INDONESIA – MEASURES CONCERNING
THE IMPORTATION OF CHICKEN MEAT AND CHICKEN PRODUCTS

(DS484)

ORAL STATEMENT
OF THE UNITED STATES OF AMERICA AT THE THIRD-PARTY SESSION
OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

July 14, 2016

Mr. Chairman, Members of the Panel:

1. We welcome this opportunity to present the views of the United States. The United States has already presented a third-party written submission and will not repeat those points. Today, we will focus on addressing Indonesia's defenses under Article XX of the GATT 1994[1] with respect to the intended use requirement, the positive list requirement, the limited application window and validity periods requirements, and the fixed license terms requirement. The United States also will briefly discuss the legal standards applicable to Brazil's claim that Indonesia imposes a "general prohibition" on the importation of poultry meat and poultry products.

I. THE INTENDED USE REQUIREMENT IS NOT JUSTIFIED UNDER ARTICLE XX(B) OR XX(D) OF THE GATT 1994

2. Now, with respect to the intended use requirement, the United States recalls that Indonesia prohibits the importation of poultry meat and poultry products for retail sale in traditional markets, or "wet markets," where the vast majority of Indonesians purchase their meat.[2]

3. Indonesia first seeks to justify this requirement under Article XX(b) by arguing that it is necessary to protect human life or health. Setting aside the second step of showing compliance with the chapeau to Article XX, to make out preliminarily a defense under Article XX(b), Indonesia must show that two elements of its text are met: (1) that the challenged measure's objective is "to protect human, animal or plant life or health" and (2) that the measure is "necessary" to the achievement of its objective.[3] In the context of an exception for a measure

[1] *General Agreement on Tariffs and Trade 1994* ("GATT 1994").
[2] Brazil First Written Submission, para. 87; U.S. Third Party Submission, para. 27.
[3] *Brazil – Retreaded Tyres (AB)*, paras. 144-145.

that would otherwise be WTO-inconsistent, a measure may be viewed as "necessary" when it is indispensable, or nearly so. Past WTO reports have analysed a measure as "necessary" if, in light of its objective, it makes a significant contribution to that objective and where less-trade-restrictive alternatives that would achieve that objective equally cannot be employed.[4]

4. Indonesia specifically asserts that the intended use requirement prevents food spoilage and protects the public health by "ensur[ing] that frozen products are not sold in markets without a proper cold chain."[5] However, Indonesia has offered no evidence – from either the text, structure, or the legislative history of the Ministry of Agriculture and the Ministry of Trade regulations – to show that food safety is, in fact, the objective (or one of the objectives) in pursuit of which the intended use requirements were imposed. Therefore, there would not appear to be an evidentiary basis for the Panel to find that the first element of the Article XX(b) defense has been met.

5. With respect to the "necessary" element, Indonesia has also failed to show how prohibiting the importation of non-beef animal products, including poultry meat and products, for sale in traditional markets contributes to the objective of food safety. Specifically, the intended use requirement in the MOA Regulation at issue only prohibits the sale of *imported* frozen meat in traditional markets; it does not address the sale of *domestic* frozen meat at all.

6. Indeed, Indonesia has not demonstrated that imported frozen or thawed meat in traditional markets poses any greater risks to human health than those associated with either freshly slaughtered, frozen, or thawed domestic meat under the same conditions. Even the

[4] *EC – Seal Products (AB)*, para. 5.169; *Korea – Beef*, paras. 164-166; *US – Gambling (AB)*, paras. 306-307.
[5] Indonesia's First Written Submission, para. 189.

evidence submitted by Indonesia indicates that the domestic "slaughter point" suppliers of fresh chicken meat to the traditional markets are characterized by (1) their lack of adherence to food safety regulations, (2) poor hygienic conditions, and (3) the lack of oversight from the government to ensure food safety.[6]

7. Moreover, the Indonesian government's own actions suggest that prohibiting imported frozen meat from the traditional market does not contribute to food safety. As recently as June 2016, the Ministry of Agriculture supplied 9,000 tons of frozen meat to traditional markets across Indonesia, and indicated that it will repeal the regulations that have prohibited the entry of frozen meat to these markets.[7] Therefore, it would not seem plausible that the intended use restrictions placed on poultry products are necessary to achieve a food safety objective in Indonesia.

