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(17-6051)



# INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS

AB-2017-2

Report of the Appellate Body

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## CASES CITED IN THIS REPORT

| Short title | Full case title and citation |
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| EC – Sardines | Appellate Body Report, European Communities – Trade Description of Sardines , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359 |
| EC – Seal Products | Appellate Body Reports, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7 |
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| India – Autos | Panel Report, India – Measures Affecting the Automotive Sector , WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827 |
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| US – Gambling | Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475) |
| US – Gasoline | Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3 |
| [redacted] | Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products , WT/DS5 |

1.3. The 18 measures challenged by the co-complainants comprise: (i) discrete elements of Indonesia's import licensing regime for horticultural products (Measures 1 through 8)[5]; (ii) Indonesia's import licensing regime for horticultural products as a whole (Measure 9)[6]; (iii) discrete elements of Indonesia's import licensing regime for animals and animal products (Measures 10 through 16)[7]; (iv) Indonesia's import licensing regime for animals and animal products as a whole (Measure 17)[8]; and (v) the requirement whereby importation of horticultural products, animals and animal products depends upon Indonesia's determination of the sufficiency of domestic supply to satisfy domestic demand (Measure 18).[9]

[5] The discrete elements of Indonesia's import licensing regime for horticultural products challenged by the co-complainants are set out in the Panel Report as follows:

- Measure 1 (limited application windows and validity periods) – a combination of limited application windows and six-month validity periods of the import recommendations obtained from the Ministry of Agriculture and the import approvals obtained from the Ministry of Trade (para. 2.33. See also

1.4. The Panel enumerated the 18 measures at issue using the following table[10]:

| A. IMPORT LICENSING REGIME FOR HORTICULTURAL PRODUCTS | |
|---|---|
| DISCRETE ELEMENTS OF THE REGIME: | |
| Measure 1 | Limited application windows and validity periods |
| Measure 2 | Periodic and fixed import terms |
| Measure 3 | 80% realization requirement |
| Measure 4 | Harvest period requirement |
| Measure 5 | Storage ownership and capacity requirements |
| Measure 6 | U.04 -0 0 (e)7.4 (i)-0.7 (ty<w 5.1793 Tw 40 >>B1806 N 0 48 15.3>>B2 (nd)5.1 ( )0.8 (f)-12.2 (i)-0 |

with Article III:4 of

GATT 1994[35] and the co-complainants' claims under Article 2.2(a) of the Import Licensing Agreement because the United States and the co-complainants, respectively, "[had] failed to make a prima facie case".[36]

1.13. In accordance with Article 19.1 of the DSU, and having found that Indonesia acted inconsistently with its obligations under Article XI:1 of the GATT 1994 with respect to Measures 1 through 18, the Panel recommended that the Dispute Settlement Body (DSB) request Indonesia to bring its measures into conformity with its obligations under the GATT 1994.[37]

1.14. On 17 February 2017, Indonesia notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal[38] and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review[39] (Working Procedures).

1.15. On 7 March 2017, New Zealand and the United States each filed an appellee's submission.[40] On 9 March 2017, Norway notified its intention to appear at the oral hearing as a third participant.[41] On 10 March 2017, Australia, Brazil, Canada, and the European Union each filed a third participant's submission.[42] On the same day, Argentina, Japan, Korea, Paraguay, Singapore, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu each notified its intention to appear at the oral hearing as a third participant.[43] Subsequently, China also notified its intention to appear at the oral hearing as a third participant.[44]

1.16. On 13 April 2017, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision.[45] The Chair of the Appellate Body explained that this was due to a number of factors, including the enhanced workload of the Appellate Body in 2017, scheduling difficulties arising from appellate proceedings running in parallel with an overlap in the composition of the Divisions hearing the appeals, the number and complexity of the issues raised in this and concurrent appellate proceedings, together with the demands that these concurrent appeals place on the WTO Secretariat's translation services, and a shortage of staff in the Appellate Body Secretariat. On 18 October 2017, the Chair of the Appellate Body informed the Chair of the DSB that the Report in these proceedings would be circulated no later than 9 November 2017.

