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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY BRAZIL

REPORT OF THE PANEL

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Argentina – Import Measures	Panel Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, DSR 2015:II, p. 783
Australia – Apples	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
Brazil – Taxation	Panel Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1, adopted 11 January 2019, as modified by Appellate Body Reports WT/DS472/AB/R / WT/DS497/AB/R
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
China – Intellectual Property Rights	Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, adopted 20 March 2009, DSR 2009:V, p. 2097
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501
Colombia – Ports of Entry	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)	Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Recourse to Article 21.5 of the DSU by Colombia / Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Recourse to Article 21.5 of the DSU by Panama*, WT/DS461/RW and Add.1, circulated to WTO Members 5 October 2018 [appealed by Panama 20 November 2018 – the Division suspended its work on 10 December 2019]
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, p. 2077
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359

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EC – Seal Products	Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and Add.1 / WT/DS401/R and Add.1, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R / WT/DS401/AB/R, DSR 2014:II, p. 365
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EU – Energy Package	Panel Report, *European Union and its member States – Certain Measures Relating to the Energy Sector*, WT/DS476/R and Add.1, circulated to WTO Members 10 August 2018 [appealed by the European Union 21 September 2018 – the Division suspended its work on 10 December 2019]
India – Agricultural Products	Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/R and Add.1, adopted 19 June 2015, as modified by Appellate Body Report WT/DS430/AB/R, DSR 2015:V, p. 2663
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
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
India – Solar Cells	Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R and Add.1, adopted 14 October 2016, as modified by Appellate Body Report WT/DS456/AB/R, DSR 2016:IV, p. 1941
India – Quantitative Restrictions	Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, p. 1799
Indonesia – Chicken	Panel Report, *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*, WT/DS484/R and Add.1, adopted 22 November 2017, DSR 2017:VIII, p. 3769
Indonesia – Import Licensing Regimes	Appellate Body Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/AB/R, WT/DS478/AB/R, and Add.1, adopted 22 November 2017, DSR 2017:VII, p. 3037
Indonesia – Import Licensing Regimes	Panel Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/R, WT/DS478/R, Add.1 and Corr.1, adopted 22 November 2017, as modified by Appellate Body Report WT/DS477/AB/R, WT/DS478/AB/R, DSR 2017:VII, p. 3131
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
Japan – Apples (Article 21.5 – US)	Panel Report, *Japan – Measures Affecting the Importation of Apples – Recourse to Article 21.5 of the DSU by the United States*, WT/DS245/RW, adopted 20 July 2005, DSR 2005:XVI, p. 7911
Japan – DRAMs (Korea)	Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, p. 2805
Korea – Alcoholic Beverages	Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by Appellate Body Report WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, p. 44
Korea – Radionuclides	Panel Report, *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*, WT/DS495/R and Add.1, adopted 26 April 2019, as modified by Appellate Body Report WT/DS495/AB/R
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
Peru – Agricultural Products	Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015, DSR 2015:VI, p. 3403
Russia – Pigs (EU)	Panel Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/R and Add.1, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R, DSR 2017:II, p. 361
Russia – Tariff Treatment	Panel Report, *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*, WT/DS485/R, Add.1, Corr.1, and Corr.2, adopted 26 September 2016, DSR 2016:IV, p. 1547
Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 of the DSU by the Philippines*, WT/DS371/RW and Add.1, circulated to WTO Members 12 November 2018 [appealed by Thailand 9 January 2019 – the Division suspended its work on 10 December 2019]

Short Title	Full Case Title and Citation
Turkey – Textiles	Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, p. 2345
US – Animals	Panel Report, *United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina*, WT/DS447/R and Add.1, adopted 31 August 2015, DSR 2015:VIII, p. 4085
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Lamb	Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R, DSR 2001:IX, p. 4107
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Renewable Energy	Panel Report, *United States – Certain Measures Relating to the Renewable Energy Sector*, WT/DS510/R and Add.1, circulated to WTO Members 27 June 2019 [appealed by the United States 15 August 2019 – the Division suspended its work on 10 December 2019]
US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, p. 815
US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007, DSR 2007:II, p. 425
US – Shrimp (Thailand)	Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R, DSR 2008:VII, p. 2539
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/RW, Add.1 and Corr.1, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW, DSR 2015:X, p. 5409 and DSR 2015:XI, p. 5653
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R, DSR 2007:I, p. 97
US – Zeroing (EC) (Article 21.5 – EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW, DSR 2009:VII, p. 3117
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Title	Short Title (if applicable)
BRA-2	Letter from Ambassador Evandro Didonet to Ambassador Hasan Kleib (29 March 2018)	
BRA-10	Republic of Indonesia, Ministry of Agriculture, Regulation 34/2016	MoA 34/2016
BRA-11	Republic of Indonesia, Ministry of Agriculture, Regulation 23/2018	MoA 23/2018
BRA-3	Letter from Ambassador Hasan Kleib to Ambassador Evandro Didonet (31 May 2018)	
BRA-5	Letter from Ambassador Evandro Didonet to Ambassador Hasan Kleib (12 September 2018)	
BRA-7	Letter from the Ministry of Agriculture of Indonesia (Directorate General of Livestock and Animal Health Services) to the Ambassador of Brazil to Indonesia (25 June 2019)	
BRA-18	Brazil's response to the 25 June 2019 letter from the Ministry of Agriculture of the Republic of Indonesia (Directorate General of Livestock and Animal Health) (2 August 2019)	
BRA-15	Republic of Indonesia, Ministry of Trade, Regulation 29/2019	MoT 29/2019
IDN-1	Minister of Agriculture Regulation 42/2019	MoA 42/2019
IDN-2	Minister of Trade Regulation 72/2019	MoT 72/2019
IDN-7	Decree concerning the appointment of Desk Review Team in 2018 issued by Director of Veterinary Public Health	
IDN-8	Communication by Indonesia, WT/DS484/18 (Compliance Communication)	
IDN-13	Decree concerning the Appointment of Expert Committee in 2014 issued by Director General of Livestock and Animal Health	
IDN-19	Decree concerning the Appointment of Expert Committee in 2019 issued by Director General of Livestock and Animal Health	
IDN-22	Minutes of Meeting from Director of Veterinary Public Health regarding the desk review result on Brazil's application on 17 June 2019	
IDN-24	Communication by Indonesia, WT/DS484/18/Add.10 (Compliance Communication)	
IDN-27	Letter to Brazil Ambassador for Indonesia from Director General of Livestock and Animal Health Services, Ministry of Agriculture on 14 October 2019 concerning the Result of Desk Review on Brazil's Application	
IDN-43	Email correspondence between the Permanent Mission of the Republic of Indonesia to the representative of Permanent Mission of Brazil to the WTO on 8 March 2018 regarding the questionnaires of country of origin and also business unit	
IDN-44	Sample of Import Recommendation and Import Approval issued for one company	

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
MoA Regulation	Regulation of the Minister of Agriculture or Regulation of the Ministry of Agriculture
MoT Regulation	Regulation of the Minister of Trade or Regulation of the Ministry of Trade
OIE	World Organization for Animal Health
RPT	Reasonable period of time
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Brazil

1.1. This case concerns Indonesia's compliance with the recommendations and rulings of the Dispute Settlement Body (DSB) in the dispute *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*. Brazil claims that Indonesia has failed to bring into conformity with its WTO obligations the four measures that the original panel found to be inconsistent with the General Agreement on Tariffs and Trade (GATT 1994), and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

1.2. The DSB adopted the panel report in the original proceeding on 22 November 2017.[1] On 15 December 2017, Indonesia informed the DSB that it was impracticable for Indonesia to comply immediately with the DSB's recommendations and rulings in this dispute and that it, therefore, required a reasonable period of time (RPT) in which to do so.[2] On 15 March 2018, Brazil and Indonesia informed the DSB of their mutual agreement, made pursuant to Article 21.3(b) of the DSU, that the RPT for Indonesia to implement the DSB's recommendations and rulings would be eight months from the date of the adoption of the panel report, expiring on 22 July 2018.[3]

1.2 Panel establishment and composition

1.3. On 27 July 2018, Brazil and Indonesia informed the DSB that the two parties concluded agreed procedures under Articles 21 and 22 of the DSU (Agreed Procedures).[4] Paragraph 1 of the Agreed Procedures provides that "[i]f Brazil deems it appropriate to invoke Article 21.5 of the DSU, Brazil may at any time request the establishment of a compliance panel pursuant to that Article." It further provides that "Brazil will not need to hold previous consultations with Indonesia before requesting the establishment of the panel".

1.4. On 13 June 2019, Brazil requested the establishment of a panel pursuant to Articles 6 and 21.5 of the DSU, Article XXIII of the GATT 1994, Article 19 of the Agreement on Agriculture and Article 11 of the SPS Agreement.[5] At its meeting on 24 June 2019, the DSB agreed, pursuant to Article 21.5 of DSU, to refer to the original panel, if possible, the matter raised by Brazil in document WT/DS484/19.[6]

1.5. One member of the original panel was unavailable for this proceeding. On 31 July, the Panel was composed, as follows:

Chairperson:	Mr Sufyan AL-IRHAYIM
Members:	Ms Delilah CABB AYALA Ms Claudia OROZCO

1.6. The Panel's terms of reference are as follows:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Brazil in document WT/DS484/19 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[7]

1.7. Australia, Canada, China, the European Union, India, Japan, the Republic of Korea, New Zealand, Norway, the Russian Federation, the Kingdom of Saudi Arabia, and the United States reserved their rights to participate in the Panel proceeding as third parties.

[1] DSB, Minutes of the meeting held on 22 November 2017, WT/DSB/M/404, para. 4.7.
[2] WT/DS484/13.
[3] WT/DS484/16.
[4] WT/DS484/17.
[5] WT/DS484/19.
[6] DSB, Minutes of the meeting held on 24 June 2019, WT/DSB/M/430, para. 6.4.
[7] WT/DS484/20.

1.3 Panel proceeding

1.3.1 General

1.8. After consultation with the parties, the Panel adopted its Working Procedures[8] and timetable on 12 August 2019.

1.9. Brazil and Indonesia filed their first written submissions on 13 September 2019 and 18 October 2019, respectively. The parties' second written submissions were filed by Brazil and Indonesia on 15 November 2019 and 13 December 2019, respectively. The Panel held a substantive meeting with the parties on 4 and 5 February 2020. A session with the third parties took place on 5 February 2020. The parties and third parties submitted responses to written questions on 21 February 2020. On 6 March 2020, the parties submitted comments on each other's responses.

1.10. Following the substantive meeting, on 11 February 2019, the Panel communicated to the DSB chairperson that it would not be able to provide its report within 90 days from the date of referral of the matter to it pursuant to Article 21.5 of the DSU.[9]

1.11. On 27 March 2020, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 26 May 2020. The Panel issued its Final Report to the parties on 24 July 2020.

1.3.2 Preliminary ruling

1.12. On 18 October 2019, Indonesia filed its first written submission, which included a request for a preliminary ruling. Indonesia requested the Panel to dismiss certain claims Brazil had made in respect of two of the measures at issue. These claims pertain to Article 4.2 of the Agreement on Agriculture regarding the so-called positive list requirement and Article XI:1 of the GATT 1994 concerning the enforcement provisions of the so-called intended use requirement.[10] These are claims that Brazil also raised in the original proceeding and on which the panel in that proceeding exercised judicial economy.[11]

1.13. Indonesia raised three separate grounds for the Panel to dismiss these claims. Indonesia argued that (1) the claims are outside the Panel's terms of reference, (2) Brazil should not be able to re-litigate these claims, and (3) it is not necessary for the Panel to make multiple findings on the same measure under various provisions when a single finding of inconsistency would suffice to resolve the dispute.[12]

1.14. On 21 October 2019, the Panel informed the parties and third parties that if they wished to comment on Indonesia's request, they could do so in their second written submissions and third-party written submissions, respectively. On 1 November 2019, the European Union and New Zealand submitted their comments on Indonesia's request for a preliminary ruling. On 15 November 2019, Brazil submitted its own comments. Brazil requested that the Panel reject Indonesia's preliminary ruling request.[13]

1.15. On 7 February 2020, the Panel issued its preliminary ruling to the parties and third parties. The Panel's conclusion was as follows:

> In view of the above considerations, we reject Indonesia's preliminary ruling request and find that Brazil's claims regarding the positive list requirement under Article 4.2 of the Agreement on Agriculture and the intended use requirement with respect to its enforcement provisions under Article XI:1 of the GATT 1994 are properly within our terms of reference. We also find that Brazil is not barred from raising these claims.

[8] See the Panel's Working Procedures in Annex A-1.
[9] Panel's communication to the DSB, WT/DS484/21.
[10] Indonesia's request for a preliminary ruling, para. 5.1.
[11] Indonesia's request for a preliminary ruling, para. 4.
[12] Indonesia's request for a preliminary ruling, para. 21.
[13] Brazil's second written submission, para. 30.

Finally, we consider that it is premature, at this stage, to decide whether to exercise judicial economy with regard to these claims.

1.16. The full text of the Panel's ruling is in Annex D-1 of the Report.

2 FACTUAL ASPECTS

2.1 Measures at issue

2.1. Brazil is challenging the measures taken by Indonesia to comply with the DSB's recommendations and rulings in the original proceeding. These measures are enacted through legal instruments issued by the Ministry of Agriculture (MoA regulations) or the Ministry of Trade (MoT regulations).

2.2. In its panel request, Brazil describes the four measures at issue as follows:

> Positive List Requirement
>
> The positive list requirement concerns Indonesian regulations governing the importation of meat, which prescribe the type of carcass for which an importer may obtain a Ministry of Agriculture Import Recommendation and Ministry of Trade Import Approval. Products that are not listed in the relevant appendices of the respective regulations cannot be the subject of either an Import Recommendation or an Import Approval.[14]
>
> …
>
> The positive list requirement is [...] reflected *inter alia*, in:..[15]
>
> The Intended Use Requirement and its Enforcement Provisions
>
> The intended use requirement limits the uses of imported chicken meat and chicken products in the Indonesian market to specific "intended uses" as identified in the relevant Indonesian regulations.[16]
>
> The enforcement provisions of the intended use requirement applicable with respect to imported products include: stricter sanctions that apply to importers deviating from the limitation on the allowed uses, including, for instance, the importer's suspension; the commitment to certain intended uses (to obtain an MoA Import Recommendation, for instance), which restricts the importer to not selling elsewhere; and the burden and cost arising from having to submit a distribution plan and a weekly distribution report.
>
> …
>
> The intended use requirement and its enforcement provisions are.. reflected *inter alia*, in: ...[17]
>
> Import Licencing Procedures
>
> Indonesia's import licensing procedures include fixed licence terms, which limit the ability of importers to modify an MoA Import Recommendation and an MoT Import Approval after their issuance.
>
> ...

[14] (footnote original) Original Panel Report, para. 7.103.
[15] Request for the establishment of a panel by Brazil, WT/DS484/19, paras. 7 and 9.
[16] (footnote original) Original Panel Report, para. 7.176.
[17] Request for the establishment of a panel by Brazil, WT/DS484/19, paras. 10 and 12.

> The fixed licence terms are ... reflected inter alia, in: ...[18]
>
> Undue Delay in Approval Procedures
>
> Indonesia ... continues to unduly delay undertaking and completing the approval procedures of the veterinary health certificate. At this date, Brazil's application for a veterinary health certificate for the importation of chicken meat and chicken products remains at the first stage of Indonesia's approval process ("desk review"), the same stage where it has been for almost 10 years now. Indonesia has therefore failed to undertake and complete the approval procedures without undue delay.[19]

2.3. Brazil's panel request also includes "any amendments or extensions to the measures identified above, any replacement measures, and any implementing measures, as well as any subsequent closely connected measures that are adopted by Indonesia".[20]

2.2 Subsequent amendments to the relevant legal instruments

2.4. Since the establishment of the Panel, Indonesia has either replaced or amended the relevant MoA and MoT regulations. The table below indicates the relevant legal instruments and their respective enactment dates.

Table 1: Amendments and revisions in the relevant legal instruments

At panel establishment	As adopted in the course of the compliance panel proceeding
MoA 34/2016 as amended by MoA 23/2018 on 24 May 2018 (hereinafter "MoA 34/2016 as amended")[21]	**MoA 42/2019 of 6 August 2019[22]**
MoT 29/2019 of 24 April 2019[23]	**MoT 29/2019 as amended by MoT 72/2019 on 27 September 2019[24] (hereinafter "MoT 29/2019 as amended")**

2.5. The Panel discusses its approach to changes to the measures at issue in section 7.1 below.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Brazil requests the Panel to find that:

a. Indonesia continues to cause an undue delay in the approval of the veterinary health certificate for the importation of chicken meat and chicken products from Brazil, inconsistently with Annex C(1)(a) and Article 8 of the SPS Agreement;

b. at the time of the Panel's establishment, Indonesia's intended use requirement and its enforcement procedures, as reflected in MoA 34/2016, as amended by MoA 23/2018, continued to accord less favourable treatment to imported chicken meat and chicken products in contravention of Indonesia's obligations under Article III:4 of the GATT 1994;

c. Indonesia's intended use requirement and its enforcement procedures, as reflected in MoA 42/2019 and MoT 29/2019, as amended by MoT 72/2019, continue to accord less

[18] Request for the establishment of a panel by Brazil, WT/DS484/19, para. 13.
[19] Request for the establishment of a panel by Brazil, WT/DS484/19, para. 16.
[20] Request for the establishment of a panel by Brazil, WT/DS484/19, para. 17.
[21] Indonesia's first written submission para. 8 and Table 1.
[22] Indonesia's first written submission para. 8 and Table 1. MoA 42/2019 replaces MoA 34/2016 as amended.
[23] Indonesia's first written submission para. 8 and Table 1. MoT 29/2019 replaces MoT 59/2016.
[24] Indonesia's first written submission para. 8 and Table 1.

favourable treatment to imported chicken meat and chicken products in contravention of Indonesia’s obligations under Article III:4 of the GATT 1994;

d. at the time of the Panel's establishment, Indonesia’s intended use requirement and its enforcement provisions, as reflected in MoA 34/2016, as amended by MoA 23/2018, constituted restrictions on the importation of chicken meat and chicken products that are inconsistent with Article XI:1 of the GATT 1994;

e. Indonesia's intended use requirement and its enforcement provisions as reflected in MoA 42/2019, and MoT 29/2019, as amended by MoT 72/2019, constitute restrictions on the importation of chicken meat and chicken products that are inconsistent with Article XI:1 of the GATT 1994;

f. at the time of the Panel's establishment, the positive list requirement, as reflected in MoA 34/2016, as amended by MoA 23/2018, and as also reflected in MoT 59/2016, as replaced by MoT 29/2019, continued to be inconsistent with Article XI of the GATT 1994 and is also inconsistent with Article 4.2 and footnote 1 of the Agreement on Agriculture;

g. the positive list requirement as reflected in MoA 42/2019 and MoT 29/2019, as amended by MoT 72/2019, continues to be inconsistent with Article XI:1 of the GATT 1994 and is also inconsistent with Article 4.2 and footnote 1 of the Agreement on Agriculture;

h. at the time of the Panel’s establishment, the fixed licence terms, as reflected in MoA 34/2016, as amended by MoA 23/2018, and as also reflected in MoT 59/2016, as replaced by MoT 29/2019, constituted a restriction on the importation of chicken meat and chicken products and thus violates Article XI:1 of the GATT 1994; and

i. the fixed licence terms as reflected in MoA 42/2019 and in MoT 29/2019, as amended by MoT 72/2019, constitute a restriction on the importation of chicken meat and chicken products and thus violates Article XI:1 of the GATT 1994.