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

[6] Socio-Economic Analysis of the Slaughtering Systems in Poultry Meat Sector in Greater Jakarta Area, p. 30 (Exh. IND- 57).

[7] *See* Newshub, "Frozen meat market entry, call the Minister of Agriculture did not exist in 70 years," *NewsHub Asia*, July 1, 2016, http://www.newshub.asia/finance/frozen-meat-market-entry-call-the-minister-of-agriculture-did-not-exist-in-70-years.html (Exh. US-11). See also Alfin Tofler, "Minister of Agriculture INTERVIEW: "Market Operations Are Aided by 12 Meat Importers, Totaling 9,000 Tons," June 30, 2016, http://www.bareksa.com/id/text/2016/06/30/wawancara-mentan-operasi-pasar-dibantu-12-importir-daging-total-9000-ton/13561/news (Exh. US-12).

[8] Indonesia First Written Submission, paras. 203-204.

requirement was *designed* to secure compliance with the food safety and consumer protection provisions cited by Indonesia.

9. More importantly, Indonesia has failed to show that the intended use requirement is necessary to secure compliance with legal provisions it identified. With respect to the food safety laws, Indonesia has not explained how barring the importation of poultry products for sale at traditional markets contributes to securing compliance with Articles 58 and 59 of Law 18/2009, which relate to the requirement on the government to regulate animal products for food safety within its authority and the requirement for importers to obtain import permits.[9]

10. And with respect to compliance with the consumer protection law, Indonesia argues that the intended use requirement prevents vendors in traditional markets from selling thawed frozen meat as fresh meat.[10] However, as discussed above, the intended use requirement does not address domestic frozen meat at all, making any contribution to securing compliance with consumer deception provisions negligible.

II. THE POSITIVE LIST REQUIREMENT IS NOT JUSTIFIED UNDER ARTICLE XX(D) OF THE GATT 1994.

11. Indonesia also asserts that its positive list requirement, which prohibits the importation of any product not listed in its regulations, is justified under Article XX(d).[11] Specifically, Indonesia argues that the positive list requirement is designed – and necessary – to secure

[9] Article 58(1), Article 59(1) and (3), Law No. 18/2009 (Animal Law) (IDN-1),
[10] Indonesia First Written Submission, para. 207.
[11] Indonesia First Written Submission, paras. 229-233.

compliance with its laws on halal as well as consumer protection and customs enforcement laws related to halal.[12] Again, however, Indonesia has failed to sufficiently support its defense.

12. With respect to the first element, Indonesia provides no evidence or explanation to show that the positive list is designed to secure compliance with halal and related laws. The entirety of its argument consists of (1) listing the provisions regarding veterinary certificates, halal certification, and the requirement to provide truthful product information, and (2) concluding that it can be "hardly disputed" that the positive list requirement is designed to secure compliance with those laws.[13] Indonesia has offered only its own characterization of the objective, without evidence or even argumentation in support; this is insufficient to meet its burden under the first element of the Article XX(d) test.[14]

13. Even aside from Indonesia's failure to establish the first element, however, Indonesia cannot demonstrate that the positive list is necessary to secure compliance with its law on halal and consumer protection and customs enforcement laws related to halal. Indonesia contends that the positive list requirement is necessary to "ensure the traceability" of imported chicken meat to the business that is halal certified,[15] and that it "discourages" foreign producers from circumventing Indonesia's halal requirement by passing non-halal products off as halal.[16]

14. Indonesia's explanation is illogical. The positive list requirement bans the importation of any poultry meat and poultry products not listed in the import licensing regulations, regardless of

[12] Indonesia First Written Submission, para. 230.
[13] Indonesia First Written Submission, para. 230.
[14] *See EC – Seal Products (AB)*, para. 5.144.
[15] Indonesia First Written Submission, para. 232.
[16] Indonesia First Written Submission, para. 232.

whether they comply with Indonesia's halal requirements. Therefore, there are no halal certificates to trace, requirements to circumvent, or non-halal products to pass off because there is no importation of these products at all.