Japan) responded to questions posed by the Members of the Appellate Body Division hearing the appeal. The participants and a third participant (Japan) made closing statements.

## 2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.[47] The Notice of Appeal, and the executive summaries of the participants' claims and arguments are contained in Annexes A and B of the Addendum to this Report, WT/DS477/AB/R/Add.1, WT/DS478/AB/R/Add.1.

## 3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the third participants that filed a written submission (Australia, Brazil, Canada, and the European Union) are reflected in the executive summaries of their written submissions provided to the Appellate Body[48], and are contained in Annex C of the Addendum to this Report, WT/DS477/AB/R/Add.1, WT/DS478/AB/R/Add.1.

## 4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised by Indonesia in this appeal:

a. whether the Panel erred in finding that Article XI:1 of the GATT 1994 deals more specifically with quantitative restrictions on agricultural products than Article 4.2 of the Agreement on Agriculture, and, accordingly, whether the Panel erred in considering the co-complainants' claims under Article XI:1 of the GATT 1994 rather than under Article 4.2 of the Agreement on Agriculture;

b. whether the Panel erred in determining that Indonesia bears the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture;

c. whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU:

   i. by failing to conduct an objective assessment of the applicability of Article 4.2 of the Agreement on Agriculture; and

   ii. by failing to conduct an objective assessment of which party bears the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture;her the PaTw 0.347 snceee74 0 Td ( )Tj -0.004 Tww 0.347 s Td ( )Tj

## 5 ANALYSIS OF THE APPELLATE BODY

5.1. We first address Indonesia's claims of error raised on appeal regarding: (i) the Panel's decision on the order of analysis between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture; and (ii) the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture. In so doing, we also address Indonesia's claims that, in ruling on these two issues, the Panel committed errors under Article 11 of the DSU. We then address the alternative claim of error raised by Indonesia with regard to Article XI:2(c) of the GATT 1994. Finally, we examine Indonesia's claim on appeal under Article XX of the GATT 1994.

### 5.1 The Panel's decision to commence its legal analysis with the claims under Article XI:1 of the GATT 1994

5.2. We begin by addressing Indonesia's claim of error regarding the Panel's decision to commence its legal analysis with the co-complainants' claims raised under Article XI:1 of the GATT 1994, rather than Article 4.2 of the Agreement on Agriculture. Indonesia requests us to reverse the Panel's decision on the order of analysis, as well as its findings that the 18 measures at issue are inconsistent with Article XI:1 of the GATT 1994.[50] In response, New Zealand and the United States request us to reject Indonesia's appeal that the Panel's order of analysis constituted a legal error, and to uphold the relevant findings of the Panel.[51]

5.3. Before the Panel, New Zealand and the United States raised claims with regard to the 18 measures at issue under, *inter alia*, Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.[52] In setting out its order of analysis, the Panel concurred with the panel in *India – Autos*, stating that it is important to consider first whether a particular order is "compelled" by principles of interpretative methodology, "which, if not followed, might constitute an error of law".[53] The Panel also recalled that, in *EC – Bananas III*, the Appellate Body stated that the provision

5.11. Accordingly, the phrase "except to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same matter"[77] identifies instances where a provision of the Agreement on Agriculture conflicts with the GATT 1994 or with other Multilateral Trade Agreements in Annex 1A to the WTO Agreement. In EC – Bananas III , that was not the case, and thus, the provisions of the Agreement on Agriculture and the GATT 1994 applied cumulatively.[78]

5.12. Indonesia argues that Article 21.1 of the Agreement on Agriculture: (i) "does not require a conflict between the GATT 1

quantitative restrictions and the obligation in Article 4.2 "not [to] maintain, resort to, or revert to" measures covered by Article 4.2.[85]

5.16. To the extent that they apply to the claims challenging the 18 measures at issue as quantitative restrictions, Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture thus contain the same substantive obligations, namely, the obligation not to maintain quantitative import restrictions on agricultural products. Had the Panel decided to commence its analysis with Article 4.2 rather than Article XI:1, it would have, in essence, conducted the same analysis to determine whether the 18 measures at issue are "quantitative import restrictions" within the meaning of footnote 1 to Article 4.2.[86]