3.2. Brazil, therefore, requests the Panel to find that Indonesia has failed to bring its measures into compliance with its WTO obligations under the GATT 1994, the SPS Agreement and the Agreement on Agriculture.[25]

3.3. Indonesia requests the Panel to reject Brazil's claims in their entirety.[26]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 22 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Canada, the European Union, Japan, New Zealand, and the United States are reflected in the executive summaries, provided in accordance with paragraph 22 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, C-6). China, India, the Republic of Korea, Norway, the Russian Federation, and the Kingdom of Saudi Arabia did not submit written or oral arguments to the Panel.

[25] See Brazil's second written submission, paras. 185-186. See also Brazil's first written submission, paras. 232-233.

[26] Indonesia's first written submission, para. 156. See also Indonesia's second written submission, para. 69.

6 INTERIM REVIEW

6.1 Introduction

6.1. On 26 May 2020, the Panel issued its Interim Report to the parties. On 23 June 2020, Brazil and Indonesia submitted written requests for the Panel to review precise aspects of the Interim Report. On 3 July 2020, the parties submitted comments on each other's request for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out our response to the parties' requests for review of precise aspects of the Report made at the interim review stage. We discuss the parties' requests for substantive modifications below, in sequential order under the same headings as they are set out in section 7 of the Report. In addition to the substantive requests discussed below, we have made editorial and drafting improvements to the Report, including, where relevant, those suggested by the parties.[27] We also note, in this context that both parties have requested the inclusion of a number of additional references in footnotes citing the original report or the parties' submissions. To the extent not specifically mentioned below, we have accepted these requests and inserted the relevant references.

6.3. The numbering of some of the footnotes in the Report has changed from that in the Interim Report as we have added new footnotes. Unless indicated otherwise, the footnote numbers refer to the numbering in the Final Report. Where relevant, we indicate the corresponding footnote number in the Interim Report.

6.2 Subsequent amendments to relevant legal instruments

6.4. Indonesia requests the Panel to rephrase paragraph **2.4** to include a reference "to subsequent amendments relating to the undue delay in approval procedures". Indonesia submits that the Panel should not equate the term "measures at issue" with legal instruments only and consider developments concerning the delay in approving Brazil's application for a veterinary health certificate as amendments to that specific measure. Brazil considers this request inapposite, because Indonesia already had an opportunity to comment on the descriptive part of the Report and because the developments referred to by Indonesia are not legal instruments adopted after the establishment of the Panel.

6.5. We note that the relevant section of the Report does not describe the measures at issue - these are described, in Brazil's own words, in the preceding section. Instead the section only concerns amendments to the legal instruments that enact, or are otherwise relevant to, the measures at issue. We, therefore, agree with Brazil that adding a reference to post-panel establishment developments in respect of the undue delay issue would be inapposite, as these developments do not constitute amendments to any legal instruments. We thus reject Indonesia's request. However, to make the difference between this section and the preceding one clearer, we have changed the heading of the section to refer to "relevant legal instruments" instead of "measures."

6.3 Order of analysis – which versions of the measures to review

6.6. Regarding paragraph **7.4**, Indonesia requests additional language to reflect that Brazil, on the delay in approving the veterinary health certificate, also made arguments on post-panel establishment developments. Brazil sees no need to add any information in paragraph 7.4, taking the view that the statement is not incorrect and that, in any event, it is not meant to be a full description of Brazil's position.

6.7. As also discussed below, our understanding of Brazil's submissions, which is confirmed by Brazil, is that Brazil's claim regarding post-panel establishment developments on undue delay is made in the alternative. Based on this understanding, the addition proposed by Indonesia would be incorrect as it does not reflect the alternative nature of Brazil's claim. For this reason, we reject

[27] This includes the correction of the erroneous reference to Article 13(1)(c) of MoT 29/2019 as amended, which should be Article 13(1)(d), as both parties have pointed out.

Indonesia's request. However, for the sake of completeness, we have added a footnote referring to Brazil's alternative claim regarding post-panel establishment developments.

6.4 Background on the relevant import licensing procedures in Indonesia

6.8. Regarding paragraph **7.17**, Indonesia requests additional language to reflect that for whole chicken, there has never been a prohibition on obtaining an Import Recommendation or an Import Approval. Brazil does not consider this change necessary on the grounds that the Panel's statement is purely factual and does not purport to attribute the absence of imports to any measure.

6.9. We note that paragraph 7.17 merely recounts that since 2009, there have been no imports of whole chicken to Indonesia. Indonesia has not contested this. The statement does not make any link to the possible reasons for the absence of imports and, therefore, does not relate to the measures at issue. For these reasons we see no need to add the information Indonesia requests.

6.5 Delay in approving Brazil's veterinary health certificate

6.10. Indonesia requests the Panel to add in paragraph **7.22** language specifying certain amendments made to the measures at issue since 2006. According to Brazil, adding this level of detail is not in line with the more general nature of the paragraph. Furthermore, Brazil opposes language that would suggest that the Panel is making a factual finding on the changes introduced through MoA 42/2019.

6.11. We note that paragraph 7.22 provides a general overview of the process to obtain a country of origin approval. Like Brazil, therefore, we consider that adding the proposed language in the text would not be in line with the intended nature of the paragraph. However, we acknowledge Indonesia's concern that the description "indicates that there has been no fundamental difference" whereas Indonesia considers that "several important amendments" have been made.[28] Therefore, we have removed the penultimate sentence of paragraph 7.22.

6.12. Regarding paragraph **7.31**, Indonesia requests additional language to reflect the fact that Indonesia had already provided Brazil with copies of both questionnaires, country of origin and business unit, in an email following up on an informal bilateral meeting between the parties on 8 March 2018. Brazil opposes inclusion of such language on the grounds that the paragraph describes the letter of 31 May 2018 and does not refer to RPT discussions between the parties. Brazil also cautions the Panel against disclosing the content of confidential bilateral discussions about the RPT as such disclosure "will make it more difficult for parties to agree on the RPT".[29]

6.13. The purpose of paragraph 7.31 is to describe the content of Indonesia's letter of 31 May 2018. The language proposed by Indonesia refers to circumstances outside the letter and, therefore does not fit with the rest of the paragraph. However, we see no problem with referring to these circumstances in a footnote to the paragraph so as to provide a more accurate overall picture of the relevant facts. Therefore, the issue of the missing business questionnaire now features in the footnote in its entirety. In this proceeding, Indonesia presented Exhibit IDN-43 which demonstrates that as a follow up to bilateral discussions Indonesia did provide links to both questionnaires, if not the text of the questionnaires themselves.[30] Brazil has not contested this other than by cautioning the Panel against disclosing information related to confidential bilateral discussions. We see some parallels between Brazil's argument and the discussion on the confidentiality of consultations in Article 4.6 of the DSU which, in contrast to the provision relevant here, namely Article 21.3(b) of the DSU, contains an explicit requirement regarding confidentiality. Taking guidance from past panels regarding the confidentiality requirement in Article 4.6, we note that while the discussions between the parties may be subject to confidentiality, information submitted by the other side during the consultations is not, much less information submitted by the party itself.[31] Therefore, even accepting Brazil's argument that the confidential nature of bilateral RPT discussions needs to be preserved, we see no grounds to treat as confidential information that Indonesia submitted in the

[28] Indonesia's request for review of the Interim Report, para. 20.

[29] Brazil's comments on the Interim Report of the Panel, para. 15.

[30] The email contained in Exhibit IDN- 43 in addition to the links themselves, includes copies of the relevant questionnaires. However, the copies themselves have not been submitted with the email.

[31] Panel Reports, *Korea – Alcoholic Beverages*, para. 10.23; *EC – Bed Linen*, paras. 6.32-6.35; and *US – Lamb*, paras. 5.39 and 5.40.

context of such discussions and has now submitted in this proceeding as evidence of its own actions. We thus refer to this evidence and have added a slightly modified version of the text proposed by Indonesia in a new footnote. As we discuss further below, we have also included here additional text that Indonesia proposed for paragraph 7.59.

6.14. Regarding paragraph **7.32**, Brazil requests that the Panel add that Brazil provided its reply to the country of origin request without prejudice to its position that the sanitary information provided to the Indonesian authorities in 2009 remained valid. The addition is necessary, in Brazil's view, to avoid the impression that Brazil would have changed its position as described in paragraph 7.29. Indonesia opposes the inclusion of such language arguing that Brazil never demonstrated that all information provided by Brazil to Indonesian authorities in 2009 remained valid. Alternatively, Indonesia proposes to add language to clarify this latter point.

6.15. We accept Brazil's argument that additional language will make clear that Brazil had not changed its position on the continued validity of the information submitted in 2009. We have therefore inserted in a new footnote a slightly modified version of the text Brazil suggested. We have not added details about what Brazil has or has not demonstrated, as Indonesia requested. Paragraph 7.32 merely describes Brazil's action in reply to Indonesia's request for a new questionnaire and offers no analysis or conclusions on the merits of Brazil's position.

6.16. Indonesia requests additional language in paragraph **7.34** to refer to the state of play regarding Indonesia's most recent request for additional information, in particular the fact that at least up to the substantive meeting, Brazil had not submitted the additional information. Brazil opposes the request on the grounds that the addition is not necessary given that the Panel's analysis stops at panel establishment. Alternatively, Brazil requests a more detailed reference to its response to the Panel regarding this matter.

6.17. Given our own approach to the analysis as set out in section 7.3.6.1, we do not share Indonesia's view that "the information is very important should there be any further assessment about the 'undue' element about the measure post-panel establishment"[32]. This said, we see no harm in adding language here, as this section merely describes facts, including some that may not be relevant to our subsequent analysis. We therefore accept Indonesia's request and have added a slightly modified version of the text proposed by Indonesia to the paragraph. We also accept Brazil's request for adding language regarding its reasons for not submitting the additional information. However, to keep the section short we have done so by inserting a reference to Brazil's submission in a new footnote.

6.18. Indonesia requests the Panel to add to paragraph **7.36** a footnote citing to the part of Brazil's first written submission discussing post-panel establishment developments. Brazil does not oppose the request.

6.19. Because paragraph 7.36 is merely an outline of the parties' arguments, we do not see the need to add a reference to Brazil's first written submission in a footnote attached to this paragraph. We therefore reject Indonesia's request.

6.20. Regarding paragraph **7.37**, Indonesia requests that the Panel rephrase the first sentence and add a further sentence to better reflect Indonesia's arguments regarding the period of review that the Panel should assess. Brazil does not oppose the request.

6.21. To accommodate Indonesia's request, we have rephrased the paragraph. We have taken out the first sentence, which we consider superfluous given the addition Indonesia proposed and have added a new sentence which closely follows the Indonesia's suggested wording.

6.22. Brazil requests the Panel to revise paragraph **7.38** and the attending footnote to reflect that New Zealand also supports Brazil's position. Indonesia does not comment on the request.

6.23. We accept Brazil's request and have revised the paragraph and the footnote accordingly.

[32] Indonesia's request for review of the Interim Report, para. 30.

6.24. Brazil requests additional language and certain other changes to paragraphs 7.45 and 7.46 to better reflect that it made arguments concerning the events after panel establishment only in the alternative. Indonesia, for its part, requests deletion of the last sentence in paragraph 7.45 on the grounds that Brazil also submitted arguments on the post-panel establishment period. Since the parties have opposing views on whether Brazil made its request in the alternative, they also oppose each other's proposed changes.

6.25. As we already noted above, our understanding of Brazil's position is that Brazil's claim regarding post-panel establishment developments is made in the alternative, should the Panel not follow Brazil's request to end the period of review at panel establishment. Our understanding thus aligns with the language suggested by Brazil. We therefore reject Indonesia's proposal and have revised the paragraphs in accordance with Brazil's proposal.

6.26. Regarding paragraph **7.59** Indonesia requests additional language that mirrors its suggestion to rephrase paragraph 7.31.[33] Indonesia also requests the Panel to mention its explanation why it only attached the country of origin questionnaire to the official letter dated 31 May 2018. Brazil opposes the request on the grounds that it is irrelevant to the discussion on the scope of the approval procedure. As with its comments on Indonesia's proposed changes to paragraph 7.31, Brazil also refers to the confidential nature of the bilateral RPT discussions.

6.27. As noted in paragraph 6.13 above, we accept Indonesia's argument that additional information would provide a more accurate picture of the facts and do not agree with Brazil that it would be contrary to the confidential nature of the bilateral RPT discussions to disclose the information in question. However, we consider that the full and accurate description of the facts belongs in the facts section rather than in the analysis section. This is why we have added further language in the footnote to paragraph 7.31 to refer to Indonesia's explanation. To make sure the reader is aware of the full description of the facts in paragraph 7.31 and the attending footnotes we have added a cross-reference to paragraph 7.31 in a new footnote to paragraph 7.59 and aligned the text of paragraph 7.59 with that in paragraph 7.31.

6.28. Indonesia proposes a revision to paragraph **7.67** to add a fourth delay period to the three listed. The fourth delay period suggested would concern the developments in approving Brazil's veterinary health certificate after the Panel was established. Indonesia notes that this period was consistently raised by Brazil in its written submissions and therefore should be reflected in the Report as such. Brazil opposes the request on the grounds that the addition does not accurately reflect the alternative nature of Brazil's claim and also that it will cause confusion given that the Panel has already set out its view on the relevant period of review.

6.29. As noted above, our understanding of Brazil's claim aligns with Brazil's explanations repeated in its interim review submission: Brazil's claim regarding the post-panel establishment period is made in the alternative, should the Panel not accept Brazil's main argument that the period of review ends with panel establishment. To simply add a fourth delay period in the description, therefore, would not reflect the alternative nature of Brazil's arguments regarding events after panel establishment. We also agree with Brazil that the addition would only create confusion given that the Panel has already set out its decision to limit its period of review to panel establishment. For these reasons, we reject Indonesia's request.

6.30. Regarding paragraph **7.80**, Indonesia suggests that the Panel add further language qualifying when an Expert Committee can hold meetings. Brazil opposes the request on the grounds that the language proposed by Indonesia is not contained in the relevant Decree.

6.31. We note that the additional language Indonesia proposes does not reflect the text of the relevant Decree, at least as submitted in its English translation in Exhibit IDN-19. Indonesia has not indicated to us that there is any mistake in that English translation. In these circumstances, we cannot add text in a description that purports to recapitulate what is contained in the relevant domestic legislation. We therefore reject Indonesia's request.

6.32. Regarding Paragraph **7.87**, Brazil requests that, in order to second Canada's argument regarding the need to expeditiously proceed with a request in a compliance scenario, the Panel

[33] See paras. 6.12 and 6.13 above.

include in the footnote a reference to Brazil's own argument addressing this point. Indonesia does not comment on this request.

6.33. We accept Brazil's request and have therefore added the relevant reference in the footnote.

6.6 Positive list requirement

6.34. Indonesia requests the Panel to rephrase paragraph **7.101** to indicate the specific chicken products that were not on the positive list in the original proceeding and, therefore, were banned. Brazil does not object to this request.

6.35. We accept Indonesia's request and have revised the paragraph to clarify that Brazil's challenge regarding the non-inclusion in the list only concerned three products out of the five at issue in the original proceeding. To reflect the same distinction between the scope of the original proceeding and the products subject to Brazil's claim on the positive list requirement, we have also made changes to paragraph 7.95.

6.36. Regarding paragraph **7.104**, Indonesia requests the Panel to reflect Indonesia's alternative argument that "animals and animal products that are outside the list [are], in fact, not subject to Import Approval and therefore, can be imported". Brazil does not object to this request but asks the Panel to add a new footnote outlining Brazil's response to Indonesia's arguments.

6.37. We accept Indonesia's request, noting that Indonesia characterizes this argument as "alternative". In addition, we explain in paragraph 7.111 that, given this characterization of Indonesia's argument, as well as in light of our findings regarding the amended version of the positive list requirement, it is not necessary for the Panel to address it in order to provide a positive solution to this dispute. We have also added an outline of Brazil's response to Indonesia's alternative argument in a footnote.

6.38. Brazil requests the Panel to revise the wording of paragraph **7.105** and footnote **204**[34] to fully reflect Brazil's arguments on whether the Panel should exercise judicial economy on Brazil's claim that the positive list requirement is inconsistent with Article 4.2 of the Agreement on Agriculture. Indonesia does not comment on Brazil's request.

6.39. We accept Brazil's request and have made corresponding changes to the wording of paragraph 7.105 and footnote 204.

6.40. Regarding paragraph **7.113**, Indonesia takes issue with the Panel's statement that Indonesia contests that the positive list requirement is a restriction on imports but has not put forward any arguments to support this position. Indonesia points to excerpts of its first and second written submissions as purportedly reflecting such arguments. Brazil does not object to the additions proposed by Indonesia, provided that Brazil's response to Indonesia's arguments is also included in paragraph 7.113.

6.41. Having re-examined the references put forward by Indonesia, we maintain the view that the referenced excerpts from Indonesia's first and second written submissions do not specifically address Brazil's arguments that the positive list requirement constitutes a restriction on the importation of poultry to Indonesia. We, therefore, reject Indonesia's request. In light of the request, however, we modify the text of paragraph 7.113 to more clearly reflect the extent of Indonesia's arguments relating to the alleged restriction on the importation of chicken products.

6.42. Brazil requests the Panel to reconsider the findings in paragraph **7.117**. In that connection, Brazil points to its arguments that the source of Indonesian authorities' undefined discretion in relation to removing the products at issue from the list is the design, architecture and revealing structure of the measure itself. In Brazil's view, this is so, because the relevant MoA or MoT regulations do not stipulate objective criteria for the exercise of the discretion to remove products from the list. Indonesia asks the Panel to reject Brazil's request and retain the original wording of paragraph 7.117.

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[34] Fn 173 in the Interim Report.

6.43. We have carefully considered this issue in our examination of Brazil's claim concerning the positive list requirement and believe that our findings fully address this and other arguments both parties raised with respect to this measure. We also recall that the interim review process is not an appropriate stage for the parties to re-argue their case on the basis of arguments that have already been debated.[35] Therefore, we reject Brazil's request.

6.7 Intended use

6.44. Indonesia requests the Panel to add to paragraph **7.135** a citation to the original panel report concerning a description of the measure at issue in the original proceeding. Brazil comments that the citation proposed by Indonesia does not match the sentence of paragraph 7.135 that Indonesia refers to.

6.45. We reject this request, because we find the citation provided by Indonesia not to match the content of paragraph 7.135.

6.46. As regards footnote **253**[36] to paragraph **7.136**, Indonesia requests the Panel to add further references to the original panel report discussing the findings of equivalence of certain measures at issue in the original proceeding. Brazil does not oppose this request.

6.47. We accept the request with respect to the reference to paragraph 7.291 of the original panel report, but not with respect to the reference in paragraph 7.294. We do not consider the latter citation to accurately reflect the relevant content of paragraph 7.136.

6.48. Regarding paragraph **7.145**, Indonesia requests that the Panel rephrase the last sentence and add language that would refer to a sanction provision "that [had] been in existence […] but never been challenged in the original proceeding."[37] Indonesia also requests to add a new footnote to refer to its submission. Brazil opposes both requests. Regarding the first, Brazil considers that it is vague and that there is no basis to include a reference to a provision which Indonesia had never raised during the proceeding. Regarding the reference in the footnote, Brazil does not see a need for the citation as the Panel is directly referring to the legislative text.

