Indonesia – Importation of Horticultural Products, Animals and Animal Products
(WT/DS477/DS478)

Third Party Written Submission of Australia

15 January 2016
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I. INTRODUCTION

1. Australia considers that these proceedings initiated by New Zealand and the United States (the complainants) under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) raise important concerns regarding the wide-ranging prohibitions and restrictions on the importation of horticultural products, animals and animal products imposed by Indonesia.

2. In Australia’s view, each of Indonesia’s prohibitions and restrictions on imports of horticultural products, animals and animal products are clearly inconsistent with Indonesia’s obligations under Article XI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 4.2 of the Agreement on Agriculture, and some are also inconsistent with Indonesia’s obligations under Article III:4 of the GATT 1994. In addition, Indonesia’s measures combined operate as import licensing regimes for horticultural products, and for animals and animal products, which together impose an even greater restriction on imports.

3. Australia has both systemic and commercial concerns about Indonesia’s trade restrictions on agricultural imports. Agricultural products made up over 48% of Australian goods and services exports to Indonesia in 2014. Indonesia is Australia’s largest export market for cattle, and cattle and bovine meat products were Australia’s second and fourth largest goods exports to Indonesia in 2014 respectively. Indonesia is also an important market for Australian horticultural exports, particularly for grapes, citrus products, potatoes and dried, shelled leguminous vegetables.

4. In this submission, Australia:

   A. confirms that the complainants’ first written submissions accurately describe a range of trade-restrictive measures imposed by Indonesia on imports of horticultural products, animals and animal products, both as individual measures and as licensing regimes as a whole, that have also affected Australian exports; and provides additional supporting examples of how Indonesia’s import licensing regimes are applied to horticultural products, animals and animal products and have been amended to further restrict imports since the Panel’s establishment;

   B. provides its views on the inconsistency of these measures with Indonesia’s obligations under the GATT 1994, the Agreement on Agriculture and the Agreement on Import Licensing Procedures; and

   C. responds to the claims in Indonesia’s first written submission in regard to the WTO-consistency of its policies, laws and regulations.

II. INDONESIA’S MEASURES TO RESTRICT IMPORTS OF ANIMALS, ANIMAL PRODUCTS AND HORTICULTURAL PRODUCTS

5. Australia considers the complainants’ first written submissions accurately set out Indonesia’s laws, regulations and practices to restrict imports of horticultural
products, animals and animal products in pursuit of its stated goal of food self-sufficiency. These Indonesian measures have operated to restrict exports of Australian horticultural products, animals and animal products to Indonesia in the same ways as described by the complainants in regard to their products.

A. Restrictions on the importation of animals and animal products

6. Australia confirms that Indonesia’s restrictions on the importation of animals and animal products at the time of the Panel’s establishment included the full range of measures described in the complainants’ first written submissions, which have also operated to limit Australian exports of animals and animal products to Indonesia.

7. We note that Indonesia’s Minister of Agriculture has subsequently issued a new regulation governing the importation of animal products: Regulation of the Minister of Agriculture Number 58/Permentan/PK210/11/2015 Regarding Importation of Carcass, Meat, and/or its Derivatives into the Territory of the Republic of Indonesia (MOA 58/2015) which entered into force on 7 December 2015. However, while MOA 58/2015 adjusted aspects of Indonesia’s import licensing regime for animal products, the regime is essentially the same and remains inconsistent with Indonesia’s WTO obligations.

8. Furthermore, as New Zealand notes in its first written submission, while the complainants have primarily focused their discussion of Indonesia’s import licensing regime for animals and animal products on restrictions applied to bovine animal products, “many aspects of the licensing regime for animals and animal products that are challenged in this dispute also apply to the importation of a number of other animals and animal products”.

9. Australia has been particularly affected by the operation of Indonesia’s import licensing regime for animals and animal products as it is applied to imports of bovine animals (cattle). The following sections therefore provide further examples to assist the Panel to understand the limiting effects of Indonesia’s import licensing regime for animals and animal products on imports of cattle.

10. Indonesia’s import licensing regimes for animals and animal products include the measures described in the paragraphs below.

1. Import restrictions based on sufficiency of domestic production

11. Imports of food and agricultural goods (including animals and animal products) are prohibited except when domestic production is deemed insufficient by the Indonesian Government. In addition, animals can only be imported for four specified purposes:

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1 Regulation of the Minister of Agriculture Number 58/Permentan/PK210/11/2015 Regarding Importation of Carcass, Meat, and/or its Derivatives into the Territory of the Republic of Indonesia, 7 December 2015 (unofficial English translation) (MOA 58/2015) (Exhibit AUS-1).
2 New Zealand’s first written submission, para. 22.
3 New Zealand’s first written submission, paras. 15-18, 115-117; United States’ first written submission, paras. 82-85.
to improve genetic quality and diversity, develop science and technology, overcome domestic shortfalls, or fulfil research and development needs.

2. **Prohibition of imports of certain animal and animal products, including imports of ready to slaughter cattle**

12. Imports of animals and animal products that are not listed in the relevant Indonesian regulations are prohibited, including certain types of bovine offal and manufacturing meat, bovine secondary cuts and carcasses (except by State-Owned Enterprises when directed by the Indonesian Government in defined circumstances), poultry cuts and certain types of cattle. Indonesia’s regulations thereby prescribe a positive list of permissible imports.

13. As of 7 December 2015, Appendix I and Appendix II of MOA 58/2015 prescribe new lists of bovine and non-bovine products that are permitted for import by businesses. These lists continue to exclude numerous cuts and types of meat. Appendix III of MOA 58/2015 also now prescribes a limited list of bovine secondary carcass and meat cuts that can only be imported by State Owned Enterprises and Regional State Enterprises, and only on the recommendation of Indonesian ministers in the event of beef shortages due to a disease outbreak or natural disaster, or to control prices and prevent inflation. Furthermore, MOA 58/2015 now prohibits imports of carcass and meat products which have been stored longer than six months (for frozen products) or three months (for chilled products) between slaughter and arrival in Indonesia.

14. Australia notes that “Feeder cattle” with a maximum weight of 350 kilograms are the only type of live bovine animal listed as permitted for importation in Appendix I of Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013 Concerning Provisions on the Import and Export of Animals and Animal Products (MOT 46/2013). The Law of the Republic of Indonesia Number 41 of 2014 Concerning Amendment of Law Number 18 of 2009 Concerning Husbandry and Animal Health (Animal Law Amendment) also requires that imported livestock “must be in the form of feeder”. Feeder cattle are defined under Indonesian regulations as “non-replacement stock cattle which have superior traits and which are nurtured for a

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4 United States’ first written submission, para. 125.
5 New Zealand’s first written submission, paras. 38-45; United States’ first written submission, paras. 104-110.
6 Article 8, Appendix I and Appendix II, MOA 58/2015 (Exhibit AUS-1).
7 Articles 22(3)-(8) and Appendix III, MOA 58/2015 (Exhibit AUS-1).
8 Article 9, MOA 58/2015 (Exhibit AUS-1).
certain period of time for meat production purposes”\textsuperscript{11}. Therefore, imports of cattle over 350 kilograms, or of “Ready to Slaughter cattle” (previously defined under Indonesian regulations as “beef cattle which is appropriate to be slaughtered”\textsuperscript{12}) are currently prohibited from importation\textsuperscript{13}.

15. Indonesia’s prohibition on imports of ready to slaughter cattle through the positive list in MOT 46/2013 is also enforced through the Animal Law Amendment, which requires that imported feeder cattle must be fattened in Indonesia for a minimum of four months after quarantine measures are completed in order “to get added value”\textsuperscript{14}.