5.17. Furthermore, a measure found to be a quantitative import restriction on agricultural products inconsistent with Article XI:1 may potentially be justified under Article XX of the GATT 1994, and the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture also incorporates Article XX of the GATT 1994.[87] To the extent that they apply to the claims regarding the 18 measures at issue in this dispute, Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture are thus subject to the same exceptions under Article XX of the GATT 1994, and, as we determine further below in our analysis, the same burden of proof applies under Article XX, regardless of whether that provision is invoked in relation to Article XI:1 or Article 4.2.[88]

5.18. In light of the above, we consider that Article 4.2 of the Agreement on Agriculture does not apply "to the exclusion of"[89] Article XI:1 of the GATT 1994 in relation to the claims challenging the 18 measures at issue as quantitative restrictions. Both provisions contain the same substantive obligations in relation to these claims and, thus, in these circumstances, they apply cumulatively.[90]

Whether a mandatory sequence of analysis exists b8.7 (u [(d ( )Tj10.3 (t)-23 0 Td [n)-0.6 ( A)-3.3 (r)-2.3 (t)-3.4 (i)-
( )0.8 (o)4 (f)-12.3 ( )15.8 (m)-3.2 (3 07 (a)-2 (s)-7.4 (ur)3.1 (3 07 (s)7.6 ( )0.8 (w)-8.9 (i)-0.)-2thi)-0.6 (n )0.8 (th3 07 ( )15.7 (m)-3.2 (3 0
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economy with respect to the claims under Article XI:1. Thus, we do not see how starting the analysis with Article XI:1 rather than with Article 4.2 could constitute "a failure to structure the analysis in the proper logical sequence [that had] repercussions for the substance of the analysis itself".[104]

5.24. We turn now to Indonesia's argument that the Panel should "have concluded that Article 4.2 applies more specifically to the products at issue, i.e. agricultural products", and consider the relative specificity of Article XI:1 of the GATT 1994 in relation to Article 4.2 of the Agreement on Agriculture.

According to them, Indonesia therefore fails to meet the legal standard under Article 11 of the DSU.[111]

5.28. We recall that, as the Appellate Body has cautioned on several occasions, a claim that a panel has failed to conduct an "objective assessment of the matter before it" under Article 11 of the DSU is "a very serious allegation".[112] Accordingly, it is incumbent on a participant raising a claim under Article 11 to identify specific errors regarding the objectivity of the panel's assessment and "to explain why the alleged error meets the standard of review under that provision".[113] Importantly, a claim under Article 11 must "stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement."[114]

5.29. We note that, in support of its claim under Article 11 of the DSU, Indonesia essentially reiterates some of the arguments it presented in support of its substantive claim on appeal regarding the Panel's decision to commence its examination of the co-complainants' claims with Article XI:1 of the GATT 1994. Like for its substantive claim, Indonesia argues that Article 4.2 of the Agreement on Agriculture deals more specifically with quantitative import restrictions on agricultural products than Article XI:1 of the GATT 1994.[115] Similarly, both under Article 11 of the DSU and in support of its substantive claim, Indonesia argues that the Panel's reliance on Articles 4.2 and 21.1 of the Agreement on Agriculture to determine that Article

### 5.1.4 Conclusions

5.31. In light of the above, we consider that Article 4.2 of the Agreement on Agriculture does not apply "to the exclusion of"[119] Article

measures are not justified under Article XX in order to present a prima facie case of violation under Article 4.2, we understand the above statement as containing an implicit reference to the burden of proof under Article XX of the GATT 1994 in the context of Article 4.2 of the Agreement on Agriculture.