6.49. Indonesia's proposed language suggests that there is a sanction provision similar to Article 31 of MoT 29/2019 as amended that would have been in existence during the original proceeding and that Brazil did not challenge. This is an assertion that Indonesia, so far, had not made in this proceeding; to introduce it now means raising it in an untimely manner. Furthermore, it is not clear to us whether the assertion implies any legal procedural argument regarding Brazil's ability to challenge something that allegedly already existed during the original proceeding. Finally, Indonesia chose to make this assertion without submitting the legislative text as evidence. We note in this respect that the wording of Article 26 of MoT 59/2016[38] as on the record in Exhibit IDN-109 rev. of the original proceeding is different from the wording quoted by Indonesia.[39]

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[35] Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259. See also Panel Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 7.26; *US – Zeroing (Japan)*, para. 6.106 *Japan – DRAMs (Korea)*, para. 6.2; *US – Poultry (China)*, para. 6.32; *India – Agricultural Products*, para. 6.5; *India – Solar Cells*, para. 6.24; *Russia – Pigs*, paras. 6.6-6.7; *Brazil – Taxation*, para. 6.7; and *EU – Energy Package*, para. 6.3.

[36] Fn 222 in the Interim Report.

[37] Indonesia's request for review of the Interim Report, para. 55.

[38] We point out that MoT 59/2016 was the legal instrument in force during the original proceeding. MoT 20/2018, which Indonesia also refers to, was not at issue in the original proceeding as it was only enacted after the adoption of the original panel report.

[39] The wording of Article 26 of MoT 59/2016 is as follows:

(1) Exporter or importer who conducts export or import of animal and/or animal products not in conformity with the requirements of this Minister Regulation will be sanctioned in accordance with the laws and regulations.

(2) Imported Animal and/or animal products of which the amount, type, business unit, and/or country of origin not in conformity with import approval and/or the requirements of this Minister Regulation must be re-exported.

(3) The importer shall be responsible for the cost resulted from re-exportation as referred to in paragraph (2).

6.50. Even assuming we were to consider the assertion as admissible, despite it being untimely, given the above questions, our duty under Article 11 of the DSU and due process would require us to reopen the procedure to properly assess Indonesia's assertion. This is not the purpose of the interim review stage; nor would it be fair on the complainant who has a right to see this proceeding come to a close.[40] For these reasons we reject Indonesia's request.

6.51. As regards the reference to Indonesia's submission in a new footnote to paragraph 7.145, we do not see the need for this reference as the paragraph directly describes the content of Article 43 of MoA 42/2019 rather than arguments made by Indonesia.

6.52. Regarding paragraph **7.154**, Indonesia requests the Panel to specify that Article 28(a) of MoT 29/2019 as amended is the provision "as amended by MoT 72/2019". Brazil sees no need for this addition given the Panel's way of using an abbreviated name of the legal instrument.

6.53. In Table 1 in paragraph 2.4 of the Report, we identify the legal instruments at issue, including MoT 29/2019 as amended by MoT 72/2019. We then indicate that the Report will use the short name of "MoT 29/2019 as amended" to refer to this legal instrument. Thus, the reference to MoT 29/2019 "as amended" means "as amended by MoT 72/2019". We, therefore, see no need to add a reference to MoT 72/2019 in this paragraph and for this reason reject Indonesia's request.

6.54. Regarding paragraph **7.155**, Indonesia requests additional language to provide more detail on its arguments regarding its objection to Brazil raising Article 31 of MoT 29/2019 as amended. Brazil opposes the request on the grounds that it is neither necessary nor accurate.

6.55. Paragraph 7.155 merely outlines the parties' arguments. More detail on the parties' arguments is contained in the section that sets forth our analysis of Article 31, namely paragraphs 7.172 and following. Paragraph 7.172 sets out Indonesia's view that there is a "clear breach of due process". Therefore, we see no need to add additional language in paragraph 7.155 and for this reason reject Indonesia's request.

6.56. Regarding paragraph **7.170**, Indonesia requests that the Panel add language to reflect its position that Brazil never made the argument that the Panel's analysis regarding Article 13 of MoT 29/2019 as amended rests on. Brazil opposes the request on the grounds that the assertion lacks merit in that Brazil had referred to the importer having to comply with the terms of the import recommendation. Brazil also points out that the Panel is free to draw its own conclusions on the relevant provisions on the record as part of its authority to make an objective assessment of the matter.

6.57. It is well established that where the complainant has made out a *prima facie* case, a panel may, in principle, draw from arguments and evidence on the record, or develop its own reasoning in reaching its findings, provided that it does so consistently with the requirements of due process.[41] Brazil, in our view, did establish a valid *prima facie* case regarding Article 28 of MoT 29/2019 as amended by submitting that deviating from the intended use would mean having submitted incorrect information within the meaning of that provision.[42] The ensuing debate between the parties focussed on Article 13 of MoT 29/2019 as amended. Given these circumstances, we concentrated our analysis on that provision and developed our own reasoning based on that analysis in line with the principle stated above. Therefore, we do not see a need to add the language suggested by Indonesia and for this reason reject Indonesia's request.

6.58. Regarding paragraph **7.171**, Indonesia requests deletion of this paragraph on the grounds that "the Panel is taking a speculative hypothetical view" on the circumstance in which the clause would apply.[43] Brazil opposes the deletion taking the view that the Panel's approach is consistent with Article 11 of the DSU and the Panel based its findings on the text of the relevant provisions.

6.59. We take note of Indonesia's disagreement with the finding in paragraph 7.171 and its request to delete this finding. In our analysis, we have carefully considered the circumstances in which a

[40] Panel Reports, *Japan – Apples (Article 21.5 – US)*, para. 7.23; *US – Poultry (China)*, para. 6.32; and *Japan – DRAMs (Korea)*, para. 6.2.

[41] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.176 and 7.177.

[42] Brazil's second written submission, paras. 144 and 145.

[43] Indonesia's request for review of the Interim Report, para. 72.

breach of Article 28(a) could be proven, and we see no fault with our conclusion. As noted above the purpose of interim review is not to re-open the debate, but to review precise aspects of the Report. We therefore reject Indonesia's request.

6.60. Regarding paragraph **7.172**, Brazil requests inclusion of a reference to its own arguments regarding the due process issue. Indonesia does not comment on this request.

6.61. We accept Brazil's point that both parties' arguments should be reflected in this paragraph. However, we have modified the text suggested by Brazil (and, correspondingly the reference in the footnote) to provide more detail on how Brazil responded to the issue of the due process breach.

6.62. Regarding paragraph **7.174,** Brazil requests two changes on the grounds that the wording could be misread to suggest that Indonesia successfully rebutted Brazil's claim under Article 31 of MoT 29/2019 as amended. Indonesia does not comment on the request.

6.63. We accept Brazil's request and have changed the wording accordingly.

6.64. Regarding paragraph **7.179**, Indonesia requests deletion of most of the paragraph on the grounds that the Panel's analysis is erroneous. Brazil opposes the request taking the view that the Panel's reasoning is based on a careful and holistic examination of Article 31 and that Indonesia offers no explanations to support its reading.

6.65. We take note of Indonesia's disagreement with our analysis as well as with the finding that follows from it and its request to delete both. Indonesia's disagreement is essentially based on the same line of argument it pursued during the proceeding, namely that the provision only concerns "types" of animals and animal products. This is an argument that we carefully considered in our analysis. As noted previously, the purpose of interim review is not to re-open the debate, but to review precise aspects of the Report. We, therefore, reject Indonesia's request.

6.66. Regarding paragraph **7.186**, Indonesia requests that the Panel insert additional language to qualify its statement that Indonesia had not submitted MoA 14/2008. Indonesia points to the evolution of Brazil's arguments to explain why it only referred to MoA 14/2008 at the substantive meeting. Indonesia considers that it then provided a summary of the content of the regulation that "should have enabled either Brazil or the Panel to examine or make comments of [sic] the content".[44] It is Indonesia's view, that if the Panel had deemed the complete text of MoA 14/2008 to be very important it should have requested Indonesia to submit it, in the same way it did for Exhibits IDN-43 and 44. Indonesia sees a contradiction between the Panel accepting Brazil's claim in respect of Article 31 and rejecting Indonesia' defence, where both have been raised at the substantive meeting. For these reasons Indonesia considers that its due process rights have been violated.[45] Indonesia also requests deletion of footnote 295 in the Interim Report.

6.67. Brazil opposes the request on the grounds that Indonesia had ample opportunity to submit the evidence and that it was Indonesia's responsibility, as the party bearing the burden of proof on this issue, to submit it. Brazil does not oppose the deletion of footnote 295 in the Interim Report.

6.68. We declined to consider Indonesia's argument primarily because of the absence of any text on record that would have allowed us to undertake our own reading and analysis of the provisions.[46] Indonesia contends that we should have requested it. We observe that as the party making an assertion/defence Indonesia has the burden of proof.[47] Just as a complainant challenging a legislative text is required to submit evidence of that text to support its claim, so a respondent basing a defence on a legislative text is required to submit evidence of such text. While a panel has the authority to ask questions and request evidence from the parties pursuant to Article 13 of the DSU, the purpose

[44] Indonesia's request for review of the Interim Report, para. 84.

[45] Indonesia's request for review of the Interim Report, para. 85.

[46] We point out that we also raise another issue in para. 7.186, namely that Indonesia had not presented this legislation in the original proceeding. Had we proceeded with considering Indonesia's argument on the basis of a text on record, we would also have considered – and discussed with the parties - the question whether Indonesia is barred from raising this defence now given that it did not do so in the original proceeding.

[47] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

of this authority is not to make a case where a party has failed to do so.[48] Indonesia's own account of what is contained in the legislation was insufficient for us to undertake a meaningful analysis. Further, investigations into this issue in accordance with due process requirements would have added a considerable amount of time, which we considered unwarranted at this late stage of the proceeding. In our view, there is no comparison to be made with our treatment of Brazil's claim regarding Article 31, as there were no evidence and additional due process issues that arose in respect of that claim. For these reasons, we reject Indonesia's request.

6.69. As regards footnote 295 in the Interim Report, we accept Indonesia's request and have deleted it.

6.8 Fixed licence terms

6.70. Brazil requests the Panel to delete the language in paragraph **7.225** suggesting that Brazil agrees that the term "importation requirements" in Article 44(3) of MoA 42/2019 refers to the requirements stipulated in Chapter II of that regulation.[49] Indonesia does not comment directly on this issue,[50] but is of the view that the Panel should not make corrections to this paragraph.

6.71. We accept Brazil's request and have modified the wording of paragraph 7.225 accordingly.

6.72. Brazil requests the Panel to clarify its findings in paragraphs **7.227** and **7.228**, which, in Brazil's view, are in tension with the Panel's findings in paragraph 7.221. According to Brazil, the Panel states in paragraph 7.221 that it would assess Brazil's contention that Indonesia's authorities enjoy undefined discretion to accept or reject a request for an amendment of import licence terms on the basis of the text of MoA 42/2019 only. Brazil submits that the Panel then accepts Indonesia's explanation that "all complete and proper applications will be accepted", as well as Indonesia's understanding of "complete" and "proper", "based on the absence of evidence of how Indonesia's authorities apply the relevant provisions of its regulation". Regarding the evidence of accepting a request for an amendment to an Import Approval, Indonesia refers to Exhibit IDN-4.

6.73. We do not share Brazil's view that there is a tension between paragraph 7.221 on the one hand and paragraphs 7.227 and 7.228 on the other. Our findings in paragraphs 7.227 and 7.228 rely solely on the text of MoA 42/2019.[51] It is this text that, in the Panel's view, does not give a clear answer to the question whether Indonesia's authorities enjoy undefined discretion in accepting or rejecting a request for an amendment to import licence terms – the premise of Brazil's argument. Our finding in Indonesia's favour follows from the application of the rules on the burden of proof, as set out in paragraph 7.221, rather than accepting Indonesia's explanations as true. We have adjusted the wording of paragraphs 7.221 and 7.228 to make this view clearer.

7 FINDINGS

7.1. Below we examine the measures challenged by Brazil in the following order: (1) delay in approving Brazil's veterinary health certificate; (2) positive list requirement; (3) intended use requirement and its enforcement provisions, and (4) fixed licence terms.

7.2. Before doing so, however, we first discuss the order of analysis in respect of the different versions of measures in existence at the time of panel establishment and as adopted since that time. Furthermore, we briefly recall the factual context of this dispute as the panel had also done in the original proceeding.

[48] See Appellate Body Reports, *US – Continued Zeroing*, para. 343; and *Japan – Agricultural Products II*, para. 129; *US – Large Civil Aircraft (2nd complaint)*, para. 1140. See also Panel Report, *EC – Seal Products,* para. 7.77.

[49] Although in its request to review precise aspects of the Interim Report, Brazil refers to para. 7.226, we understand this to be a clerical error and that Brazil is in fact seeking a revision of para. 7.225.

[50] Indonesia's comments relate to the letter containing the statements of reasons, which is not addressed in this paragraph.

[51] This is clear from the language of the introductory sentences to both paragraphs.

7.1 Order of analysis – which versions of the measures to review

7.3. As noted above, since the establishment of the Panel, Indonesia has either replaced or amended the relevant MoA and MoT regulations embodying the measures at issue.[52] This raised the question which versions of these measures the Panel should address. With regard to the positive list requirement, intended use requirement and fixed licence terms, Brazil requests the Panel to make findings both on the amended versions of the measures and on the versions that existed at the time of panel establishment.[53] Indonesia submits that the Panel should focus its assessment only on the amended measures.[54]

7.4. Below we explain which versions of the three measures we will address and why. As regards the delay in approving the veterinary health certificate, Brazil asks the Panel to consider developments up until the Panel's establishment.[55] Because this request for findings is different from that for the other three measures, and taking into account the specific nature of the undue delay claim, we explain the manner in which we assess this claim together with our analysis of the substance of that claim.[56]

7.5. We note at the outset that neither party has contested the Panel's jurisdiction to review both the versions of the measures that existed at panel establishment and the amended ones.[57] Nor do we see any reason to doubt that our mandate covers either version of the measures.[58] In the absence of jurisdictional obstacles, our decision will be guided by the parties' specific requests[59] and the overarching objective of the dispute settlement system to secure a positive solution to the dispute.[60] We shall also take account of the specific nature of compliance proceedings.

7.6. Starting with the amended versions of the measures, the parties concur that considering them would "contribute to the prompt settlement of the dispute".[61] We agree that findings on the recent amendments would be particularly conducive to solving this dispute and note that the parties have extensively argued about the alleged inconsistency of the amended measures.[62] Addressing the amended measures would also be useful if Indonesia is found to have achieved compliance with respect to some or all of them. This is particularly relevant in the context of compliance proceedings. Leaving unresolved new developments that have been properly argued before a panel in such proceedings could not only lead to additional litigation, but also to unnecessary suspension of

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[52] See section 2.2 above.

[53] Brazil's second written submission, paras. 2, 99, 100, 118, 127, 134, 162, and 184. Brazil's response to Panel question No. 1.

[54] Indonesia's first written submission, para. 24; See also Indonesia's second written submission, para. 2.

[55] Brazil makes arguments regarding the post-panel establishment period only in the alternative, should the Panel not accept its request, see Brazil's first written submission, para. 55; second written submission, para. 48; and Brazil's response to Panel question No. 3, paras. 25 and 29.

[56] See section 7.3.6.1 below.

[57] Brazil's second written submission, paras. 100-101; Indonesia's first written submission, para. 10.

[58] Brazil submits that the adoption of MoA 42/2019 and the amendment to MoT 29/2019 have not changed the essence of the measures at issue in this dispute. Brazil's second written submission, para. 101.

[59] Prior adjudicators regarded parties' requests for findings as an important factor in deciding whether to rule on a measure adopted in the course of proceedings. See Panel Reports, *US – Renewable Energy*, para. 7.24; *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, para. 7.111.

[60] Article 3.7 of the DSU. See Appellate Body Report, *Chile – Price Band System,* paras. 131-132; Panel Reports, *Russia – Tariff Treatment*, paras. 7.83 and 7.171; *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, para. 7.113; *Thailand – Cigarettes (Article 21.5 – Philippines)*, para. 7.809; and *US – Renewable Energy*, para. 7.17.

[61] Brazil's second written submission, para. 102; Indonesia's second written submission, para. 2.

[62] Appellate Body Report, *Chile – Price Band System*, para. 143; Panel Reports, *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, para. 7.113; and *US – Renewable Energy*, para. 7.24. In *US – Renewable Energy*, the panel commented that:

> [T]he version of the measure that is currently in force [is] the version of the measure to which any meaningful findings of WTO-inconsistency and concomitant recommendations would need to be directed, and in respect of which such findings and recommendations would need to be implemented.

concessions or other obligations, running counter to the DSU objective of prompt settlement of disputes.[63]

7.7. Turning to the earlier versions of the measures, Brazil submits that it is entitled "to findings regarding whether Indonesia complied with the DSB's recommendations and rulings within the RPT … and at the date of the Panel's establishment".[64] Brazil explains that (i) there is a disagreement between the parties whether these measures have achieved substantive compliance with the DSB's recommendations and rulings; and that (ii) such findings will preserve Brazil's rights for the purposes of any subsequent Article 22.6 proceedings on the level of suspension of concessions and other obligations.[65] Indonesia contests, in particular, Brazil's second point, arguing that "it is not permissible to invoke Article 22.6 proceedings if the Panel has found that the most recent versions of the measure at issue are already consistent with the original panel findings and recommendations".[66]

7.8. We would not subscribe to a view whereby a complainant would always and necessarily be "entitled" to findings that are in addition to findings on a later version of the same measure. There may well be situations where such additional findings would simply not be necessary because the findings already made address all relevant issues.[67]

7.9. However, Brazil gives us two reasons why in this case additional findings would be necessary. Regarding the first, we understand Brazil to be making a point about the importance of the RPT. Indonesia was required to achieve substantive compliance by the end of the RPT and there is disagreement between the parties whether Indonesia has done so. To bypass this disagreement and focus only on the current situation would undermine the role of the RPT. It could create an incentive for responding Members to wait for Article 21.5 proceedings to start before implementing the DSB's recommendations and rulings. Therefore, we accept that, to give full effect to the RPT agreed between the parties, it may well be necessary to make a finding whether substantive compliance was achieved by the end of the RPT.

7.10. Regarding Brazil's second reason, we do not take a view on whether, and if so, how, such additional findings would assist a potential arbitrator in assessing the level of nullification or impairment. That is for an arbitrator to decide.

7.11. In conclusion, for the reasons set out above, we will review both versions of the positive list requirement, intended use requirement and fixed licence terms. We will first address the amended measures, that is, the current version of the measures. We will then provide, in addition, an assessment of their earlier versions, that is, the versions in place at panel establishment.

7.2 Background on the relevant import licensing procedures in Indonesia

7.12. Having explained the order in which we analyse different versions of the measures at issue, we briefly present the factual context of this dispute. We highlight some salient features of Indonesia's import licensing regime, of which the challenged measures form part. Our description largely draws on the original panel's explanations. Although Indonesia has since modified certain aspects of this system, its basic set-up has remained unchanged.[68]

7.13. In order to import poultry products into Indonesia, an importer has to apply for and obtain an Import Recommendation from the Minister of Agriculture (Import Recommendation) and an Import Approval from the Minister of Trade (Import Approval). The former is a necessary step in

[63] The Appellate Body has highlighted the importance of addressing developments that took place in the course of compliance proceedings. See *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 122.

[64] Brazil's second written submission, para. 2.

[65] Brazil's response to Panel question No. 1, para. 1.

[66] Indonesia's comments on Brazil's response to Panel question No. 1, para. 3.