3. Limited application windows and validity periods for import licences

16. Until 7 December 2015, import recommendations from the Ministry of Agriculture and import approvals from the Ministry of Trade were both only valid for three month import quarters, with applications only permitted in the month (or, in practice, often only part of the month) preceding that import quarter\textsuperscript{15}. Under MOA 58/2015, import recommendations for animal products from the Ministry of Agriculture are now valid for four month import periods (1 January-30 April, 1 May-30 August, and 1

\textsuperscript{11} Article 1(1), Regulation of the Minister of Agriculture Number 48/Permentan/PK.440/8/2015 Regarding Importation of Feeder Cattle and Production Heifer into the Territory of the Republic of Indonesia, 2 September 2015 (unofficial English translation) (MOA 48/2015) (Exhibit AUS-2).

\textsuperscript{12} Article 1(3), Regulation of the Minister of Agriculture Number 108/Permentan/PD.410/9/2014 Regarding Importation of Feeder Cattle, Production Heifer and Ready to Slaughter Cattle into the Territory of the Republic of Indonesia, 9 September 2014 (unofficial English translation) (MOA 108/2014) (Exhibit AUS-3).

\textsuperscript{13} Until July 2015, imports of ready to slaughter cattle were only permitted under MOA 108/2014 if necessary for “price stability”. (Article 28 and Appendix, MOA 108/2014 (Exhibit AUS-3).) In July 2015, Indonesia amended MOA 108/2014 to permit the importation of ready to slaughter cattle at any time to “stabilize supply”. (Article 1(f), Regulation of the Minister of Agriculture Number 42/Permentan/PP.040/7/2015 Regarding the Amendment of the Regulation of the Minister of Agriculture Number 108/Permentan/PD.410/9/2014 Regarding Importation of Feeder Cattle, Production Heifer and Ready to Slaughter Cattle into the Territory of the Republic of Indonesia, 29 July 2015 (unofficial English translation) (MOA 42/2015) (Exhibit AUS-4).) However, in September 2015, Indonesia prohibited the importation of ready to slaughter cattle by issuing MOA 48/2015, which states that “importation of ready-to-slaughter cattle is no longer applicable”, and does not include ready to slaughter cattle in the list of permissible cattle imports in its Appendix. (Preamble, para. b, and Appendix, MOA 48/2015 (Exhibit AUS-2).) This is consistent with the exclusion of ready to slaughter cattle from the positive list of permissible imports in MOT 46/2013, and means there is now no legal basis for the importation of ready to slaughter cattle. (See also T. Allard, “Indonesia increases cattle permits amid soaring beef prices”, The Sydney Morning Herald, 11 August 2015, http://www.smh.com.au/national/indonesia-prepares-to-increase-cattle-permits-amid-soaring-beef-prices-20150810-giw1xp.html (Exhibit US-61); Directorate General of Livestock and Animal Health, MOA Recommendation Login Page: Sistem Informasi Rekomendasi Perijinan (SIMREK), http://ditjennak.pertanian.go.id/upr (accessed 17 September 2015) (Exhibit NZL-27).)

\textsuperscript{14} Article 36B(5), Animal Law (Exhibit JE-4) as amended by Article 1(11), Animal Law Amendment (Exhibit JE-5). While MOA 48/2015 now makes provision for imported Feeder cattle to be slaughtered less than four months after quarantine measure are completed, this can only occur with the approval of Indonesian officials from both the Ministry of Agriculture and Ministry of Trade, and only in the case of a supply shortage. (Article 7(2)-(5), MOA 48/2015 (Exhibit AUS-2).)

\textsuperscript{15} New Zealand’s first written submission, paras. 46-48; United States’ first written submission, paras. 111-115.
September-31 December\textsuperscript{16}, and businesses can only apply for import recommendations in December, April and August of each year\textsuperscript{17}.

17. As a result, import approvals from the Ministry of Trade are still valid for three month import quarters\textsuperscript{18}, while import recommendations from the Ministry of Agriculture are now valid for four months. This lack of coordination and inconsistency in Indonesia’s regulations has further complicated the process for obtaining import licences in 2016, with additional disruptions to trade likely to result from the uncertainty surrounding import validity periods.

18. Import approvals are issued only at the start of the relevant import period, and in practice are often issued after the import period has commenced (for example, import permits for cattle for the first quarter of 2015 were not issued until 13 January\textsuperscript{19}). These limited application windows and import periods effectively prevent imports at the beginning and end of each import period, as goods must commence shipment and clear Indonesian customs within that period\textsuperscript{20}. In addition, they also create considerable uncertainty for importers and exporters, particularly when combined with other Indonesian measures (such as the reference price mechanism) which mean that future import approvals may not be granted in the volumes requested by importers. As a result, importers and exporters are unable to plan beyond the current import period, or enter into long-term supply arrangements\textsuperscript{21}.

4. **Fixed licence terms imposing quotas on imports**

19. Within an import period, the terms of import recommendations and approvals are fixed, and importers are not permitted to import goods except in accordance with the quantity, type, country of origin and port of entry specified\textsuperscript{22}. MOA 58/2015 now also prevents any changes to the establishment from which animal products are to be sourced\textsuperscript{23}. This effectively creates a quota for each import period that cannot be

\textsuperscript{16} Article 30(1), MOA 58/2015 (Exhibit AUS-1).
\textsuperscript{17} Article 22(1), MOA 58/2015 (Exhibit AUS-1). Similarly, import recommendations for feeder cattle from the Ministry of Agriculture are now valid for four month import periods, with applications permitted between the 1\textsuperscript{st} and the 10\textsuperscript{th} day of the preceding month. (Articles 26(1)-(2), MOA 48/2015 (Exhibit AUS-2).)
\textsuperscript{18} Article 12, MOT 46/2013 (Exhibit JE-18).
\textsuperscript{20} While a maximum 30-day extension is possible for goods shipped before the end of the import period, this requires approval from the Ministry of Trade and is not permitted in the final import period of the year. (New Zealand’s first written submission, footnote 85 to para. 48; United States’ first written submission, footnotes 211 to para. 112.)
\textsuperscript{21} New Zealand’s first written submission, paras. 46-48; United States’ first written submission, paras. 111-115.
\textsuperscript{22} New Zealand’s first written submission, paras. 49-51; United States’ first written submission, paras. 116-120.
\textsuperscript{23} Article 32(a), MOA 58/2015 (Exhibit AUS-1).
exceeded, and prevents importers and exporters responding to any developments in the Indonesian or exporting market during that import period\textsuperscript{24}.

20. Feeder cattle are subject to the same restrictions, with import approvals establishing fixed import terms for the forthcoming import period. In regard to cattle, the Indonesian Government has regularly acknowledged that these fixed licence terms enforce an import quota – a maximum permissible volume of imports – on the importation of feeder cattle, as noted in the complainants’ first written submissions\textsuperscript{25}. Once the cattle import quota has been set by the Indonesian ministers, it is then distributed among importing businesses and State Owned Enterprises via the import approval system\textsuperscript{26}.

21. Quotas on feeder cattle imports are evidenced by a large number of media articles and public statements by Indonesian officials. For example, New Zealand notes that in March 2015 the then Director General of International Trade was reported as stating that “live cattle imports are limited by quota”\textsuperscript{27}. In response to media reports that permits would be issued for only 50,000 cattle in the third quarter of 2015, the then Minister for Trade, Rachmat Gobel, was quoted as stating that “It doesn't mean we are lowering the quota. It's possible there is another addition... Maintaining a stable supply and price for beef is our goal”\textsuperscript{28}.

22. In addition to imposing fixed limits on the number of feeder cattle that can be imported, quarterly import quotas have caused significant uncertainty for importers and exporters, and imposed considerable economic costs on exporters. The quota of 50,000 feeder cattle for the third quarter of 2015 was significantly lower than expected, and Australian exporters had to find alternative markets at short notice for cattle that had been prepared for shipment to Indonesia (and were therefore under 350 kilograms and not ready to slaughter)\textsuperscript{29}.

