed to reach the most important distribution channels in that country, where the majority of food purchases occur. Such restrictions do not apply to domestic products, which have free and open access to all distribution and retail channels, resulting in a clear discrimination in the conditions of competition of imported and like domestic products, inconsistent with Indonesia's obligations under the WTO agreements.[10]

26. In the present case, there is no conflict between these provisions in a way that would require the Panel to apply one to the exclusion of the other. This is clearly an instance in which a measure can be simultaneously inconsistent with more than one provision of the same Agreement or of different WTO Agreements. In this case, regardless of the Panel's decision concerning the order of analysis and the exercise of judicial economy, a finding can and should be made on each one of these inconsistencies.

27. As the Panel in *EC – Bananas III* clarified, there would be two situations in which a legal conflict would occur between WTO provisions: (i) clashes between obligations in the GATT 1994 and in the Annex 1A Agreements, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time; and, (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits[11]. None of this occurs in the present dispute.

28. Concerning Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, as already mentioned, they are not mutually exclusive obligations and therefore can and should be complied with at the same time without the need to renounce explicit rights or authorizations.[12]

29. As regards the possibility of the same measure violate both Article III:4 and Article XI:1 of the GATT 1994, Brazil recalls the findings and rulings of the Panel in *India – Autos*[13]. In that case, the Panel came to the conclusion that "it cannot be excluded *a priori* that different aspects of a measure may affect the competitive opportunities of imports in different ways", making them fall within the purview of those two GATT provisions. In this sense, depending on the aspect of the measure at issue and the type of restriction it creates, the measure can be regarded either as a border measure (under the scope of Article XI:1) or an internal measure (within the purview of Article III:4).

30. It is clear, thus, that, regardless of the Panel's decision concerning the order of analysis and the exercise of judicial economy, nothing in the WTO rules prevents the

[10] Brazil's oral statement at the first meeting of the Panel, para. 67.
[11] Panel Report, *EC – Bananas III*, para. 7.159
[12] Appellate Body Report, EC – *Bananas III*, para. 7.160.
[13] Panel Report, *India – Autos*, para. 7.224

Panel from making findings on each one of these inconsistencies challenged by Brazil. This would be particularly important in this case because of the shifting nature of Indonesia's legislation regarding the intended use requirement. Since the establishment of the Panel proceedings, Indonesia's legislation regarding the intended use requirement has been continuously amended[14]. In the absence of findings regarding the inconsistency of this measure with the relevant WTO rules, both as a border measure and as an internal measure, there would be a risk that Indonesia could continue to evade its obligations by simply reinforcing in new pieces of legislation the particular aspect of the intended used requirement that was not addressed in the Panel's decisions, on the grounds that the requirement operates only as a border measure and not as an internal measure, or vice-versa, which would not eliminate the restriction and which could prompt new disputes.

2. The intended use, as a border measure, falls within the range of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

31. As mentioned in Brazil's first written submission[15], the intended use requirement should first be examined as part of the set of documents, procedures and approvals needed to obtain an import license in Indonesia. This measure is required by letter (j) of Article 28 and paragraphs (1) and (2) of Article 31 of MoA Regulation 34/2016 in order to receive a MoA Recommendation[16]; and is a prerequisite for obtaining the MoT Import Approval, as per MoT Regulation 05/2016,[17] as amended by MoT Regulation 37/2016[18]. In this respect, the intended use requirement for imports of chicken meat and chicken products is imposed as a condition for importation at the border.

32. As a requirement to be fulfilled by the importer to obtain an import license, the intended use requirement affects the process of importation itself. If the importer wants to indicate or require another intended use not listed in MoA Regulation 34/2016 and MoT Regulation 05/2016, the Indonesian Government will not grant the import license. Without stating the intended use for imported chicken meat and chicken products, importation simply cannot take place. This restriction occurs before the product has even entered the territory of Indonesia, falling within the scope of Article XI:1 of GATT 1994.

33. In prohibiting the imports of chicken meat and chicken products that do not comply with the intended use requirement, this measure has a limiting effect on the

[14] MoA Regulation 58/2015 was replaced with MoA 34/2016; MoT 05/2016 has been amended by MoT 37/2016, for instance.
[15] Brazil's first written submission, paras. 87-89; 102-105.
[16] MoA Regulation 34/2016, Articles 4 (3) and (5); 28(j) and 31 (1) and (2).
[17] MoT Regulation 05/2016, Article 20. Exhibit BRA-03.
[18] MoT Regulation 37/2016, Article I. Exhibit BRA-49.

quantity or amount of product which can be imported and constitutes a "restriction" within the meaning of Article XI:1 of the GATT 1994[19].

34. Brazil is of the view that a "prohibition" or "restriction" on the importation can be considered a violation of Article XI:1 of the GATT 1994, as long as it has "limiting effects on the importation"[20] of products of other Members.[21] The application of Article XI:1 is very broad in scope since it disciplines for import prohibitions or restrictions other than duties, taxes or other charges.[22] As asserted with precision by Canada[23], the rationale which permeates Article XI:1 is "the idea that tariff measures are preferable to border measures that restrict trade volumes and distort prices"; thus, any measure that can quantitatively limit the importation of products fall under the purview of this provision.

35. It should also be noted that a violation under Article XI:1 does not require a complainant to demonstrate that a measure has adversely impacted the overall volume of imports. Such limiting effect can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context[24] and do not require a showing of the measure's effects on trade volumes. As such, Brazil understands that the structure of how the intended use requirement is framed reveals a quantitative dimension, since it allows the importation of the products only for specific niches of the marketplace and impedes access to the most relevant parts of it. Additionally, for those uses not included in Indonesia's legislation, importation of chicken is not even allowed to occur.

36. Article 4.2 of the Agreement on Agriculture follows the same rationale of Article XI:1 of the GATT 1994. It incorporates WTO Members' understanding that tariffs are preferable to border measures, under the strict obligation to Members not to maintain, resort to, or revert to any measure required to be converted into ordinary customs duties. The illustrative list in Footnote 1 to Article 4.2 brings additional clarity regarding the types of measures Members are not entitled to maintain (and resort or revert to) but which should, in reality, have been converted into ordinary customs duties. Among them, "quantitative import restrictions" are included.

37. In the present dispute, the intended use requirement, viewed as a border measure, falls under the definition of a quantitative import restriction, as explained in the previous paragraphs. The way in which it was designed does limit the quantity of

[19] In a very similar case, the Panel in *India – Quantitative Restrictions* concluded that a measure which prohibited imports of certain products other than where the imported product was for the importer's "own use" (rather than for on-sale) constituted a restriction on imports under Article XI:1. See Panel Report, *India - Quantitative Restrictions*, paras. 5.142-5.143.
[20] Panel Report, *Argentina – Import Measures*, para. 6.363.
[21] Brazil's first written submission, para. 145.
[22] Panel Report, *India – Quantitative Restrictions*, para. 5.129.
[23] Canada's third-party executive summary, para. 4.
[24] Appellate Body Report *Argentina – Import Measures* , paras. 5.217, 5.244.

products that could be imported. Indonesia limits importation only for specific purposes, and, unsurprisingly, proscribes importation for those most important uses and distribution channels. Therefore, as the measure falls within one of the measures listed in Footnote 1, Brazil understands that the Panel should also make a finding of inconsistency of the intended use with Article 4.2 of the Agreement on Agriculture.

3. The intended use requirement, as an internal restriction, falls within the range of Article III:4 of the GATT 1994

38. As an internal measure, the intended use requirement also affects the internal sale, offering for sale and distribution of imported chicken meat and chicken products. Because this limitation does not apply to domestic like products, Brazil maintains that there is a less favourable treatment to the detriment of imported products, in breach of the obligation under Article III:4 of the GATT 1994.

39. Brazil has already explained why it understands that there is no legal conflict in applying Article III:4 and Article XI:1 of the GATT 1994 simultaneously, as different aspects of the intended use affect importation, on one side, and the internal sale of the products, on the other.

40. Indonesia has maintained the position that the Panel should consider the intended use requirement as solely an internal measure, and not a border measure, due to the alleged application of the *Ad Note* to Article III of the GATT 1994. Indonesia argues that, although enforced at the border (or the point of importation), "this requirement applies the same to both imported and domestic chicken"[25], which would suggest that the measure falls exclusively under the scope of Article III, and not of Article XI.

41. Brazil disagrees that the *Ad Note* to Article III is applicable to the case[26]. The intended use does not apply "the same", as Indonesia wants the Panel to believe, for imported and domestic products. In fact, the limitations derived from the intended use requirement simply do not apply to domestic products. Because of that, there is not an "equivalent internal requirement" to suggest that the *Ad Note* to Article III should apply in the present situation. The situation analysed by the Panel in *EC – Asbestos*, in which Article III also covers a situation in which a law, regulation or requirement applies both to an imported product and to the like domestic product and is enforced in the case of the imported product at the time or point of importation[27], does not apply to the current dispute.

[25] Indonesia's response to Panel question No. 53.
[26] Indonesia's first written submission, paras. 87-88.

42. In this dispute, in addition to affecting the conditions of importation, the intended use is also a requirement that affects the internal sale, offering for sale, and distribution of imported chicken meat and chicken products. Once imported, the products cannot be used for another purpose other than that for which it was imported. In this sense, the requirement is also to be regarded as an internal measure subject to Article III[28], but not exclusively to this provision as Indonesia suggests.

43. Even considering, for the sake of argument, that the intended use requirement is also to be read somehow, in light of the cold-chain system requirement, that it would somehow apply to all frozen products regardless of its origin, the measure is not applied in the same manner for imported and domestic like products. The restrictions faced by imported products are much stricter, as explained in the example in paragraphs 55 and 56 below, as they are excluded from a large portion of Indonesia market.

44. Indonesia has not denied that imported chicken products and domestic chicken are subject to different requirements. Instead, it argued that imported chicken meat and domestic chicken are not like products and therefore the measure falls outside de scope of Article III of the GATT. Brazil disagrees with this proposition. As demonstrated in the section below, imported and domestic chicken meat and chicken product are "like" products.

4. Imported and domestic chicken meat and chicken products are like products

45. Brazil understands that, based on the findings of the Appellate Body in *EC – Asbestos,* the likeness analysis in the present dispute requires an assessment of the nature and the extent of competitive relationship of the products[29]. “Fresh”, “frozen” or “chilled” chicken meat and chiken products have the same or similar end-uses and can – and usually do – compete in the marketplace. For Brasil, it is clear that the restriction is applicable to imported products and the only distinctive criterion adopted by Indonesia to restrict products to certain intended uses is the foreign origin of the product. This is confirmed by Indonesia’s legislation itself. The legal provisions that regulates the intended use requirements does not distinguish "frozen", "chilled" or "fresh" product. It only determines that products that are imported (i.e., with a different origin) are subject to a different treatment.

46. Indonesia's argument relies on the assumption that “frozen”, “fresh” and “chilled” chicken are not like products. Throughout its first written submission, Indonesia argues that imported chicken meat cannot have the same treatment accorded

[28] *Ad* Note to Article III in the Notes and Supplementary Provisions in Annex I to the GATT 1994.

[29] As regards the traditional four criteria previously established by the WTO jurisprudence to determine “likeness”, the Appellate Body added that their application is not mandatory but simply a useful framework. In the Appellate Body's own words, they are "neither a treaty-mandated nor a closed list of criteria". See Appellate Body Report, *EC – Asbestos*, para. 102.

to domestic chicken meat because the domestic product is offered for sale fresh while imported products would necessarily be frozen due to the distance between the two countries.

47. Brazil would like to recall, however, that, as recognized by Indonesia, the difference between the imported and domestic products at issue would depend only on the temperature conditions to which each one was subjected,[30] something that does not change the relevant properties of the product. Additionally, even if imported and domestic chicken meat and chicken products could present certain differences (for example, physical characteristics), the Appellate Body has already established that they "may still be considered 'like' if the nature and extent of their competitive relationship justifies such a determination".[31]

48. In the present dispute, domestic and imported chicken meat and chicken products are directly competitive products. In consequence, since the foreign origin of the products is the only distinctive criterion between imported and domestic chicken meat and chicken products in what concerns the intended use requirement, the competitive relationship between Brazilian imported chicken and Indonesian locally produced chicken should guide the assessment of the likeness of the products. Actually, Indonesia appears to agree with this argument when it affirms in its first written submission that "frozen-thawed chicken meat… is… similar to fresh meat once thawed and could be thus offered for sale as fresh meat after being thawed".[32]

49. Brazil would like to recall that the Appellate Body in *Argentina – Financial Services*[33] established that when a measure makes a distinction between products based exclusively on the origin of the product, the likeness of such products can be presumed. Thus, "measures involving a *de jure* distinction between products of different origin" will typically allow the application of the presumption of "likeness"[34]. It is clear that the products at issue in the present dispute are defined *de jure* by the scope of the regulations imposing the restriction, which do not differentiate between fresh, frozen or chilled chicken but between imported and domestic chicken.