III. THE LIMITED APPLICATION WINDOW AND VALIDITY PERIOD REQUIREMENTS AND THE FIXED LICENSE TERM REQUIREMENT ARE NOT JUSTIFIED UNDER ARTICLES XX(B) AND XX(D) OF THE GATT 1994

15. In seeking to justify the limited application window and validity periods and the fixed license term requirements under Article XX(d), Indonesia appears to have adopted the same approach it took with respect the positive list requirement. That is, it lists a myriad of food safety, halal, and consumer protection laws, and concludes summarily that "it can hardly be disputed" that its import licensing measures are designed to secure compliance with those provisions.[17] Again, Indonesia has not offered any evidence or explanation from the text, structure, or legislative history on *whether* or *how* these two measures are designed to secure compliance with halal and other legal requirements. Such a showing is clearly insufficient to succeed under the first element of Article XX(d).

16. Indonesia also has failed to explain sufficiently how the limited application window and validity periods and the fixed license terms requirements are necessary to secure compliance with the food safety, halal, and consumer protection provisions it has identified. Instead, Indonesia asserts that these requirements "enables government officials to monitor foreign trade" by making the importers reapply for permits periodically.[18] As examples, Indonesia argues that these requirements address the problems of "overstatement of anticipated import volume" and

[17] Indonesia First Written Submission, para. 297.
[18] Indonesia First Written Submission, para. 299.

customs enforcement at the various ports of entry.[19] None of these arguments and examples relate to the food safety, halal, and consumer protection provisions that Indonesia cited.

IV. The Legal Standards Regarding Brazil's "General Prohibition" Claim

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

18. Brazil has characterized the challenged "general prohibition" as a single, "overarching"[20], and "unwritten"[21] measure consisting of six individual component measures, each sharing the same "overriding objective" of protecting the domestic production to achieve national self-sufficiency by restricting imports.[22]

19. First, with respect to identification, the DSU does not specify in detail the types of measures that complainants may identify in a panel request.[23] The DSU requires that the measure be "taken by another Member" and suggests that a measure would normally be capable of "impair[ing]" "benefits accruing to it directly or indirectly under the covered agreements"[24] and would normally be capable of being withdrawn in the absence of a mutually agreed

[19] Indonesia First Written Submission, para. 299.
[20] Brazil's First Written Submission, paras. 75-76
[21] Brazil's First Written Submission, paras. 172.
[22] Brazil's First Written Submission, paras. 75-76; 174
[23] DSU, Article 6.2.
[24] DSU, Article 4.3.

solution.[25] Once the complainant identifies a specific measure in the panel request, this measure forms part of the "matter" referred to the Dispute Settlement Body under Article 7.1 of the DSU and that the DSB tasks the panel with examining to assist the DSB in carrying out its responsibilities under the DSU.

20. Second, with respect to proving the existence of the challenged measure, the United States recalls that the burden is on the complainant to demonstrate the existence of a measure. This requirement on the complainant is the same whether the measure is written or unwritten. Due to the nature of an unwritten measure, however, a larger volume of evidence may be required to prove the existence of an unwritten measure while a written measure may often be identified solely by reference to its publication.[26]

21. In *Argentina – Import Measures*, the Appellate Body found that a panel should look to "the specific measure challenged and how it is described and characterized by a complainant" to determine "the kind of evidence it is required to submit and the elements it must prove to establish the existence of the measures challenged."[27] The Appellate Body further noted that, in a dispute in which the complainant has characterized the measure as a single, unwritten measure composed of different instruments, the complainant may need to "provide evidence of how different components operate together as part of a single measure and how a single measure exists as distinct from its components."[28]

[25] DSU, Article 3.7 ("In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.").
[26] *Argentina – Import Measures (Panel)*, para. 6.325.
[27] *Argentina – Import Measures (AB)*, para. 5.110.
[28] *Argentina – Import Measures (AB)*, para. 5.108.

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

V. Conclusion

23. This concludes the U.S. oral statement. We thank the Panel for its consideration of the views of the United States and look forward to answering any questions you may have.