5.2.1

in WTO jurisprudence that Article XX of the GATT 1994 is in the nature of an affirmative defence, with respect to which the respondent bears the burden of proof[135], and that there is no basis for Indonesia to argue that the nature of Article XX as an affirmative defence is changed in the context of Article 4.2 of the Agreement on Agriculture.[136]

5.40. We begin by recalling the text of Article 4.2, including footnote 1, of the Agreement on Agriculture. Article 4.2 reads:

> Article 4
>
> Market Access
>
> ...
>
> 2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties[1], except as otherwise provided for in Article 5 and Annex 5.
>
> _____
>
> [1] These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

5.41. Article 4.2 prohibits Members from maintaining, resorting to, or reverting to "measures of the kind which have been required to be converted into ordinary customs duties", subject to certain exceptions under Article 5 and Annex 5 to that Agreement. The first part of footnote 1 to Article 4.2 contains an "illustrative list"[137] of the categories of measures prohibited under Article 4.2, which refers to, *inter alia*, "quantitative import restrictions". The second part of footnote 1 provides that "measures" within the meaning of Article 4.2 do not include measures maintained under "balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement". Article XX of the GATT 1994 is one of the "other general, non-agriculture-specific provisions of GATT 1994". As such, a Member is prohibited under Article 4.2 from maintaining, resorting to, or reverting to a measure that falls within any of the cat, 3 (t r)19.64h thath 6a

5.47. We recall that, in US – Clove Cigar ettes , the Appellate Body found[148] that "the burden of proof in respect of a particular provision of the covered agreements cannot be understood in isolation from the overarching logic of that provision, and the function which it is designed to serve."[149] Indonesia has not explained how and to what extent the reference in the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture modifies the overarching logic and function of Article XX of the GATT 1994. We recall in this regard that the Appellate Body has stated that Article XX "contains provisions designed to permit important state interests … to find expression".[150] Paragraphs (a) to (j) of Article XX "comprise measures that are recognized as exceptions to substantive obligations established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character".[151] The chapeau of Article XX, in turn, "embodies the recognition on the part of WTO Members of the ne11.4 (co411.4 4(n) )14 (of)11.4 62 (a) t)-77(T1.3 ( )04(T1.3Lth) (n)10.4 )04( ).4 (iti)13.3 (2.4(t)-2 2 Tm (

the TBT Agreement as "convert[ing] exceptions under Article XX of the GATT 1994 into positive obligations"[158], as neither of these provisions contains a specific reference to Article XX. In addition, although Articles 2.2 and 2.4 both refer to certain "legitimate objectives"[159] that are

Article 4.2, the Panel impaired Indonesia's due process rights.[164] New Zealand argues in response that Indonesia fails to substantiate independently this claim under Article 11 of the DSU, as it is solely based on Indonesia's challenge to the legal standards applied by the Panel.[165] According to New Zealand, Indonesia's claim must therefore fail.[166] We note that, in its appellee's submission, the United States does not separately address this claim by Indonesia. However, at the oral hearing, the United States reiterated the argument it put forward with respect to Indonesia' ( in)12.3 (d)2.

### 5.2.4 Conclusions

5.56. For the reasons stated above, Article 4.2 of the Agreement on Agriculture and footnote 1 thereto, read in their relevant context, do not suggest that the nature of Article XX of the GATT 1994 as an affirmative defence is modified by virtue of its incorporation into the second part of footnote 1 to Article 4.2. We thus find that the burden of proof under Article XX remains with the respondent even when Article XX is applied through the reference in the second part of footnote 1 to Article 4.2. In addition, we consider that Indonesia has not substantiated its claim under Article 11 of the DSU that the Panel failed to conduct an objective assessment of which party bears the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreemeeme iA006 13 T04o ooe(u)12.l7 (tu)12.3 (r)6.4 4

5.61. In its appeal, Indonesia claims that the Panel erred in finding that Article XI:2(c) of the GATT

Agreement on Agriculture. However, a plain reading of the term "quantitative import restrictions" suggests that it refers to any restriction on the importation of an agricultural product[196] that is related to its quantity . In addition, because "quantitative import restrictions" in footnote 1 to Article 4.2 are among "measures of the kind which have been required to be converted into ordinary customs duties "[197], the term "quantitative import restrictions" does not include ordinary customs duties.