50. Therefore, the foreign origin of the products may be considered as the distinctive criterion between imported and domestic chicken meat and chicken products in what concerns the intended use requirement, amounting to less favourable treatment to "like" imported products, in violation of Article III:4 of the GATT 1994.

[30] "Indonesia submits that Brazilian chicken meat and chicken products are frozen and pre-packaged products, while Indonesian chicken meat and chicken products are not pre-packaged". See Indonesia's first written submission, para. 152.
[31] Appellate Body Report, *Philippines – Distilled Spirits*, para. 121.
[32] Indonesia's first written submission, para. 134.
[33] Appellate Body Report, *Argentina – Financial Services*, para. 6.36.
[34] Indonesia's response to Panel question No. 62(a).

a) The intended use requirement accords treatment less favourable to imported like products and is inconsistent with Article III:4 of the GATT 1994

51. To the extent that the restriction imposed by the intended use requirement does not apply to domestic like products, which have free and open access to the whole market, Brazil claims that this measure provides a less favourable treatment for imported products. This is naturally a measure which falls under the purview of Article III:4 of the GATT 1994.

52. As already explained, the effects of the intended use requirement do not end at the border, but also affect the conditions of competition once the product has been cleared and entered the Indonesian market. After customs clearance, the importer is not allowed to offer for sale the imported product to other distribution and retail channels than those listed in the import license. This restriction does not apply to domestic products, which can access the market as a whole.[35]

53. The intended use requirement restricts the internal sale, offering for sale and distribution of imported chicken meat and chicken products, as MoA Regulation 34/2016 states that these can only be sold to a very limited number of end-users,[36] and not to the general public.[37] This radically reduces the opportunities for imported products to reach Indonesian consumers, and effectively prevents importation of chicken meat and products for domestic consumption.

54. In what regards this aspect of the measure, which functions as an internal restrictive measure, the discrimination caused by the intended use requirement occurs "after the border" and confers a less favourable treatment for imported products. Accordingly, this aspect of the measure affects negatively the competitive opportunities on the Indonesian domestic market for chicken products[38] and results in a "less favourable treatment" for imported products in the sense of Article III:4 of GATT 1994.

55. For instance, a shipment of chicken products imported from Brazil to be used in a restaurant in Jakarta could not be redirected to a traditional market (or even to other allowed intended uses, such as a hotel). In this case, the product has already been cleared and was imported for a specific restaurant. If, as suggested in this example, the restaurant denies receiving the product, the internal limitation caused by the intended use impedes the importer-distributor to sell it to other buyers. Re-exportation appears to be the only legal solution available for the importer in order to avoid a total loss.

[35] Brazil's first written submission, para. 260-283.
[36] Such as hotels, restaurants, catering, industries and other particular purposes.
[37] Importantly, it forbids chicken meat and chicken products from being sold at traditional retail outlets (such as wet markets, small stalls or shops, and street carts).
[38] Panel Report, *India – Autos*, para. 7.224

56. Conversely, this type of limitation on the places (or uses) where chicken can be sold and distributed does not apply to domestic like products. If the same restaurant in the previous example denies receiving chicken locally produced, the distributor can simply redirect it to another buyer, such as a hotel, another restaurant, a modern market or even a stall shop at a traditional market. Needless to say that the burden of re-exportation would not arise in this situation.

57. In sum, it results that the intended use requirement impedes Indonesian regular end-use consumers from having access to imported chicken meat and chicken products. It is an internal measure, enforced within Indonesia's territory, that applies after the product has been cleared from customs. It affects the internal sale, offering for sale, purchase, transportation, distribution or use of the imported products, according treatment less favourable to imported chicken meat and chicken products than that accorded to like products of domestic origin.

ii. Indonesia has failed to justify the intended used requirement under Article XX of the GATT 1994

58. Indonesia seeks to justify the intended use requirement under Article XX(b) of the GATT 1994, as it alleges that the measure would be "designed to protect human life or health"[39], and under Article XX(d) as it asserts that "the implementation of halal requirements is necessary to secure compliance with certain laws and regulations".

59. At the outset, Brazil notes that the analysis under Article XX involves a two-tiered analysis, in which the respondent must first justify the measure under one or more of the subparagraphs and, then, demonstrate that it also fulfills the requirements of the *chapeau*.

60. It is important to highlight that both subparagraphs (b) and (d) incorporate two elements. First, the challenged measure must be adopted or enforced to pursue the objective covered by the subparagraph, and, secondly, the measure must be "necessary" to the achievement of that objective.[40]

1. Indonesia has failed to demonstrate that the intended use requirement is provisionally justified under Article XX(b) of the GATT 1994

61. To begin with, according to Article XX (b), the measure must be within the range of policies "necessary to protect human … life or health" and must also be "necessary" to fulfill this policy objective. Indonesia seeks to justify the intended use requirement under the argument that this prohibition contributes to the protection of

[39] Indonesia's first written submission, para. 189.
[40] Appellate Body Reports, *EC – Seal Products*, para. 5.169; *Brazil – Retreaded Tyres*, paras. 144-145; *Korea – Beef*, para. 157.

human life or health[41] "by eliminating the risk of freezing and thawing products for sale to consumers".[42] Indonesia sustains that frequent thawing and freezing would increase microbial growth and facilitate product deterioration as this process would "mechanically damage the cell membranes and reduce water-holding capacity"[43]. This appears to be the policy objective Indonesia seeks to protect through the establishment of the measure at issue.

62. However, there is no meaningful connection between limiting the sale of frozen chicken to places with cold chain facilities and the objective of "eliminating the risk of [frequent] freezing and thawing products for sale to consumers." First of all, if traditional markets have no cold storage, how is it possible that the chicken will be refrozen? The simple answer is: it is not possible. Therefore, once imported frozen chicken undergoes the thawing process it would either be sold or (if sanitary rules are observed) thrown away, exactly as domestic fresh chicken would. Secondly, the freezing process the imported chicken undergoes (which brings its temperature to minus 15°C) is capable of ensuring that the meat will remain fresh for a longer period, as compared to the meat that has never been frozen. All this points to the conclusion that Indonesia would have more reasons to prohibit the sale of fresh chicken in markets without cold storage than prohibiting the sale of frozen chicken. Finally, Indonesia has offered no evidence to support its claims that food safety is the objective of the intended use requirement. Brazil considers that Indonesia has not fulfilled its evidentiary burden.

63. As the Appellate Body noted in *Argentina – Financial Services*, which reads:

> where the assessment of the design of the measure, including its content and expected operation, reveals that the measure is incapable of securing compliance with specific rules, obligations, or requirements under the relevant law or regulation, as identified by a respondent, further analysis with regard to whether this measure is 'necessary' to secure such compliance may not be required.[44]

Therefore, since Indonesia failed to show a connection between the intended use requirement and the objectives it purports to achieve, the Panel need not even consider the actual "necessity" of the measure.

64. In any event, the intended use requirements are clearly not "necessary". Brazil recalls that the analysis of whether a measure is necessary needs to take into account, among other factors, whether there would be less trade-restrictive alternative measures "reasonably available"[45] that are capable of making an equivalent contribution to the achievement of the objective pursued. Indonesia has not demonstrated or justified the

[41] Brazil's oral statement at the first meeting of the Panel, para. 60.
[42] Indonesia's first written submission, paras. 189 and 191.
[43] Indonesia's first written submission, paras. 134.
[44] Appellate Body Report, *Argentina – Financial Services*, para. 6.203.
[45] Appellate Body Report, *Korea – Various Measures on Beef*, para. 165.

actual "necessity" of this restrictive measure. In the present case, there is no doubt that there are less trade-restrictive measures which could satisfy Indonesia's appropriate level of protection, such as rules regulating the thawing of frozen chicken to be offered for sale and/or restricting the possibility of refreezing previously thawed chicken for sale in traditional markets. An outright prohibition of the sale of frozen chicken in those venues, which, as confirmed by Indonesia, have none or very few cold chain systems available, is in excess of the aim of protecting human life or health due to the alleged "risk of freezing and thawing products".

65. In its analysis of the necessity of the measure, the Panel should also compare the current situation in wet markets, where Indonesia only allows the sale of what it considers "fresh" chicken, that is, those chicken carcasses slaughtered in the same morning or even in the previous night[46], and the situation in which imported previously-frozen thawed chicken could also be offered for sale. In these situations, both like products would be available for the public and sold in the same day. Brazil has never suggested that imported frozen or thawed chicken should be subject to refreezing if not sold in the day offered for sale, as it does not occur with local "fresh" chicken. In this case, there would be no risk of "freezing and thawing" as Indonesia appears to wish to avoid through the prohibition of imported products to traditional markets. In this sense, Brazil understands that the existence of less trade-restrictive alternatives to Indonesia's measure makes the defendant fail the necessity test under subparagraph (b) of Article XX.[47]

66. As a final note, Indonesia's assertions on this subject contradict the actual practice of its government. The Panel has been duly informed[48], and Indonesia has confirmed[49], that 9,000 tons of imported frozen meat from the United States was recently offered for sale in Indonesian traditional markets. Indonesia confirmed that the imported meat was sold frozen but did not inform whether it ensured that the products were exclusively kept in cold-chain systems at the points of sale. Given that these systems are normally not available in wet markets, Brazil believes it is improbable that the intended use requirement was duly enforced.

67. In Brazil's view, this is evidence enough that the measure at issue is *not* necessary to fulfill Indonesia's policy objective, as the government itself does envisage some flexibility in the enforcement of the legislation. The intended use requirement is nothing but another trade restriction imposed by Indonesia in order to protect its market from foreign competition.

[46] Indonesia's first written submission, para. 135.
[47] Brazil's oral statement at the first meeting of the Panel, para. 62.
[48] United States' third-party statement, para. 7.
[49] Indonesia's response to Brazil's question Nos. 2(a), 2(b) and 2(c).

2. Indonesia has failed to demonstrate that the intended use requirement is provisionally justified under Article XX(d) of the GATT 1994

68. Indonesia alleges that the intended use requirement is provisionally justified under the Article XX (d) of the GATT 1994 because "the intended use requirement is designed to secure compliance with Indonesia's laws and regulations on public health (namely, those setting out sanitary requirements), deceptive practices and customs enforcement".[50] It also argues that the measure aims to secure compliance, in particular, with legal provisions which require imported chicken meat and chicken products to be safe, healthy, and wholesome, and those that "require entrepreneurs to provide honest information about the condition and quality of products".[51]

69. Here again, Brazil contends that Indonesia has failed to provide any evidence that the challenged intended use requirement contributes to the enforcement of any particular law related to food safety. Moreover, as noted by one of the third parties, there is no basis in the text, structure, or the legislative history of Law 18/2009 and Law 8/1999 to support the claim that the intended use requirement was designed to secure compliance with the food safety and consumer protection provisions cited by Indonesia.[52]

70. Similarly, Indonesia has not indicated whether there would not be any less trade-restrictive alternative measures to secure compliance with its laws and regulations. In this sense, Brazil highlights that a measure is "necessary" within the meaning of Article XX (d) only when there would not be any alternative measure reasonably available.

71. In the present dispute, Indonesia has not successfully met its burden to justify the challenged measure under subparagraph (d) of Article XX, since it failed to provide any evidence that the challenged intended use measure contributes to the enforcement of any particular law or regulation, nor that there were not any less trade restrictive alternative measures to achieve its goals.[53]

3. Indonesia has failed to demonstrate that the intended use meets the requirements of the *chapeau* of Article XX of the GATT 1994

72. It is important to underscore that the purpose and object of the *chapeau* of Article XX is generally the prevention of abuse of the exceptions based on this article. In *US – Gasoline*, the Appellate Body stated that "the *chapeau* is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal

[50] Indonesia's first written submission, para. 203.
[51] Indonesia's first written submission, para. 203
[52] United States' third-party statement, para. 9.
[53] Brazil's oral statement at the first meeting of the Panel, para. 55.

right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement."[54]

73. Indonesia submits "that the intended use requirement is applied in a non-discriminatory manner to chicken meat and chicken products imported from all WTO Members, and that these requirements do not constitute a disguised restriction on international trade",[55] and therefore it is not "applied arbitrarily or in a discriminatory manner to Brazilian chicken meat and chicken products".[56]

74. Notwithstanding, Indonesia failed to demonstrate that its measure satisfies the requirements of the *chapeau*. When faced with a similar argument in *Thailand – Cigarettes (Philippines)*, the Appellate Body found that Thailand had failed to meet the requirements of the *chapeau* when it made only one cursory and conclusory reference to that provision during the panel proceeding.[57]

75. Throughout its first written submission, Indonesia limited itself to insisting that imported and domestic chicken should not be considered like products, and hence the discriminatory and less favourable treatment granted to imported products would be justified.