[67] In some cases, past panels have rejected requests to make additional findings on prior versions of the measures at issue on the grounds that such findings were not necessary; see Panel Reports, *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, para. 7.112; *Russia – Tariff Treatment*, paras. 7.168-7.169; and *US – Renewable Energy*, para. 7.25.

[68] We discuss changes in the relevant legal instruments in the sections below dealing with the measures at issue.

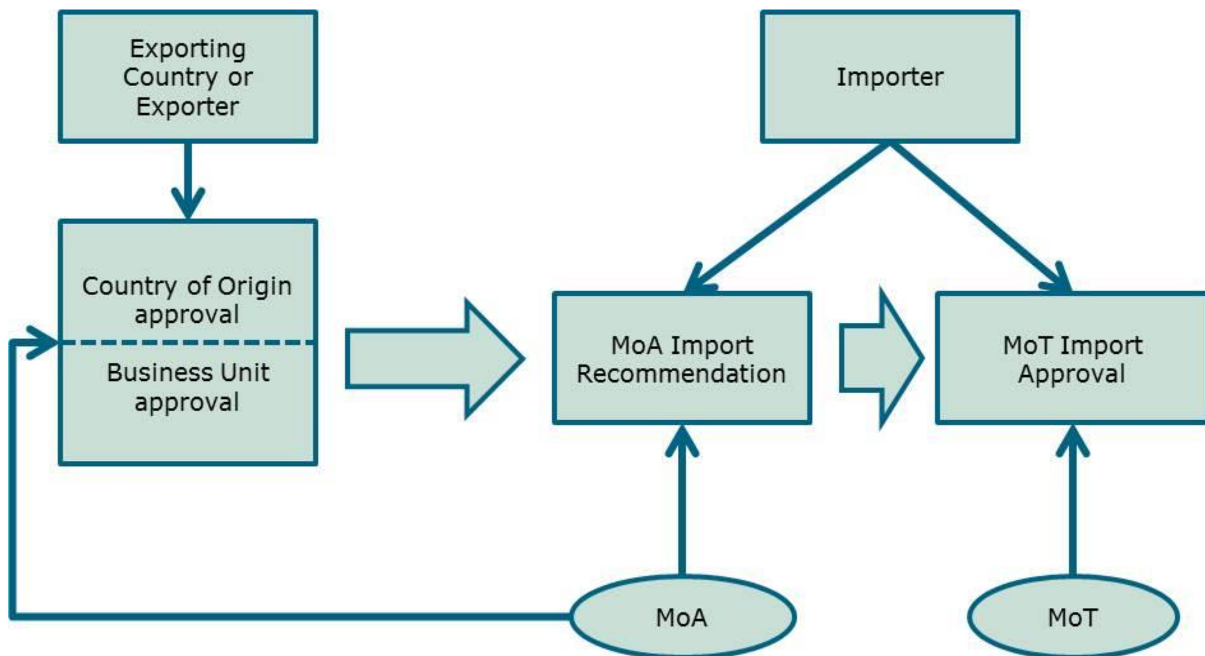
obtaining the latter. The relevant MoA and MoT regulations set out the procedural and substantive requirements for obtaining an Import Recommendation and an Import Approval.[69]

7.14. Importers can only apply for an Import Recommendation if the exporting country has been approved in advance as a "country of origin". Similarly, the relevant business unit in the exporting country is required to be pre-approved before an importer can include it in an application for an Import Recommendation. The country of origin approval serves to verify animal health conditions for the relevant product in the exporting country. The business unit approval serves to verify the animal health and food safety conditions at the relevant business units in the country of origin.[70]

7.15. In addition to having country of origin approval and business unit approval, importers must submit a number of other documents when applying for an Import Recommendation.[71]

7.16. We reproduce below the chart from the original panel report that provides an overview of the basic features of Indonesia's import licensing regime.[72]

Figure 1: Overview of Indonesia's import licensing regime



7.17. In the original proceeding, the parties did not dispute that there had been virtually no imports of chicken cuts (since 2006) and whole chicken (since 2009) into Indonesia, including from Brazil.[73] In this proceeding, Brazil likewise asserts, and Indonesia does not contest, that there have been "virtually no exports" of chicken from Brazil to Indonesia.[74]

7.18. We now turn to reviewing Brazil's claims in the order set out above.

[69] Panel Report, *Indonesia – Chicken*, para. 7.96. We discuss some of these requirements in the sections below dealing with the measures at issue.
[70] Panel Report, *Indonesia – Chicken*, para. 7.97.
[71] Businesses, for example, have to produce a halal certificate as part of the documentation necessary to obtain an Import Recommendation, see Article 7 of MoA 42/2019. See also Panel Report, *Indonesia – Chicken*, para. 7.98.
[72] Panel Report, *Indonesia – Chicken*, Figure 1.
[73] Panel Report, *Indonesia – Chicken*, para. 7.100.
[74] Brazil's first written submission, para. 2.

7.3 Delay in approving Brazil's veterinary health certificate

7.3.1 Introduction

7.19. In this section we address the undue delay claim under Article 8 and Annex C(1)(a) of the SPS Agreement, which Brazil raises in respect of its request for approval of a veterinary health certificate for the importation of poultry from Brazil into Indonesia.[75] Indonesia requests us to reject the claim.

7.20. We first recall some factual background as well as relevant findings by the original panel. We then describe developments subsequent to the adoption of the panel report and briefly outline the parties' arguments before turning to our analysis of these arguments.

7.3.2 Background on the veterinary health certificate

7.21. To recall the original panel's description, a veterinary health certificate is a document issued by an officially recognized veterinarian in the country of origin, attesting to certain health characteristics of the traded product and of its place of origin.[76] These health characteristics pertain to aspects such as the disease status of the product or the animal from which it is derived and of its place of origin; the type of veterinary inspection to which the animal was subject; the conditions of the establishment in which the products were obtained; the type of monitoring to which the establishments are subject; and the product's wholesomeness and suitability for human consumption.[77] Under Indonesian law, imported animal products must be accompanied by a veterinary health certificate.[78]

7.22. As noted above, both the exporting country itself and its exporting business units need prior approval to allow for any importation of animal products into Indonesia.[79] A model veterinary health certificate is part of the exporting country's approval as a "country of origin".[80] Indonesian law provides for a four-step procedure to obtain country of origin approval, and therefore also, approval of the veterinary health certificate, including (1) a desk review of the documents, (2) an on-site inspection, (3) a risk analysis by Indonesian authorities, and finally (4) a bilateral health protocol that includes the model veterinary certificate.[81] The legal instrument currently governing the approval procedure is MoA 42/2019, which was adopted in August 2019.[82]

7.23. Brazil requested approval of a veterinary health certificate for importation of poultry from Brazil into Indonesia in 2009. The Indonesian authorities' treatment of this request was the subject of the original proceeding and is also the subject of the present compliance proceeding.

7.3.3 Relevant findings in the original proceeding

7.24. Just as in the present compliance proceeding, in the original proceeding Brazil claimed that the Indonesian authorities' treatment of its request involved "undue delay" pursuant to Article 8 and Annex C(1)(a) of the SPS Agreement.[83]

7.25. The panel found that the approval of a veterinary health certificate was an SPS approval procedure as defined in, and subject to, the requirements of, Annex C of the SPS Agreement.[84] The

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[75] Request for the establishment of a panel by Brazil, WT/DS484/19, para. 16.

[76] Panel Report, *Indonesia – Chicken*, para. 7.499. See also definition of "international veterinary health certificate" in the World Organization for Animal Health (OIE) Terrestrial Animal Health Code:

> A certificate, issued in accordance with Chapter 5.2, describing the animal health and public health requirements that are fulfilled by the exported commodities.

OIE, Terrestrial Animal Health Code (28th edition, 2019), Glossary. Available at: https://www.oie.int/index.php?id=169&L=0&htmfile=glossaire.htm (last accessed on 11 May 2020).

[77] Panel Report, *Indonesia – Chicken*, paras. 7.499-7.501.

[78] Panel Report, *Indonesia – Chicken*, para. 7.501.

[79] See para. 7.14 above; see also Panel Report, *Indonesia – Chicken*, para. 7.97.

[80] Panel Report, *Indonesia – Chicken*, para. 7.501.

[81] See graph in Panel Report, *Indonesia – Chicken*, para. 7.502.

[82] MoA 42/2019, (Exhibit IDN-1).

[83] Panel Report, *Indonesia – Chicken*, para. 7.497.

[84] Panel Report, *Indonesia – Chicken*, para. 7.517.

panel further found that Brazil's application had remained in step 1 (desk review).[85] Relying on Indonesia's explanation, the panel identified the reason for the "hold up" to be that Brazil had not submitted the halal assurance documentation required under the relevant regulation for business unit approval.[86] The panel found that at least one request for business unit approval had been submitted in 2012[87] and that the country of origin approval procedure was bundled with the business unit approval procedure.[88]

7.26. The panel observed that a Member may not delay the completion of an SPS approval procedure because non-SPS-related information, which the Member requires the applicant to submit, is outstanding from the application.[89] Applying this conclusion to the facts at issue, the panel recalled that the only information that was outstanding related to halal assurances, which was non-SPS-related information. Accordingly, the panel found the delay to be unjustified and therefore undue. The panel noted that, given the scope of Brazil's claim, this finding applied to the approval procedure relevant to obtain the veterinary health certificate, that is, the country of origin approval procedure. Referring to its relevant previous findings, the panel noted that this procedure was bundled with the business unit approval procedure, which had an SPS component as well as the halal component at issue.[90]

7.27. Accordingly, the panel concluded that Indonesia had caused an undue delay in the approval of the veterinary health certificate in violation of Article 8 and Annex C(1)(a) of the SPS Agreement.[91]

7.3.4 Developments subsequent to the adoption of the panel report in the original proceeding

7.28. As noted above, the panel report was adopted on 22 November 2017 and Indonesia indicated that it needed a RPT to comply with the DSB's recommendations and rulings because it was impracticable to do so immediately.[92] The parties negotiated an agreement under Article 21.3(b) of the DSU, which they notified to the DSB on 15 March 2018.[93] The agreed RPT was eight months as of the adoption of the report and expired on 22 July 2018.

7.3.4.1 Up to the end of the RPT

7.29. As both parties confirm, the issue of the pending request for the approval of a veterinary certificate was part of the discussions on the RPT. The record indicates that there was some debate on the need to update relevant information submitted with the request in the form of replies to a questionnaire. Indonesia pointed to the need to submit updated questionnaires for the request to be processed,[94] whereas Brazil took the view that the sanitary information provided to Indonesian authorities in 2009 remained valid.[95]

7.30. On 24 May 2018, Indonesia adopted MoA 23/2018 amending MoA 34/2016.[96] The amendments concerned, *inter alia*, the halal requirement in the business unit approval procedure.[97]

7.31. By letter of 31 May 2018 Indonesia advised Brazil that the sanitary information provided by Brazil in its 2009 questionnaire was no longer adequate for a proper sanitary assessment in 2018. Indonesia requested Brazil "to provide a completed questionnaire containing updated sanitary

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[85] Panel Report, *Indonesia – Chicken*, para. 7.520.
[86] Panel Report, *Indonesia – Chicken*, paras. 7.508 and 7.520.
[87] Panel Report, *Indonesia – Chicken*, para. 7.506.
[88] Panel Report, *Indonesia – Chicken*, para. 7.518.
[89] Panel Report, *Indonesia – Chicken*, para. 7.531.
[90] Panel Report, *Indonesia – Chicken*, para. 7.532.
[91] Panel Report, *Indonesia – Chicken*, para. 7.535.
[92] See para. 1.2 above.
[93] WT/DS484/16.
[94] Email from the Representative of Indonesia's Mission in Geneva to Brazil's Mission in Geneva, dated 8 March 2019, (Exhibit IDN-43).
[95] Letter from Ambassador Evandro Didonet to Ambassador Hasan Kleib (29 March 2018), (Exhibit BRA-2).
[96] Republic of Indonesia, Ministry of Agriculture, Regulation 23/2018, (Exhibit BRA-11).
[97] Indonesia notified this amendment to the DSB in its status report of 14 September 2018, see Communication by Indonesia, WT/DS484/18 (Compliance Communication).

information for Brazil and the relevant business units"[98] and attached a country of origin questionnaire addressed to the authorities of exporting countries to this letter.[99]

7.3.4.2 Between the end of the RPT and panel establishment

7.32. Brazil provided its replies to the country of origin questionnaire on 12 September 2018.[100]

7.3.4.3 Since the establishment of the Panel

7.33. The Panel was established on 24 June 2019. On 25 June 2019, that is nine months after Brazil had submitted its updated questionnaire, Indonesia sent Brazil a letter informing it that the desk review of Brazil's request "has been done on June 17, 2019". Indonesia also stated that based on the desk review, further information was needed. The letter provided a list of additional information requested, namely (a) volume of chicken meat exports and destination countries in the last five years; (b) recall system mechanism for exported poultry meat products, including the triggers for a recall and procedure for informing the importing country; (c) explanation and information related with refusal of chicken meat from Brazil to other countries caused by *Salmonella* spoilage; and (d) results of surveillance/monitoring of *Salmonella, Listeria monocytogenes* and *Campylobacter* in the last five years.[101] Indonesia informed Brazil that "[a]fter the documents are completed, the process of country approval can proceed to the on-site inspection".[102]

7.34. Brazil provided the requested information on 2 August 2019.[103] Indonesia claims to have replied to this letter on 14 October 2019 and Brazil claims not to have received the reply.[104] In the copy of the reply provided to the Panel, Indonesia requested further additional information concerning the results of the investigation and measures taken by the Brazilian authority regarding the notifications due to the presence of *Salmonella spp.* in Brazilian poultry meat from a number of countries.[105] Indonesia re-sent the request on 13 December 2019.[106]

7.3.5 Outline of parties' arguments

7.35. In this section we outline the parties' arguments, which are summarized in more detail under the relevant points in the legal analysis.

7.36. Brazil claims undue delay both for country of origin approval and business unit approval. It alleges three different undue delays between the adoption of the report and panel establishment, all essentially relating to the requirement to submit an updated questionnaire and the subsequent processing of that questionnaire. Brazil does not see a need for the Panel to review the events after panel establishment and puts forward arguments concerning that period only in the alternative.

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[98] Letter from Ambassador Hasan Kleib to Ambassador Evandro Didonet (31 May 2018), (Exhibit BRA-3), p. 3.

[99] No business unit questionnaire was attached to the letter. We note, however, that, Indonesia had already sent copies of both questionnaires to Brazil in an email dated 8 March 2018 following up on an informal bilateral meeting of the parties of the same date, see Exhibit IDN-43. Furthermore, we take note of Indonesia's explanation that it "was only attaching the country questionnaire in the official letter of 31 May 2018 as a favour", see Indonesia's response to Panel question No. 10.

[100] Letter from Ambassador Evandro Didonet to Ambassador Hasan Kleib (12 September 2018), (Exhibit BRA-5). In this letter, Brazil also reiterated its position that the sanitary information provided to Indonesian authorities in 2009 remained valid.

[101] Letter from the Ministry of Agriculture of Indonesia (Directorate General of Livestock and Animal Health Services) to the Ambassador of Brazil to Indonesia (25 June 2019), (Exhibit BRA-7), p. 2.

[102] Letter from the Ministry of Agriculture of Indonesia (Directorate General of Livestock and Animal Health Services) to the Ambassador of Brazil to Indonesia (25 June 2019), (Exhibit BRA-7), p. 2.

[103] Brazil’s response to the 25 June 2019 letter from the Ministry of Agriculture of the Republic of Indonesia (Directorate General of Livestock and Animal Health) (2 August 2019), (Exhibit BRA-18).

[104] Brazil's second written submission, para. 87.

[105] Letter to Brazil Ambassador for Indonesia from Director General of Livestock and Animal Health Services, Ministry of Agriculture on 14 October 2019 concerning the Result of Desk Review on Brazil’s Application, (Exhibit IDN-27), p. 2. See also Indonesia's first written submission, para. 146.

[106] Indonesia's opening statement at the meeting of the Panel, para. 10. Brazil confirmed at the substantive meeting that it had not yet submitted the requested additional information to Indonesia and provided further details on why it had not yet done so in its written replies to the Panel's questions, see Brazil's response to Panel question No. 21, para. 62.

7.37. Indonesia contends that the Panel should review the period starting from the end of the RPT until the substantive meeting of the Panel with the parties. Indonesia also extensively argues why the delays Brazil identified were not incurred or were not undue. Much of its defence, however, concentrates on demonstrating that delays currently incurred are justified because of the salmonella risks that Indonesia's requests for additional information address.

7.38. Among the third parties, Canada, the European Union and New Zealand submitted views on the issue of undue delay essentially supporting Brazil's position.[107]

7.3.6 Analysis of the Panel

7.39. We must determine whether Indonesia has failed to comply with the DSB's recommendations and rulings by acting inconsistently with Article 8 and Annex C(1)(a) of the SPS Agreement when dealing with Brazil's request for a veterinary health certificate.

7.40. Article 8 mandates that Members observe the provisions of Annex C in the operation of control, inspection and approval procedures. Thus, a violation of the obligations contained in Annex C entails a violation of Article 8.[108]

7.41. Article 8 of the SPS Agreement reads:

> Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

7.42. Annex C(1)(a) of the SPS Agreement reads:

> 1. Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:
>
> (a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;
>
> (…)

7.43. Thus, the following three elements can be discerned from Annex C(1)(a).[109] First, the approval procedure at issue must be an SPS approval procedure, that is a procedure to check and ensure the fulfillment of sanitary and phytosanitary measures. Second, there must be a delay in a Member undertaking or completing such SPS procedure. Third, the delay must be "undue". We address these three elements in turn.

7.44. However, given the parties' arguments, we will first discuss the order of analysis.

7.3.6.1 Order of analysis – whether to review post-panel establishment developments

7.45. As we explained in section 7.1 above, for all other measures at issue in this proceeding we start our review with the latest version of the measure as adopted after panel establishment. We do so because the parties have both requested it, and because reviewing the most recent version contributes to the positive solution of the dispute. For Brazil's undue delay claim, however, the situation is different, first and foremost because Brazil has requested review of events after panel establishment only in the alternative.

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[107] Canada's third-party-response to Panel question Nos. 1 and 2; European's Union's third-party-response to Panel question Nos. 1 and 2; and New Zealand's third-party submission, paras. 7–11.

[108] Appellate Body Report, *Australia – Apples*, para. 434; see also Panel Report, *Indonesia – Chicken*, para. 7.511.

[109] See also Panel Report, *Indonesia – Chicken*, para.7.512.

7.46. We take the view that the complainant has control over the scope of its case. The complainant can choose to pursue or not any claim that is within the terms of reference of the panel and can even withdraw the entire case, if it so wishes.[110] A panel, in our view, therefore, cannot review a measure or claim that the complainant tells it not to review.[111] Here, Brazil explicitly contends that the appropriate end-date for our assessment is the date of the Panel's establishment and makes arguments regarding the post-panel establishment developments on the application procedure only if the Panel were to disagree with its position. Brazil's choice (assuming, from a terms of reference point of view, that it has a choice)[112] means that it has to prove that there was a violation of Annex C(1)(a) up until the time of panel establishment.[113] The measure that we are to review, therefore, is the alleged failure to act without undue delay up to panel establishment. We note that not reviewing post-panel establishment events as part of the measure does not prevent us from taking such events into account as evidence – if we see a need to do so.[114]

7.47. Accordingly, there are two possible outcomes of this analysis: Brazil either succeeds or fails to prove undue delay in the time leading up to panel establishment. In our view, in either case we do not need to consider post-panel establishment developments that Indonesia has presented as evidence. This is obvious, should we find that Brazil failed to prove its case. In that case, Brazil would not prevail with its claim, and Indonesia would not need to raise any defence.