5.71. Furthermore, as context for interpreting the prohibition of "quantitative import restrictions" under Article 4.2 of the Agreement on Agriculture, we note that Article XI of the GATT 1994 sets out a prohibition of quantitative restrictions . Article XI provides, in relevant part:

Article XI

General Elimination of Quantitative Restrictions

> 1. 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 Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member.
>
> 2. The provisions of paragraph 1 of this Article shall not extend to the following:
>
> ...
>
> (c) di (ov)11 ( a)7 (n)12.3 (y)11.3 (p)2.7 ( )13.7 (or )-13 (or)6.4 11.3 (e)-1.213 Td [(p)2.3 (r)ov

5.73. As noted above, Indonesia alleges that, because the term "quantitative import restrictions" in the first part of footnote 1 to Article 4.2 of the Agreement on Agriculture is not defined in that Agreement, this term must be informed by both Article XI:1 and XI:2 of the GATT 1994[201], such that measures satisfying the conditions of Article XI:2(c), among others, are excluded from "quantitative import restrictions" in the first part of footnote 1.[202]

5.74. As we have already stated in section

5.77. Lastly, we note that Indonesia's interpretation of footnote 1 to Article 4.2 of the Agreement on Agriculture and Article XI:2(c) of the GATT 1994 relies on the distinction between a limitation of scope and an exception. For example, Indonesia asserts that the "common feature" of measures falling within the second part of footnote 1 is that they are inconsistent with GATT obligations but justified under GATT exceptions, such as Articles XII, XVIII, XIX, and XX of the GATT 1994.[206] According to Indonesia, because Article XI:2(c) is a "scope" provision and not an "exception", whether or not this provision detracts from the obligation under Article 4.2 is not a question under the second part of footnote 1, but rather a question that concerns the interpretation of the first part of footnote 1.[207] Indonesia also appears to consider that the fact that Article XI:2(c) concerns the "scope" of the prohibition of quantitative restrictions under Article XI:1 should inform the definition of "quantitative import restrictions" in the first part of footnote 1 to Article 4.2.[208]

5.78. We disagree that the distinction between a limitation of scope and an exception is dispositive of the issue before us. As we have already explained, while Article XI:2(c) of the GATT 1994 limits the scope of the obligation under Article XI:1 of the GATT 1994, this provision does not define the scope of the notion of quantitative restrictions itself, because the term "[i]mport restrictions" in Article XI:2(c), read in light of the word "quantitative" in the title of Article XI, is a reference to a certain class of quantitative (import) restrictions. This confirms the interpretation that the term "quantitative import restrictions" in the first part of footnote 1 to Article 4.2 of the Agreement on Agriculture covers the kinds of measures referred to in Article XI:2(c). In addition, regardless of how we characterize Article XI:2(c), nothing in the text of Article XI suggests that Article XI:2(c) limits not only the scope of the obligation under "paragraph 1 of this Article" but also the scope of the obligation under Article 4.2. Nor does the text of Article 4.2 or footnote 1 suggest that the prohibition of quantitative import restrictions under this provision is subject to the carve-outs set out in Article XI:2(c). On the contrary, the second part of footnote 1 clearly indicates that, while measures maintained under "general, non-agriculture-specific provisions"[209] of the GATT 1994, such as Article XX, are excluded from the obligation under Article 4.2, measures maintained under agriculture-specific "provisions" of the GATT 1994, including Article XI:2(c), do not qualify for such derogations. This conclusion is not dependent on whether Article XI:2(c) is a limitation of scope of, or an exception from, the obligation under Article XI:1, as the second part of footnote 1 uses the word "provisions" and does not distinguish between a "limitation of scope" and an "exception".