23. The limiting effect of quotas on cattle exports is compounded by the fact that quotas are often not set and import approvals not granted until after the start of the relevant

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\textsuperscript{24} New Zealand’s first written submission, paras. 49-51; United States’ first written submission, paras. 116-120.

\textsuperscript{25} New Zealand’s first written submission, para. 132; United States’ first written submission, para. 371.


import period, as discussed in the complainants’ first written submissions\textsuperscript{30}. For example, in addition to the feeder cattle quota for the third quarter of 2015 (commencing 1 July) being significantly lower than expected, import permits were not released to importers until 13 July. This further shortened the permissible shipping period, and generated additional costs for exporters, including demurrage costs of between A$20,000 and A$60,000 per vessel per day to keep ships available in port for loading while awaiting the issuance of import permits\textsuperscript{31}. Most recently, import permits for the first quarter of 2016 were not released to importers until 11 January, for the period from 1 January to 31 March 2016.

24. In addition to the limiting effect of the quota system on imports, quarterly quotas on feeder cattle imports have led to reductions in supply and higher prices for Indonesian beef consumers\textsuperscript{32}.

25. Media reports indicate that the Indonesian Government has announced an indicative annual volume of feeder cattle imports in 2016, with import approvals and recommendations continuing to enforce fixed quotas for three or four month import periods at a time\textsuperscript{33}. Numerical limits will therefore continue to be imposed on feeder cattle imports, with importers and exporters unable to plan beyond the current import period.

5. \textit{80\% realisation requirement on imports of bovine animals and animal products}

26. Importers of bovine animals and bovine animal products are required to import (“realise”) 80\% of the quantity of each product specified in their import approval, and will have their importer recognitions frozen or revoked if they fail to do so. This acts as a strong incentive for importers to limit the quantities in their import applications. This incentive is compounded by the inability of importers to vary the terms of their import recommendations and approvals once granted\textsuperscript{34}.

\textsuperscript{30} New Zealand’s first written submission, para. 47; United States’ first written submission, para. 114.
\textsuperscript{32} New Zealand’s first written submission, paras. 24-25, Figure 1 and Figure 2; United States’ first written submission, para. 304.
\textsuperscript{34} New Zealand’s first written submission, paras. 52-54; United States’ first written submission, paras. 121-123.
6. Prohibitions/restrictions on the use, sale and distribution of imported animals and animal products

27. The uses for which animals and animal products can be imported are restricted. Until 7 December 2015, imported bovine animal products were prohibited from sale in modern and traditional markets, and other imported animal products prohibited from sale in traditional markets. Under MOA 58/2015, all imported meat products other than processed meat are now prohibited from sale in both modern and traditional markets. This prohibits the sale of imported animal products where the majority of Indonesian consumers do their food shopping.

7. Domestic purchase requirement for importers of bovine animal meat

28. Importers of bovine meat are required to purchase (“absorb”) a specified quantity of beef from specific abattoirs that has been raised and slaughtered in Indonesia in order to receive an import recommendation. MOA 58/2015 provides further detail on this requirement, indicating that the volume of local beef meat required to be purchased by importers is 3% of imports for general importers and 1.5% for producer importers. This requirement to substitute domestic beef for imports also restricts the volume of imports according to the availability of local beef and increases the costs of importing.

8. Reference price requirement on imports of bovine animals and animal products

29. Imports of bovine animals and bovine animal products are prohibited when the market price of bovine secondary cuts in Indonesia falls below a set reference price. This acts not only as a ban on imports when the market price is below the reference price, but also maintains an artificially high price for beef and puts a limit on the ability of imports to compete with domestic beef on price. No information is available about how the market price is calculated or determined by the Indonesian Government.

B. Restrictions on the importation of horticultural products

30. Australia confirms that Indonesia’s restrictions on the importation of horticultural products at the time of the Panel’s establishment included the full range of measures

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35 New Zealand’s first written submission, paras. 55-58; United States’ first written submission, paras. 124-128.
36 Article 31, MOA 58/2015 (Exhibit AUS-1).
37 New Zealand’s first written submission, paras. 55-58; United States’ first written submission, paras. 124-128.
38 New Zealand’s first written submission, paras. 59-61; United States’ first written submission, paras. 129-130.
39 Article 5(3), MOA 58/2015 (Exhibit AUS-1).
40 New Zealand’s first written submission, paras. 179-186; United States’ first written submission, paras. 301-304.
41 New Zealand’s first written submission, paras. 62-63; United States’ first written submission, paras. 131-132.
as described in the complainants’ first written submissions, which have also operated to limit Australian exports of horticultural products to Indonesia.

31. We note that Indonesia’s Minister of Trade has subsequently issued a new regulation to govern the importation of horticultural products: Regulation of the Minister of Trade Number 71/M-DAG/PER/9/2015 Regarding Horticultural Product Import Provision (MOT 71/2015), which entered into force on 1 December 2015\textsuperscript{42}.

32. However, as noted in New Zealand’s first written submission, MOT 71/2015 does not alter “the essential requirements with which importers must comply in order to import horticultural products into Indonesia”\textsuperscript{43}. In fact, MOT 71/2015 adds further restrictions on horticultural imports and Indonesia’s import licensing regime remains inconsistent with its WTO obligations.

33. Indonesia’s import licensing regimes for horticultural products include the measures described in the paragraphs below.

1. Import restrictions based on sufficiency of domestic production and requirements to prioritise the sale of local products

34. Imports of food and agricultural goods (including horticultural products) are prohibited except when domestic production is deemed insufficient by the Indonesian Government. Operators of markets selling horticultural products must prioritise the sale of local products over imported ones\textsuperscript{44}.

2. Limited application windows and validity periods for import licences

35. Import licences for fresh horticultural products listed in the relevant Indonesian regulations (aside from chilies and shallots) are only valid for six month import semesters, with applications only permitted in short windows preceding that import semester. These limited application windows and import periods effectively prevent imports at the beginning and end of each import semester, as goods must commence shipment and clear Indonesian customs within the semester. In addition, they also create considerable uncertainty for importers and exporters, particularly when combined with other Indonesian measures on horticultural imports (such as harvest period restrictions) which mean that future import approvals may not be granted in the volumes requested by importers. As a result, importers and exporters are unable to plan beyond the current import semester, or enter into long-term supply arrangements\textsuperscript{45}.

\textsuperscript{42} Article 37, Regulation of the Minister of Trade Number 71/M-DAG/PER/9/2015 Regarding Horticultural Product Import Provision, 28 September 2015 (MOT 71/2015) (Exhibit JE-12).
\textsuperscript{43} New Zealand’s first written submission, footnote 131 to para. 74.
\textsuperscript{44} New Zealand’s first written submission, paras. 67-69, 115-117; United States’ first written submission, paras. 12-18.
\textsuperscript{45} New Zealand’s first written submission, paras. 87-88; United States’ first written submission, paras. 45-49.
3. **Fixed licence terms imposing quotas on imports**

36. Within an import semester, the terms of import recommendations and approvals are fixed, and importers are not permitted to import listed horticultural products except in accordance with the quantity, type, country of origin and port of entry specified. This effectively creates a quota for each import semester that cannot be exceeded, and prevents importers and exporters responding to any developments in the Indonesian or exporting market during that six month period.\(^{46}\)

37. The new regulation MOT 71/2015 formalises this system for placing an upper limit on import quantities by establishing an annual quota setting process for horticultural imports. Article 3 of MOT 71/2015 states that the total number of horticultural products to be imported each year will be determined in a “Coordination Meeting”.\(^{47}\) In addition, no information is provided on the factors which will be considered or the calculation methods which will be used to determine the quota, creating considerable uncertainty for importers and exporters.