7.48. However, in our view, it would also hold true if Brazil proves its case for undue delay. We understand Indonesia to argue that delays currently incurred (i.e. post-panel establishment) are not undue and that for this reason Indonesia is now in compliance with its obligation in Annex C(1)(a).[115] We agree with Indonesia that if post-panel establishment developments could demonstrate that Indonesia has come into compliance, it would be important to find so now rather than concluding this proceeding on a factual basis that is no longer applicable and await future proceedings to find compliance had already existed in the first place.[116]

7.49. However, the specific nature of the undue delay claim has a bearing on how compliance can be achieved and, in our view, excludes the need to review events after panel establishment in the specific circumstances of this case – if we find undue delay before panel establishment.

7.50. Annex C(1)(a) requires a Member not to incur undue delay. The obligation is continuous in nature: it starts at the moment the request is received and ends when a final decision on that request has been made. This follows from the reference to the procedure as being "undertaken and completed without undue delay".[117] The obligation, thus, consists in not incurring undue delays over the entire course of this time period. If and when a Member does incur undue delay at any stage in the procedure it is in breach of its obligation under Annex C(1)(a).[118]

7.51. What follows from this, in our view, is that once a breach has occurred, the violation is not "cured" by proceeding without undue delay thereafter. The reason is the continuous nature of the obligation as described above: since there must not be "undue delay" all the way to completion of

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[110] Panel Reports, *China – Raw* Materials, para. 7.23.

[111] Appellate Body Report, *Chile – Price Brand System*, para. 173.

[112] We understand Brazil also to be raising a terms of reference issue when referring to the "temporal boundaries" of the claim, see Brazil's second written submission, para. 44; Brazil's responses to Panel Question No. 3, para. 26 (referring to Appellate Body Report, *EC – Chicken Cuts*, para. 156).

[113] See also Panel Report *Korea – Radionuclides*, para. 7.138.

[114] Brazil's second written submission, para. 47; Appellate Body Report, *EC – Selected Customs Measures*, para. 188.

[115] Indonesia's response to Panel question No. 3.

[116] See also European Union's response to Panel question No. 2, para. 9 and Canada's third-party-response to Panel question No. 2, para. 11.

[117] As the panel in *EC – Approval and Marketing of Biotech Products* explained "approval procedures must be started and then carried out from beginning to end", Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1494. See also Panel Report *US – Animals*, para. 7.112. We agree with the following observation that that panel made: "The requirement to carry out an approval procedure to the end should not be confused with an obligation for the importing Member to *approve* the importation of the product(s) subject to the procedure. Pursuant to Annex C(1)(a), the importing Member is simply required to issue a final determination regardless of whether it be positive or negative."

[118] See also Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1502.

the procedure, if it occurs, it necessarily affects that completion and, therefore the violation cannot be undone.[119]

7.52. The impossibility of "curing" undue delay does not mean that the Member concerned cannot bring its measure into conformity with its WTO obligations and secure compliance with DSB recommendations and rulings. A Member can achieve compliance with a finding of "undue delay" by proceeding without any *further* undue delay when implementing the DSB's recommendations and rulings. This is consistent with the understanding that the WTO dispute settlement system provides for prospective, and not retrospective, remedies.

7.53. Any *further* undue delay incurred in the implementation process, however, is a new breach of the obligation, which must necessarily lead to a finding of non-compliance irrespective of what happens subsequently. After that point, only completion of the procedure can end the violation. We therefore do not agree with Indonesia's position that currently incurred delays, if not undue, would mean compliance. They would not if Indonesia has incurred any (further) undue delay between the end of the RPT and panel establishment. If that were the case, Indonesia could only end the undue delay with the completion of the approval procedure.[120] Completion in this case, however, has not happened to this date.

7.54. In these circumstances we do not see a need to review events subsequent to panel establishment if Brazil manages to prove undue delay before panel establishment.[121]

7.55. For these reasons we assess Brazil's undue delay claim on the basis of events up to panel establishment. With this, we turn to the three-pronged test outlined above.

7.3.6.2 Whether the approval procedure at issue is an SPS approval procedure

7.56. Brazil submits that the approval of the veterinary health certificate is an SPS approval procedure. In support, Brazil relies on the original panel's finding, which, in Brazil's view, equally applies to the procedure at issue in this proceeding.[122] Furthermore, Brazil submits that the approval procedure encompasses both country of origin and business unit approval. Indonesia contests that business unit approval is at issue in this proceeding.

7.57. As noted above, Brazil's request for the approval of a veterinary health certificate is the same request that was at issue in the original proceeding.[123] In the original proceeding, the parties agreed, and the panel concluded, that the approval of a veterinary health certificate constitutes a "procedure to check and ensure the fulfilment of sanitary and phytosanitary measures" and for this reason was an SPS approval procedure.[124]

7.3.6.2.1 Scope of the approval procedure – whether country of origin only or also business unit approval

7.58. Although the parties agree that the procedure in question is an SPS approval procedure, they disagree on the elements it covers. It is not clear if the procedure covers only the country of origin approval or also the business unit approval. This distinction is relevant insofar as the Panel would need to take into account in its assessment of Brazil's claim any delays in responding to the business unit approval request.

7.59. Brazil, in this proceeding, states that its claim under Article 8 and Annex C(1)(a) covers both the country of origin approval and the business unit approval. Brazil refers to the original panel's findings explaining that it understands the reference to approval for the veterinary health certificate there to cover both approvals.[125] Indonesia, for its part, while noting the missing business unit

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[119] See also Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1502.

[120] See also Canada's third-party-response to Panel question No. 2, para. 13: "An obvious means of rectifying undue delay would be for Indonesia to complete the procedure".

[121] This is obvious if we do not find undue delay before panel establishment. Then we would conclude that Brazil has not proven its case of non-compliance.

[122] Brazil's first written submission, para. 52.

[123] Brazil's first written submission, para. 52.

[124] Panel Report, *Indonesia – Chicken*, para. 7.517.

[125] Brazil's response to Panel question No.13, para. 57.

questionnaire, submits that the pending desk reviews only cover the country of origin approval.[126] As a factual matter, we recall that Indonesia's letter of 31 May 2018 requested both an updated questionnaire for country of origin and for business units, attaching a country of origin questionnaire only.[127] In reply to this letter, Brazil only submitted a country of origin questionnaire and did not submit any updated business unit questionnaire.

7.60. The parties' respective positions therefore raise questions about the scope both of the finding in the original proceeding and of the requested finding in the present proceeding.

7.61. Turning first to the issue of what the exact scope of the finding in the original proceeding was, we recall the following finding by that panel:

> […] the only information which is outstanding relates to halal assurances, which both parties agree is not SPS related. We agree. Accordingly we find that the delay is not justified and, is therefore undue. *We note that given the scope of Brazil's claim, this finding applies to the approval procedure relevant to obtain the veterinary health certificate, which, as seen above, is part of the country of origin approval procedure. As noted above, this procedure is bundled with the business unit approval procedure, which, has an SPS component as well as the halal component at issue*.[128] [emphasis added]

7.62. We read this finding to mean that the panel, although recognizing that the business unit approval procedure was "bundled" with the country of origin approval, limited its finding to the request for approval of the veterinary health certificate and did not, as suggested by Brazil, use it as a broad reference to both country of origin and business unit approval. The reference to the bundling of the country of origin approval procedure with a business unit approval procedure was supporting evidence that the delay affected the country of origin approval, even though the outstanding information (halal assurance) concerned the business unit approval.[129] Based on this reading, we find that the scope of the original panel's finding was limited to the country of origin approval procedure only.

7.63. Having addressed the scope of the original panel's findings, we now turn to the question of the scope of Brazil's claim in the present proceeding. Brazil's request for the establishment of a panel – the document that defines our terms of reference – first summarizes the original panel's findings before turning to the situation giving rise to non-compliance with Annex C(1)(a). The summary of the original panel's findings contains the above description of the veterinary health certificate (part of country of origin approval, in turn bundled with business unit approval). It also mentions that Brazil requested approval of the veterinary health certificate in 2009 and that, in 2012, at least one Brazilian enterprise submitted the relevant SPS-related information to obtain business unit approval.[130] In subsequently describing the current situation, however, the panel request only refers to the pending 2009 request for approval of the veterinary health certificate ("almost 10 years now")[131] and neither mentions again the 2012 business unit request nor, for that matter, any other business unit request.[132]

7.64. On its face, therefore, Brazil's panel request, just like its request in the original proceeding, is limited to the country of origin approval procedure in the form of the 2009 request for approval of the veterinary health certificate. We find this reading confirmed[133] by the complete absence of any reference to any specific business unit approval request in Brazil's submissions[134], as well as by

[126] Indonesia's comments on Brazil's response to Panel question No. 11, para. 22: "The two desk reviews only assessed the country of origin questionnaires submitted by Brazil."

[127] See para. 7.31 above.

[128] Panel Report, *Indonesia – Chicken*, para. 7.532. (fn omitted)

[129] As noted above, the panel had found at least one such business unit approval to be pending since 2012.

[130] Request for the establishment of a panel by Brazil, WT/DS/484/19, para. 14.

[131] See request for the establishment of a panel by Brazil, WT/DS/484/19, para. 16.

[132] Request for the establishment of a panel by Brazil, WT/DS/484/19, para. 16.

[133] Appellate Body Report, *EC – Bananas III*, para. 141.

[134] Brazil makes one unspecified reference to "information submitted by Brazil and its business units"; however, does not link that assertion to any evidence. We note that business unit approval requests, both under MoA 42/2019 (Article 22(1)) and its predecessor, regulation MoA 34/2016 as amended (Article 16(1)),

Brazil's conclusions in its written submissions, requesting the Panel to find "undue delay in the approval of the veterinary health certificate".[135]

7.65. We, therefore, conclude that in this proceeding Brazil's claim of undue delay in respect of its request for a veterinary health certificate only concerns the country of origin approval and does not cover any business unit approval.[136] Our review under Annex C(1)(a), therefore, focuses on whether undue delays have occurred in the country of origin approval procedure.

7.66. As a factual issue, we note not only that the country of origin approval is a separate procedure from the business unit approval, but also, as both parties agree[137], that under the current legislation there is no bundling requirement.[138] We, therefore, understand Indonesia's references to missing business unit questionnaires as a mere statement of fact of the current situation on any business unit approvals and not as an actual or potential justification for any delays in the pending country of origin approval procedure.

7.3.6.3 Whether there is delay in undertaking and completing the approval procedure

7.67. Brazil alleges three different delays as undue: The first concerns the period between the adoption of the report and the letter of 31 May 2018, by which Indonesia requested an updated questionnaire; the second concerns the period that elapsed because of the need to fill in a new updated questionnaire, which Brazil submitted on 12 September 2018; and the third concerns the time that Indonesia took to reply to that updated questionnaire, which it did on 25 June 2019.[139]

7.68. Indonesia does not contest the existence of the delays. However, Indonesia argues that a compliance panel cannot review actions taken after the adoption of the panel report but before the end of the RPT. Therefore, in Indonesia's view, the appropriate start-date for the Panel's assessment is, 23 July 2018 – the day after the end of the RPT.[140] On the basis of Indonesia's argument, thus, the first and part of the second delay would be excluded from our review.

7.69. We recall that the ordinary meaning of the word "delay" is "(a period of) time lost by inaction or inability to proceed".[141] We have before us three different delays, the reviewability of two of which is (at least partly) contested. To succeed in its claim, Brazil only needs to prove one undue delay. The third delay, which Brazil has identified, does not raise any questions of reviewability. We, therefore, address this delay first. If it is undue, we do not need to look further and can leave important systemic questions such as the one on the role of the RPT to future panels.

7.70. The third delay concerns the time that elapsed after Brazil submitted its updated questionnaire on 12 September 2018. As noted above, Indonesia replied to this submission on 25 June 2019, that is, nine months later (and one day after panel establishment).[142] Indonesia acknowledges the actual desk review of Brazil's request only took place on 17 June 2019 and provides several reasons why this was the case.[143] Thus, Indonesia does not contest that there was an extended period of inaction and, therefore, that there was a delay. Indeed, Indonesia refers in this context to its standard processing time for desk review (as laid down in the current legislation), which is shorter, namely

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are to be submitted through the country of origin's authorities. Brazil, thus, would have specific information, if any business unit had applied for approval, see Brazil's first written submission, para. 63, see also Brazil's response to Panel question No. 20, para. 60.

[135] Brazil's first written submission, para. 232, letter (a); Brazil's second written submission, para. 185, letter (b).

[136] We leave open the question whether the scope of this Article 21.5 proceeding would allow for the inclusion of any business unit requests.

[137] Indonesia's response to Panel question No. 5(b); Brazil's comment on Indonesia's response to Panel question No. 12, para. 58.

[138] There is no need for us to decide whether there was a bundling requirement under the previous legislation or whether bundling was just done as a matter of fact; See Panel Report, *Indonesia – Chicken*, para. 7.518.

[139] See, in particular, Brazil's first written submission, para. 70; and Brazil's response to Panel question No 13, para. 60.

[140] Indonesia's first written submission, paras. 113, 127, 128, and 130.

[141] See Panel Report, *Indonesia – Chicken*, para. 7.519, referring to Appellate Body Report, *Australia – Apples*, para. 437 (citing *Shorter Oxford English Dictionary*, 6th edn., A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 635).

[142] Brazil's first written submission, paras. 66 and 69.

[143] Indonesia's first written submission, para. 145.

six months.[144] Rather than denying that there was delay, Indonesia focuses on the reasons why its authorities did not undertake the desk review earlier, to demonstrate that the delay is not undue.

7.71. We, therefore, turn to whether the delay is undue.

7.3.6.4 Whether the delay is undue

7.72. In examining whether the delay that Indonesia has incurred is undue, we recall that the ordinary meaning of that term is "unwarranted" or "unjustifiable".[145] In line with past panels and the Appellate Body, we consider that whether a delay is unwarranted or unjustifiable requires a case-by-case analysis of the reasons for the alleged failure to act with appropriate dispatch.[146] Canada argues in this respect that the specific nature of a compliance situation may have a bearing on that analysis and we agree. We come back to this point below.

7.73. Indonesia states that Brazil's updated questionnaire only reached the Ministry of Agriculture on 3 October 2018[147] because Brazil had submitted it to Indonesia's Permanent Mission in Geneva instead of the Ministry of Agriculture as required.[148] As regards the period thereafter, Indonesia explains essentially that Brazil's updated questionnaire needed to be reviewed by an Expert Committee and that this Committee was only available to do so on 17 June 2019.[149]

7.74. The parties agree that Brazil's request is at step 1 of the approval procedure, that is, the desk review.[150] A desk review is described in Article 23(1) of MoA 42/2019 as follows:

> Desk review as referred to in Article 20 letter (a) and (b), is done to review:
>
> a. the completeness and correctness of the Country of Origin and/or Business Unit application for approval as referred to in Article 22 paragraph (2); and
>
> b. the fulfillment of the Country of Origin and/or Business Unit requirements as referred to in Article 11 to Article 15.[151]

7.75. Article 23(2) specifies that desk review is done by a "document reviewer team" and Article 23(3) provides that this team consists "of representative[s] of General Director of Livestock and Animal Health, Agriculture Quarantine Body, and/or Commission of Animal Health Experts, Public Health Veterinary, and Animal Quarantine".

7.76. With Indonesia's help we have come to the following understanding of how the desk review process is organized and how this process played out in the specific circumstances of this case.

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[144] We do not take a view whether this standard processing time *per se* is an appropriate benchmark.

[145] See Panel Report, *Indonesia – Chicken*, para. 7.526 referring to Appellate Body Report, *Australia – Apples*, para. 437 (citing *Shorter Oxford English Dictionary*, 6th edn., A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 635). See also Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495, finding that Annex C(1)(a) dictates that approval procedures should be undertaken and completed with no unjustifiable loss of time.

[146] Appellate Body Report, *Australia – Apples*, para. 437. See also Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495, finding that Annex C(1)(a) dictates that approval procedures should be undertaken and completed with no unjustifiable loss of time.

[147] Indonesia's first written submission, para. 145. We note that in a later submission Indonesia refers to November as the relevant date when the questionnaire was received by the Ministry of Agriculture, see Indonesia's response to Panel question No. 16(a).

[148] Indonesia's first written submission, paras. 145, 136, and 137. Indonesia lists two more formal errors in Brazil's submission (no official stamp on questionnaire; no cover letter) but confirms that these are not a reason to delay the procedure, Indonesia's first written submission, para. 137.

[149] Indonesia's first written submission, para. 145.

[150] As noted above, desk review is followed by an on-site visit (step 2), a risk analysis (step 3) and the conclusion of a bilateral health protocol (step 4). See para. 7.22 above.

[151] See MoA 42/2019, (Exhibit IDN-1).

7.77. Within the Ministry of Agriculture there exists a Desk Review Team, currently consisting of 25 members (including doctors),[152] whose task it is to "review the documents submitted" and "submit a written report to the Director of Livestock and Animal Health".[153] The decree setting up this Desk Review Team also provides that, if necessary, the Desk Review Team can "ask for suggestions and opinions from Expert Committee of Animal Health and Veterinary Public Health and/or experts with related scientific backgrounds".[154] Indonesia describes the Desk Review Team's task as ensuring "the completeness and the accuracy of all required formalities" in respect of the submitted information.[155] We see this task as corresponding to the description in Article 23(1)(a) of MoA 42/2019 above.

7.78. Furthermore, as referred to in the Decree establishing the Desk Review Team, there is the Expert Committee for Animal Health and Veterinary Public Health, also created by a ministerial decree. As Indonesia explains, this Committee is composed of "the most prominent veterinarians, experts from major universities and also highly qualified professionals in Indonesia".[156] There are currently 29 experts.[157] The Committee is renewed every five years and this renewal came up, when the previous Expert Committee's mandate ended on 14 February 2019.[158] The new Expert Committee was appointed by Ministerial Decree of 7 May 2019.

7.79. The Committee's task is described in the decree as "a. Doing technical analysis regarding an issue related to animal health, veterinary public health and/or animal quarantine. b. Giving critics and advice regarding an issue related to animal health, veterinary public health and/or animal quarantine."[159] According to Indonesia, the Expert Committee systematically assists the Desk Review Team with the task of "assess[ing] whether the application has fulfilled all the requirements for country of origin" approval.[160] We see that task as corresponding to the description in Article 23(1)(b) above. Regarding that task, Indonesia explains that the Expert Committee's analysis of whether the country of origin requirements are fulfilled differs from the risk analysis in step 3 of the approval process insofar as it is a process to "determine whether all required information has been received for further verification (on-site visit)", while risk analysis serves to "assess the risk based on the information that has been verified whether it is safe or not to import certain products from certain country."[161] Furthermore, as indicated in the relevant provisions in MoA 42/2019 and confirmed by Indonesia, the Expert Committee's assistance also extends to the on-site visit and the risk analysis.[162]

7.80. Under the current ministerial decree, the Expert Committee "is allowed to hold meetings periodically every 6 (six) months or anytime"[163], whereas the previous committee was to hold meetings periodically once every three months and, if needed, could hold meetings anytime depending on its necessity.[164] Indonesia explains that up to date there has never been any special meeting conducted by the Expert Committee outside the regular schedule for desk review.[165] Furthermore, Indonesia notes that "to find a schedule that can accommodate all 10-29 veterinary

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[152] We refer to the list of names contained in the decree, which lists 14 people with the title of doctor. We cannot infer from the list or the decree itself, whether these are veterinary doctors, medical doctors or other. See Decree concerning the appointment of Desk Review Team in 2018 issued by Director of Veterinary Public Health, second and third clause, (Exhibit IDN-7), page 8.