5.79. In light of the foregoing, we disagree with Indonesia that agricultural measures maintained under Article XI:2(c) of the GATT 1994 are not "quantitative import restrictions" within the meaning of the first part of footnote 1 to Article 4.2 of the Agreement on Agriculture. We therefore find that the prohibition of "quantitative import restrictions" under Article 4.2 extends to the kinds of quantitative import restrictions carved out from the prohibition under Article XI:1 of the GATT 1994 by virtue of Article XI:2(c). As a consequence, Members cannot maintain quantitative import restrictions on agricultural products that satisfy the requirements of Article XI:2(c) of the GATT 1994 without violating Article 4.2 of the Agreement on Agriculture. This is because the prohibition of "quantitative import restrictions" under Article 4.2 does not allow for the kind of derogations recognized under "agriculture-specific" provisions such as Article XI:2(c) of the GATT 1994.

5.80. We recall in this regard that Article 21.1 of the Agreement on Agriculture provides that the provisions of the GATT 1994 "shall apply subject to" the provisions of that Agreement. The Appellate Body has stated that "Members explicitly recognized that there may be conflicts between the Agreement on Agriculture and the GATT 1994, and explicitly provided, through Article 21, that the Agreement on Agriculture would prevail to the extent of such conflicts."[210] There is a conflict[211] between Article XI:2(c) and Article 4.2 because quantitative import restrictions on agricultural products that fall within the permission under the former provision cannot be maintained without violating the latter provision. Therefore, in accordance with Article 21.1 of the

[206] Indonesia's appellant's submission, para. 121.
[207] See Indonesia's appellant's submission, paras. 116 and 120.
[208] Indonesia's appellant's submission, para. 123.
[209] Emphasis added.
[210] Appellate Body Report, EC – Export Subsidies on Sugar, para. 221. (italics omitted)
[211] In the context of interpreting Article 1.2 of the DSU, the Appellate Body has defined "conflict" as "a situation where adherence to the one provision will lead to a violation of the other provision". (Appellate Body Report, Guatemala – Cement I, para. 65) See also Panel Reports, EC – Bananas III, para. 7.159.

Agreement on Agriculture, Article XI:2(c) cannot be applied to justify or exempt measures that fall within the prohibition of quantitative import restriction under Article 4.2.

5.81. The Panel further stated that, by virtue of Article 21.1 of the Agreement on Agriculture, "Indonesia cannot rely upon Article XI:2(c)(ii) of the GATT 1994 to exclude Measures 4, 7 and 16 from the scope of Article XI:1 of the GATT 1994 because, with respect to agricultural measures, Article XI:2(c) has been rendered inoperative by Article 4.2 of the Agreement on Agriculture."[212] By referring to "the scope of Article XI:1 of the GATT 1994", the Panel apparently considered that Indonesia cannot rely on Article XI:2(c) not only with respect to the co-complainants' claims under Article 4.2 of the Agreement on Agriculture, but also with respect to their claims under Article XI:1 of the GATT 1994.

5.82. We note that Indonesia has not demonstrated that Measures 4, 7, and 16 satisfy all the elements of Article XI:2(c)(ii) of the GATT 1994[213], and thus the Panel's findings of inconsistency of these measures with Article XI:1 of the GATT 1994 remain undisturbed. We also recall that Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture contain essentially the same substantive obligations as far as the elimination of quantitative import restrictions on agricultural products is concerned. As such, the Panel's findings that Measures 4, 7, and 16 are quantitative restrictions on the importation of agricultural products inconsistent with Article XI:1 would, without requiring much more, lead to the conclusion that these measures also fall within the prohibition of quantitative import restrictions under Article 4.2 and the first part of footnote 1 thereto.[214] Accordingly, and because Article XI:2(c) cannot be invoked to justify or exempt measures falling within the prohibition of Article 4.2, Indonesia cannot maintain, resort to, or revert to Measures 4, 7, or 16 regardless of whether Article XI:2(c) is being invoked by Indonesia in relation to Article XI:1 or Article 4.2.