4. **80% realisation requirement on imports of horticultural products**

38. Importers of listed horticultural products have been required to import (“realise”) 80% of the quantity of each product specified in their import approval, and their importer designations could be suspended or revoked if they failed to do so. This has acted as a strong incentive for importers to limit the quantities in their import applications, and been compounded by the inability of importers to vary the terms of their import recommendations and approvals once granted.\(^{48}\)

5. **Import restrictions based on Indonesian harvest periods**

39. Imports of certain horticultural products are prohibited or restricted for periods of time based on Indonesian harvest periods. For example, imports of citrus products other than lemons were prohibited by Indonesia from July-September 2015.\(^{49}\)

40. Indonesian officials have advised that similar restrictions will be imposed on citrus and other products in 2016 to avoid over supply, with imports of citrus products (other than lemons) only to be permitted in February, March, September and October.\(^{50}\)

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\(^{46}\) New Zealand’s first written submission, paras. 89-91; United States’ first written submission, paras. 50-55.

\(^{47}\) Article 3, MOT 71/2015 (Exhibit JE-12).

\(^{48}\) New Zealand’s first written submission, paras. 92-94; United States’ first written submission, paras. 56-59.

\(^{49}\) New Zealand’s first written submission, paras. 95-98, 238-240; United States’ first written submission, paras. 60-64.

6. **Restrictions based on storage ownership and capacity**

41. Importers must own their own storage capacity, and import approvals for each semester are limited to the volume of that storage capacity as audited and determined by the Indonesian Government. No allowance is made for inventory turnover during an import semester, resulting in a quota or numerical limit on horticultural imports for each semester51. Furthermore, under MOT 71/2015, importers must own their own transport equipment as well as storage capacity52.

7. **Prohibitions/restrictions on the use, sale and distribution of imported horticultural products**

42. The uses for which listed horticultural products can be imported are restricted, with Registered Importers only permitted to trade or transfer imports to a distributor, and Producer Importers only permitted to use imports in their own production processes. Importers of horticultural products are not permitted to sell those products directly to consumers or retailers, which imposes additional costs on imported horticultural products and reduces their competitiveness against domestic products53.

8. **Reference price requirement on imports of chilies and shallots**

43. Imports of chilies and shallots are prohibited when the market price in Indonesia falls below a set reference price. Imports under an existing approval can be postponed if the market price falls below the reference price54. This not only acts as a ban on imports when the market price is below the reference price, but creates considerable uncertainty for importers and exporters. No information is available about how the market price is calculated or determined by the Indonesian Government.

9. **Requirement that products be harvested no more than six months previously**

44. Imports of fresh horticultural products harvested more than six months previously are prohibited55.

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51 New Zealand’s first written submission, paras. 99-105; United States’ first written submission, paras. 65-68.
52 Articles 6(1)(b)-(c) and 7(b)-(c), MOT 71/2015 (Exhibit JE-12). Importers must also provide evidence of having experience as a distributor, and contracts with three other distributors, for at least one year. (Articles 6(1)(d)-(e), MOT 71/2015 (Exhibit JE-12).)
53 New Zealand’s first written submission, paras. 106-108; United States’ first written submission, paras. 69-72.
54 New Zealand’s first written submission, paras. 109-110; United States’ first written submission, paras. 73-78.
55 New Zealand’s first written submission, paras. 111-112; United States’ first written submission, paras. 79-81.
C. Combined operation and effect of Indonesia’s measures and its import licensing regimes

45. Australia agrees with the complainants that, in addition to their individual effects on imports, Indonesia’s measures discussed above also combine to operate, as a whole, as import licensing regimes which prohibit or restrict imports of horticultural products and animals and animal products.\(^{56}\) Indeed, the measures reinforce and amplify the limiting effects of each other. For example, short licence validity periods combine with the reference price mechanism (which could block imports entirely in future import periods), to prevent importers and exporters making business plans with any certainty beyond the current import period.

46. Indonesia’s measures have had a significant effect on the volume of Australian exports to Indonesia. For example, Australian exports of frozen bovine offal products (excluding tongues) to Indonesia for the first nine months of 2015 were 74% lower by value (a reduction of over A$15.7 million) and 93% lower by volume (a reduction of over 9,800 metric tons) than for the same period of 2014.\(^{57}\) This followed the introduction on 24 December 2014 of Regulation of the Minister of Agriculture Number 139/Permentan/PD.410/12/2014 Concerning Importation of Carcasses, Meats, and/or their Processed Products into the Territory of the Republic of Indonesia (MOA 139/2014), which reduced the range of permissible bovine offal imports to tongues and tails.\(^{58}\) Australian exports of boneless, frozen beef hindquarter and forequarter cuts and crops to Indonesia for the first nine months of 2015 were also 34% lower by value (a reduction of over A$7.4 million) and 51% lower by volume (a reduction of over 2,600 metric tons) than for the same period of 2014, following the prohibition on imports of secondary bovine cuts (except by State Owned Enterprises in limited emergency circumstances) imposed in 2015.\(^{59}\)

47. Australian citrus exporters were also particularly affected by the restrictions imposed by Indonesia on citrus imports between July and September 2015, which coincided with Australia’s peak production period for citrus.

48. Furthermore, Indonesia’s import licensing regimes not only limit exports to Indonesia by Australian producers who are willing to operate within these restrictions, but also

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\(^{56}\) New Zealand’s first written submission, paras. 65, 114; United States’ first written submission, para. 2.

\(^{57}\) Australian Exports to Indonesia, Australian Department of Foreign Affairs and Trade statistics based on Australian Bureau of Statistics data (Exhibit AUS-11).

\(^{58}\) Appendix I, Regulation of the Minister of Agriculture Number 139/Permentan/PD.410/12/2014 Concerning Importation of Carcasses, Meats, and/or their Processed Products into the Territory of the Republic of Indonesia, 24 December 2014 (MOA 139/2014) (Exhibit JE-26).

\(^{59}\) Australian Exports to Indonesia, Australian Department of Foreign Affairs and Trade statistics based on Australian Bureau of Statistics data (Exhibit AUS-11).

\(^{60}\) Article 23, Appendix I, Regulation of the Minister of Agriculture Number 139/Permentan/PD.410/12/2014 Concerning Importation of Carcasses, Meats, and/or their Processed Products into the Territory of the Republic of Indonesia, as amended by Regulation of the Minister of Agriculture Number 02/Permentan/PD.410/1/2015 Concerning Amendment to Regulation of the Minister of Agriculture Number 139/Permentan/PD.410/12/2014 (Exhibit JE-28).
Indonesia’s goal for domestic production to be sufficient implies that demand per person is fixed, and cannot increase as a result of changes in consumer income and preferences. Yet, due to economic and population growth and continued urbanisation, the value of agrifood consumption in Indonesia is projected to quadruple between 2009 and 2050, with the real value of beef consumption projected to rise more than 14 times and fruit and vegetable consumption projected to rise three times due to more diverse diets. Indonesia’s self-sufficiency policy therefore places an artificial cap on markets that serves as a strong disincentive for importers, exporters and investors.

49. The limiting effect on trade from Indonesia’s import restrictions in the agricultural sector has been reported by the business communities of both Australia and Indonesia. In a position paper to the Australian and Indonesian Governments, the Indonesia-Australia Business Partnership Group (IA-BPG) stated that, in the agriculture and agribusiness sector, “[c]umbersome importation licensing and slow certification procedures in Indonesia cause delays and high costs” and that “[a]mbiguous regulations, administrative processes and frameworks in Indonesia create an uncertain trading environment.”

50. Indonesia’s pursuit of food self-sufficiency has also resulted in higher prices, product shortages and reduced choice for Indonesian consumers. The IA-BPG position paper further stated that “[i]mport quotas (caps) on beef and uncertain live cattle import requirements for breeding cattle, meant to protect domestic producers caused undersupply of beef and price increases.”

51. Australia notes that the Indonesian measures discussed above are part of a broader policy of the Indonesian Government to restrict agricultural imports in order to protect domestic industries and seek food self-sufficiency, which also limits a wide range of other agricultural imports. For example, the Indonesian Government has set goals to

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62 The members of the IA-BPG are the Australian Chamber of Commerce and Industry (ACCI), the Indonesian Chamber of Commerce and Industry (KADIN Indonesia), the Indonesia Australia Business Council (IABC) and the Australia Indonesia Business Council (AIBC).


64 IABPG Position Paper, p. 57 (Exhibit AUS-13).

65 IABPG Position Paper, p. 58 (Exhibit AUS-13).
achieve self-sufficiency in rice, corn, sugar and soybean, and to consequently cease imports of these products, by 2017\textsuperscript{66}.

52. These broader policies and practices of the Indonesian Government in pursuit of food self-sufficiency provide important context for the Panel’s consideration of Indonesia’s import licensing regimes for horticultural products and animals and animal products, including when considering the intended and likely effects of individual measures and the licensing regimes as a whole.

53. Australia also agrees with the United States that Indonesia’s regular amendments to its import licensing regimes should not enable it to avoid its WTO obligations\textsuperscript{67}. The frequent changes to Indonesia’s licensing regimes have not reduced their WTO-inconsistencies. In fact, Indonesia’s frequent amendments to its regulations over many years, often without notification and with no or limited opportunities for consultation with trading partners, have only served to further increase uncertainty for Indonesian importers and consumers and overseas exporters, limiting the development of long-term trading relationships and deterring investment. As the panel stated in EC – Fasteners (China), where measures are replaced following the establishment of a panel, to require the complainant:

in such circumstances to restart the dispute settlement process, potentially requiring a new request for consultations, would defeat the purpose of the DSU to provide for the “prompt settlement of situations in which a Member considers that benefits accruing to it” under a covered Agreement are being impaired by another Member’s measure, as provided for in Article 3.3 of the DSU\textsuperscript{68}.

III. INCONSISTENCY OF INDONESIAN MEASURES WITH WTO OBLIGATIONS

A. GATT 1994 Article XI:1

54. Australia agrees with the complainants that the individual Indonesian measures identified in their first written submissions, as well as the import licensing regimes as a whole for horticultural products, and for animals and animal products, are clearly inconsistent with GATT Article XI:1, which states that:

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


\textsuperscript{67} United States’ first written submission, paras. 5-6.

\textsuperscript{68} Panel Report, EC – Fasteners (China), para. 7.34
contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

55. Indonesia’s import licensing regimes include outright prohibitions on imports of certain products, including ready to slaughter cattle\(^69\), certain types of bovine offal and secondary cuts, and chicken cuts and parts, through Indonesia’s positive list of permissible imports of animals and animal products. They also include prohibitions on imports of fresh horticultural products harvested more than six months previously, and on animal products that have been stored for more than three or six months between slaughter and arrival in Indonesia. These bans on imports of particular products are clearly “prohibitions” on the import of a product within the meaning of Article XI:1, defined by the Appellate Body as a “legal ban on the trade or importation of a specified commodity”\(^70\), and therefore inconsistent with the requirements of Article XI:1.

56. Indonesia’s import licensing regimes also include prohibitions on imports of certain products in certain circumstances. These include prohibitions on imports of:
   a) food and agricultural products when domestic production is deemed sufficient;
   b) certain bovine secondary cuts and carcasses except by State Owned Enterprises and Regional State Enterprises in the event of beef shortages due to a disease outbreak or natural disaster, or to control prices and prevent inflation;
   c) bovine animals and animal products, and chilies and shallots, when the market price for these products is below a set reference price\(^71\); and
   d) horticultural products based on Indonesian harvest periods.

These measures are clearly “prohibitions” on imports when the relevant circumstances are deemed to apply for each product. Furthermore, these measures can also be considered “restrictions” on the import of a product. A “restriction” has been defined by the Appellate Body as a “limitation on action”\(^72\) or “limiting condition”\(^73\) on imports. The panel in Argentina – Import Measures confirmed that “uncertainties can constitute ‘restrictions’ under Article XI:1 of the GATT 1994”\(^74\), as uncertainty “negatively impacts business plans of economic operators who cannot count on a

\(^{69}\) The ban on imports of ready to slaughter cattle is also achieved through the requirement for imported cattle to be fed for four months in Indonesia.

\(^{70}\) Appellate Body Reports, China – Raw Materials, para. 319 and Argentina – Import Measures, para. 5.217.

\(^{71}\) These reference prices operate similarly to a minimum import price, which was held to be contrary to Article XI by the GATT panel in EEC – Minimum Import Prices. (GATT Panel Report, EEC – Minimum Import Prices, paras. 4.9, 4.14.) The same reasoning was applied to minimum export prices by the GATT panel in Japan – Semi-Conductors and the panel in China – Raw Materials. (GATT Panel Report Japan – Semiconductors, paras. 105-106, 117 and Panel Report, China – Raw Materials, paras. 7.1075, 1081-7.1082.)

\(^{72}\) Appellate Body Reports, China – Raw Materials, para. 319 and Argentina – Import Measures, para. 5.217.

\(^{73}\) Appellate Body Reports, China – Raw Materials, para. 319 and Argentina – Import Measures, para. 5.217.

\(^{74}\) Panel Reports, Argentina – Import Measures, para. 6.260.
stable environment in which to import and who accordingly reduce their expectations as well as their planned imports.\textsuperscript{75} Indonesia’s prohibitions on imports in certain circumstances also create considerable uncertainty for importers and exporters as they are do not know when the Indonesian Government will declare the relevant circumstances (such as sufficiency of production, or a beef shortage) to exist, and therefore are unable to make business plans with any confidence. These measures are, therefore, also inconsistent with Article XI:1.

57. In addition, Indonesia’s import licensing regimes include the imposition of \textit{numerical limits on imports}\textsuperscript{76}. Import licences specify the quantity of each product that can be imported for a given import period, and new permits cannot be sought during that period, effectively establishing a fixed numerical limit, or quota, for that import period. In regard to animals, explicit quotas are set for imports of feeder cattle, which are then enforced by assigning fixed quantities to each importer under the import approval system. An annual quota system has been introduced for horticultural imports, which are also limited in each import period to the storage capacity owned by an importer. These numerical limits clearly act as a limiting condition on imports and are “restrictions” contrary to Article XI:1.

58. Furthermore, Indonesia’s import licensing regimes include measures which affect the “competitive situation”\textsuperscript{77} of importers. Limited licence validity periods and application windows prevent long term planning and contractual arrangements, impose additional costs on importers and exporters when the issuance of licences is delayed, and effectively prevent imports at the beginning and end of each import period. Fixed licence terms prevent importers from responding to any changes in the importing or exporting market during an import period. Eighty per cent realisation requirements on imports of bovine animals and products and horticultural products have encouraged importers to limit the quantities in their import licence applications. Rules preventing the sale of imported meat products in modern and traditional markets, and importers from selling horticultural products directly to consumers and retailers, reduce the commercial opportunities for imported goods and impose additional distribution costs on imports.

59. In addition to acting as a minimum import price, reference price rules also limit the ability of imports of bovine animals and animal products, and chilies and shallots, to compete with like domestic products on price. Laws requiring operators of markets to prioritise the sale of local horticultural products further affect the competitive position of imports. Requirements for importers of bovine meat to purchase local beef require importers to substitute imports with domestic products, limit imports according to the availability of local beef and increase the costs of importing. The requirement for imported cattle to be fed for four months in Indonesia not only effectively prohibits the importation of ready to slaughter cattle (in conjunction with Indonesia’s positive

\textsuperscript{75} \textit{Panel Reports, Argentina – Import Measures}, para. 6.260.

\textsuperscript{76} The panel in \textit{India – Autos} stated that a breach of Article XI “need not be a blanket prohibition or a precise numerical limit”, indicating that a precise numerical limit is clearly inconsistent with Article XI. (\textit{Panel Report, India – Autos}, para. 7.270.)

\textsuperscript{77} \textit{Panel Report, Colombia – Ports of Entry}, para. 7.240.
list licensing regime), but also places a restriction on the use of imported feeder cattle that affects their competitive position against local cattle. These measures are clearly “restrictions” on imports which “create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly”\(^\text{78}\), which the panel in *Colombia – Ports of Entry* held would have “implications on the competitive situation of an importer”\(^\text{79}\) contrary to the requirements of Article XI:1.

60. Australia agrees with the complainants that all of these measures operate individually as “quotas, import … licences or other measures”\(^\text{80}\) to prohibit or restrict imports contrary to Article XI:1. Furthermore, we agree that the Panel should also consider the effect of Indonesia’s import licensing regimes as a whole, in which the various prohibitions and restrictions reinforce and amplify one another, and “contribute in different combinations and degrees … towards the realization of common policy objectives”\(^\text{81}\) of food self-sufficiency and the promotion of domestic production, similar to the situation in *Argentina – Import Measures*\(^\text{82}\). These import licensing regimes as a whole impose an even greater restriction on imports than their individual components.

**B. Agreement on Agriculture Article 4.2**

61. Australia also agrees with the complainants that Indonesia’s measures, and its import licensing regimes for horticultural products and animals and animal products as a whole, are “measures of the kind which have been required to be converted into ordinary customs duties”\(^\text{83}\) that are prohibited under Article 4.2 of the Agreement on Agriculture. These individual measures and the regimes as a whole are also “quantitative import restrictions … minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises … and similar border measures”\(^\text{84}\) as identified in footnote 1 to Article 4.2 as specifically prohibited under Article 4.2. These measures are contrary to Article 4.2 as a result of the same limiting effects on imports that rendered them inconsistent with Article XI:1 of GATT 1994.

**C. GATT 1994 Article III:4**

62. Australia further agrees with New Zealand that some of Indonesia’s measures, in addition to being contrary to Article XI of the GATT 1994, are also inconsistent with Article III:4 of the GATT 1994, which provides 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

\(^{78}\) Panel Report, *Colombia – Ports of Entry*, para. 7.240.

\(^{79}\) Panel Report, *Colombia – Ports of Entry*, para. 7.240.

\(^{80}\) Article XI, GATT 1994.

\(^{81}\) Panel Reports, *Argentina – Import Measures*, para. 6.228.

\(^{82}\) Panel Reports, *Argentina – Import Measures*, para. 6.228.

\(^{83}\) Article 4.2, Agreement on Agriculture.

\(^{84}\) Footnote 1 to Article 4.2, Agreement on Agriculture.
respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

63. We agree that, in regard to bovine meat products, the requirement that importers also purchase domestic beef “modifies the conditions of competition”85 between like domestic and imported bovine products, inconsistent with Article III:4.

64. We also consider that rules preventing the sale of imported animal products in modern and traditional markets, and preventing importers selling horticultural products directly to consumers and retailers, accord less favourable treatment to the sale of like imported products, contrary to Article III:4.

D. Agreement on Import Licensing Procedures Article 3.2

65. Australia agrees with the complainants that the limited application windows and validity periods that form part of Indonesia’s import licensing regimes for horticultural products and animals and animal products are inconsistent with Article XI:1 of GATT 1994, as a result of their limiting effect on imports.

66. Australia also agrees that, to the extent the Panel considers that the limited application windows and validity periods are non-automatic licensing procedures, they are also inconsistent with Article 3.2 of the Agreement on Import Licensing Procedures, which provides that:

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

67. As there is no underlying permissible restriction implemented by these licensing procedures, the trade-restrictive effects 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”. Furthermore, the procedures are clearly “more administratively burdensome than absolutely necessary” as there is no permissible measure that they administer.

IV. INDONESIAN CLAIMS REGARDING ITS MEASURES

68. Australia does not agree with several claims in Indonesia’s first written submission about the operation of its measures and the applicable WTO provisions. Australia will address some of our concerns in this submission, and may raise others in our oral statement to the Panel.

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85 Appellate Body Report, Korea – Various Measures on Beef, para. 137.
1. Indonesia’s claim that it does not operate a positive list import regime for animals and animal products

Indonesia’s claim that its regulations do not prescribe a positive list of animals and animal products that are permitted for import is clearly contradicted by the evidence before the Panel. While Indonesia asserts that products not listed in its regulations are not subject to any import licensing requirements, and can be imported without any controls or approvals, this is clearly not the case.

The appendices of MOA 58/2015 state that they list the products “allowed” to be imported. To obtain an import approval for any product listed in the appendices of MOT 46/2013 from the Ministry of Trade, an importer must provide an import recommendation from the Ministry of Agriculture, which means that products not listed in MOA 58/2015 cannot be imported at all. Furthermore, the regulations have clearly been interpreted as a positive list by Indonesian ministers and officials, as Minister of Agriculture Dr Amran Sulaiman was reported to have said that offal imports were banned following the introduction of MOA 139/2014.

Indonesia supports its claim by noting that cattle falling under Indonesia Tariff Schedule headings not listed in Appendix I or II of MOT 46/2013 (0102.29.10.90 and 0102.29.90.00) have been imported in previous years. Australia firstly notes that this appears to have been due, in part, to discrepancies in the use of Indonesia’s Tariff Schedule headings between MOT 46/2013 and Regulation of the Minister of Agriculture Number 108/Permentan/PD.410/9/2014 Regarding Importation of Feeder Cattle, Production Heifer and Ready to Slaughter Cattle into the Territory of the Republic of Indonesia (MOA 108/2014). Indonesia listed feeder cattle under 350 kilograms under the tariff heading 0102.29.10.90 in MOA 108/2014, while listing feeder cattle under 350 kilograms under tariff heading 0102.29.10.10 in MOT 46/2013. This discrepancy likely accounts for all, or some, of the imports under tariff heading 0102.29.10.90 in previous years.

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86 Indonesia’s first written submission, paras. 34, 96-99.
87 Appendices I, II and III, MOA 58/2015 (Exhibit AUS-1); see also Appendices I and II, MOA 139/2014 (Exhibit JE-26).
88 Article 11(1)(b) and Article 11(2)(a), MOT 46/2013 (Exhibit JE-18).
90 MOA 108/2014 (Exhibit AUS-3).
91 Appendix, MOA 108/2014 (Exhibit AUS-3). Feeder cattle under 350 kilograms also continue to be listed under the tariff heading 0102.29.10.90 in the current regulation MOA 48/2015. (Appendix, MOA 48/2015 (Exhibit AUS-2).)
92 Appendix I, MOT 46/2013 (Exhibit JE-18).
72. Furthermore, Australia has noted at footnote 13 of this submission the highly changeable approach of Indonesia to the importation of ready to slaughter cattle. Indonesia’s Minister of Agriculture issued three regulations on cattle importation in 2014 and 2015, while MOT 46/2013 was not amended\(^93\). Under MOA 108/2014, the tariff headings 0102.29.10.90 and 0102.29.90.00 were permitted for import and included ready to slaughter male and female cattle respectively\(^94\). At times this has led to the importation of ready to slaughter cattle to address beef shortages and price increases\(^95\), even though this was inconsistent with the requirements of MOT 46/2013. Indonesia’s failure to adhere to its own regulations in the case of ready to slaughter cattle due to severe supply shortages does not reflect the way that the regulations have been applied to other animals and animal products, which is as a positive list of permissible imports whereby imports of products not listed in both MOT 46/2013 and MOA 58/2015 (and its predecessor MOA 139/2014) are not permitted. Indonesia therefore does apply a positive list approach to permitting imports of animals and animal products, contrary to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

2. **Indonesia’s claim that its import licensing regimes are “automatic” and therefore outside the scope of Article 4.2 of the Agreement on Agriculture**

73. Indonesia claims that its import licensing regimes are “automatic” and therefore outside the scope of Article 4.2 of the Agreement on Agriculture\(^96\), which prohibits, *inter alia*, “discretionary import licensing”\(^97\). Australia notes that the complainants have specifically argued that Indonesia’s measures are in breach of Article 4.2 as quantitative import restrictions, minimum import prices or similar border measures. Furthermore, Australia does not agree that Indonesia’s import licensing regimes are automatic. While Indonesia asserts that all import applications submitted in 2015 were granted\(^98\), this would not be sufficient to establish that Indonesia’s import licensing procedures are automatic.