76. As explained above, Indonesia's arguments are groundless.

77. The lack of evidence with regard to the exceptions invoked by Indonesia as relating to the intended use requirement indicate that the discriminatory treatment accorded to imported products is clearly incompatible with both paragraphs (b) and (d) of Article XX of the GATT 1994, as well as with the *chapeau*.

iii. Conclusion

78. Considering that the intended use requirement amounts to a quantitative import restriction on the importation of chicken meat and chicken products, Brazil submits that the measure is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Furthermore, the measure at issue is also in breach of Article III:4 of the GATT 1994 due to the treatment less favourable to imported products in relation to like domestic products. None of these violations are justified under subparagraphs (b) and (d) of Article XX of the GATT 1994.

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[54] Appellate Body Report, *US – Gasoline*, p. 22.
[55] Indonesia's first written submission, para. 213.
[56] Indonesia's first written submission, para. 214.
[57] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 179. (stating: "In its entirety, this reference consisted of Thailand's argument that, '[g]iven that these measures are applied to all products, imported or domestic, subject to VAT, they are not applied in a manner that constitutes an arbitrary or unjustifiable discrimination or a disguised restriction on international trade.' This cannot suffice to establish that the additional administrative requirements fulfil the requirements of the chapeau of Article XX.").

B. The positive list is a quantitative restriction that violates the WTO obligations

79. In this section, Brazil will demonstrate that, contrary to what Indonesia argues, the positive list requirement has not been removed from the relevant legislation and, thus remains inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. It will also address Indonesia's defence of the measure under Article XX(d) of the GATT 1994.

i. The positive list amounts to a quantitative import restriction in violation of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

80. In its first written submission, Brazil demonstrated that, because some HS Codes of chicken meat and chicken products – i.e. chicken cuts, fresh, chilled or frozen[58], and other prepared or preserved chicken meat[59] – were not included in the Appendices of MoA Regulation 34/2016[60] and MoT Regulation 05/2016, importers could not obtain a MoA Import Recommendation and a MoT Import Approval for these HS Codes. The exclusion of these HS Codes from the positive list amounts to a quantitative import restriction in violation of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

81. Indonesia argues that the positive list requirement no longer exists, as the relevant legislation was altered after Brazil's first written submission.[61] According to Indonesia, these changes were inscribed in Article 7(3) of MoA Regulation 34/2016, which revoked MoA Regulation 58/2015, and the new Article 29A of MoT Regulation 05/2016, introduced by MoT Regulation 37/2016, which provides that the products not listed in the Annexes of the MoA and MoT Regulations may still be granted import approvals "as long as they meet the requirements of being safe, healthy, wholesome and halal."

82. Brazil reiterates its understanding that the positive list requirement is still in place. Despite the amendments introduced by Indonesia, MoA Regulation 34/2016 and MoT Regulation 37/2016 still contain a list of animals and animal products limiting the HS Codes that can be imported into Indonesia. This sole fact is proof enough that Indonesia has not revoked the positive list. Moreover, the HS Codes for chicken cuts and other prepared or preserved chicken meat are still not in the list, and thus are excluded from the Annexes of both regulations.

[58] HS Codes 0207.13 and 0207.14.
[59] HS Code 1602.32.
[60] Brazil recalls that MoA 34/2016 replaced and revoked MoA 58/2015.
[61] Indonesia's first written submission, para. 224; Indonesia's response to Panel question No. 13.

83. For Brazil, these amendments simply allow Indonesian authorities the discretionary power to determine which chicken products could receive a MoA Recommendation and a MoT Import Approval. They do not ensure access to all types of chicken meat and chicken products, as required by Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Now, instead of an outright prohibition on the importation of chicken cuts and other prepared or preserved chicken meat, Indonesia offers the importer only the fortuitous possibility to obtain a Recommendation and an Import Approval, always under the full discretion of Indonesian authorities. In addition, these pieces of legislation do not provide any guidance for importers in relation to what is to be regarded as "the requirements of safe, healthy, wholesome and halal". As previously explained, these changes not only kept in place the positive list, but also introduced new discretionary elements in the issuance of the import license.[62]

84. Brazil recalls that Article XI:1 of the GATT 1994 determines that Members shall not maintain "prohibitions" or "restrictions" on importation. Restrictive measures, other than duties, taxes or other charges, are understood in a broad sense that includes any measure which has "limiting effects on the importation"[63] of products of other Members. According to the Appellate Body, "such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context".[64] Lastly, Article 4.2 of the Agreement on Agriculture prohibits a Member from maintaining, resorting to or reverting to "measures of the kind which have been required to be converted into ordinary customs duties". Footnote 1 illustrates some measures which fall within the scope of this provision, including, among others, "quantitative import restrictions", "minimum import prices", and "similar border measures" other than ordinary customs duties. Where a measure constitutes a "prohibition or restriction" (other than duties, taxes or other charges) in breach of Article XI:1 of the GATT 1994, that measure also would run afoul of the prohibition in Article 4.2 on maintaining agricultural measures of the kind listed in footnote 1.[65]

ii. The positive list is not justified under Article XX(d) of the GATT 1994

[62] Brazil's response to Panel question No. 14.
[63] Panel Reports, *Argentina – Import Measures*, para. 6.479.
[64] Appellate Body Reports, *Argentina – Import Measures*, para. 5.217.
[65] See Panel Report, *India – Quantitative Restrictions*, paras. 5.238-242; Panel Report, *Korea – Various Measures on Beef*, para. 768 ("Since the panel has already reached the conclusion that the above measures are inconsistent with Article XI and the Ad Note to Articles XI, XII, XIII, XIV, and XVIII relating to state-trading enterprises, the same measures are necessarily inconsistent with Article 4.2 of *the Agreement on Agriculture* and its footnote referring to non-tariff measures maintained through state-trading enterprises"); see also Panel Report, *EC – Seal Products*, para. 7.665 (rejecting Norway's challenge to the EU seal regime under Article 4.2 on the ground that the panel had already rejected essentially the same challenge under Article XI:1 of the GATT 1994).

85. In this section, Brazil will demonstrate that Indonesia's defence of the positive list under Article XX(d) of the GATT 1994 is meritless, as it can neither be justified under paragraph (d) nor fulfil the requirements of the *chapeau*.

1. Indonesia has failed to demonstrate that the positive list is provisionally justified under subparagraph (d) of Article XX of the GATT 1994

86. Indonesia tried to justify the positive list requirement under Article XX(d) of the GATT 1994. In Brazil's view, Indonesia's arguments have no merit.

87. To be justified under subparagraph (d) of Article XX of the GATT 1994 the positive list would have to be designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. The burden to demonstrate that the measure meets this two requirements ("secure compliance" and "necessity") falls with the Member invoking Article XX (d) as a justification,[66]that is, Indonesia.

88. In order to sustain a defence under Article XX(d), Indonesia would have to identify laws or regulations which are not inconsistent with the GATT 1994, and establish that the measure found to be GATT-inconsistent is "necessary" to secure compliance with those GATT-consistent "laws or regulations".[67] Therefore, an Article XX(d) defence could not succeed if the laws or regulations with which the measures at issue purportedly secure compliance are themselves GATT-inconsistent.

89. Indonesia declared that "it does not dispute that MoA Regulation 58/2015 and MoT Regulation 05/2016 established a prohibition on the importation of chicken cuts (i.e. a positive list requirement)". However, it tried to justify this prohibition on the basis of Article XX(d) of the GATT 1994, claiming that it "was necessary to secure compliance with Indonesia's laws and regulations (Law 33/2014, MoA Regulation 58/2015 on Importation of Carcass, Meat or Processed Products into Indonesia, MoA Regulation 381/2005 on Guidelines on Veterinary Control Certification, Ministry of Religious Affairs 519/2001 and Fatwa 12/2009 on Halal Slaughter Certification Standards) dealing with halal food".[68] According to Indonesia, its "main concern has been that certain exporters may try to circumvent Indonesia's halal requirements by sourcing chicken parts from slaughterhouses that do not produce halal chicken meat and chicken products, and passing them off as halal".[69]

[66] Panel Report, *Korea – Various Measures on Beef*, para. 658.
[67] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 163.
[68] Indonesia's first written submission, para. 223.
[69] Indonesia's first written submission, para. 232.

90. Nevertheless, Indonesia failed to demonstrate that this measure is necessary – that is, the least trade-restrictive means – to secure compliance with its halal requirements, as stated in Article XX(d).[70]

91. In reality, MoA Regulation 58/2015 (revoked by MoA Regulation 34/2016) and MoT Regulation 05/2016 (as altered by MoT 37/2016) do not impose the same restriction, for instance, in relation to the importation of cuts of lamb and goat, which should also comply with halal requirements. In fact, with regards to this issue, Indonesia frail attempt to justify this restriction is based on the alleged (and not proved) "specific incident in Indonesia, whereby non-halal chicken cuts were put in a package labelled halal".[71] In Brazil's view, the fact that Indonesia does not prohibit the entrance into its territory of cuts of animals and animal products other than chicken meat and chicken products suffices to demonstrate that Indonesia itself does not consider it necessary in all cases to restrict imports of cuts of animal products in order to ensure compliance with halal requirements.[72]

92. Moreover, as mentioned above, WTO jurisprudence has already elucidated that a Member "cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it."[73] Therefore, as there are less trade-restrictive alternative measures to guarantee the halalness of the products currently prohibited from being imported into Indonesia, the complete ban cannot be justified under Article XX(d) of the GATT 1994.

93. In what regards chicken cuts and other prepared and preserved chicken meat, a less trade restrictive alternative measure would be to implement certification procedures with the foreign slaughterhouses seeking to export to Indonesia. The slaughtering process would have to follow halal requirements as determined by Indonesia.

94. Brazil emphasizes that it does not take issue with Indonesia's halal requirements, and agrees with Indonesia that each country is entitled to establish its own level of protection. What Brazil is challenging is Indonesia's reliance on halal requirements as pretext for imposing restrictions on imported products.

95. As already demonstrated in the present dispute, Brazil is the world's largest producer and exporter of halal chicken. Brazil exports to the majority of Muslim countries, always in compliance with the halal requirements established by each of them, and, thus, is fully able to comply with Indonesia's halal requirements, such as

[70] Brazil's oral statement at the first meeting of the Panel, para. 57.
[71] Indonesia's response to Brazil's question No. 1(a).
[72] Brazil's oral statement at the first meeting of the Panel, para. 57.
[73] (footnote original) GATT Panel Report, *US — Section 337*, para. 5.26. See also Panel Report, *Korea – Various Measures on Beef*, para. 166

manual slaughtering.[74] This could be easily verified should Indonesia apply the proper certification procedures, instead of banning Brazilian chicken product and chicken meat.

96. Indeed, it is Brazil's understanding that instead of prohibiting importation, Indonesia should proceed to the certification of the Brazilian slaughterhouses, according to its own halal requirements. Continuous certification procedures – which are a common feature of international trade of food products – would ensure the halalness of the products leaving the slaughterhouses and would also prevent deceptive practices with regard to the compliance with halal requirements.[75]

97. All in all, Brazil considers that the positive list has an exorbitant limiting effect, as it imposes an unreasonable total import ban on the importation of some chicken products. In this respect, it is clear that Indonesia's justification under Article XX(d) cannot succeed as the total ban is not proved either "necessary to secure compliance with laws and regulations" nor to prevent "deceptive practices", and there are other less trade restrictive alternatives to an outright prohibition on the importation of the products.

98. Therefore, Indonesia failed to demonstrate how this measure is necessary to secure compliance with its halal requirements as it did not provide any evidence that the challenged positive list requirements contribute in any meaningful way to the enforcement of any particular GATT-consistent law or regulation. Consequently, Indonesia's positive list requirements cannot be justified under paragraph (d) of Article XX of the GATT 1994.

2. Indonesia has failed to demonstrate that the positive list meets the requirements of the *chapeau* of Article XX of the GATT 1994

99. Even if the Panel considers that the positive list requirement is justified under the paragraph (d) of Article XX, the discriminatory treatment provided by Indonesia would not pass the test of the *chapeau* of this provision.

100. Brazil recalls that the *chapeau* of Article XX prohibits the application of a measure that constitutes: (i) "arbitrary discrimination" (between countries where the same conditions prevail); (ii) "unjustifiable discrimination" (with the same qualifier); or (iii) "disguised restriction" on international trade. In *US – Gasoline*, the Appellate Body held that the *chapeau* has been worded so as to prevent the abuses under the exceptions provided by Article XX. In this sense, the Appellate Body found that "while the exceptions of Article XX may be invoked as a matter of legal right, they should not be

[74] See Exhibit BRA-51.
[75] Brazil's oral statement at the first meeting of the Panel, paras. 58-59.

so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement".[76]

101. In this sense, Indonesia is not allowed to abuse the exceptions contained in Article XX. Brazil has shown that it is fully capable of complying with Indonesia's halal requirements. Therefore, any restriction on the importation of chicken cuts, fresh, chilled or frozen, and other prepared or preserved chicken meat is clearly arbitrary, and constitutes a disguised restriction on international trade; as such prohibition is only a pretext to close Indonesia's domestic market for imports.

102. In conclusion, Indonesia also failed to meet the requirements of the *chapeau* of Article XX, and, accordingly, the positive list cannot be justified under this provision of the GATT 1994.

iii. Conclusion

103. In light of the above, Brazil submits that the positive list requirement amounts to a quantitative import restriction that is in breach of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture and is not justified under Article XX(d) of the GATT 1994.

C. Indonesia's import licensing procedures are inconsistent with WTO obligations

104. In Brazil's view, it is undeniable that Indonesia's complex and burdensome import licensing procedures are used as an effective tool to restrict trade. Brazil takes issue in particular with the following measures that restrict/prohibit imports of chicken meat and chicken products:

i. prohibition of applying for licenses for the importation of chicken cuts and chicken products, as a result from their exclusion from the "positive list" of products allowed to be imported;

ii. prohibition of importing chicken meat and chicken products for certain intended uses;

iii. limited (and short) application periods and validity periods of the MoA Import Recommendation and MoT Import Approvals;

iv. fixed license terms; and

v. discretionary import licensing.

[76] Appellate Body Report, *US — Gasoline*, p. 22.

105. There is certainly a sense of *"déjà vu"* regarding the issues dealt with under this section, as they are intimately connected with those discussed in section II ("General Prohibition"), III.A ("Positive List") and III.B ("Intended Uses"). As Brazil has explained in its first written submission and in its responses to the Panel's questions, these five elements are not only inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, but are also inconsistent with Article 3.2 of the Agreement on Import Licensing Procedures ("ILA").

i. The obligations under the Agreement on Import Licensing Procedures

106. At the outset, it is important to bear in mind that the preamble of the ILA provides the context in which the substantive provisions of the Agreement must be read. In *EC – Poultry*, the Appellate Body explained that "the preamble to the Licensing Agreement stresses that the Agreement aims at ensuring that import licensing procedures 'are not utilized in a manner contrary to the principles and obligations of GATT 1994' and are 'implemented in a transparent and predictable manner'".[77]

107. The object and purpose of the ILA is thus to allow the legitimate utilization of import licensing procedures while ensuring that such procedures are not used to restrict trade. These goals permeate the entire text of the preamble of the ILA. They apply both to automatic and non-automatic licensing procedures.

1. Indonesia's import licensing procedures are not automatic

108. In its first written submission, Indonesia claimed its import licensing procedures are "automatic". Yet Indonesia also recognized that its import licensing procedures for chicken meat and chicken products are aimed at addressing policy concerns, which would suggest that such procedures are "non-automatic", placing them under the purview of Article 3.2 of the ILA. Indeed, according to Indonesia, "in order to ensure that imports of this important food source [chicken] comply with Indonesia's comprehensive halal and sanitary requirements, Indonesia has implemented an automatic import licensing procedure, which is administered jointly by the Ministries of Agriculture and Trade."[78] It follows that the primary function of its import licensing regime seems to be to administer non-trade concerns.

109. At this point, it is important to bear in mind the distinction between automatic and non-automatic import licensing. As provided in Article 2.1of the ILA:

> Automatic import licensing is defined as import licensing where approval of the application is *granted in all cases*, and which is in accordance with the requirements of paragraph 2(a). (emphasis added)

[77] Appellate Body Report, *EC – Poultry*, para. 121.
[78] Indonesia's first written submission, para 38.

110. Non-automatic import licensing procedures in contrast are defined by default as any procedure not falling within the definition contained in paragraph 1 of Article 2. As a report by the OECD helps to clarify:

> Non-automatic licensing refers to the practice of requiring, as a prior condition for the importation of goods, an import license that is not granted automatically. The basic difference with automatic licensing is that the latter is mainly used for compiling trade statistics and approval is granted in all cases, almost immediately upon application. Non-automatic licensing systems, instead, are a means of controlling imports, by making them comply with specific criteria. These schemes can be applied for a variety of both economic and non-economic (social) regulatory goals.[79]

111. Indeed, non-automatic import licensing procedures are frequently used to administer tariff-rate quotas and restrictions associated with the application of antidumping and countervailing duties. They can also be used to achieve a wide variety of policy goals, such as protection of health, safety, quality, the environment, security, morality, religion and intellectual property rights and ensuring compliance with international obligations, ensuring that imports do not undermine those goals.

112. In light of this, and based on the explanations already submitted by Indonesia,[80]it is difficult to see how its import licensing regime could be qualified as automatic. To start with, if its objective is to ensure compliance with certain policy goals, it is unlikely that approval for applications would be *granted in all cases*. Secondly, as Brazil has already demonstrated, Indonesia's licensing regime does not comply with the requirement in Article 2.2(a) of the ILA. Firstly, applications for licences cannot be submitted on any working day prior to the customs clearance of the goods. Secondly, not any person engaging in imports operation in Indonesia is equally eligible to apply for and to obtain an import license for chicken meat and chicken products. Finally, application for licences is not approved immediately on receipt.

113. It is also clear that many of Indonesia's import licensing regime elements can be considered "discretionary" in the terms of footnote 1 of Article 4.2 of the Agreement on Agriculture (see section III.C.iii.5 *infra*). As one of the third parties has persuasively argued in its responses to the Panel's questions to third parties, "discretionary import licensing is, by definition, non-automatic import licensing".[81] In this case, some aspects of Indonesia's import licensing regime for chicken meat and chicken cut are indeed discretionary, which supports the assertion that they can only be non-automatic.

[79] OECD (2005), Looking Beyond Tariffs: The Role of Non-Tariff Barriers in World Trade, OECD Publishing, Paris. DOI: http://dx.doi.org/10.1787/9789264014626-en.
[80] Indonesia's first written submission, para. 38.
[81] United States' third-party response to Panel questions Nos. 14 and 15.

114. Therefore, and since compliance with the requirements under Article 2.2 of the ILA is a necessary condition for a licensing regime to be deemed "automatic", one can only conclude that Indonesia's import licencing requirements are "non-automatic".

2. Indonesia's non-automatic import licensing procedures do not comply with the provisions under Article 3.2 of the ILA

115. As a non-automatic procedure, to be considered consistent with the WTO, Indonesia's licensing procedures for chicken meat and chicken products would need to conform to the disciplines under Article 3.2 of the ILA, which must be read in light of the object and purpose of this Agreement.

116. In this regard, recital ten of the preamble of the ILA is particularly relevant. It reads: "Recognizing that non-automatic licensing procedures should be no more administratively burdensome than absolutely necessary to administer the relevant *measure*".

117. This obligation is made even clearer by the language of Article 3.2 of the ILA. According to this provision, "non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction and […] shall correspond in scope and duration to the measure they are used to implement, and shall be no more burdensome than absolutely necessary to administer that measure." The first requirement in this provision is that a non-automatic procedure must be related to the implementation of a permissible "trade restrictive measure", that is, a measure consistent with the relevant provisions of the WTO Agreement. The second is that the procedure itself cannot have restrictive effects additional to those caused by the imposition of the restriction and shall not be more administratively burdensome than necessary to administer the restriction. Indonesia´s import licensing regime fails both tests.

a) There is no underlying permissible restriction implemented by Indonesia's licensing procedures

118. As Brazil has shown, the aforementioned five elements of Indonesia's import licensing regime are not connected to a permissible *measure/restriction* they are aimed at implementing.[82] The mere fact that Article 2 of MoA Regulation 58/2015 provides that the procedure "is intended to be the legal basis in the implementation of importation, which purpose is to: a) protect public health and inner peace, animal health and environmental health; b) ensure the compliance of safety, healthy, 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

[82] Brazil's first written submission, para. 257.

animal disease, chemical hazard, and physical hazard; and d) to provide smoothness and certainly in the importation of carcass, meat and processed product thereof," does not justify *per se* the above mentioned requirements for the importation of chicken meat and chicken product put in place by Indonesia, and challenged in the present dispute.

119. As Indonesia itself recognized, there is a wide range of pre-market procedures in place aiming precisely at achieving these goals by ensuring that its sanitary and halal requirements are fulfilled, such as: desk review to establish the sanitary conditions of the country of origin, import risk analysis, on-site visit inspections on business units and implementation of a halal assurance system, among others. Once these appropriate measures are implemented there are no grounds in WTO rules to submit the importation of chicken meat and chicken product to the challenged requirements in the absence of a specific permissible restriction on the imports of those products.

120. Brazil does not see, and Indonesia failed to establish, a persuasive connection between halal and sanitary requirements with provisions establishing (i) a positive list of products than can be imported; (ii) intended use requirements; (iii) limited and short application periods and validity periods; (iv) fixed license terms; and (v) discretionary import licensing procedures. Indonesia has not even challenged the conclusion that there is no specific permissible trade restriction in place regarding the imports of chicken meat that could justify its licensing procedures. In fact, it simply limited itself to briefly stating, in a circular manner that "the measure that is implemented through import licensing procedures at issue (including the alleged limited application and validity periods) is Indonesia's import licensing regime for chicken, which, in turn, serves to ensure compliance with Indonesia's halal, sanitary and other relevant requirement".[83]

121. It follows that in the present case, the import licensing procedures are being used for only one purpose: to impede the flow of international trade of chicken meat and chicken products into Indonesia in a manner inconsistent with the purposes and objectives of the ILA. As Australia has stated in paragraph 2 of its third-party executive summary:

> As there is no underlying permissible restriction implemented by these licensing procedures, the trade-restrictive effect of these procedures, including their effect on long-term business planning and the flow of goods at the beginning and end of each import period, must be considered 'additional'.

122. As explained in Brazil's first written submission, even considering, *in arguendo*, that Indonesia's procedures could be applied to administer legitimate restrictions on imports, *quod non*, by its design, structure and operation, the regime imposes restrictions on the importation of Brazilian chicken meat and chicken products that are

[83] Indonesia's first written submission, para. 289.

additional to those that would be required to implement the relevant controls and *restrictions,* for the purpose of the first sentence of Article 3.2 of the ILA.[84]

123. It is important to note that Indonesia has not submitted any arguments related to the consistence of the first ("positive list") and second ("intended uses") requirements with the provisions of Article 3.2 of the ILA. In paragraph 247 of its first written submission, Indonesia has only explained that:

> It has already addressed the consistency of the first [positive list] and second [intended use requirements] elements with its WTO obligations in sections III.D and III.E. Indonesia thus incorporates by reference, *mutatis mutandis*, its arguments with respect to the first and second elements into its response to Brazil's claim with respect to Indonesia's import licensing regime.

124. However, the sections referred to by Indonesia do not deal with Brazil's claims under Article 3.2 of the ILA. Therefore, even if the Panel were to rule that any or all of these five requirements are connected with a permissible *measure/restriction*, which they are not, Brazil recalls that it has also established that Indonesia's licensing procedures "do not correspond in scope and duration to the measure they are used to implement" and are "more administratively burdensome than absolutely necessary to administer the measure*".* These are additional obligations that establish a more stringent standard than under Article XX of the GATT 1994. For this reason, Indonesia's reasoning regarding its Article XX defence cannot be automatically transplanted to support the compliance of Indonesia's import licensing requirements with Article 3.2 of the ILA. Therefore, Brazil's claims under Article 3.2 of the ILA remain unchallenged by Indonesia.

3. The standard for trade-restrictive or -distortive effects in Article 3.2 of the ILA

125. Having established that the five elements of Indonesia's import licensing regime fall under the scope of the ILA, Brazil now proceeds to show how they are in breach of Article 3.2 of the ILA. Firstly, it must be recalled that Indonesia has only replied to Brazil's claims under Article 3.2 of the ILA in relation to the third element (limited application and validity periods). As explained, regarding the first and the second elements, Indonesia's arguments rested on the erroneous notion that these were not under the scope of the ILA. Therefore, Brazil's claims regarding the compatibility of the

[84] Brazil's first written submission, para. 253. Article 2 of MoA Regulation 58/2015 provides that it "is intended to be the legal basis in the implementation of importation, which purpose is to: a) protect public health and inner peace, animal health and environmental health; b) ensure the compliance of safety, healthy, 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 hazard, and physical hazard; and d) to provide smoothness and certainly in the importation of carcass, meat and processed product thereof." (Exhibit BRA-01).

first, second, fourth and fifth elements of Indonesia's import licensing regime with Article 3.2 of the ILA remain unchallenged.