5.83. We further note that, while Article 21.1 of the Agreement on Agriculture governs the relationship between Article 4.2 of the Agreement on Agriculture and Article XI:2(c) of the GATT 1994, it does not necessarily follow that Article 21.1 affects the internal relationship between Article XI:1 and XI:2(c) of the GATT 1994, in the sense that Article 21.1 precludes Members from relying on Article XI:2(c) not only vis-à-vis claims under Article 4.2 but also vis-à-vis claims under Article XI:1 of the GATT 1994. In any event, our finding that Indonesia cannot rely on Article XI:2(c) to justify or exempt its measures with respect to the prohibition of quantitative import restrictions under Article 4.2 would provide sufficient guidance for the purpose of resolving the present dispute, including in relation to the implementation by Indonesia of the recommendations and rulings by the DSB.

### 5.3.3 Conclusions

5.84. For the reasons stated above, we disagree with Indonesia that agricultural measures maintained under Article XI:2(c) of the GATT 1994 are not "quantitative import restrictions" within the meaning of the first part of footnote 1 to Article 4.2 of the Agreement on Agriculture. We therefore find that the prohibition of "quantitative import restrictions" under Article 4.2 extends to measures satisfying the requirements of Article XI:2(c). We further find

5.92. In contrast, New Zealand and the United States take the view that analysing a measure under the chapeau without first assessing it under the applicable paragraphs of Article XX is not per se a reversible legal error.[236] Rather, according to them, it is only ground for reversal if it causes a panel's conclusion to be substantively wrong.[237] In the instant case, New Zealand and the United States consider that the Panel conducted a substantively correct analysis of the chapeau of Article XX, and there is thus no basis for reversing the Panel's finding under Article XX in respect of Measures 9 through 17.[238]

5.93. We recall that Article XX of the GATT 1994 provides, in relevant part[239]:

> Article XX
>
> General Exceptions
>
> Subject to the requirement that such measures 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
>
> ...
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices; ...

5.94. Members can resort to Article XX as an exception to justify measures that would otherwise be inconsistent with GATT obligations. Article XX is made up of two main parts: (i) ten paragraphs, which enumerate the various categories of "governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization"[240]; and (ii) the chapeau, which imposes additional disciplines on measures that have been found to be provisionally justified under one of the paragraphs of Article XX.[241]

5.95. The chapeau and the paragraphs of Article XX contain independent requirements that must be satisfied for a measure to be justified. Specifically, the chapeau of Article XX serves the purpose of ensuring that provisionally justified measures under one of the paragraphs are not applied in such a way as would constitute an abuse of the exceptions of Article XX.[242] The chapeau does so by requiring that measures not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or

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According to Indonesia, in light of the principle of jura novit curia , the Panel was not "driven" to follow
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remains possible at all, where the interpreter … has not first identified and examined the specific exception threatened with abuse."[248]

5.98. Furthermore, the Appellate Body has recognized that the objective that is found to justify provisionally the measure at issue under a paragraph of Article XX is a relevant consideration to assess whether there is "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" pursuant to the chapeau of Article XX. Specifically, in Brazil – Retreaded Tyres, the Appellate Body stated that "[t]he assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure."

### 5.4.3 Conclusions

5.101. As discussed above, the normal sequence of analysis under Article XX of the GATT 1994 involves, first, an assessment of whether the measure at issue is provisionally justified under one of the paragraphs of Article XX and, second, an assessment of whether that measure also meets the requirements of the chapeau of Article XX. This reflects "the fundamental structure and logic of Article XX".[256] It also comports with the function of the chapeau of Article XX, which is "to prevent abuse of the exceptions specified in the paragraphs of that provision"[257], and to ensure that a balance is struck between the right of a Member to invoke an exception under Article XX and the substantive rights of other Members under the GATT 1994.[258] Depending on the particular circumstances of the case, a panel that deviates from the sequence of analysis under Article XX might not necessarily, for that reason alone, commit a reversible legal error provided the panel has made findings on those elements under the applicable paragraphs that are relevant for its analysis of the requirements of the chapeau . However, following the normal sequence of analysis under Article XX provides panels with the necessary tools to assess the requirements of the chapeau .