74. Article 2.1 of the Agreement on Import Licensing Procedures states that “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)”. Paragraph 2(a) provides that “automatic licensing procedures shall not be administered in such a manner as to have restricting effects on imports”, and:

… shall be deemed to have trade-restricting effects unless, *inter alia*:

\[\ldots\]
(ii) applications for licences may be submitted on any working day prior to the customs clearance of the goods;
(iii) applications for licences when submitted in appropriate and complete form are approved immediately on receipt, to the extent administratively feasible, but within a maximum of 10 working days.

75. As Indonesia’s import licensing procedures limit the time periods in which applications can be submitted, and only issue import recommendations and approvals at the start of designated import validity periods, they do not satisfy the requirements of Article 2.2(a)(ii) or Article 2.2(a)(iii) and therefore do not satisfy the definition of automatic import licensing procedures in Article 2.1 of the Agreement on Import Licensing Procedures.

3. Indonesia’s claim that a quantitative restriction under Article 4.2 of the Agreement on Agriculture must impose “an absolute limit on imports”

76. Indonesia’s claim that “For a measure to be a quantitative restriction within the meaning of the Agriculture Agreement, it must include a mechanism that imposes an absolute limit on imports”99 is not supported by WTO jurisprudence. In Turkey – Rice, the panel held that:

Even without any systematic intention to restrict the importation of rice at a certain level, the lack of transparency and of predictability of Turkey’s issuance of Certificates of Control to import rice is similarly liable to restrict the volume of imports. … This conduct can, therefore, be considered as a measure of the kind which have been required to be converted into ordinary customs duties under Article 4.2 of the Agreement on Agriculture100.

77. There is, therefore, no basis for Indonesia’s claim that a quantitative restriction under Article 4.2 of the Agreement on Agriculture cannot be a measure that “impacts competitive opportunities for imports”101.

4. Indonesia’s claims that the complainants have not demonstrated effects on trade volumes from its measures

78. While Indonesia frequently claims that the complainants have not demonstrated declines in import volumes as a result of its import licensing procedures102, panels have consistently held that there is no requirement for complainants to demonstrate “a causal link between the measure and its effects on trade volumes”103. The limiting effects of Indonesia’s measures are clearly evident in their design. Furthermore, while not required, the complainants have provided considerable evidence of the

99 Indonesia’s first written submission, para. 55.
100 Panel Report, Turkey – Rice, paras. 7.120-7.121.
101 Indonesia’s first written submission, para. 55.
102 Indonesia’s first written submission, paras. 71, 80, 82, 90, 95.
103 Panel Report, Colombia – Ports of Entry, para. 7.252; see also Panel Report, Korea – Various Measures on Beef, para. 627.
effect on trade volumes from Indonesia’s measures where it is possible to quantify those effects\textsuperscript{104}.

5. **Indonesia’s claims that limited application windows and validity periods for import licences, fixed licence terms, and 80\% realisation requirements are not quantitative restrictions**

79. Australia does not agree with Indonesia’s claim that its limited licence application windows and validity periods, and fixed licence terms, do not amount to quantitative restrictions. Indonesia claims that importers are not prohibited from shipping goods for the next import validity period prior to receiving a license\textsuperscript{105}. Even if this was correct\textsuperscript{106}, this argument disregards the fact that due to other components of Indonesia’s import licensing regime, importers cannot know in advance the quantities they will be allowed to import in the next import period, or if imports of certain products will be allowed at all.

80. Indonesia also claims that exporters are not required to cease shipments prior to the end of the validity period\textsuperscript{107}. However, this is the unavoidable consequence of regulations requiring imports to clear Indonesian customs during the fixed import period for which licences were granted. From a certain point in each import period, it will be either impossible or prohibitively expensive to transport products to Indonesia by the end of an import period, and import recommendations and approvals for the next period will not yet have been issued.

81. Furthermore, Indonesia acknowledges that dips in shipments towards the end of import validity periods can also result when importers have already imported their maximum permitted volumes for one import period\textsuperscript{108}, and are unable to obtain additional import approvals until the next import period or amend their existing approvals to import additional quantities. This demonstrates that Indonesia’s short and fixed licence application windows and validity periods, and fixed licence terms, act individually and together to restrict the volume of imports into Indonesia, and are therefore quantitative restrictions contrary to Article XI:1 of GATT 1994 and Article 4.2 of the Agreement on Agriculture.

82. Furthermore, contrary to Indonesia’s assertions\textsuperscript{109}, the requirements for importers of bovine animals and animal products and horticultural products to import at least 80\% of the volumes in their import approvals are a strong incentive for importers to request lower quantities of imports in their import applications. This is not based on

\textsuperscript{104} New Zealand’s first written submission, paras. 24, 150, 151, 261, Figures 1, 4, 5, 6, Annex 4, Annex 5; United States’ first written submission, paras. 110, 182.

\textsuperscript{105} Indonesia’s first written submission, paras. 67, 101.

\textsuperscript{106} Noting that the complainants have presented evidence to the contrary. (New Zealand’s first written submission, paras. 48, 84; United States’ first written submission, paras. 47, 112.)

\textsuperscript{107} Indonesia’s first written submission, paras. 67, 101.

\textsuperscript{108} Indonesia’s first written submission, para. 71.

\textsuperscript{109} Indonesia’s first written submission, paras. 78, 141.
“anecdotal conjecture”\textsuperscript{110}, but flows naturally from the design of the measure, particularly given the severity of the penalty if the requirement is not met (prohibition from importation for a period of time), and the inability of importers to amend their licence terms. Therefore, the 80% realisation requirements are a quantitative restriction on imports.

6. Indonesia’s claims that its reference prices are not minimum import prices within the meaning of Article 4.2 of the Agreement on Agriculture

83. Indonesia claims that its reference price rules for imports of bovine animals and products, and chilies and shallots, are not minimum import prices within the meaning of Article 4.2 of the Agreement on Agriculture because they do not impose additional duties on imports below a set price\textsuperscript{111}. Australia notes that the complainants have also challenged these reference price rules as “quantitative import restrictions” and “similar border measures”\textsuperscript{112} under Article 4.2 of the Agreement on Agriculture. As the reference prices result in a complete ban on imports when the domestic market price falls below a set reference price, they are clearly quantitative import restrictions inconsistent with Article 4.2 of the Agreement on Agriculture.

84. In regard to whether the reference price rules are also minimum import prices or measures similar to minimum import prices, Australia notes that by banning imports based on the domestic market price, Indonesia’s reference price system does not operate in a manner identical to other minimum import price systems, which generally impose an additional duty on imports below a certain price. However, the Appellate Body has recognised that measures which operate “in a different manner to”\textsuperscript{113} a typical minimum import price system to prevent imports at price lower than a set threshold can nevertheless be considered a minimum import price or a measure similar to a minimum import price. Given Indonesia’s approach is actually more trade-restrictive than other minimum import price systems, by completely banning imports when the market price falls below a set threshold, it should be considered a minimum import price or similar measure under Article 4.2 of the Agreement on Agriculture, as well as a quantitative import restriction.

7. Indonesia’s claims that the domestic purchase requirement for importers of bovine animals and animal products is not a quantitative restriction

85. Indonesia claims that the domestic purchase requirement for importers of bovine animals and animal products is not a quantitative restriction, because it is a suggestion that has not been enforced\textsuperscript{114}. However, MOA 58/2015 (and its predecessor MOA 139/2014) states that importers must submit evidence of local beef purchases in their

\textsuperscript{110} Indonesia’s first written submission, para. 141.
\textsuperscript{111} Indonesia’s first written submission, para. 92.
\textsuperscript{112} New Zealand’s first written submission, paras. 333-334, 367-368; United States’ first written submission, paras. 245, 357.
\textsuperscript{113} Appellate Body Report, Peru – Agricultural Products, para. 5.129; see also Appellate Body Report, Chile – Price Band System (Article 21.5 – Argentina), paras. 194-195.
\textsuperscript{114} Indonesia’s first written submission, para. 111.
applications for import recommendations. Furthermore, even if this requirement was not being enforced as Indonesia claims, its existence in Indonesia’s regulations could still be challenged de jure. As the panel stated in US – Section 301 Trade Act: legislation itself may be construed as a breach, since the mere existence of legislation could have an appreciable "chilling effect" on the economic activities of individuals.

8. Indonesia’s claims that its measures fall within the exception in Article XX(d) of the GATT 1994

Indonesia claims that its limited application windows and validity periods for import licences, fixed licence terms, 80% realisation requirements, and storage capacity restrictions, fall within the exception provided in Article XX(d) of the GATT 1994, which allows for measures “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement…”.

However, Indonesia has not demonstrated that these measures are designed or “necessary” to secure compliance with laws or regulations relating to customs enforcement, as required under the exception in Article XX(d) of the GATT 1994. The Appellate Body stated in Korea – Various Measures on Beef that: For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to ‘secure compliance’ with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be ‘necessary’ to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met.

Indonesia states that these measures are necessary for Indonesia “to have an estimate of expected trade volumes for each validity period” because it has “limited resources to devote to” import administration, and these measures give Indonesian authorities “an opportunity to allocate their limited resources accordingly”. This explanation, if accepted, would suggest that these measures are designed to serve a resource allocation purpose. Indonesia does not indicate any particular laws or

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115 Article 23(1)(l), MOA 58/2015 (Exhibit AUS-1); Article 24(1)(l), MOA 139/2014 (Exhibit JE-26); see also Indonesian Ministry of Agriculture - Directorate General of Animal Husbandry and Veterinary Public Health and Postharvest, “Evaluation on Local Beef Absorption as Requirement to the Request of technical Recommendation for Q4 Beef Importation in 2015 according to MOA Reg no 139/2014” presentation dated 25 August 2015 (Exhibit NZL-38).
116 Panel Report, US — Section 301 Trade Act, para.7.81.
117 Indonesia’s first written submission, paras. 136, 140, 145, 149.
119 Indonesia’s first written submission, para. 79.
120 Indonesia’s first written submission, paras. 79, 136, 140, 142; see also para 149.
121 Indonesia’s first written submission, para. 140.
regulations related to customs enforcement with which these requirements are
designed to “secure compliance”.

89. Furthermore, Indonesia has not provided any evidence that these measures are
“necessary” to its customs enforcement, and that “alternative WTO-consistent
measures were not ‘reasonably available’”\textsuperscript{122}. In finding that Korea’s dual retail
system for imported beef was not justified under Article GATT XX(d), the Appellate
Body in \textit{Korea – Various Measures on Beef} stated that:

\begin{quote}
It is pertinent to observe that, through its dual retail system, Korea has
in effect shifted all, or the great bulk, of these potential costs of
enforcement (translated into a drastic reduction of competitive access to
consumers) to imported goods and retailers of imported goods, instead of
evenly distributing such costs between the domestic and imported
products. In contrast, the more conventional, WTO-consistent measures
of enforcement do not involve such onerous shifting of enforcement costs
which ordinarily are borne by the Member's public purse\textsuperscript{123}.
\end{quote}

90. Furthermore, even if these measures were held to be provisionally justified under
Article XX(d) of the GATT 1994, they do not comply with the chapeau of Article
XX, which requires that the measures under Article XX:

\begin{quote}
are not applied in a manner which would constitute a means of arbitrary
or unjustifiable discrimination between countries where the same
conditions prevail, or a disguised restriction on international trade.
\end{quote}

91. Given that these measures operate within the context of the broader policy of food
self-sufficiency publicly announced and implemented by the Indonesian Government,
as discussed above at paragraph 51, these measures amount to a disguised restriction
on international trade, which includes a “concealed or unannounced restriction or
discrimination in international trade”\textsuperscript{124}. Therefore, these measures do not meet the
requirements of the chapeau of Article XX of the GATT 1994.

\textbf{9. Indonesia’s claims that its purpose of use restrictions fall within the exception in
Article XX(a) of the GATT 1994}

92. Australia does not agree with Indonesia’s claims that its measures banning the sale of
imported animal products in modern or traditional markets, and prohibiting importers
from selling horticultural products directly to consumers, can be justified under the
exception provided in Article XX(a) of the GATT 1994\textsuperscript{125}, which allows for measures
“necessary to protect public morals”.

93. In regard to imported animal products, Indonesia claims that these products are
prohibited for sale in traditional markets because products in those markets are
unlabelled and consumers assume all products in those markets conform to Halal

\textsuperscript{122} Appellate Body Report, \textit{Korea – Various Measures on Beef}, para. 182.
\textsuperscript{125} Indonesia’s first written submission, paras. 158, 166.
requirements. However, Indonesia requires that imported animal products, except for products from swine slaughterhouses, come from establishments which implement Halal practices and have permanent employees for Halal slaughtering. Indonesia also requires that imported animal products with a Halal certificate are not shipped in the same container as animal products without a Halal certificate.

Consistent with Indonesia’s requirements, the Australian Government has a system in place (the Australian Government Authorised Halal Program) to ensure all red meat and red meat products exported to Indonesia are certified by an Approved Islamic Organisation designated by the Indonesian Government. Australia also notes that Indonesia provides no explanation as to why imported animal products, aside from processed meat products, are also prohibited from sale in modern markets (e.g. supermarkets). Therefore, this measure is clearly not designed or “necessary” to protect public morals, and does not conform with the requirements of Article XX(a) of the GATT 1994.

94. Indonesia also claims that its restrictions on the use and sale of horticultural products are designed “to prevent consumer deception regarding whether certain food products are Halal” by preventing their sale in traditional markets. However, while under MOT 71/2015, registered importers are prohibited from selling imports directly to consumers or retailers and must transfer them to a distributor, there do not appear to be any restrictions on distributors selling imported products in traditional markets. Therefore Indonesia’s regulations do not appear to prevent the sale of imported horticultural products in traditional markets, and do not conform with the requirements of Article XX(a) of the GATT 1994.

10. Indonesia’s claims that its measures fall within the exception in Article XX(b) of the GATT 1994

95. Furthermore, Australia does not agree with Indonesia’s claims that several of its measures can be justified under the exception provided in Article XX(b) of the GATT 1994, which allows for measures “necessary to protect human, animal or plant life or health”. Indonesia provides no evidence to support its claims that these measures are “necessary” or that it has considered less trade-restrictive alternatives to these measures. Indonesia also does not demonstrate that it has equivalent measures in place in regard to similar risks posed by like domestic products. Therefore, the Panel should conclude that these measures are not necessary to protect human, animal or
plant life or health and also amount to “an arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”\footnote{Article XX, GATT 1994.}.

\section*{V. CONCLUSION}

96. In this submission, Australia has argued that the Indonesia’s prohibitions and restrictions on imports of horticultural products, and animals and animal products, are clearly inconsistent with Indonesia’s WTO obligations, including under Articles III:4 and XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Australia has also argued that Indonesia’s import licensing regimes for horticultural products, and for animals and animal products, as a whole, impose even greater restrictions on imports than their individual component measures. These measures are frequently amended to cause further uncertainty for importers and exporters, in service of Indonesia’s policy of self-sufficiency. Australia does not consider that these measures can be justified under any of the exceptions in Article XX of the GATT 1994.

97. Australia thanks the Panel for the opportunity to provide this third party submission.