First sentence of Article 3.2 of the ILA

126. Brazil recalls that the first sentence of Article 3.2 of the ILA provides that "[n]on-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction". It follows that two determinations need to be made to establish a violation of the first sentence: i) whether the measure has trade-restrictive or -distortive effects; and ii) whether these effects are additional to the restriction. It is not clear what elements of this standard Indonesia is challenging. In paragraph 283 of its first written submission, Indonesia seems to imply, based on the jurisprudence of the Appellate Body in *EC – Poultry*, that there is no "causal relationship" between Indonesia's non-automatic licensing procedures and the fact that Brazil (or any other country in the world) has not been able to export chicken to Indonesia since 2009. Indonesia, thus, seems to imply that the first requirement to establish a violation of Article 3.2 (the trade-restrictiveness of the measure) has not been met.

127. It is important to bear in mind that, in *EC – Poultry*, the Appellate Body questioned the existence of a causal relationship between the European Community's licensing regime for in-quota poultry, on one side, and the decrease in the exports of out-of-quota poultry to the EC, on the other side, based on Brazil's "constant percentage share of the tariff-rate quota, full utilization of the tariff-rate quota and a growing total volume of exports".[85] In other words, the reason the Appellate Body failed to see a causal relationship between the licensing regime and the trade restriction was the fact that Brazil continued to export as much or even more than before the establishment of such regime. It is not difficult see to that the factual situation in *EC – Poultry* bears no relation with the present dispute. Indeed, Indonesia's licensing regime has such overwhelming trade-restrictive and -distortive effects that not even a single piece of chicken has been able to enter Indonesia's market for the past seven years. This is "persuasive evidence" of the "decline in market share".[86] As acknowledged by the Panel in *Brazil – Retreated Tyres*, an import ban is "by design as trade-restrictive as can be".[87]

128. The second determination to establish a violation of the first sentence of Article 3.2 consists in asserting whether the trade-restrictive or distortive effects on the imports are "additional to those caused by the imposition of the restriction". As discussed in paragraphs 119 to 122 above, if the measure is not *permissible*, any trade-restrictive or distortive effects shall be deemed "additional". In the present dispute, to the extent that the five elements of Indonesia's import licensing regime violate substantive provisions

[85] Appellate Body Report, *EC – Poultry*, para. 126.
[86] Appellate Body Report, *EC – Poultry*, para. 126.
[87] Panel Report, *Brazil – Retreaded Tyres*, para. 7.211.

of the WTO Agreements, in particular Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, they cannot be deemed *permissible*, and are thus in violation of Article 3.2 of the ILA.

Second sentence of Article 3.2 of the ILA

129. Establishing a violation of the second sentence of Article 3.2 of the ILA also requires two determinations. A complainant needs to establish that the non-automatic licensing procedures: i) do not correspond in scope and duration to the measure they are used to implement; and ii) are more administratively burdensome than absolutely necessary to administer the measure. It is worth emphasizing that both provisions require the existence of a *permissible* measure, which means that the same reasoning put forward in the previous paragraph apply. If there is not *permissible* measure, the conclusion must be that the import licensing procedures under examination are in violation of the second sentence of Article 3.2 of the ILA.

130. When a *permissible* measure is found to exist, the import licensing procedures put in place to administer it need to comply with the aforementioned requirements. In paragraph 253 of its first written submission, Brazil has explained that "even considering that Indonesia's procedures could be applied to administer legitimate restrictions on imports, by its design, structure and operation the regime imposes restrictions on the importation of Brazilian chicken meat and chicken products far additional than those that would be required to implement the relevant controls and 'restrictions'". In addition to the limitations associated with the positive list and intended use requirements, whose conformity with Article 3.2 of the ILA Indonesia is not sustaining, 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 the license, this particular feature of Indonesia's import licensing regime imposes an unduly additional restriction on trade that severely affects Brazil's export interests."[88]

131. Brazil emphasizes that the standard of "no more administratively burdensome than absolutely necessary" in Article 3.2 of the ILA is more stringent than that contained in Article XX of the GATT 1994. Firstly, different from the necessity test under the *chapeau* of Article XX, the second sentence of Article 3.2 of the ILA refers to burden ("no more burdensome"), and not to trade-restrictive. The trade-restrictiveness of the licensing procedures is examined under the first sentence of Article 3.2, which means that the second sentence must add to the obligations already contained under the first sentence. Secondly, the second part of the second sentence of Article 3.2 of the ILA contains the word "absolutely", which further limits the imposition of any burden on WTO Members in connection with the implementation of non-automatic licensing procedures. Indonesia's interpretation of the standard in Article 3.2 of the ILA fails to

[88] Brazil's first written submission, para. 254.

give effect to the textual differences between this provision and the text of Article XX of the GATT 1994.

132. Similarly, the standard under Article 3.2 of the ILA is also not analogous to Article 2.2 of the Agreement on Technical Barriers to Trade ("TBT Agreement"), which provides that "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, *taking account of the risks non-fulfilment would create*" (emphasis added). Under Article 2.2 of the TBT Agreement, the focus is on the proportionality between the trade-restrictiveness of the technical regulation (the measure) and the risks it seeks to mitigate.[89] By contrast, Article 3.2 of the ILA focus on the burden of the implementation of the measure, not on its trade-restrictiveness, which is the object of the first sentence of Article 3.2 of the ILA. Therefore, even in situations where trade-restrictive or -distortive effects cannot be substantiated, a non-automatic licensing regime can still violate Article 3.2 of the ILA if it is more *burdensome* than *absolutely* necessary. Again, the focus of the second sentence is on the burden of the measure, not on its trade restrictiveness, which is addressed under the first sentence.

ii. The grey zones of Indonesia's import licensing procedures

133. Indonesia argued in its first written submission that, of the five elements of Indonesia's import licensing regime challenged by Brazil under Article 3.2 of the ILA, only the "limited application and validity periods" would fall under the ILA.[90] According to Indonesia, the positive list and intended use requirements do not fall under the ILA because they are substantive, rather than procedural import licensing requirements. Brazil considers that this distinction does not apply in the present case.

1. Bridging the procedural versus substantive divide

134. Article 1.1 of the ILA defines import licensing as

> administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than required for customs purposes) to the relevant administrative body as a prior condition for importation.

135. The ILA thus distinguishes between administrative procedures (import licensing) and the substantive rules (*the measure*) these procedures are meant to

[89] Appellate Body Report, *US – COOL (21.5)*, para. 5.215. "[I]n assessing the equivalence of the respective degrees of contribution, such a margin of appreciation can be informed by the risks that non-fulfilment of the technical regulation's objective would create, in particular, it may be affected by the nature of the risks and the gravity of the consequences arising from the non-fulfilment of the technical regulation's objective. This stems from the requirement in Article 2.2 that account is to be taken of 'the risks non-fulfilment would create' in assessing whether a technical regulation is 'more trade-restrictive than necessary to fulfil a legitimate objective." (emphasis added).
[90] Indonesia's first written submission, para. 245 and 286.

administer. This distinction is made clear in light of recital five of the preamble of the ILA according to which "import licensing [i.e. administrative procedures] may be employed to administer *measures* such as those adopted pursuant to the relevant provisions of the GATT 1994".

136. For instance, as discussed in section III.C.i above, non-automatic import licensing is frequently used in the administration of anti-dumping duties. In this situation, the administrative act imposing the anti-dumping duty is *the measure*. Non-automatic import licensing procedures are thus put in place to administer compliance with this normative act (*the measure*). This means that, as a prior condition for importation, the relevant administrative body of the country imposing the anti-dumping duty may subject the import of the product under anti-dumping duties to a non-automatic licensing procedure, to attest whether the products are subjected or not to the relevant measure. This is clearly an administrative procedure, different from the underlying measure, designed to implement a measure (an import licensing regime), which meets the definition of import licensing in Article 1.1 of the ILA.

137. The dividing line between substantive and procedural requirements is, however, somewhat blurred in relation to the challenged elements of Indonesia's import licensing regime for chicken meat and chicken products. For instance, the positive list requirement establishes a quantitative restriction on the importation of chicken meat and chicken products. In this sense, it could be considered a "substantive measure" analogous to the administrative act imposing the anti-dumping duty referred to above, though not permissible under WTO rules. Yet, the positive list requirement also obliges, as a prior condition for importation, the importer to submit documentation to the relevant administrative bodies in Indonesia attesting that the products being imported is included in Indonesia's positive list. In other words, there is also an administrative procedure attached to the implementation of the positive list requirement that meets the definition of import licensing in Article 1.1 of the ILA, and therefore falls squarely under the scope of the ILA.

138. What makes it difficult to distinguish between procedural and substantive requirements is the fact that there is no clear permissible *measure* Indonesia's import licensing regime is meant to implement. However, even if one considers the positive list requirement, to continue with the previous example, as the *measure* the administrative procedures are meant to implement, the question then becomes whether these procedures are permissible. In many respects, the confusion lies in the very bottom of the problem before this Panel: as the positive list requirement (as well as the other elements of Indonesia's import licensing regime), as a substantive requirement, is in violation of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture (i.e. they are not *permissible*), it cannot properly constitute a *measure* within the meaning of Article 3.2 of the ILA.

139. Due to this specific feature of Indonesia's import licensing regime, there are several instances of grey zones where the requirements could easily be characterized both as substantive and procedural, and, in this sense, not only do they violate the substantive provisions of WTO Agreements, but also pertain to procedural provisions regulated by the ILA.

140. As explained in paragraphs 246-247 of Brazil's first written submission, Indonesia's import licensing regime meets all the relevant criteria under both Articles 1.1 and 3.2 of the ILA. Firstly, in order to obtain the MoA Import Recommendation and the MoT Import Approval required to perform an import transaction, the importer must, among other steps, submit applications to different administrative bodies. Secondly, the submission of the application and the other required documents for the MoA Import Recommendation and the 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 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.

141. Brazil agrees that the jurisprudence in *EC – Bananas III*, referred to by Indonesia in paragraph 280 of its first written submission, is relevant in determining the scope of Article 1.1 of the ILA. In that dispute, the Panel explained that:

> [I]rrespective of whether the term 'licensing' is used, in our opinion, administrative procedures are covered by the Licensing Agreement provided that they have a purpose similar to licensing. In other words, Article 1 of the Licensing Agreement, as further elaborated by footnote 1 thereto, *clearly follows a functional approach*.[91]

142. Three paragraphs below, the Panel further explains that Article 1.1 of the ILA is to be interpreted broadly:

> Indeed, the general definition of *the scope of application in Article 1.1 of the Licensing Agreement is formulated in a comprehensive manner*: import licensing procedures are mentioned without any reference to the underlying measure for whose administration they are employed. Moreover, procedures which are not in explicit terms labelled as 'licensing' but pursue a similar purpose are included in the scope of the Licensing Agreement by virtue of footnote 1 to Article 1.1.[92]

143. The Panel thus proposes a functional approach, according to which what needs to be taken into account is the effect in practice of procedures that perform "as a prior

[91] Panel Report, *EC-Bananas III*, para. 7.147. (emphasis added).
[92] Panel Report, *EC – Bananas III*, para. 7.150. (emphasis added).

condition to importation". Under this light, there may not be a clear distinction between the procedural and substantive aspect of the licensing regime, particularly in the absence of a permissible restriction that the import licensing procedures are meant to implement. In this particular case, the administrative procedures attached to the alleged substantive requirement in a licensing regime cannot be discarded as a procedural measure within the realm of the ILA. Moreover, in the present dispute, Brazil has shown that the five elements of Indonesia's import licensing regime are administrative procedures under the purview of Article 1.1 of the ILA.

144. Indonesia, in turn, has not explained why it considers that the positive list and the intended use requirements are not under the purview of the ILA. It has also not responded to Brazil's claims regarding the fourth (fixed license terms) and fifth (discretionary import licensing) elements of its import licensing regime. Brazil's claims in relation to these two elements of Indonesia import licensing regime remain unchallenged.

iii. Article XI:1 of the GATT 1994, Article 4.2 of the Agreement on Agriculture and Article 3.2 of the ILA shall be interpreted harmoniously

145. In its first written submission and in its responses to the Panel's questions, Indonesia argued that "Article XI:1 of the GATT 1994 does not apply in the present dispute, and that the substantive requirements pertaining to the challenged import licensing regime must be analysed under Article 4.2 of the Agreement on Agriculture, under the *lex specialis* rule."[93] In section II.B.i above, Brazil has explained that Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture are not mutually exclusive. Brazil considers that, *mutatis mutandis*, the same reasoning applies to the evaluation of Indonesia's import licensing procedures with Article XI:1 of the GATT and Article 4.2 of the Agreement on Agriculture. Similarly, as Brazil has explained in several instances, there are no grounds to consider that a licensing procedure cannot violate at the same time Article XI:1 of the GATT 1994, Article 4.2 of the Agreement on Agriculture and Article 3.2 of the ILA.

146. Indeed, there is no conflict between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture on the one hand, and Article 3.2 of the ILA on the other. Brazil agrees with the statements in paragraph 20 of the United States' response to the Panel's questions:

> In the present dispute, the United States does not see (nor has Indonesia identified) a conflict between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture on one hand, and Article 3.2 of the ILA on the other. Indeed, Article 3.2 of the ILA anticipates that there may be a separate WTO-

[93] Indonesia's first written submission, para. 245.

> consistent "restriction" "impos[ed]" through non-automatic licensing procedures. If a Member imposes non-automatic import licensing and another provision of the WTO Agreement provides a WTO-consistent basis to impose that measure – such as a tariff-rate quota consistent with a Member's Schedule and exempted from Article XI:1, for example – the Import Licensing Agreement, including Article 3.2, applies to ensure that the permissible measure is not implemented through an overly restrictive or burdensome licensing procedure. Nevertheless, licensing requirements that in themselves impose a limitation or limiting condition on importation or have a limiting effect on trade also would fall within the scope of Article XI:1 of the GATT 1994.[94]

147. In the present dispute, the limiting effect on trade of Indonesia's import licensing regime cannot be disputed, as not a single chicken or chicken product has been able to enter the Indonesian market since 2009.

1. The prohibition on the importation of certain animal and animal products (the positive list requirement)

148. The compatibility of the positive list requirement with Article XI:1 of the GATT and Article 4.2 of the Agreement on Agriculture was dealt with in Section III.B.i above. As a procedure, requiring that importers provide evidence that a given product is included in the positive lists as a prior condition for importation constitutes a violation of Article 3.2 of the ILA. As the positive list requirement is not a "*permissible* measure", any administrative procedures attached to this *restriction/measure* must be considered "additional" in the terms of Article 3.2 of the ILA.

149. Brazil has also established that, even if the Panel considers that the positive list requirement is a permissible restriction, i) it is more administratively burdensome than absolutely necessary to administer the measure; and ii) does not correspond in scope and duration to the measure it is used to implement. In other words, even assuming that there could be a legitimate reason for exceptionally preventing imports of chicken meat and chicken product from Brazil during a certain period of time, due for instance to a disease outbreak, completely denying the possibility of obtaining a license for a particular product for no specific reason, and for an indefinite period, certainly does not correspond in scope and duration to the objective of preventing the spread of the disease and is also more burdensome than necessary to achieve that objective. Indonesia did not submit any argument to the contrary.

2. The prohibition of granting import licensing to certain intended uses

[94] (footnote original) See Panel Report, *China – Raw Materials*, para. 7.957 (finding that "license requirement that results in a restriction additional to that inherent in a permissible measure would be inconsistent with GATT Article XI:1") (findings mooted on appeal on other grounds).

150. The same applies to the intended use requirement. Substantively, it has an important limiting effect on imports, in violation of both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Procedurally, requiring that the importer demonstrates that previous imports have complied with its declared intended use as a prior condition to obtain a new license is a violation of Article 3.2 of the ILA. As there is no permissible measure this requirement implements, any administrative procedure attached to the intended use requirement is necessarily an additional restriction in the sense of Article 3.2 of the ILA.

3. The limited application windows and validity periods

151. As for the limited application windows and validity period, Brazil understands that Indonesia does not challenge the procedural nature of this requirement, nor that it would fall under the purview of the ILA. Curiously, Indonesia has not even tried to rebut Brazil's claims regarding the incompatibility of the limited application and validity periods with Article 3.2 of the ILA. It limited itself to state that "Brazilian exporters have been prevented from obtaining the Import Approval, because they have not satisfied Indonesia's halal requirements (…) and not because of the limited (and short) application windows".[95] Yet, Indonesia has not explained how the limited validity and application period of the Import Recommendation and Import Approval are related to the observance of halal requirements. As abundantly explained, if there is no *permissible* measure non-automatic import licensing procedures are meant to implement, they are in violation of Article 3.2 of the ILA.

152. Brazil has also clearly demonstrated that Indonesia's limited application windows and validity periods of the MoA Import Recommendation and the MoT Import Approvals have a limiting effect on trade in a manner inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. As a third party in these proceedings observed,[96] the jurisprudence in *Colombia – Ports of Entry* is relevant in supporting this limiting effect. In that dispute, the panel noticed that

> a number of GATT and WTO panels have recognized the applicability of Article XI:1 to measures which create uncertainties and affect investment plans, restrict market access for import or make importation prohibitively costly, all of which have implication on the competitive situation of an importer[97].

153. More recently in *Argentina – Import Measures*, the panel found that the DJAI procedure challenged in that dispute had a limiting effect because

> it: (a) restricts market access for imported products to Argentina as obtaining DJAI in exit status is *not automatic*; (b) creates uncertainty as to the applicant's ability to

[95] Indonesia's first written submission, para. 288.
[96] Japan's third-party statement, para. 8.
[97] Panel Repot, *Colombia – Ports of Entry*, para. 7.240.

> import; (c) does not allow companies to import *as much as they desire* or need without regard to their export performance; and (d) imposes *significant burden* on importers that is unrelated to their normal importing activity.[98]

154. For the reasons already explained in Brazil's first written submission, in the present dispute, the limited application and validity periods have indeed a limiting effect on imports of chicken meat and chicken products into Indonesia.

155. In its responses to the Panel's questions after the first meeting, Indonesia has clarified that the MoA Recommendation and the MoT Import Approval cover all transactions taking place throughout the four-month validity period. Brazil appreciates the clarification, but considers that this fact does not alter the trade-restrictive nature of Indonesia's import licensing regime. As explained, 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. As the whole export procedures of chicken meat and chicken products from Brazil to Indonesia would take in average 100 days, these elements of Indonesia's import licensing regime have a particular limiting effect on Brazilian exports.

156. In conclusion, Indonesia's limited applications windows and validity periods of the MoA Import Recommendation and the MoT Import Approvals have a negative effect on the competitive opportunities available for importers of Brazilian products, contrary to the obligations under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

> *The limited application and validity periods are not justified under Article XX(d) of the GATT 1994*

157. Indonesia frailly attempts to justify the limited application and validity period under Article XX(d) of the GATT 1994 as a measure "designed to secure compliance with Indonesia's laws and regulations addressing halal, public health, as well as deceptive practices (consumer protection) and customs enforcement relating to halal and safety".[99] It is difficult to see any connection between the limited application and validity periods with the observance of halal requirements. Brazil agrees with the United States that, in order to justify a measure under Article XX(d) of GATT 1994, it is not enough to simply list a number of general laws and regulations without offering any evidence or explanation on how the measures at issue are designed to secure compliance of these pieces of legislation."[100]

[98] Panel Report, *Argentina – Import Measures*, para. 6.474. (emphasis added).
[99] Indonesia's first written submission, para. 296.
[100] United States' third-party oral statement, para. 15.

158. Compliance with halal and animal health requirements can be obtained through much less trade-restrictive measures, such as proper certification procedures and verification, and information on trade flows can easily be obtained through other means. Indonesia contended that it could not rely on any other means for that but has never explained why it cannot achieve the same results by other means or why these alternative measures are not sufficient to address Indonesia's concerns. The reason is clear. It cannot explain. Both the limited application windows and validity periods have no other objective than to restrict trade.

4. Fixed license terms

159. As for the fixed license terms, Indonesia's response to Brazil's claims that the measure violates Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture is rather curious. It argues that "the terms of the import license – including the type, quantity, country of origin, and port of entry – are at the complete discretion of the importers themselves." Therefore, they are not "measures that are instituted or maintained by Indonesia."[101] The fallacy in this argument is evident, as it is clear that what is at stake in the present dispute is the fact that "the license terms, once defined by the importer, are fixed, and may not be altered during the term that constitutes the restriction". As Norway further observed:

> In *Colombia – Ports of Entry* the panel concluded that restrictions limiting imports from Panama to two ports of entry in Colombia limit "competitive opportunities", and consequently had a limiting effect on imports arriving from Panama contrary to Article XI:1. Furthermore, in *India – Autos*, the panel found that a measure which in reality has the consequence that an importer would not be "free to import [as much] as he otherwise might" constituted a restriction. In the present dispute, the fact that importers are prevented from responding to changes in market conditions has a limiting effect on trade. Therefore, the measure challenged is not the terms of importation as they are determined by private parties, but the requirements limiting what importers can import. The importer being "free to alter their terms of importation from one license application to the next" does not change the fact that this limitation has a limiting effect in a set term.[102]

160. Brazil considers that it is clear that the fixing of the license terms is a measure that is instituted and maintained by Indonesia. Moreover, the trade-restrictiveness of this Indonesian measure is evident, particularly considering that the importer who fails to comply with these "fixed license terms" is subject to several sanctions, including the impossibility of submitting new import requests.[103]

[101] Indonesia's first written submission, para. 262.
[102] Norway's third-party executive summary, paras. 7-8.
[103] Brazil's first written submission, para. 210.

The fixed license terms are not justified under Article XX(d) of the GATT 1994

161. Here again Indonesia tried to justify the measure under Article XX (d) of the GATT 1994. According to Indonesia, the fixed license terms "were designed to secure compliance with Indonesia's laws on halal and public health, as well as deceptive practices and customs enforcement relating to halal and food safety". Indonesia based its reasoning on the consideration that, allegedly, the fixed license terms "enable[s] the Government to monitor foreign trade and to facilitate customs enforcement. They provide an estimate of the volume of imports that would enter Indonesia at a particular port and at a given time so that the Government can best allocate its limited resources in order to expedite customs clearance".[104] There are two basic flaws with Indonesia's reasoning.

162. Firstly, it had not explained how the fixed license terms bear any relation to the observance of halal or sanitary requirements. This is a similar situation as in relation to the limited application and validity periods described above, and thus Brazil transports, *mutatis mutandis*, the same argument.

163. Secondly, according to Indonesia, "many of these terms are not as stringent", as "importers may identify more ports than they ultimately use, or higher quantities of import than they ultimately import".[105] If this statement is accurate, one must wonder what actually the purpose of fixing the license terms is. If importers are completely free to identify more ports than they ultimately use or to alter the quantities they ultimately import, how does fixing the license terms provides an "estimate of the volume of imports that enters Indonesia at a particular port and at a given time"? Indonesia clearly contradicts itself. If the terms are "not as stringent", then the only purpose they can have is to serve as yet another trade restrictive tool to close the Indonesian market. If they are "as stringent" as they seem, then they are clearly in violation of the WTO rules.

5. Discretionary import licensing

164. Footnote 1 of Article 4.2 of the Agreement on Agriculture places discretionary import licensing among the measures of the kind which have been required to be converted into ordinary customs duties. Members shall not maintain, resort to, or revert to any of such measures. In paragraph 157 of its first written submission, Brazil has recalled the standard established in *Turkey – Rice* for interpreting the term "discretionary import licensing", i.e, "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". Moreover, the panel clarified that one of the features of "discretionary import licensing"

[104] Indonesia's response to Panel question No. 24.
[105] Indonesia's response to Panel question No. 24.

is the "lack of transparency and lack of predictability", which also is liable to restrict the volume of imports.[106] This means that the simple lack of transparency or predictability as to whether a particular document which is necessary for the importation of a good will be granted or not is sufficient to qualify a measure as "discretionary import licensing".

165. In the present dispute, Brazil has argued that some requirements of Indonesia's 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 those 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.[107]

166. In its responses to the Panel´s questions after the first meeting, Indonesia argued that the "letter of recommendation" and the "veterinary supervision" are only "procedural steps that must be taken to obtain documents required for the Import Recommendation." Still according to Indonesia, the only requirements that can be properly characterized as import licensing within the meaning of footnote 1 are those that must be fulfilled to obtain the Import Recommendation and the Import Approval themselves. Any requirements further upstream, such as the application process for various sanitary documents, or Customs Registration, which importers of chicken may use to obtain the Import Recommendation and the Import Approval do no constitute 'import licensing'."[108] Brazil considers that this separation between the documents required to obtaining the license and the granting of the license itself is clearly artificial. In *Turkey – Rice*, the Appellate Body made no such distinction when it explained that "discretionary import licensing" was related to the "a particular document which is necessary for the importation of a goods". Therefore, the "letter of recommendation" and the "veterinary supervision" clearly fall under the concept of "discretionary import licensing".

167. On substance, Brazil appreciates Indonesia's explanation and clarifications in its responses to Panel questions Nos. 17 to 21. It is clear from Indonesia's description of the requirements for obtaining the "letter of recommendation" and from the procedures related to the "veterinary supervision" that they both represent yet another overlapping layer of control and supervision in Indonesia's maze-like and burdensome import licensing regime. As previously explained, all these procedures are oriented by the self-sufficiency policy – the glue that holds together the entire system of trade restriction on the importation of chicken meat and chicken products. Indeed, this objective is spelled out in the preamble of MoA Regulation 58/2015, which specifically refers to Laws 18/2009 and Law 18/2012. This means that the substantive provisions of MoA

[106] Panel Report, *Turkey – Rice*, para. 7.132.
[107] Brazil's first written submission, para. 234.
[108] Indonesia's first written submission, para. 273.

Regulation 58/2015 must be read in light of Indonesia's self-sufficiency policy. This adds to the discretionary nature Indonesia´s import licensing regime, as well as to its lack of transparency or predictability.

168. As for the explanation about the process for obtaining a letter of recommendation from the provincial authority of DKI Jakarta, Brazil would like to point out that the procedure spelled out in Indonesia's response to the Panel's question No. 17 does not correspond to the content of the Exhibits IND-95 and IND-96. The former is only a list of the required documentation with no reference to the specific piece of legislation it has been taken from. The latter seems to be a copy of a form entitled "Application of Recommendation on Import the Animal Products to DKI Jakarta". There is also no reference to any piece of legislation. Moreover it is not clear whether these exhibits have any legal value or whether they can be enforced in court in case the local authority refuses to grant the relevant certificate. If the local authority is not legally obliged to issue the certificate, one can only conclude that this requirement (a prior condition to importation) is "discretionary", in the sense of footnote 1 of Article 4.2 of the Agreement of Agriculture.

169. Moreover, as Indonesia has properly stated in paragraph 267 of its first written submission, the "letter of recommendation" and the procedures related to the "veterinary supervision" are only two examples of discretionary requirements under Indonesia's import licensing regime provided by Brazil". Another example of discretionary import licensing is contained in Article 27 of MoA Regulation 58/2015, which reads:

> Determination of the amount in Recommendation per Business Player, Social Institution, and Foreign Country Representative/International Institution, shall be stipulated by the minister administrating governmental trade affairs.

170. The translation of Article 27 is not entirely clear. In particular, the term "amount" could refer to i) the stipulation of the amount (quantity) of products that can be imported by each Business Player; or ii) the amount (quantity) of Recommendations a Business Player can obtain from the Minister of Trade. Under both interpretations, the Minister of Trade has the discretionary power to stipulate the "amount" to be imported per Business Player. In any event, the fact remains that the stipulation of the "amount" falls exclusively under the discretion of the Minister of Trade, which qualifies this provision as a "discretionary import licensing".

171. Moreover, even if the Panel considers that these requirements of Indonesia's import licensing regime are not "discretionary", it is easy to see that they fail under Article 3.2 of the ILA, as they impose a heavy burden on the exporter, who needs to comply with a series of overlapping import controls that are not "absolutely" necessary to achieve Indonesia' policy objectives.

iv. Conclusion

172. In conclusion, Brazil has established that Indonesia's import licensing regime is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, as well as with Article 3.2 of the ILA.

D. Indonesia's halal labelling requirements accords less favourable treatment to imported like products

173. As mentioned at length, Brazil takes no issue with regard to Indonesia's halal requirements and it does not challenge Indonesia's right to establish halal requirements as "an imperative of the religious beliefs of the Indonesian society".[109] However, Brazil challenges the discriminatory implementation system established by Indonesia with regard to labelling certification procedures. While Indonesia grants a 5-year grace period to implement labelling certification procedures exclusively to domestic producers, starting from 2014, the same treatment is not granted for imported chicken meat and chicken products, which are only allowed to be imported after complying with all Indonesian halal certification and labelling requirements.

174. A less favourable treatment, as already discussed in the present dispute, 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 domestic products.[110]

i. Legal standard under Article III:4 of the GATT 1994 for labelling certification procedures

175. Article III:4 of the GATT 1994 provides in relevant part that:

> 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.

176. The Appellate Body has previously established that there are three elements that must be demonstrated by the complainant in order to make a *prima facie* case that a measure violates Article III:4, as follows: (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 their internal sale, offering for sale, purchase, transportation,

[109] Indonesia's first written submission, para. 345.
[110] See Brazil's first written submission, para. 290; Appellate Body Report, *Korea – Various Measures on Beef*, para. 135; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 93.

distribution or use", and (iii) the imported products are accorded "less favourable" treatment than that accorded to like domestic products.[111]

177. As to the first element, Brazil has already clarified in Section III.A.i.4 above that the imported and domestic products at issue are like.[112]

178. In what regards the second element for a violation of Article III:4 of the GATT 1994, it is undisputable that the measure falls within the definition of "law, regulation, or requirement" affecting the internal sale, offering for sale and distribution of foreign chicken meat and chicken products. In fact, Indonesia has recognized in its first written submission that it "does not take issue with the characterization of Law 33/2014 or MoT Regulation 58/2015 as a 'law, regulation, or requirement affecting the products' internal sale, offering for sale, purchase, transportation, distribution, or use'".[113]

179. With respect to the third element, Brazil recalls that the Panel in *Japan – Film* defined that the standard of equality of competitive conditions is a benchmark for establishing "no less favourable treatment".[114] Indeed, also in *US – Section 337*, the GATT panel report stated that "the words 'treatment no less favourable' in paragraph 4 call for *effective equality of opportunities* for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products".[115]

180. As Brazil demonstrated, the fact that currently only imported products are obliged to observe the halal requirements and are subject to stricter controls is a clear violation of Article III:4 of the GATT 1994.

ii. Indonesia failed to demonstrate that the measure is justified under Article XX of the GATT 1994

181. In its first written submission, Indonesia seeks to justify the implementation of its halal labelling certification procedures under subparagraphs (a) and (d) of Article XX of the GATT 1994.[116] However, Brazil recalls that Article XX provides for limited and conditional exceptions from obligations and, thus, defences under this provision should not be viewed as an easy shortcut to deviate from other GATT commitments and obligations.

[111] See Appellate Body Report, *Korea – Various Measures on Beef*, para. 113.
[112] 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).
[113] Indonesia's first written submission, para. 315.
[114] Panel Report, *Japan – Film*, para. 10.379.
[115] GATT Panel Report, *US — Section 337*, para. 5.11. (emphasis added).
[116] Indonesia´s first written submission, para. 342.

182. The Appellate Body has provided useful guidance in the interpretation of the application of Article XX in *US – Gasoline*[117] and *US – Shrimp*[118], in which it defines the importance of a balance between trade liberalization, market access, non-discrimination, and other societal values and interests.

183. In analysing a defence under Article XX, the Panel must conduct a two-tiered test analysis. First, the GATT-inconsistent measure must meet the requirements of Article XX exceptions listed in paragraphs (a) to (j); and secondly, the measure must meet the requirements of non-discrimination of the *chapeau*, which prohibits the application of measures that unjustifiably or arbitrarily discriminate among countries where the same conditions prevail, or imposes a disguised restriction to trade.

184. The first defence invoked by Indonesia with regard to its halal certification labeling requirements is under Article XX(a) of the GATT 1994. In this sense, Indonesia argues that "the halal requirements are necessary to protect public morals".[119]

185. As repeatedly asserted by Brazil in its first written submission and during the first meeting with the Panel, it does not challenge Indonesia's right to establish the halal requirements nor questions the fact that these requirements are necessary to protect its religious beliefs and public morals. As the world's leading exporter of halal chicken, Brazil is fully aware of the importance of respecting the different halal standards adopted by different Muslim countries.[120] Thus, it does agree with Indonesia on the relevance of the decision of the Appellate Body in *EC – Seal Products* that "Members should be given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values".[121]

186. Brazil also clarifies that Indonesia's assertion that Brazil utilizes mechanical slaughtering in poultry slaughterhouses is mistaken.[122] Halal slaughtering in Brazil is performed by the country's poultry slaughterhouses through manual slaughtering[123], as required by Indonesia.

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[117] Appellate Body Report, *US – Gasoline*, p. 18.
[118] Appellate Body Report, *US – Shrimp*, para. 156.
[119] Indonesia's first written submission, para. 346.
[120] Brazil has extensively demonstrated that it is capable of complying with any halal requirement established by Indonesia, just as it complies with distinct halal requirements of the many Muslim destinations Brazil exports to. As a matter of fact, Brazil has recently received a notice from the Majelis Ulama Indonesia regarding the renewal of approval of one of its halal certification bodies, in a clear indication that Indonesia recognizes that the Brazilian halal certification bodies observe and comply with Indonesia's halal requirements. See Exhibit BRA-50.
[121] Appellate Body Report, *EC – Seal Products*, para. 5.199.
[122] Indonesia's first written submission, para. 21.
[123] Halal manual slaughtering in Brazil is performed as follows: (i) manual slaughtering by a Muslim who has reached puberty; (ii) the Muslim in charge of the slaughter must pronounce the name of Allah during slaughter, with the face of the animal facing Mecca; (iii) the animal must not be thirsty at the time of slaughtering; (iv) the knife must be very sharp, and should not be sharp in front of the animal; (v) the three major vessels (jugular, trachea and esophagus) must be cut; (vi) the death must be quick to avoid

187. Brazil contends that Indonesia did not provide any evidence to justify the "necessity" of the discrimination between domestic and imported chicken meat and chicken products to protect its public morals, as required by Article XX or how this discriminatory treatment contributes to further the public morals of the country.

188. Certainly, it is for the Member raising defences under any of the subparagraphs of Article XX to establish that its measure is provisionally justified and does not constitute either a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. With regard to the "necessity" of the measure under Article XX(a), Indonesia bears the obligation to demonstrate that the inconsistent measure is in fact "necessary", while it is for the Panel to "weigh and balance" the factors surrounding the establishment of the measure and assess whether less-trade restrictive alternatives are also adequate vis-à-vis the objective pursued by the Member.[124]

189. It is Brazil's understanding that even if it was possible to justify the discriminatory 5-year grace period halal certification and labeling requirements under subparagraph (a) of Article XX, this measure would not pass the test of the *chapeau*. Indeed, to the extent that the measure is only applicable to imported products, it is on its face a violation of Article III:4 of the GATT 1994.

190. Furthermore, Indonesia tries to explain in section III.H.4 of its first written submission that halal labelling would be applicable only to packaged products and, therefore, because domestic chicken meat and chicken products are mainly sold in the traditional markets and are not necessarily packaged like imported products, then the halal label would not be mandatory for the domestic products.

191. However, Indonesia's explanation is completely misguided. In trying to explain that the halal label is mandatory only to "packaged products, whether domestic or imported",[125] Indonesia cites several Articles of its domestic legislation, but it conveniently leaves behind maybe the most important provision of Law 33/2014, which states that:

> *Article 38*
> *Business Operators that have obtained Halal Certificate must include the Halal Label on:*
> *-Product packaging;*

suffering to the animal; and (vii) the blood must be completely removed of the carcass. Available in Portuguese in: <http://abpa-br.com.br/setores/avicultura/mercado-externo/a-tecnica-de-abate-halal>. See Exhibit BRA-51. These are the basic procedures followed by Brazil, but nothing prevents the country to comply with additional halal requirements that Muslim consumers around the world deem necessary to protect their religious belief.

[124] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 242.

[125] Indonesia's first written submission, para. 329.

-specific part of the Product; and/or
-specific place of the Product.

192. Law 33/2014 concerning Halal Product Assurance, in Article 38, does not make any reference with regard to the necessity to attach the halal label only to packaged products. Instead, it provides for three different possibilities to the attachment of the label: (i) in the package of the product; (ii) in a specific part of the product; and/or (iii) in a specific place of the product. That is, according to Indonesia legislation, packaging is not a reason to justify the discriminatory treatment.

193. The same applies to the defences claimed by Indonesia under paragraph (d) of Article XX.[126] Indeed, Indonesia has failed to provide any evidence that the challenged measures contribute to the enforcement of any particular law or regulation. As already explained, it is not sufficient that Indonesia simply asserts that "the implementation of halal requirements is 'necessary' to secure compliance with these domestic legal provisions" without providing any evidence or further clarification that would justify the discriminatory treatment against imported products, which must be certified and labeled halal before entering the Indonesian territory.

iii. Conclusion

194. The discriminatory treatment provided by Indonesia against imported products with regard to the 5-year grace period for halal labeling certification requirement is inconsistent with both paragraphs (a) and (d) of Article XX of the GATT 1994, as well as with the *chapeau* of the same provision since it imposes an arbitrary or unjustifiable discrimination between domestic and imported like products.

E. Indonesia's undue delay to approve the veterinary certificate required to authorize Brazilian exports of chicken to enter the Indonesian market is a violation of the SPS Agreement

195. As explained in Brazil's first written submission and discussed during the first meeting with the Panel, Indonesia has failed to undertake and complete the procedures to check and ensure the fulfillment of sanitary requirements necessary to authorize Brazilian exports of chicken meat and chicken products.

196. Since 2009, when Brazil submitted a proposal of an International Health Certificate ("veterinary certificate") for the approval of exports of chicken meat and chicken products, Indonesia has not provided any response to the Brazilian Government. Brazil recalls that its proposal followed every guideline from the World Organization for Animal Health ("OIE") and there was nothing related to Indonesia's

[126] Indonesia's first written submission, para. 230.

sanitary requirements that could prevent Brazilian exports of the products at issue.[127] Due to this delay of more than seven years, Brazil reiterates its claims that Indonesia's omission is a violation of Article 8 and paragraph 1(a) of Annex C of the SPS Agreement.

197. In its first written submission, Indonesia tried to discredit Brazil's claim by arguing that (i) Brazil had failed to its *prima facie* case because it referred to a different legal provision that establishes the requirement for exporters to have a valid veterinary certificate[128]; and (ii) any delays experienced by Brazil in obtaining the veterinary certificate would be of their own doing because it would have "not submitted all the appropriate documentation"[129] regarding the halal certification requirement in order to continue the process of desk review.

198. Brazil will address each of these arguments in the following subsections in order to demonstrate why they are meritless and should not be considered by the Panel. Before that, Brazil will make a brief overview of the obligation under Article 8 and paragraph 1(a) of Annex C of the SPS Agreement, consistently violated by Indonesia for not approving the proposal of the International Veterinary Certificate.

i. The legal standard of Article 8 and Annex C(1)(a) of the SPS Agreement

199. The negotiation of an International Health Certificate is the first step undertaken by countries interested in the trade of animal products, including chicken. In fact, Indonesia does not dispute the necessity to obtain a valid International Health Certificate for the purpose of exporting chicken meat and chicken products to its market, as it constitutes a sanitary pre-marketing approval requirement. It is clear that the negotiation of a valid International Health Certificate is encompassed by the term "approval procedures" referred to by Article 8 and Annex C as it is a procedure "applied to check and ensure the fulfillment of one or more substantive SPS requirements the satisfaction of which is a prerequisite for the approval to place a product on the market".[130]

200. Article 8 of the SPS Agreement states that:

> 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

[127] As mentioned in Brazil's first written submission (footnote 145), the proposal presented by Brazil to Indonesia authorities were based on the guidelines of the PIE 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").
[128] Indonesia's first written submission, paras. 360-362.
[129] Indonesia's first written submission, para. 366.
[130] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.424.

> contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

201. The relevant part of Annex C of the SPS Agreement, on its turn provides that "1. Members shall ensure the fulfillment of sanitary or phytosanitary measures" and that "(a) such procedures are undertaken and completed without undue delay…". The purpose of this provision is clear – to avoid those sanitary procedures that could be used as a disguised restriction to trade.

202. Therefore, pursuant to both Article 8 and paragraph 1(a) of Annex C of the SPS Agreement, Indonesia was under the obligation to ensure that the procedure to approve the veterinary certificate required to export chicken meat and chicken products to its market was undertook and completed without delay. Seven years without response certainly does not meet this standard.

203. In *Australia – Apples*, the Appellate Body clarified that "Annex C(1)(a) requires Members to ensure that relevant procedures are undertaken and completed with appropriate dispatch", meaning that the procedures shall not involve "periods of time that are unwarranted, or otherwise excessive, disproportionate or unjustifiable".[131] With regard to the present dispute, the relevant aspects in the interpretation of Annex C(1)(a) to be observed are (i) the identification of the approval procedures designed to "ensure the fulfillment of sanitary or phytosanitary measures", and (ii) the understanding that the term undue delay may refer to the absence of formal response from the authorities of the importing country.

204. Indeed, the term "undue delay" comprises not only situations where responses were given with "undue delay", but also situations – like the present one in this dispute – where no responses were given at all. The Panel in *EC – Approval and Marketing of Biotech Products*, in addressing the term "undue delay" clearly identified that the term delay refers to an "unjustifiable loss of time" lost by "inaction or inability to proceed".[132]

205. It is clear from WTO jurisprudence that the delay in approving sanitary procedures, if it occurs, must be reasonable and justified, which is far from being the case in the present dispute. To put it differently, the delay shall not "involve periods of time that are unwarranted, or otherwise excessive, disproportionate or unjustifiable". [133]

206. Indonesia has never provided a response for the Brazilian proposal of an International Health Certificate sent in 2009. Even when questioned by the Panel, Indonesia confirmed that it "has not responded to Brazil's proposed model for a

[131] Appellate Body Report, *Australia – Apples*, para. 437.
[132] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495.
[133] Appellate Body Report, *Australia - Apples*, para.437.

Veterinary Certificate".[134] Surprisingly, Indonesia repeatedly attempts to justify its inaction by arguing that the lack of response to the Brazilian Health Certificate proposal is Brazil's own fault. More worrisomely, Indonesia insists in claiming that it did not proceed to the analysis of the Brazilian proposal because Brazil did not present the appropriate documents and information related to the halal requirements related to two different business units, something that clearly has no connection with the sanitary requirements to which the Health Certificate proposal refers to, in accordance with the SPS Agreement.

207. Compliance with halal requirements has never been an issue for Brazil, which has had for several years its two main certification bodies duly approved by Indonesia: the Islamic Dissemination Centre for Latin America ("CDIAL") and the Federation of Muslims Associations in Brazil ("FAMBRAS").[135]

208. Brazil insists, however, that, although halal certification is not a problem for Brazilian exporters of chicken, halal requirements have no relation with the process of sanitary approval initiated by Brazil's proposal of the veterinary certificate, which should be analysed and approved by Indonesia regardless of the halal requirements. Indonesia simply cannot justify an unreasonable delay resorting to non-SPS issues.

ii. The veterinary certificate is a requirement established in Indonesia's legislation for the importation of chicken meat and chicken products

209. In its first written submission, Indonesia argued that Brazil had not made its *prima facie* case under Article 8 of the SPS Agreement because it referred to a different legal provision which requires a veterinary certificate to export chicken to Indonesia.[136]According to it, Brazil had referenced a provision related to quarantine and not to import procedures.

210. It is important for the Panel to consider that Brazil's reference to Indonesia's legislation served only for the purposes of clarifying that internal regulations required Brazilian chicken exporters to obtain a veterinary certificate if they intended to export to the Indonesian market. The fact that Brazil's legal reference may not have been completely precise – although still related to the importation of the products at issue – does not invalidate the situation in which a veterinary certificate is necessary for importation.

211. Additionally, Brazil highlights that its claim under Article 8 of the SPS Agreement has nothing to do with Indonesia's decision to require exporters to obtain a sanitary certificate – a standard practice in trade of animal products –, but rather its

[134] Indonesia's response to Panel question No. 36.
[135] See Exhibit BRA-50.
[136] Indonesia's first written submission, para. 360-362.

undue delay of more than seven years to undertake and conclude the approval of the Brazilian proposal of veterinary certificate. Thus, an imprecise reference to an internal regulation cannot be used to dismiss Brazil's claim, let alone to justify the undue delay prohibited by Article 8 and paragraph 1(a) of the SPS Agreement.

iii. Halal certification guards no relation with the conclusion of the sanitary procedures related to the approval of the International Health Certificate

212. As previously mentioned, the issue of halal certification guards no connection with the conclusion of the sanitary procedures required by Indonesia. Halal certification is not a SPS procedure and, therefore, should not be confounded with a sanitary requirement nor considered in a government-to-government sanitary approval process of an International Health Certificate that would allow exports of the products at issue in the present dispute.

213. Indonesia does not dispute that halal certification is not covered by the scope of the SPS Agreement. Indeed, it notes that these requirements "are completely different from sanitary or phytosanitary information provided by the business units to obtain the 'International Veterinary Certificate'".[137] Brazil, thus, fails to understand why Indonesia attaches the sanitary procedure of approving the veterinary certificate to compliance with non-halal requirements.

214. In sum, Indonesia's attempt to justify its undue delay for not concluding the analysis of Brazil's veterinary certificate proposal with non-SPS requirements has no merit and should be disregarded by the Panel.

iv. Conclusion

215. Indonesia has consistently failed to undertake and complete, without undue delay, the procedures to check and ensure the fulfillment of sanitary requirements necessary to authorize Brazilian exports of chicken meat and chicken products, and is, therefore, in violation of Article 8 and paragraph(1)(a) of Annex C of the SPS Agreement.

F. The direct transportation requirement is a quantitative import restriction

216. It is still unclear to Brazil how the direct transportation requirement operates in practice. The legal provision challenged by Brazil – previously Article 20(a) of MoA Regulation 58/2015, now replaced by Article 19(a) of MoA Regulation 34/2016 – requires that the transportation of carcass, meat and/or processed products shall be

[137] Indonesia's first written submission, para. 371.

"*conducted directly* from the Country of Origin to the port of entry within the territory of the Republic of Indonesia".[138]

217. In its first written submission and in its response to the Panel's questions 39-42, Indonesia has suggested that "direct" in this provision does not have its ordinary meaning. Indonesia explained that "direct" "may be used in the same manner as it is used in the airline industry. A direct flight is one that may make stops and pick up additional passengers but the original passengers do not leave the plane. A 'non-stop' flight does not make any stops at all".[139] Indonesia claims that the direct transportation requirement should be read in the context of the other provisions in the same Article, which would suggest that transit is, in fact, allowed.

218. Brazil sees two problems with Indonesia's explanation of the operation of the direct transportation requirement. Firstly, the plain reading of this provision does not support the conclusion that transit would be allowed by the Indonesian authorities. In other words, there is not a logical connection (or any connection at all) identified in the specified provision that infers that the direct transportation requirement must be interpreted together with the provisions that regulate quarantine. This generates uncertainty to exporters and economic operators, as they may not have a legal remedy should their exports be prevented from entering Indonesia because they did not travel a direct route.

219. Secondly, the way Indonesia has described its direct transportation requirement, as a flight that "makes stops and pick up additional passengers but the original passengers do not leave the plane", seems to imply that transshipment is not included in Indonesia's definition of transit. If this is the case, then Brazil understands that the restrictions to transshipment is also a quantitative restriction in the sense of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

i. The restrictions on the transportation of the products at issue are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

220. To the extent that the Indonesian legislation requires on its face that transportation is "conducted directly from the Country of Origin to the port of entry within the territory of the Republic of Indonesia", Brazil claims that this measure has a clear limiting effect on the imports of the products at issue.

221. In fact, considering the specific case of Brazil, due to the distance between both countries, it is nearly impossible that a vessel traveling from Brazil to Indonesia would not need to stop for transit, including transshipment, in another port. Therefore, this

[138] See Exhibit BRA-48. (emphasis added).
[139] Indonesia's first written submission, footnote 421 to paragraph 305.

requirement amounts to a virtual ban on the importation of the products at issue from Brazil. As mentioned in Brazil's first written submission, even if it was possible to export animals and animal products from Brazil directly to Indonesia, the requirement to conduct a direct transportation from the port of origin to the port of destination would considerably increase the transportation costs of the Brazilian exports and, thus, greatly "discourage importation" which, in accordance with the Panel's findings in *Argentina – Import Measures*,[140] violates the obligation under Article XI:1 of the GATT 1994.

222. Similarly, even if transit (and transshipment) is allowed in practice, the legal uncertainties generated by the murky language of Regulation Article 19(a) of MoA Regulation 34/2016 also amount to a quantitative restriction. Indeed, in *Colombia-Ports of Entry*, the panel noted that "a number of GATT and WTO panels have recognized the applicability of Article XI:1 to measures which create uncertainties and affect investment plans, restrict market access for import or make importation prohibitively costly, all of which have implication on the competitive situation of an importer".[141] More recently in *Argentina – Import Measures*, the panel found that the DJAI procedure challenged in that dispute had a limiting effect because

> it: (a) restricts market access for imported products to Argentina, as obtaining DJAI in exit status is not automatic; (b) *creates uncertainty as to the applicant's ability to import*; (c) does not allow companies to import as much as they desire or need without regard to their export performance; and (d) imposes significant burden on importers that is unrelated to their normal importing activity[142] (emphasis added).

223. As explained previously, a violation of Article XI:1 of the GATT 1994 would also entail a violation of Article 4.2 of the Agreement on Agriculture in the case of agricultural products. Because this dispute is related to chicken meat and chicken products, Brazil claims that the direct transportation requirement is inconsistent with Article 4.2 and its footnote.

ii. Conclusion

224. Indonesia's direct transportation requirement amounts to a quantitative restriction to the imports of chicken meat and chicken products, which is in breach of Article XI:1 of the GATT 1994 and Article 4.2 and footnote 1 of the Agreement on Agriculture.

[140] Panel Report, *Argentina – Import Measures*, para. 6.261.
[141] Panel Repot, *Colombia – Ports of Entry*, para. 7.240.
[142] Panel Report, *Argentina – Import Measures*, para. 6.474.

IV. CONCLUSION

225. In light of the foregoing arguments, in addition to all previous submissions and documents presented in these proceedings, Brazil reiterates its request for the Panel to find that Indonesia's general prohibition on the importation and each individual restrictive measure affecting chicken meat and chicken products are inconsistent with the relevant WTO rules.