5.102. Having made these observations, we note Indonesia's contention that it would not be possible for us to complete the legal analysis to determine whether Measures 9 through 17 are justified under Article XX(a), (b), or (d)

as quantitative restrictions. Both provisions contain the same substantive obligations in relation to these claims[263] and, thus, in these circumstances, they apply cumulatively. Moreover, there is no mandatory sequence of analysis between Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994 in this dispute, and the decision as to whether to commence the analysis with the claims under Article XI:1 or those under Article 4.2 was within the Panel's margin of discretion. We also consider that Indonesia has not substantiated its claim under Article 11 of the DSU that the Panel failed to make an objective assessment of the applicability of Article 4.2 of the Agreement on Agriculture.

a. Therefore, we reject Indonesia's claim that the Panel erred in assessing the claims regarding the measures at issue under Article XI:1 of the GATT 1994, rather than Article 4. (T)n ( t)- t ( )Tj 0.0040 112.4 (ia)7 3 ( A)8 (gr)4.3 (iw 15 3.t3 (iw 83J 0F2 ( o)42.3 (8.7 (r

### 6.3 Indonesia's alternative claim that the Panel erred in finding that Article XI:2(c) of the GATT 1994 has been rendered "inoperative " by Article 4.2 of the Agreement on Agriculture

6.5. We disagree with Indonesia that agricultural measures maintained under Article XI:2(c) of the GATT 1994 are not "quantitative import restrictions" within the meaning of the first part of footnote 1 to Article 4.2 of the Agreement on Agriculture.

a. Therefore, we find that the prohibition of "quantitative import restrictions" under Article 4.2 of the Agreement on Agriculture extends to measures satisfying the requirements of Article XI:2(c) of the GATT 1994.

b. We further find that, by virtue of Article 21.1 of the Agreement on Agriculture, Article XI:2(c) of the GATT 1994 cannot be relied upon to justify or exempt quantitative import restrictions that are inconsistent with Article 4.2 of the Agreement on Agriculture.

6.6. In addition, the Panel's findings that Measures 4, 7, and 16 are quantitative restrictions on the importation of agricultural products inconsistent with Article XI:1 of the GATT 1994 would lead to the conclusion that these measures also fall within the prohibition of quantitative import restrictions under Article 4.2 of the Agreement on Agriculture. This conclusion does not change regardless of whether Article XI:2(c) is being invoked by Indonesia in relation to Article XI:1 or Article 4.2.

a. Consequently, we uphold the Panel's finding, in paragraph 7.60 of the Panel Report, to the extent that it states that, by virtue of Article 21.1 of the Agreement on Agriculture, Article XI:2(c) of the GATT 1994 cannot be relied upon to justify or exempt measures falling within the prohibition of quantitative import restrictions under Article 4.2 of the Agreement on Agriculture.

### 6.4 Indonesia's claim under Article XX of the GATT 1994

6.7. The normal sequence of analysis under Article XX of the GATT 1994 involves, first, an assessment of whether the measure at issue is provisionally justified under one of the paragraphs of Article XX and, second, an assessment of whether that measure also meets the requirements of the chapeau of Article XX. This reflects "the fundamental structure and logic of Article XX".[265] It also comports with the function of the chapeau of Article XX, which is "to prevent abuse of the exceptions specified in the paragraphs of that provision"[266], and to ensure that a balance is struck between the right of a Member to invoke an exception under Article XX and the substantive rights of other Members under the GATT 1994.[267] Depending on the particular circumstances of the case, a panel that deviates from the se[arT

completing the legal analysis, the Panel's findings that these measures are inconsistent with Article XI:1 of the GATT 1994 would remain undisturbed. For this reason, we consider that a ruling on Indonesia's claim on appeal under Article XX is unnecessary for the purposes of resolving this dispute.

a. Therefore, we decline to rule on Indonesia's claim on appeal under Article XX of the GATT 1994 and declare the Panel's finding that "Indonesia ha[d] failed to demonstrate that Measures 9 through 17 are justified under Articles XX(a), (b) or (d) of the GATT 1994, as appropriate", in paragraph 7.830 of the Panel Report[269], moot and of no legal effect.

### 6.5 Recommendation

6.9. The Appellate Body recommends that the DSB request Indonesia to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 12th day of October 2017 by: