Indonesia – Importation of Horticultural Products, Animals, and Animal Products

(AB-2017-2 / DS477, DS478)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE APPELLATE ORAL HEARING

August 28, 2017

1. Good morning Presiding Member, members of the Division. On behalf of the United States, I would like to thank you and the Secretariat assisting you for your work on this appeal.

2. This dispute concerns eighteen measures through which Indonesia prohibits and restricts the importation of horticultural products and animals and animal products. As the Panel found, each of the challenged measures severely restricts or prohibits imports of the covered products and falls far short of meeting Indonesia's WTO obligations.[1] Indonesia has not appealed any of the Panel's findings on the operation or effect of the challenged measures.

3. Over the course of the Panel proceedings, Indonesia raised a growing number of defenses of the challenged measures under Article XX of the GATT 1994.[2] Many of these defenses consisted of a bare recitation of the elements of the defense or even a single citation to an Article XX subparagraph.[3] In assessing Indonesia's defenses, the Panel found, as a matter of fact, that the legitimate objectives Indonesia cited were actually pursued by unrelated laws and regulations and not by the measures at issue.[4] In fact, agreeing with the co-complainants, the Panel found that "the actual policy objective behind all these measures is to achieve self-sufficiency through domestic production by way of restricting and, at time, prohibiting imports."[5] Again, Indonesia has not appealed any of these factual findings.

4. Indeed, Indonesia does not even attempt to argue that any of the challenged measures is substantively consistent with its WTO obligations. In its appellant submission, Indonesia never requests the Appellate Body to analyze a measure and find it consistent with the GATT 1994 or the *Agreement on Agriculture*. Instead, Indonesia's appeal rests on technical legal arguments that have no basis in the covered agreements. These arguments, regrettably, appear designed to relieve Indonesia of the burden of having to present an adequate defense of measures that are

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[1] Panel Report, paras. 7.288-297, 7.148-151, 7.192, 7.388, 7.214-219, 7.440-445, 7.419.
[2] *General Agreement on Tariffs and Trade 1994* (GATT 1994).
[3] Panel Report, paras. 7.506-512, 7.514-516.
[4] Panel Report, paras. 7.719, 7.802-803, 7.812, 7.819-821.
[5] Panel Report, para. 7.822.

flatly contrary to WTO rules, and to thus prevent co-complainants from obtaining the legal remedies provided in the covered agreements and the DSU.[6]

5. As indicated in the U.S. appellee submission, we are disappointed with the nature and scope of Indonesia's appeal, much of which, by design, could not change the outcome of this dispute. For the DSB not to adopt recommendations in this dispute as a result of Indonesia's appeal, the Appellate Body would have to find that Article XI:1 of the GATT 1994 *does not apply* to import restrictions on agricultural products. For reasons we will explain in more detail below, this claim lacks any legal basis, is inconsistent with numerous prior reports, and should be rejected easily and in no uncertain terms. And once the Division has disposed of Indonesia's appeal under Article XI:1, its work is done. If Article XI:1 applies to the measures at issue, none of Indonesia's other appeals can have any impact on the outcome of the dispute.

6. As the United States explained in its appellee submission, Articles 3.3, 3.4, and 3.7 of the DSU establish that the purpose of the dispute settlement system, including the recommendations and rulings of the DSB, is to achieve a positive solution to a dispute between Members.[7] On this basis, the Appellate Body has refrained from considering claims on appeal if doing so was "unnecessary for the purposes of resolving [the] dispute."[8] The Appellate Body has recognized that this is the case where a claim could not "affect the resolution of [the] dispute" because a responding Member's obligation regarding compliance would not change "irrespective of whether [the Appellate Body] were to uphold or reverse" the panel finding at issue.[9]

7. If the Division rejects Indonesia's claims under Article XI:1, none of Indonesia's other claims provide a basis for changing the DSB recommendations or Indonesia's resulting

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[6] *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).
[7] *See* U.S. appellee submission, paras. 115-116; DSU Articles 3.3 (prompt settlement), 3.4 (satisfactory settlement), 3.7 ("The aim of the dispute settlement mechanism is to secure a positive solution to the dispute").
[8] *US – Upland Cotton (AB)*, paras. 510-511, 763(c).
[9] *US – Upland Cotton (AB)*, para. 510

compliance obligations in this dispute. Indonesia's claim concerning Article 4.2 of the Agreement on Agriculture could not alter the DSB recommendations because, even if Indonesia prevailed and if no breach were found under that agreement, the claim provides no basis for altering the Panel's findings of breach of the GATT 1994 or the resulting recommendations.[10] Indonesia's claim concerning the Panel's interpretation of Article XI:2(c) of the GATT 1994 also could not affect the DSB recommendations because, even if Indonesia prevailed, it has not asked the Appellate Body to find that any measure is justified under Article XI:2(c) or given any explanation of how the Appellate Body could do so.[11] Indeed, Indonesia's notice of appeal and appellant submission show that Indonesia does not even appeal the Panel's finding that Indonesia failed to demonstrate the elements of Article XI:2(c).[12] Indonesia's claim concerning GATT 1994 Article XX likewise could not affect the Panel's findings of breach of the GATT 1994 or its recommendations because, as Indonesia acknowledges, the Appellate Body *cannot find* that Indonesia successfully defended any of the challenged measures under Article XX.[13] We urge the Appellate Body to make efficient use of its scarce time and resources and assess only the claims necessary to resolve this dispute, that is, those addressing Article XI:1 of the GATT 1994.

8. Indonesia's argument under these claims is that Article XI:1 *does not apply* to measures concerning the import of agricultural products. That is the only argument Indonesia has put forward – both in its legal appeal and in its appeal under DSU Article 11 – that could result in the Appellate Body reversing the Panel's findings under GATT 1994 Article XI:1.[14]

9. This argument is inconsistent with a key tenet of the WTO system, set out in Article II:2 of the WTO Agreement,[15] namely that the covered agreements are "integral parts" of a single

[10] U.S. appellee submission, paras. 114-120.
[11] *See* Indonesia's notice of appeal, sec. IV; Indonesia's appellant submission, paras. 119-127; Panel Report, paras. 7.59-60.
[12] Indonesia's appellant submission, para. 126; Panel Report, para. 7.60; U.S. appellee submission, paras. 156-158.
[13] Indonesia's appellant submission, para. 161; *see* U.S. appellee submission, paras. 166-170.
[14] *See* Indonesia's appellant submission, paras. 53-64, 104.
[15] *Agreement Establishing the World Trade Organization* ("WTO Agreement").

agreement and that, therefore, the general rule is that their provisions apply cumulatively.[16] The general interpretive note to Annex 1A of the WTO Agreement provides specifically that a provision of another covered agreement would supersede the GATT 1994 only "in the event of a conflict" between the provisions and only "to the extent of [that] conflict."[17] That is, unless there is an inconsistency between the GATT 1994 and the provisions of another covered agreement, provisions of both agreements apply to measures falling within their scope.

10. Article 21.1 of the Agreement on Agriculture also refutes Indonesia's argument, stating that, with respect to agricultural products, the provisions of the GATT 1994 "shall apply subject to" the Agreement on Agriculture. As the Appellate Body explained in *EC – Export Subsidies on Sugar*, Article 21.1 provides that the Agreement on Agriculture supersedes provisions of the GATT 1994 only "to the extent of" a conflict between provisions of the two agreements.[18] Otherwise, Members must comply with all relevant provisions of both agreements.[19] Contrary to Indonesia's arguments, the Appellate Body report in *EC – Bananas III* also supports this interpretation of Article 21.1. There, the Appellate Body found that because Article 4 of the Agreement on Agriculture did not "specifically" authorize Members to act inconsistently with Article XIII of the GATT 1994, both provisions applied to the measures at issue.[20]

11. Past disputes also show that Article XI:1, and other provisions of the GATT 1994 that overlap with Article 4.2 of the Agreement on Agriculture, *do apply* to agricultural products.[21] Indeed, Indonesia presents *not one* example of a panel or Appellate Body report finding that a

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[16] WTO Agreement, Article II:2; *see US – Upland Cotton (AB)*, para. 549.
[17] WTO Agreement, Annex 1A, Multilateral Agreements on Trade in Goods, General interpretative note to Annex 1A.
[18] *EC – Export Subsidies on Sugar (AB)*, paras. 221.
[19] *EC – Export Subsidies on Sugar (AB)*, paras. 219.
[20] *EC – Bananas III (AB)*, para. 157.
[21] *See India – Quantitative Restrictions (Panel)*, paras. 5.122-242; *Korea – Various Measures on Beef (Panel)*, paras. 747-769; *EC – Seal Products (Panel)*, paras. 7.652-665; *US – Poultry (China)*, paras. 7.484-487; *Turkey – Rice*, paras. 7.141-142; *Argentina – Import Measures (Panel)*, paras. 6.169, 6.188-189, 6.192, 6.334, 6.364, 6.397; *India – Quantitative Restrictions (AB)*, paras. 5, 154; *Korea – Various Measures on Beef (AB)*, para. 5, 187; *Argentina – Import Measures (AB)*, paras. 5.287-288; *Peru – Agricultural Products (AB)*, paras. 5.74-75.

provision of the Agreement on Agriculture precluded the application of a provision of the GATT 1994, or of another covered agreement, except due to a conflict between the provisions.[22]

12. Indonesia advances no other ground on which the Appellate Body could reverse the Panel's findings under Article XI:1. Neither the DSU nor any covered agreement imposes a rule for how panels should sequence their analysis of different provisions and agreements. Consequently, panels have discretion "to structure the order of their analysis as they see fit" provided they properly interpret the provisions at issue.[23] Other than its claim that Article XI:1 of the GATT 1994 does not apply to import restrictions on agricultural products, Indonesia does not even allege, let alone prove, that the Panel's sequence of analysis affected the substance of its findings under Article XI:1. Thus, for the reasons discussed above, the Appellate Body should reject Indonesia's appeals and uphold the Panel's findings that each challenged measure is inconsistent with Article XI:1.

13. The U.S. appellee submission fully discussed the bases on which the Appellate Body, were it to reach Indonesia's other claims, should reject those claims. At this time, we would make two further points regarding Indonesia's appeal under Article XX of the GATT 1994.

14. First, the Panel's analysis did not result in legal error.

15. To be justified under Article XX, a measure found inconsistent with another provision of the GATT 1994 must meet the requirements of both a subparagraph and the chapeau.[24] Panels have discretion in their order of analysis unless the chosen order prevents the panel from correctly applying a provision at issue.[25] Therefore, the critical question is whether the Panel's evaluation of Measures 9 through 17 under the Article XX chapeau was substantively incorrect

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[22] *See* Indonesia's appellant submission, paras. 44-62.
[23] *Canada – Wheat Exports and Grain Imports (AB)*, paras. 126-127.
[24] *EC – Seal Products (AB)*, para. 5.297; *US – Gasoline (AB)*, pp. 22-23.
[25] U.S. appellee submission, paras. 22-27, 179; *see* Canada – *Wheat Exports and Grain Imports (AB)*, para. 127; *Canada – Autos (AB)*, para. 151.

as a result of the sequence of its analysis.[26]

16. Indonesia has failed to identify any such error. Citing *US – Shrimp*, Indonesia claims that if a panel starts its analysis with the chapeau, "it [will] not have any information with respect to the design of the measure and the policy objective it pursues," which precludes a correct chapeau analysis.[27] In the circumstances of this dispute, however, that argument is incorrect. In fact, the Panel had already analyzed the design of all of the challenged measures, including as relevant to discrimination under the Article XX chapeau, in its analysis under Article XI:1.[28] Further, because Indonesia's defenses under subparagraphs (a), (b), and (d) were highly related or identical with respect to all the measures for which Indonesia raised defenses, the Panel had already identified and analyzed all of the objectives Indonesia raised under Article XX, in its analysis of Measures 1 through 8.[29] The Panel then brought these analyses to bear in its assessment under the chapeau of Indonesia's defenses of Measures 9 through 17, identifying and discussing the design and effect of each challenged measure in light of each of the objectives Indonesia raised under the Article XX subparagraphs.[30] Thus, the Panel avoided legal error.

17. Additionally, Indonesia fails to explain how any subparagraph analysis could cure the defect in its defense the Panel identified – that it put forward no relevant arguments or evidence that any measure met the chapeau requirements. Considering Indonesia's arguments under the chapeau with respect to its Article XX(a) defenses, the Panel found that Indonesia put forward no relevant argument that the measures did not discriminate,[31] failed to argue that the relevant "conditions" were not the same across countries,[32] and failed to "explain how the discrimination

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[26] *See Canada – Wheat Exports and Grain Imports (AB)*, paras. 122, 124-125.
[27] *See* Indonesia's appellant submission, para. 143.
[28] Panel Report, paras. 7.813-815; *see id.*, secs. 7.2.7.2, 7.2.6.2, 7.2.7.2, 7.2.8.2, 7.2.9.2, 7.2.10.2, 7.2.11.2, 7.2.12.2, 7.2.13.2, 7.2.14.2, 7.2.15.2, 7.2.16.2, 7.2.17.2.
[29] U.S. appellee submission, para. 185, n.322; *see* Panel Report, paras. 7.570-585, 7.626-635, 7.650-660, 7.673-682, 7.709-720, 7.773-742, 7.765-776, 7.789-804.
[30] Panel Report, paras. 7.812-815, 7.819-822.
[31] Panel Report, paras. 7.539, 7.812.
[32] Panel Report, para. 7.825.

arising from" the measures was not arbitrary and unjustifiable.[33] The Panel made the same findings with respect to Indonesia's chapeau arguments concerning its Article XX(b) and XX(d) defenses.[34] Indonesia has not appealed any of these findings.[35] They thus establish that the Panel's finding that Indonesia failed to demonstrate that any of the challenged measures meets the requirements of the chapeau is correct.

18. Indonesia also failed to offer arguments and evidence sufficient to prove that any measure is provisionally justified under an Article XX subparagraph. Factual findings of the Panel establish that Indonesia failed to demonstrate that any of the objectives identified in its Article XX defenses was the actual objective of any of Measures 9 through 17.[36] Factual findings of the Panel and uncontested facts on the record also establish that Indonesia provided insufficient argumentation and evidence as to the elements of the Article XX subparagraphs to make a *prima facie* case that any of Measures 9 through 17 was provisionally justified. Thus, even if the Panel had erred in its chapeau analysis, Panel findings and uncontested facts on the record show that Indonesia failed to establish that any measure is justified under Article XX.

19. Presiding Member, members of the Division, this concludes our opening statement. We thank you for your attention and would be pleased to respond to any questions you may have.

[33] Panel Report, para. 7.819.
[34] Panel Report, paras. 7.539, 7.814, 7.815, 7.820, 7.821, 7.825.
[35] Indonesia's appellant submission, para. 160.
[36] *See, e.g.*, Panel Report, paras. 7.822 (all defenses); *id.* paras. 7.719, 7.819 (Article XX(a) defenses); *id.* paras. 7.635, 7.682, 7.742, 7.776, 7.801, 7.820 (Article XX(b) defenses); *id.* paras. 7.580-585, 7.577, 7.594, 7.605, 7.692, 7.750, 7.821 (Article XX(d) defenses).