[153] Decree concerning the appointment of Desk Review Team in 2018 issued by Director of Veterinary Public Health, second and third clause, (Exhibit IDN-7), page 8.

[154] Decree concerning the appointment of Desk Review Team in 2018 issued by Director of Veterinary Public Health, clause four, (Exhibit IDN-7), page 8.

[155] Indonesia's first written submission, paras. 140 and 142.

[156] Indonesia's response to Panel question No. 16(b).

[157] Decree concerning the Appointment of Expert Committee in 2019 issued by Director General of Livestock and Animal Health, (Exhibit IDN-19).

[158] Indonesia's first written submission, para. 144.

[159] Decree concerning the Appointment of Expert Committee in 2019 issued by Director General of Livestock and Animal Health, second clause, point 4, (Exhibit IDN-19), page 13.

[160] Indonesia's first written submission, para. 142. As Indonesia explains, this Expert Committee reviews in the same way business unit approval requests.

[161] Indonesia's response to Panel question No. 18.

[162] See Indonesia's response to Panel question No. 16(e).

[163] Decree concerning the Appointment of Expert Committee in 2019 issued by Director General of Livestock and Animal Health, (Exhibit IDN-19), sixth clause.

[164] Decree concerning the Appointment of Expert Committee in 2014 issued by Director General of Livestock and Animal Health, (Exhibit IDN-13), fifth and sixth clause.

[165] Indonesia's response to Panel question No. 16(c).

experts is very hard" and this is why regular meetings have now been changed to every six months.[166]

7.81. As Indonesia explains, the previous Expert Committee, whose mandate ended on 14 February 2019 met only once between November and February, namely on 12 February 2019. Brazil's request was not reviewed at that meeting, because Indonesia applied the first-come, first-served principle: there were already around 20 other applications in the pipeline and due to the large number of documents, the Expert Committee could only review 17 of them.[167]

7.82. The current Expert Committee, according to Indonesia, after being composed in May, met for the first time on 17 June 2019 and this was when Brazil's request was reviewed. From the attendees list attached to the minutes of that meeting, we understand that this meeting was a joint meeting of experts and the Desk Review Team.[168]

7.83. With this understanding of what the desk review entails and how the process played out in the specific circumstances, we now turn to our assessment of whether the delay incurred is unwarranted or unjustifiable. We focus directly on the period between October 2018 and June 2019 when Brazil's request was with the Ministry of Agriculture in charge of processing it. We see two issues with the way Indonesia handled the process.

7.84. The first is the lack of resources coupled with issues of the design/set-up of the process itself. The reason why Brazil's request was not processed sooner, as per Indonesia's explanations, is essentially the lack of resources, both internal and external. Indonesia points to the small number of officials in the Desk Review Team and to the unavailability of the Expert Committee due to the experts' busy schedules. We observe that it is Members' responsibility to allocate resources to the institutional framework that they create so that they are in a position to discharge the obligations they have assumed under the WTO Agreement.[169] Thus, Indonesia has the responsibility to make sure that there is enough capacity to proceed without delay.[170] Therefore the relatively small number of desk review officials, does not exonerate Indonesia. As regards the outsourcing of parts of the process to outside expertise, as a matter of principle, we do not see a problem with such outsourcing. However, the Member's responsibility to discharge its obligations under the WTO Agreement remains. Therefore, in such a situation a Member has to make sure that the (outside) capacity is such that the process can be undertaken and completed without undue delay. Consequently, the outside experts' busy schedule does not exonerate Indonesia. We find relevant, in this regard, Canada's point that "undue delay in the operation of a procedure can arise from the design of the procedure itself".[171] While the procedure itself is not the measure at issue here, we point out that it may be the very design of the process – the number of outside experts and the extent of their involvement in the process – that has resulted in the delay that Indonesia is now responsible for.

7.85. We see another design problem in the set-up of the process itself. The involvement of an Expert Committee at the desk review stage seems to invite a level of substantive analysis that closely resembles the risk analysis stage. By front-loading that analysis to the desk review stage and, at the same time, involving the Expert Committee also in the subsequent stages of on-site visit and risk analysis, we see a risk of repetition, that in our view, could be avoided.[172]

7.86. The second issue is the lack of priority given to Brazil's request. It is clear from Indonesia's explanations that Brazil's request was treated like a regular request, namely on a first-come,

[166] Indonesia's response to Panel question No. 16(b).

[167] Indonesia's response to Panel question No. 16(a).

[168] Minutes of the Meeting from Director of Veterinary Public Health regarding the desk review result on Brazil's application on 17 June 2019, (Exhibit IDN-22), pp. 18-21. We have some trouble identifying more than four experts from the Expert Committee; at the same time, we note a large presence of Members of the Desk Review Team.

[169] See also Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1500, fn. 1290 and European Union's third-party submission, para. 67; Canada's third-party statement, para. 8.

[170] We note that there is no special and differential treatment for developing countries with regard to the obligation in Annex C(1)(a) to process requests without undue delay.

[171] Canada's third-party statement, para. 7.

[172] We note that MoA 42/2019 does not *necessarily* require in the input of the Expert Committee in every stage.

first-served basis.[173] The Desk Review Team does not seem to have given the request any special treatment; a special meeting of the Expert Committee was not organized nor was Brazil's request given any priority at the regular meeting of the Committee that took place on 12 February 2019. As we noted above, whether a delay is unwarranted or unjustifiable requires a case-by-case analysis as to the reasons for the alleged failure to act with appropriate dispatch.[174] What constitutes appropriate dispatch, therefore, may vary from one situation to the next. The specific situation at hand here is that Indonesia was under the obligation to comply with the DSB's recommendations and rulings in respect of the panel's undue delay finding. Canada, in this regard, points out that:

> [B]ringing oneself into compliance in the face of a finding of a violation arising from undue delay in the operation of an approval procedure calls for action by the Member concerned that is qualitatively different from what might be required to cure a substantive violation. This is because the very essence of the obligation in Annex C(1)(a) is timeliness. As a result, the gravamen of a violation of this obligation arises from the time lost. Any further delays only aggravate the situation created by the responding party.[175]

7.87. We agree with Canada that this means that a responding Member already found to have acted inconsistently with Annex C(1)(a) cannot pursue a "business-as-usual" approach, but must prioritize to ensure that the approval procedure advances without further delays.[176] Additional delays, even if they might otherwise have been "normal" are unjustifiable in this context and are, therefore, undue.

7.88. Based on our analysis of these two issues we find that the delay that Indonesia incurred in processing Brazil's updated questionnaire was unjustifiable and, therefore, undue.

7.3.7 Conclusion

7.89. We have found undue delay in the period between Brazil's submission of the updated questionnaire and panel establishment. Because of this finding we do not consider it necessary to decide whether there was also undue delay in the other instances that Brazil identified. Furthermore, as we explained in section 7.3.6.1 above if (and because) there is a finding of undue delay in the period leading up to panel establishment and given the non-completion of the procedure, we must conclude on non-compliance irrespective of the events that occurred after panel establishment.

7.90. Indonesia, therefore, will have to complete this approval procedure to end non-compliance with the DSB's recommendations and rulings. In this respect we emphasize that we do not call into question Indonesia's right to take measures to address the risk of salmonella (or any other risk identified in Annex A, paragraph 1 of the SPS Agreement), and that are consistent with its obligations under the SPS Agreement.

7.91. In conclusion, we find that Indonesia has caused further undue delay in the approval of the veterinary health certificate inconsistent with Article 8 and Annex C(1)(a) of the SPS Agreement.

7.4 Positive list requirement

7.4.1 Introduction

7.92. In this section we address Brazil's claims relating to the positive list requirement. Brazil describes this measure as concerning:

> Indonesian regulations governing the importation of meat, which prescribe the type of carcass for which an importer may obtain a Ministry of Agriculture Import Recommendation and Ministry of Trade Import Approval. Products that are not listed

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[173] Indonesia's first written submission, para. 140; Indonesia's response to Panel question No.16(a); see also Communication by Indonesia WT/DS484/18/Add.7 (Compliance Communication).

[174] Appellate Body Report, *Australia – Apples*, para. 437. See also Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495, finding that Annex C(1)(a) dictates that approval procedures should be undertaken and completed with no unjustifiable loss of time.

[175] Canada's third-party statement, para. 11.

[176] Canada's third-party statement, para. 11; see also Canada's third-party-response to Panel question No. 1, para.2; and Brazil's response to Panel question No. 2, para. 15.

> in the relevant appendices of the respective regulations cannot be the subject of either an Import Recommendation or an Import Approval.[177]

7.93. Brazil claims that the measure continues to inhibit the importation of poultry products into Indonesia in contravention of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Indonesia contests these allegations and maintains that the positive list requirement is consistent with both provisions.

7.94. We start by recalling the relevant findings of the panel in the original proceeding. We then briefly describe the measure that Indonesia has taken to comply with that panel's ruling and introduce the parties' arguments relating to the consistency of that measure with the two provisions. We follow with our analysis of the parties' positions. As explained in section 7.1 above, we will first deal with the current version of the measure and then turn to its earlier iteration.

7.4.2 Relevant findings in the original proceeding

7.95. Brazil stated that the scope of its complaint concerned five different chicken products.[178] With respect to three of these, Brazil challenged their non-inclusion in the appendices to the relevant MoA and MoT regulations. According to Brazil, this amounted to a prohibition on imports under Article XI:1 of the GATT 1994 and a quantitative import restriction under Article 4.2 of the Agreement on Agriculture.

7.96. The panel established that "[c]hicken cuts and other chicken products cannot be the subject either of an MoA Import Recommendation or an MoT Import Approval, because they are not listed in the relevant appendices of the respective regulations".[179] The panel then recalled that the term "prohibition" as used in Article XI:1 means "a legal ban on the trade or importation of a specified commodity".[180] The panel found on this basis that:

> [T]he positive list requirement qualifies as a "legal ban" because the direct legal consequence of not being listed as a product is that importation of that product is not allowed. The positive list requirement, therefore, is a prohibition within the meaning of Article XI.[181]

7.97. The panel also established that the positive list requirement was made effective through a licence and concluded that it was a prohibition on importation inconsistent with Article XI:1 of the GATT 1994.[182]

7.98. The panel further considered that it did not need to address Brazil's claim under Article 4.2 of the Agreement on Agriculture and exercised judicial economy on that claim.[183] Although the panel had to address various iterations of the measure, it reached the same conclusions for all of them.[184]

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[177] Request for the establishment of a panel by Brazil, WT/DS484/19 para. 7 (referring to Panel Report, *Indonesia – Chicken*, para. 7.103).

[178] Request for the establishment of a panel by Brazil, WT/DS484/8, fn.1:

> The products concerned in the present dispute are referred by the following HS codes of the Gallus Domesticus species: (i) 0207.11 (whole chicken, not cut into parts, fresh or chilled); (ii) 0207.12 (whole chicken, not cut into parts, frozen); (iii) 0207.13 (chicken cuts and offal, fresh or chilled); (iv) 0207.14 (chicken cuts and offal, frozen) and; (v) 1602.32 (chicken meat, other leftover meat and blood that has been processed or preserved).

[179] Panel Report, *Indonesia – Chicken*, para. 7.103.

[180] Panel Report, *Indonesia – Chicken*, para. 7.116 (citing Appellate Body Reports, *China – Raw Materials*, para. 319; and *Argentina – Import Measures*, para. 5.217).

[181] Panel Report, *Indonesia – Chicken*, para. 7.116.

[182] Panel Report, *Indonesia – Chicken*, paras. 7.117-7.118. The panel also rejected Indonesia's defence that the positive list requirement was necessary to ensure compliance with Indonesia's halal requirements. This issue does not arise in this dispute, as Indonesia is not raising any defence with respect to the challenged measures.

[183] Panel Report, *Indonesia – Chicken*, paras. 7.159-7.160.

[184] Panel Report, *Indonesia – Chicken*, paras. 7.168-7.172.

7.4.3 Whether the positive list requirement is consistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

7.99. In implementing the DSB's recommendations and rulings, Indonesia amended the relevant MoA and MoT regulations, maintaining the essential element of the measure: the requirement for products to be listed in the appendices to the regulations as a condition for being eligible for an Import Recommendation and an Import Approval.[185] As noted above, at issue in this proceeding are two successive versions of the positive list requirement. The first one is embodied in MoA 34/2016 as amended and MoT 29/2019;[186] the second in MoA 42/2019 and MoT 29/2019 as amended. The main difference between these two versions of the measure are the specific chicken products that Indonesia included in the list.

7.4.3.1 As enacted through MoA 42/2019 and MoT 29/2019 as amended (current version)

7.100. In the version currently in force, Indonesia has included the following chicken products in the lists annexed to MoA 42/2019 and to MoT 29/2019 as amended:

a. whole chicken, not cut into parts fresh or chilled (HS code 0207.11)[187];

b. whole chicken, not cut into parts, frozen (HS code 0201.12)[188];

c. chicken cuts and offal, fresh or chilled (HS code 0207.13)[189];

d. chicken cuts and offal, frozen (HS code 0207.14)[190]; and

e. chicken meat, other leftover meat and blood that has been processed or preserved (HS code 1602.32).[191]

7.101. These are all the products covered by the scope of the original proceeding, including the three products that Brazil had indicated in the original proceeding as not listed and, therefore, banned.

7.4.3.1.1 Outline of the parties' arguments

7.102. As in the original proceeding, the scope of Brazil's claim is limited to chicken meat and chicken products.[192] Brazil contends that including these products in the appendices does not remove the inconsistency of the positive list requirement with Article XI:1 of the GATT 1994[193] and Article 4.2 of the Agreement on Agriculture.[194] According to Brazil, adding these products to the list would not bring Indonesia into compliance because "the measure at issue is not the list itself but 'the requirement to be on [the] list in order to be allowed to be imported'".[195]

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[185] MoA 42/2019 (Exhibit IDN-1), Articles 6 b., 8 a. and 9(2); MoT 29/2019 as amended, (Exhibit BRA-15), Articles 13(1a)a. and 13(2a)a.

[186] Communication by Indonesia, WT/DS484/18 (Compliance Communication), (Exhibit IDN-8), p. 1; Communication by Indonesia, WT/DS484/18/Add.10 (Compliance Communication), (Exhibit IDN-24), p. 1.

[187] MoA 42/2019, (Exhibit IDN-1), Appendix II, p. 35; MoT 72/2019, (Exhibit IDN-2), Appendix III, p. 25.

[188] MoA 42/2019, (Exhibit IDN-1), Appendix II, p. 35; MoT 72/2019, (Exhibit IDN-2), Appendix III, p. 25.

[189] MoA 42/2019, (Exhibit IDN-1), Appendix II, p. 35; MoT 72/2019, Appendix III (Exhibit IDN-2), p. 25.

[190] MoA 42/2019, (Exhibit IDN-1), Appendix II, p. 35; MoT 72/2019, (Exhibit IDN-2), Appendix III, p. 25.

[191] MoA 42/2019, (Exhibit IDN-1), Appendix II, p. 36; MoT 72/2019, (Exhibit IDN-2), Appendix IV, p. 31.

[192] Brazil's response to Panel question Nos. 36 and 37.

[193] Brazil's first written submission, para. 180.

[194] Brazil's first written submission, paras. 192-197; see also Brazil's second written submission, paras. 122-124.

[195] Brazil's first written submission, para. 181 (quoting Panel Report, *Indonesia – Chicken*, para. 7.165).

7.103. Brazil maintains that "being on the list remains a legal condition for importation"[196] that amounts to a prohibition or, in the alternative, a restriction on imports within the meaning of Article XI:1.[197] For the same reason, the measure also continues to be a quantitative restriction on the imports of agricultural products under Article 4.2. of the Agreement on Agriculture.[198] Brazil concludes that to comply with the DSB's recommendations and rulings, Indonesia should have removed the positive list requirement altogether instead of adding certain products to the list.[199] Australia, New Zealand and the European Union concur with Brazil's conclusion.[200]

7.104. Indonesia, by contrast, considers that the inclusion of all relevant chicken products in the positive list is sufficient to achieve compliance with the DSB's recommendations and rulings.[201] According to Indonesia, the inclusion of these products in the list has removed the obstacle to obtaining an Import Recommendation and an Import Approval for these products and, by extension, allowed their importation.[202] In any event, Indonesia argues, in the alternative, that animals and animal products not on the list can be imported even without an Import Approval.[203]

7.105. Brazil also asks the Panel to rule on its claim under Article 4.2 of the Agreement on Agriculture, if the Panel were to find the measure consistent with Article XI:1 of the GATT 1994. Brazil considers, however, that if the Panel were to find the measure inconsistent with Article XI:1, the Panel retains discretion to exercise judicial economy on Brazil's claim under Article 4.2 in this situation, but notes that it is not required to do so.[204] Indonesia submits that the Panel need not make multiple findings of inconsistency of the same measure with several provisions and asks the Panel to exercise judicial economy in such a case.[205]

7.4.3.1.2 Whether the positive list requirement is a prohibition or a restriction on the importation of chicken meat and chicken products contrary to Article XI:1 of the GATT 1994

7.106. There are two issues that follow from the parties' arguments. Firstly, does the positive list requirement prohibit the importation of poultry products despite these products being included in the list? Secondly, in the alternative, does the positive list requirement restrict the importation of these products to Indonesia? We address these questions in turn.

7.4.3.1.2.1 Prohibition

7.107. The original panel explained the meaning of "prohibition" in Article XI:1 as "a legal ban on the trade or importation of a specified commodity".[206] In this dispute, the specified commodity are chicken meat and chicken products.[207] With the addition of these items to the list, Indonesia has made it possible for importers to obtain an Import Recommendation and an Import Approval. Brazil does not contest this fact. As a result, Indonesia has removed the legal impediment to the importation of chicken products that the original panel found to violate Article XI:1.

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[196] Brazil's second written submission, para. 114.

[197] Brazil's response to Panel question Nos. 38 and 39.

[198] Brazil's first written submission, paras. 195-196.

[199] Brazil's second written submission, para. 117; Brazil's response to Panel question No. 38, para. 121.

[200] European Union's third-party submission, paras. 17-22; New Zealand's third-party submission, para. 19; Australia's third-party statement, para. 13.

[201] Indonesia's first written submission, para. 16; see also Indonesia's second written submission, para. 4.

[202] Indonesia's first written submission, paras. 21-22 and 42-43; see also Indonesia's second written submission, para. 4.

[203] Indonesia's second written submission, paras. 14-16. Brazil replies that Indonesia's argument that animals and animal products not on the list can be imported even without Import Approval is not supported by the relevant regulations, lacks credibility, and is contradicted by Indonesia's own statements and actions. See Brazil's opening statement at the meeting of the Panel, paras. 55-60 (referring to Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.293).

[204] Brazil's second written submission, para. 126; see also Brazil's response to Panel question No 45, paras. 163-165.

[205] Indonesia's first written submission, para. 46; see also Indonesia's request for a preliminary ruling, paras. 25-26.

[206] Panel Report, *Indonesia – Chicken*, para. 7.116 (quoting Appellate Body Reports, *China – Raw Materials*, para. 319 and *Argentina – Import Measures*, para. 5.217).

[207] Brazil's response to Panel question No. 36.

7.108. Brazil nevertheless maintains that the prohibition of imports persists as long as the positive list requirement remains in place. This follows from Brazil's understanding of the original panel's ruling that "the measure is not the list itself, but 'the requirement to be on [the] list in order to be allowed to be imported'".[208] Relying on this statement, Brazil argues that as long as there is a requirement to be on the list, the measure amounts to a prohibition within the meaning of Article XI:1, regardless of whether or not specific products are on the list.[209]

7.109. In our view, Brazil's conclusions take the original panel's findings out of their context. The panel did not rule in the abstract that the positive list requirement constituted a legal ban; its conclusion was based on the absence of poultry products from the list. It was the impossibility of importation resulting from this absence that led the original panel to qualify the measure as a legal ban. In the same paragraph that Brazil relies on, the original panel recalled that:

> [T]he measure that is at issue in this dispute and that we have examined is the requirement for chicken meat and chicken products to be listed in the relevant appendices of Indonesia's regulations governing the importation of animal products, in order for their importation to be permitted.[210]

7.110. Like in the original proceedings, our focus is the market access for a specific commodity – chicken meat and chicken products. We cannot agree with Brazil that the positive list requirement is a legal ban on the importation of chicken products, despite these products being on the list. We understand that Brazil and certain third parties share concerns about the broader implications of the positive list requirement, including for other product categories.[211] Nonetheless, we remain bound by our mandate in this dispute.

7.111. In light of the foregoing, we do not view the positive list requirement embodied in the most recent legal instruments as a prohibition on the importation of chicken meat and chicken products. As a result, we do not see the need to address Indonesia's alternative argument that animals and animal products that are not on the list are not subject to Import Approval and can be imported.

7.4.3.1.2.2 Restriction

7.112. Having rejected Brazil's contention that the positive list requirement is a prohibition on imports of chicken products, we turn to Brazil's alternative argument that the measure restricts the importation of these products.

7.113. Brazil asserts that the measure creates uncertainty about the access for poultry products to the Indonesian market.[212] This uncertainty relates to the alleged possibility that Indonesia's authorities may add or remove products from the positive list as they please.[213] It discourages, in Brazil's view, poultry importers from selling foreign chicken in Indonesia, limiting, in effect, its importation.[214] Although Indonesia contests that the positive list requirement is a restriction on imports[215], it does not put forward any specific arguments in support of this position. This does not relieve us, however, from the duty to examine if Brazil has made a successful *prima facie* case.[216]

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[208] Brazil's first written submission, para. 181; Brazil's response to Panel question No. 38, para. 122 (quoting Panel Report, *Indonesia – Chicken*, para. 7.165).

[209] Brazil's first written submission, para. 181; see also Brazil's response to Panel question No. 38, para. 123.

[210] Panel Report, *Indonesia – Chicken*, para. 7.165.

[211] Brazil's second written submission, para. 117; see also Australia's third-party statement, paras. 11-13; New Zealand's third-party submission, para. 19; and European Union's third-party submission, paras. 19-20.

[212] Brazil's second written submission, para. 116; Brazil's response to Panel question No. 41, paras. 146-148.

[213] Brazil's second written submission, para. 116; Brazil's response to Panel question No. 41, paras. 149-150.

[214] Brazil's second written submission, para. 116.

[215] Indonesia's second written submission, para. 6.

[216] Panel Report, *US – Shrimp (Ecuador)*, para. 7.9. See also Appellate Body Report, *EC – Hormones*, para. 109.

7.114. As noted by the original panel, a "restriction" within the meaning of Article XI:1 is a condition that has a limiting effect on the importation of products.[217] As the Appellate Body observed "not every condition or burden placed on importation or exportation will be inconsistent with Article XI:1, but only those that … limit the importation or exportation of products".[218] A complainant does not need to quantify the measure's impact on trade flows to prove that it has limiting effects; showing that such effects stem from the measure's design would suffice.[219]

7.115. As argued by Brazil, a number of prior panels have regarded uncertainty as one of the factors capable of limiting the importation of goods.[220] These panels examined aspects of the measures that generated uncertainties and limited import opportunities.[221] Consistent with this approach, we will now assess if the possibility of removing poultry products from the list creates uncertainties for importers and exporters that could limit the importation of these products to Indonesia.

7.116. Brazil maintains that access to the Indonesian market is uncertain, because "products can shift from being permitted, to being prohibited, to being permitted again in a never ending cycle, at the stroke of a legislative pen".[222] Brazil and Australia point to a number of changes that the measure underwent in the course of the compliance proceeding, as well as before that, to illustrate the lack of predictability in terms of market access.[223] In Brazil's view, this uncertainty is exacerbated by the absence of any criteria that would circumscribe the discretion of Indonesian authorities in adding or removing products from the list.[224]

7.117. To us, Brazil's reasoning seems problematic. First and foremost, we do not see that the uncertainty that Brazil alludes to stems from the design of the measure itself. Brazil derives this uncertainty from the undefined discretion the Indonesian authorities allegedly enjoy in deciding on the removal of products from the list.[225] Yet, Brazil has not pointed to any specific element of the measure that could be the source of such discretion. Instead, this possibility seems to follow from the general competence of the Indonesian executive to regulate. As a result, we do not see how any uncertainty relating to the risk of products being taken off the list is rooted in the design of the measure itself. In that regard, we are concerned that following Brazil's logic would open to a challenge under Article XI:1 any measure, simply because national legislators or regulators have the power to modify, replace or remove it. This, in our view, would be an impermissible interference with Members' legislative and executive prerogatives.

7.118. In any event, we see the modifications to the measure that Brazil criticizes as primarily aimed at bringing Indonesia into conformity with the obligation in Article XI:1.[226] Brazil and certain

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[217] Panel Report, *Indonesia – Chicken*, para. 7.199; See also Appellate Body Reports, *China – Raw Materials*, para. 320; and *Argentina – Import Measures*, para. 5.217; Panel Reports, *India – Quantitative Restrictions*, para. 5.128; *India – Autos*, para. 7.270; and *Argentina – Import Measures*, paras. 6.250-6.251.

[218] Appellate Body Report, *Argentina – Import Measures*, para. 5.217.

[219] The text of Article XI:1 refers to restrictions or prohibitions "made effective through quotas, import or export licences or other measures". It thus requires the restriction to stem from the challenged measure itself. See Appellate Body Report, *Argentina – Import Measures*, paras. 5.217-5.218; and Panel Reports, *China – Raw Materials*, para. 7.917.

[220] Panel Reports, *Colombia – Ports of Entry*, para. 7.240; *China – Raw Materials*, para. 7.1081; *US – Poultry (China)*, para. 7.454; *Argentina – Import Measures*, para. 6.260; and *Indonesia – Import Licensing Regimes*, para. 7.224.

[221] In *Colombia – Ports of Entry*, the panel found that uncertainties for importers related to limiting the access for imported goods to only one seaport and one airport instead of 11 ports and, as a result, restricting "the number of opportunities for importers to deliver goods into Colombia". Panel Report, *Colombia – Ports of Entry*, paras. 7.272-7.274. In *Argentina – Import Measures*, "[t]he uncertainty was generated by the unwritten and discretionary nature of the requirements", which caused the importers not to know what requirements they would be subject to, under what circumstances and for how long. Panel Report, *Argentina – Import Measures*, para. 6.260. In *Indonesia – Import Licensing Regimes*, the importers did not know the price level activating a temporary halt on imports, which incentivized them "to limit the quantities they import to prevent the price falling below the activation threshold". Panel Report, *Argentina – Import Measures*, para. 7.222. In *China – Raw Materials*, the limiting effect of the measure was the possibility of the minimum export price being set at a level high enough that the exporter would not be able to find buyers and, as a result, export the product. Panel Reports, *China – Raw Materials*, para. 7.1081.

[222] Brazil's second written submission, para. 116.

[223] Brazil's second written submission, para. 116; see also Brazil's responses to Panel questions Nos. 41 and 42; Australia's third-party statement, paras. 6-9 and 12.

[224] Brazil's response to Panel question No. 41, para. 150.

[225] Brazil's response to Panel question No. 42, paras. 158-160.

[226] Indonesia's first written submission, paras. 8 and 21.

third parties complain that this process has been far from perfect.[227] Nonetheless, as far as we know, none of the amendments in question has removed any of the chicken products, or indeed any other product, from the list; instead they have added some. In fact, the only instance of a product being taken off the list indicated by Brazil and the third parties is bovine offal, removed in 2014.[228] In our view, this single example from six years ago is not enough to display the degree of uncertainty about access to the Indonesian market that could affect investment plans or otherwise limit the importation of chicken products.[229]

7.119. As a result, we find that Brazil has failed to substantiate its claim that the positive list requirement is a restriction on importation within the meaning of Article XI:1.

7.120. Concluding our analysis under Article XI:1, we find that Brazil has not demonstrated that the positive list requirement, in its current version, amounts to a prohibition or a restriction on the importation of chicken products contrary to Article XI:1 of the GATT 1994.

7.4.3.1.3 Whether the positive list requirement is a quantitative import restriction contrary to Article 4.2 of the Agreement on Agriculture

7.121. We now turn to Brazil's claim against the same measure made under Article 4.2 of the Agreement on Agriculture.[230] This provision prohibits Members from maintaining or adopting, with respect to agricultural products, "any measures of the kind which have been required to be converted into ordinary customs duties".[231] Among the examples of measures to which Article 4.2 applies, footnote 1 mentions "quantitative import restrictions".[232] This term shares textual similarities with "restrictions … on the importation of any product", prohibited by Article XI:1 of the GATT 1994. Both obligations apply to limitations on the quantity of imported products.[233] They also reflect a common objective of replacing volume- and price-distortive border measures with tariffs.[234] We agree, therefore, with prior adjudicators that "there is essentially no difference" between the two obligations.[235] It follows that addressing the same arguments of law and fact raised with respect to the same measure under Article XI:1 and Article 4.2 would require us to conduct the same analysis under both provisions.[236]

7.122. To substantiate its claim under Article 4.2, Brazil essentially repeats the arguments it has already made under Article XI:1:

[227] Brazil's first written submission, para. 166; see also Brazil's response to Panel question No. 42, paras. 160-161; New Zealand's third-party submission, para. 20; and Australia's third-party statement, para. 12.

[228] This happened a year before the original panel was established. Brazil's response to Panel question No. 41, para. 152; Australia's third-party statement, para. 11.

[229] Our approach is consistent with that taken by the compliance panels in *Colombia – Textiles*, which refused to qualify three changes to the measure within a little over a year at issue as "constant" and disagreed with the complainant that these modifications created uncertainty. Panel Reports, *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, para. 7.226.

[230] In its request for a preliminary ruling, Indonesia asked us not to rule on Brazil's claim under Article 4.2 of the Agreement on Agriculture, *inter alia,* because such findings would not be necessary to solve the dispute, if we were to find the positive list requirement inconsistent with Article XI:1. We have not found the current version of the positive list requirement to violate Article XI:1, and, therefore, we must address Brazil's claim against this measure under Article 4.2. For other arguments that Indonesia put forward in its requests for a preliminary ruling, see section 1.3.2 above as well as Annex D-1.

[231] The parties do not contest that the products in question fall with within the product scope of the Agreement on Agriculture, as defined in Annex 1 to that Agreement. See Brazil's second written submission, para. 122.

[232] Appellate Body Report, *Chile – Price Band System*, para. 209.

[233] Appellate Body Report, *Argentina – Import Measures*, fn 84.

[234] Appellate Body Reports, *Chile – Price Band System*, para. 200; and *Peru – Agricultural Products*, para. 5.39; Panel Report, *Turkey – Textiles*, para. 9.63.

[235] Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.15. Although Article 4.2 applies to a narrower category of products, the substance of both obligations remains the same.

[236] Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.16.

a. The positive list requirement limits the quantities of products that can be imported, because products not listed in the relevant annexes cannot obtain an Import Recommendation and an Import Approval.[237]

b. The measure has "'characteristics in common with a quantitative import restriction' and limits the opportunities for importation into the Indonesian market."[238] According to Brazil, this characteristic of the positive list requirement has not changed with the addition of chicken meat and chicken products to the relevant appendices.[239]

7.123. Brazil's claim under Article 4.2 is thus identical to the claim under Article XI:1 in all relevant aspects: the challenged measure, the underlying facts, and the arguments raised to prove the violation. Indonesia too makes the same arguments to contest Brazil's claim.[240] As a result, the outcome of our analysis will also necessarily be the same under both provisions. Therefore, for the reasons explained in section 7.4.3.1.2 above, we find that Brazil has equally not demonstrated that the positive list requirement is a quantitative import restriction prohibited in Article 4.2 of the Agreement on Agriculture.

7.4.3.2 As enacted through MoA 34/2016 as amended and MoT 29/2019 (version at panel establishment)

7.124. We now address Brazil's claims made under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture against the version of the positive list requirement in force at panel establishment. This iteration of the measure was embodied in MoA 34/2016 as amended and in MoT 29/2019.

7.125. The essence of the measure, i.e. the requirement to be on the list in order for a product to be allowed for importation, was the same at panel establishment as it is in the current version of the measure. But the products listed at that time in the appendices to the regulations were different. With the adoption of MoT 29/2019, Indonesia added all five chicken products that were the focus of the original proceeding to the list appended to that regulation.[241] However, it only included four of these products in the relevant appendices to MoA 34/2016. One product – other prepared or preserved chicken meat, chicken offal or blood – was still missing from the list in that regulation.[242] Furthermore, similar to the last version at issue in the original proceeding, Indonesia added a provision, Article 7(A) of MoA 34/2016, on importation of products outside of the list.

7.126. We first assess if this measure is consistent with Article XI:1 and then move to Article 4.2.

7.4.3.2.1 Whether the positive list requirement is a prohibition or restriction on the importation of products contrary to Article XI:1 of the GATT 1994

7.127. As with the amended measure, Brazil maintains that the positive list requirement in its earlier version continued to qualify as a legal ban and that the addition of certain chicken products to the list did not rectify its inconsistency with Article XI:1.[243] In Brazil's view, a separate provision allegedly allowing importation of products that are not on the list cannot change this characterization of the measure.[244] Indonesia does not put forward any arguments with respect to this version of the measure. As noted above, this does not relieve us, however, from the duty to examine if Brazil has made a successful *prima facie* case.

[237] Brazil's first written submission, paras. 194-196; see also Brazil's second written submission, para. 123.
[238] Brazil's first written submission, para. 196. see also Brazil's second written submission, para. 123.
[239] Brazil's first written submission, para. 196.
[240] Indonesia's first written submission, para. 48.
[241] Republic of Indonesia, Ministry of Trade, Regulation 29/2019 (Exhibit BRA-15), p. 41; The four products were (i) whole chicken, not cut into parts fresh or chilled; (ii) whole chicken, not cut into parts, frozen; (iii) chicken cuts and offal, fresh or chilled; and (iv) chicken cuts and offal, frozen See also Brazil's first written submission, para. 180.
[242] See MoA 23/2018, (Exhibit BRA-11), p. 48.
[243] Brazil's first written submission, paras. 178-181.
[244] Brazil's first written submission, para. 177.

7.128. Earlier in this Report, we found Brazil's arguments unpersuasive insofar as all the relevant poultry products are currently included in the list.[245] At the time this Panel was established, four of the relevant chicken products were on the list and importers could obtain import documents for these products.[246] It follows that, like in the current version of the measure, Indonesia has removed the obstacle for importation of these four specific products. However, as Brazil rightly points out, the relevant annexes to MoA 23/2018 did not include at the time of panel establishment one of the products of interest, i.e. other prepared or preserved chicken meat, chicken offal or blood.[247] Hence, importers of this fifth product could not obtain an Import Recommendation and, by extension, an Import Approval. The positive list requirement operated thus as a legal ban with respect to other prepared or preserved chicken meat, chicken offal or blood.

7.129. We, therefore, find that Brazil has made a valid *prima facie* case[248] and, therefore, conclude that the positive list requirement, in the version in force at panel establishment, was inconsistent with Article XI:1 insofar as other prepared or preserved chicken meat, chicken offal or blood were not included in the list.[249]

7.4.3.2.2 Whether the positive list requirement is a quantitative import restriction contrary to Article 4.2. of the Agreement on Agriculture

7.130. Having found the positive list requirement to be inconsistent with Article XI:1 of the GATT 1994, the original panel exercised judicial economy on Brazil's claim under Article 4.2 of the Agreement on Agriculture.[250] The panel considered its findings under Article XI:1 sufficient to secure a positive solution to the dispute.[251] We see no reason to deviate from the original panel's approach. In light of our conclusion that the version of the positive list requirement existing at the time of panel establishment was inconsistent with Article XI:1, we do not find it necessary to address Brazil's claim under Article 4.2 with respect to that measure in order to secure a positive solution to this dispute.

7.4.4 Conclusion

7.131. In light of the foregoing, we conclude that Brazil has not demonstrated that the positive list requirement, in its current version, amounts to a prohibition or a restriction on the importation of chicken products inconsistent with Article XI:1 of the GATT 1994. Brazil has also not shown that the measure is a quantitative import restriction on agricultural products prohibited under Article 4.2 of the Agreement on Agriculture.

7.132. Regarding the version of the positive list requirement that existed at panel establishment, we conclude that it was a prohibition inconsistent with Article XI:1 of the GATT 1994, insofar as other prepared or preserved chicken meat, chicken offal or blood were not included in the list.

7.5 Intended use requirement and its enforcement provisions

7.5.1 Introduction

7.133. In this section we address Brazil's claims regarding the intended use requirement and its enforcement provisions. In line with the original panel's description, Brazil identifies the intended use requirement as "limit[ing] the uses of imported chicken meat and chicken products in the

[245] See para. 7.109 above.

[246] See fn 210 to para. 7.125 above.

[247] MoA 42/2019, (Exhibit IDN-1), p. 37.

[248] We take the view that Brazil was not required to make arguments on Article 7(A) of MoA 34/2016 in order to make a valid *prima facie* case on the positive list requirement. It would have been Indonesia's responsibility to raise this provision as factual rebuttal that the positive list requirement operates as a ban. Indonesia has not done so. In any event, similar to the original proceeding, we find Article 7A to be non-operational because even if an importer could obtain an Import Recommendation on this basis, it could not obtain an Import Approval for non-listed products pursuant to Articles 12(1), 10(1) and 13(1a) of MoT 29/2019, see also Panel Report, *Indonesia- Chicken*, para. 7.165.

[249] Panel Report, *Indonesia – Chicken*, para. 7.116.

[250] Panel Report, *Indonesia – Chicken*, paras. 7.159-7.160.

[251] Panel Report, *Indonesia – Chicken*, para. 7.160.

Indonesian market to specific 'intended uses' as identified in the relevant Indonesian regulations".[252] Under the terms of the intended use requirement at issue in the present compliance proceeding, an importer may sell frozen chicken products only to places that have cold chain storage. Brazil's claims focus on certain enforcement provisions regarding the intended use requirement. Brazil alleges a violation of Articles III:4 and XI:1 of the GATT 1994. Indonesia requests the Panel to reject these claims.

7.134. We first summarize the relevant findings in the original proceeding before turning to Indonesia's measure taken to comply. Our analysis will first concentrate on the current version of the measure, followed by an analysis of the version in force at panel establishment.

7.5.2 Relevant findings in the original proceeding

7.135. At issue in the original proceeding were two successive versions of the intended use requirement, both of which Brazil challenged under Articles III:4, XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. The first version required intended uses to be limited to hotels and modern markets only, thereby excluding sales in open-air, so-called wet markets altogether; the second, enacted through MoA 34/2016, allowed for intended uses in all markets but on the condition that cold storage facilities were provided. We focus on the relevant findings of the original panel in respect of this latter version as the one relevant to Indonesia's implementation.

7.136. The panel established that Article III:4 was applicable on the grounds that an equivalent domestic measure existed similarly imposing a cold storage requirement on the sale of frozen and chilled domestic chicken in markets.[253] The panel identified this equivalent domestic measure to be MoA Decree 306/1994.[254]

7.137. The panel first considered the cold storage requirement itself and examined whether it resulted in less favourable treatment between imported frozen chicken and domestic fresh chicken, as argued by Brazil. The panel found that frozen and fresh chicken were not "like" products in the specific circumstances envisaged by the cold storage requirement and therefore rejected Brazil's argument.[255]

7.138. The panel then turned to the enforcement provisions which Indonesia had newly enacted through the second version of the intended use requirement. The panel identified these to be certain sanction provisions[256] as well as the requirement to submit a distribution plan (detailing the country of origin, type of meat, to whom the goods would be sold in what quantity and at what price)[257] and a weekly distribution report (reporting *inter alia*, on the details set out in the distribution plan).[258]

7.139. Examining these enforcement provisions and comparing them to the relevant provisions applying to domestic frozen and chilled chicken, the panel found that they resulted in less favourable treatment of imported chicken on three grounds. First, the panel found that stricter sanctions applied to importers than to sellers of domestic chicken, where chicken was sold in contravention of the cold storage requirement.[259] The relevant sanction provided for a temporary suspension of the Import Recommendation for one year after written warning where an importer "conduct[s] importation of type/category of carcass, meat and/or their processed products other than what is stated in the Recommendation".[260] As the panel found, "domestic sellers who would sell frozen or chilled chicken without respecting the cold storage requirement, d[id] not face a comparable sanction – if any sanction at all". Furthermore, the panel noted that "Indonesia ha[d] not referred to any sanction

[252] Request for the establishment of a panel by Brazil, WT/DS484/19, para. 10; see also Panel Report, *Indonesia – Chicken*, para. 7.176.

[253] Panel Report, *Indonesia – Chicken*, paras. 7.291 and 7.296.

[254] Panel Report, *Indonesia – Chicken*, para. 7.193.

[255] Panel Report, *Indonesia – Chicken*, para. 7.320.

[256] Panel Report, *Indonesia – Chicken*, paras. 7.268 and 7.272.

[257] Panel Report, *Indonesia – Chicken*, para. 7.270.

[258] Panel Report, *Indonesia – Chicken*, para. 7.271.

[259] Panel Report, *Indonesia – Chicken*, para. 7.326.

[260] Panel Report, *Indonesia – Chicken*, para. 7.326, referring to Articles 38(4) and 32(1)(b) of MoA 34/2016. The panel had also noted a similar sanction provision in Article 38(1) for a breach of Article 4(6) of MoA 34/2016, see Panel Report, *Indonesia – Chicken*, para. 7.268.

that could apply to the domestic distributor who sold the frozen chicken to the seller in the traditional market".[261]

7.140. Second, the panel found that the requirement to submit a distribution plan and a weekly distribution report effectively bound the importer to sell to the buyer identified therein, making it impossible for the importer to switch within allowed uses. That restriction, which had no equivalent in the regulation of the domestic market, resulted, in the view of the panel, in less favourable treatment *vis-à-vis* imported chicken.[262]

7.141. Third, the panel found that the burden and cost on importers of having to submit a distribution plan and a weekly distribution report resulted in less favourable treatment in respect of imported chicken, as there was no comparable burden and cost on domestic sellers of chicken.[263]

7.142. Accordingly, the panel found a violation of Article III:4.[264] Turning to Brazil's claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture the panel applied judicial economy leaving open the question whether the application of Article XI:1 was excluded because of the applicability of Article III:4.[265]

7.5.3 Whether the intended use requirement is inconsistent with Articles III:4 and XI:1 of the GATT 1994

7.143. In implementing the DSB's recommendations and rulings in respect of the above findings, Indonesia has maintained the intended use requirement with reference to cold storage, which, as seen above, the original panel did not find to be inconsistent with Article III:4. Thus, the relevant regulations define permissible uses for imported products that utilize cold chain handling/storage (hereinafter "cold storage"), and this is explicitly stated in both the Import Recommendation and the Import Approval.[266] Indonesia's measure taken to comply amends the enforcement provisions of the intended use requirement. Brazil's claims are exclusively focused on these enforcement provisions. The equivalent domestic measure referred to in the original proceeding has not been amended.[267]

7.144. As noted above, Indonesia modified or replaced after panel establishment the legal instruments embodying this (as well as other) measure(s). There are thus two versions of the enforcement provisions of the intended use requirement, one enacted through MoA 34/2016 as amended by MoA 23/2018, and one enacted through MoA 42/2019 and MoT 29/2019 as amended. As we explained in section 7.1 above, we first address the version currently in force, as enacted through MoA 42/2019 and MoT 29/2019 as amended.

7.5.3.1 As enacted through MoA 42/2019 and MoT 29/2019 as amended (current version)

7.145. In its current form, the intended use requirement enacted through Article 43 of MoA 42/2019 and Article 22 of MoT 29/2019 as amended is limited to the product being destined for use by entities that utilize cold storage. The condition no longer requires submission of a distribution plan or weekly distribution report. There are, however, certain sanction provisions (different from the ones at issue in the original proceeding) the meaning and relevance of which is contested between the parties.

[261] Panel Report, *Indonesia – Chicken*, para. 7.326.

[262] Panel Report, *Indonesia – Chicken*, paras. 7.327-7.328.

[263] Panel Report, *Indonesia – Chicken*, para. 7.329.

[264] The panel then briefly considered Indonesia's invocation of Article XX(b) and (d) and found that Indonesia had not put forward a *prima facie* case justifying the specific violation at issue, see Panel Report, *Indonesia – Chicken*, para. 7.334.

[265] Panel Report, *Indonesia – Chicken*, para. 7.336.

[266] MoA 42/2019, (Exhibit IDN-1), Article 40(k); and MoT 72/2019, (Exhibit IDN-2), Article 15(A)(h). Both regulations provide for two different categories of uses, namely "general purpose" and "special purposes". On the difference, see below section 7.5.3.1.2.1

[267] Brazil's response to Panel question No. 23, para. 68; Indonesia's comment on Brazil's response to Panel question No. 23, paras. 26-27.

7.5.3.1.1 Outline of parties' arguments

7.146. Brazil, directly referring to the relevant findings of the panel in the original proceeding, bases its claims under Articles III:4 and XI:1 on two assertions, namely that: (1) it remains impossible for the importer to switch "between" and "among" end uses; and (2) that harsher sanctions continue to apply to importers where they breach the intended use requirement.[268]

7.147. Indonesia rejects both assertions arguing that (1) importers are free to switch within uses; and (2) no sanction provisions under either regulation apply to the situation of an importer not complying with the terms of the Import Recommendation as regards the intended use requirement or its enforcement provisions.[269]

7.148. Among the third parties, only the European Union comments on the intended use requirement essentially supporting Brazil's arguments.[270]

7.5.3.1.2 Analysis of the Panel

7.149. The parties' arguments turn mainly on the meaning of the relevant provisions in MoT 29/2019 (and to some extent in MoA 42/2019).[271] Because the parties' arguments reflect disagreement on the meaning of Indonesia's law, it is our task to examine its meaning objectively and based on the available evidence.[272]

7.5.3.1.2.1 Switching uses

7.150. Brazil's arguments regarding the alleged impossibility to switch "between" and "among" uses initially covered both categories of "uses" identified in Article 43 of MoA 42/2019, namely (1) "general purpose", which is defined as covering "hotel, restaurant, catering, industry, market, and/or other places"[273] and (2) "special purpose" which is defined as covering a number of non-commercial uses.[274] In later submissions, however, Brazil abandoned the reference to "special purpose".[275]

7.151. In respect of the "general purpose", Brazil's claim was premised on the understanding that the importer, in the Import Recommendation and Import Approval, would have to state a specific end-use (e.g. "hotel") and would then be bound to that specific end-use once importation has occurred.[276] Indonesia, however, clarified that the intended use as recorded in an Import Recommendation features the whole list (i.e. "hotel, restaurant, catering, industry, market and/or other places") and that that list "covers virtually any place with cold storage facilities that importers want to sell the imported animal product to."[277] In support of this statement Indonesia submitted examples of Import Recommendations and Import Approvals, which show the "intended use" recorded as the whole list of possible "general purpose" uses.[278] In light of this evidence, Brazil

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[268] Brazil's second written submission, paras. 140-145.

[269] Indonesia's first written submission, para. 105; Indonesia's second written submission, paras. 46 and 49; Indonesia's opening statement at the meeting of the Panel, para. 29.

[270] European Union's third-party submission, section III. Japan focuses on the applicable legal standard under Article III:4 and only comments in passing on the merits of Brazil's arguments under this claim, see Japan's third-party submission, para. 9.

[271] See fn. 284 below.

[272] See Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.445-4.446 with further references.

[273] See MoA 42/2019, (Exhibit IDN-1), Article 43(2).

[274] See MoA 42/2019, (Exhibit IDN-1), Article 43(3). These uses are:

a. Gifts for worship, social or disaster management purposes;

b. Foreign country representatives/international institutions together with their officials who work in Indonesia, purposes;

c. Research and development purposes; or

d. samples that are not intended for sale (exhibition purposes) up to 200 (two hundred) kilograms.

[275] Brazil's response to Panel question No. 25, para. 73.

[276] Brazil's second written submission, para. 140.

[277] Indonesia's second written submission, para. 46; Indonesia's opening statement at the meeting of the Panel, para. 30.

[278] See Samples of two sets of Import Recommendations and Import Approvals, (Exhibit IDN-44).

stated that if this was the case for every Import Recommendation, it would no longer pursue its argument regarding the alleged impossibility of switching uses.[279]

7.152. We believe that Indonesia has sufficiently demonstrated that "general purpose" intended use as recorded on the Import Recommendation and on the Import Approval lists all permissible uses ("hotel, restaurant, catering, industry, market, and/or other places"), which, therefore, allows an importer to freely choose from the list. Consequently, we do not need to further examine this aspect of Brazil's claim.

7.5.3.1.2.2 Sanctions

7.153. Brazil's argument regarding stricter sanctions initially addressed generally the situation that the importer would deviate from the intended uses set out in the Import Recommendation and Approval.[280] Indonesia has clarified that general purpose uses are all stated in the import documents (see preceding section), and that an importer does not deviate from the licence terms when switching uses since all possible uses are listed. The question of sanctions, therefore, no longer arises for this scenario.

7.154. However, the question remains whether in deviating from the licence terms by breaching the cold storage requirement the importer faces stricter sanctions than those applied to domestic sellers or distributors.[281] This is what the panel in the original proceeding had found to be the case. While the specific sanction provisions at issue in the original proceeding no longer exist, Brazil refers to other sanction provisions. Specifically, Brazil mentions Article 28(a) of MoT 29/2019 as amended, which, it argues, applies to a breach of the cold storage requirement.[282] At the Panel's substantive meeting with the parties, Brazil also referred to Article 31 of MoT 29/2019 as amended as an applicable sanction provision.[283]

7.155. Indonesia submits that sanctions no longer apply to non-conformity with the obligations related to the intended use requirement[284] and, more specifically, that neither of the two provisions Brazil raised is applicable to a breach of the cold storage requirement.[285] Indonesia argues that the importer, under both regulations at issue, is subject to a cold storage obligation only for its own transport to, and storage in, the warehouse, but not for sales in the market (i.e. to wholesalers or retailers).[286] With regard to the two provisions, Indonesia argues that they do not capture, as per their meaning, the situation of a breach of the cold storage requirement in the market.[287] Indonesia also submits that the Panel should not assess Article 31, because Brazil had only raised it at the substantive meeting with the parties.[288]

7.156. We first turn to the question whether the importer's responsibility for cold storage extends to sales in the market. If it does not, then we would not need to examine the specific provisions raised. If there is no cold storage requirement on the importer for sales in the market, there could

[279] Brazil's response to Panel question No. 25, para. 73.

[280] Brazil's first written submission, paras. 111-113; Brazil's second written submission, para. 145.

[281] Brazil's opening statement at the meeting of the Panel, paras. 74-77.

[282] Brazil's opening statement at the meeting of the Panel, para. 76; Brazil's response to Panel question No. 29, paras. 79-84; see also Brazil's second written submission, para. 145.

[283] Brazil's response to questioning by the Panel at the meeting; see also Brazil's opening statement at the meeting of the Panel, para. 76, fn. 74.

[284] Indonesia points to the "administrative sanction" provision in Article 53 of MoA 42/2019 to demonstrate that it does not cover the case of any deviation from intended uses; see Indonesia's first written submission, para. 100. Brazil has not raised this provision (nor, for that matter, directly rebutted Indonesia's argument in its second written submission) but in reply to a question from the Panel submits that it also applies to the breach of the cold storage requirement, see Brazil's response to Panel question No. 29. We do not consider that Article 53 is among the provisions that we need to examine, since Brazil has not raised it. In any event, we agree with Indonesia that it is not applicable to a breach of the cold storage requirement. While it covers the situation that an importer would "do Importation [without] an importation approval" [reference to Article 5(1) of MoA 42/2019] we do not see a breach of the cold storage requirement to constitute "importation without import approval".

[285] Indonesia's response to Panel question No. 29.

[286] Indonesia's response to Panel question No. 28.

[287] Indonesia's response to Panel question No. 29.

[288] Indonesia's comments on Brazil's response to Panel question No. 29, para. 37.

not be any sanction to enforce it. Therefore, only if we find there is such a requirement, would we address the sanction provisions at issue.

Whether the cold storage requirement applies to sales in the market

7.157. Indonesia submits that the "importer's responsibility for cold storage requirement is only from the moment importer received the goods at the port of entry until the goods are transferred to their warehouse".[289] Indonesia refers to Article 13(1) of MoT 29/2019 as amended which requires an importer to provide "evidence on the control of cold storage and refrigerated transportation equipment".[290] Indonesia thus argues that the importer's responsibility for cold storage under MoT 29/2019 as amended does not extend to sales in the market. According to Indonesia, if an importer were to sell directly in the market, it would be subject to domestic regulation on monitoring food safety.[291]

7.158. Brazil submits that Indonesia's position is contradicted by the original panel's findings, is not supported by the text of Indonesia's regulations and cannot be reconciled with evidence submitted by Indonesia in this proceeding.[292]

7.159. If Indonesia's position were correct, then there would be no need for us to review the sanction provisions discussed between the parties, as it would be clear that they do not apply to the scenario discussed here. If there is no cold storage requirement on the importer in respect of sales in the market, there could not be any sanction to enforce it.

7.160. We agree with Indonesia that Article 13(1)(d) of MoT 29/2019 as amended contains a requirement for the importer to submit proof of possession of cold storage and refrigerated transportation equipment for its own transport and storage in the warehouse.[293] A similar clause is contained in Article 7(1)(f) of MoA 42/2019 requiring a "stamped certificate of cold storage possession that already has NKV and refrigerated transportation".[294] Indonesia, therefore, is right, that the importer has a cold storage obligation for its own transportation and storage. However, that is not the cold storage requirement at issue in this case. Both Article 22 of MoT 29/2019 as amended and Article 43 of MoA 42/2019 refer, *in addition*, to the cold storage requirement, not of the *importer*, but of the *buyer* of the imported animal product. As noted previously, both regulations, in the respective provision on "intended uses" feature a clause referring to the cold chain storage or cold chain handling used by the recipient of the imported goods.[295] Thus, Article 22 of MoT 29/2019 states:

> (1) The use of Types of Animal Products as listed in Appendix III and Appendix IV, which are an integral part of this Ministerial Regulation, are intended for general purpose *using cold chain handling and special purpose using cold chain facility*.[296]
>
> (2) General purpose as referred to in paragraph (1) is for hotel, restaurant, catering, industry, market and/or other places.

7.161. Article 43 of MoA 42/2019, for its part, states:

> (1) Intended use as referred to in Article 40 letter k is for carcass, Meat, Edible Offal, and/or its Processed Products *that utilize cold chain storage*, which involves general and special purposes.[297]

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[289] Indonesia's response to Panel question No. 28.
[290] Indonesia's response to Panel question No. 28.
[291] Indonesia refers to MoA 14/2008 concerning Supervision and Testing Guidelines on the Safety and Quality of Animal Products but has not submitted a copy of this legislation. See Indonesia's response to Panel question No. 28. On this point, see also para. 7.186 below.
[292] Brazil's comments on Indonesia's response to Panel question No. 28, para. 102.
[293] See the text in para. 7.168 below. From what we can see, the word "control" refers to a word in Bahasa that is also translated as "possession".
[294] See MoA 42/2019, (Exhibit IDN-1).
[295] See para. 7.143 above.
[296] See MoT 72/2019, (Exhibit IDN-2). (emphasis added)
[297] MoA 42/2019, (Exhibit IDN-1). (emphasis added)

> (2) General purpose as referred to in paragraph (1) is for hotel, restaurant, catering, industry, market and/or other places.

7.162. Furthermore, both regulations require that the "intended use" is stated in the Import Recommendation and Import Approval.[298] The examples of Import Recommendations and Import Approvals that Indonesia provided include references to *buyers* with cold storage. The examples of Import Approvals also show that such cold storage is stated as a condition/limitation on the scope of the approval granted: "The imported fresh animal products *can only be used* for hotel, restaurant, catering, industry, market and/or other places with cold storage facilities."[299] In other words, the terms of the Import Approval do not cover use of the imported animal product by hotels, restaurants and markets that do *not* have cold storage facilities.

7.163. We see the wording and structure of these provisions to be very similar to Article 31(1) of MoA 34/2016, which was the provision at issue in the original proceeding. It defined "purpose of usage" as being for "hotels, restaurants, caterings, industries, markets *with cold chain facilities*, and other special needs".[300] In respect of this requirement, Indonesia confirmed, and the original panel accordingly found, that the importer was subject to relevant sanctions under the MoA regulation when selling chicken meat and chicken products at a market without cold chain facilities.[301] We, therefore, agree with Brazil that "Indonesia's assertion that an importer is not responsible for the cold storage requirement beyond transportation from the port to its warehouse is … inconsistent with the adopted findings of the original panel."[302]

7.164. Based on our reading of the relevant provisions both in MoT 29/2019 as amended and in MoA 42/2019, the evidence submitted by Indonesia, as well as the historical context of those provisions, we find that there is a requirement on the importer to sell only to places with cold storage facilities. A separate question is what enforcement provisions there are to enforce this requirement. We turn to this question next.

Whether Article 28(a) of MoT 29/2019 as amended applies to breach of cold storage requirement

7.165. Article 28(a) of MoT 29/2019 as amended states as follows:

> Export and Import Approvals are revoked if Export or Importer
>
> a. is proven to submit incorrect data and/or information as requirements for obtaining Export Approval and Import Approval;[303]

7.166. Brazil argues that an importer submits data and/or information on the control of cold storage, when applying for Import Approval, referring to Article 13(1)(d) of MoT 29/2019.[304] According to Brazil, this information allows the Import Approval to be issued with the allowed intended use stated as per Article 15A of MoT 29/2019. If an importer then sells the chicken to a market or other place that does not have cold storage facilities, the importer would be deviating from data/information that it supplied when seeking to obtain an Import Approval and, therefore, would be deemed to have submitted incorrect data and/or information.[305]

7.167. Indonesia contends that the data/information to be submitted as "requirements for obtaining" an Import Approval are those set out in the list in Article 13 of MoT 29/2019. Article 28(a) only applies, according to Indonesia, if false information is submitted with regard to any item on

[298] See MoA 42/2019, (Exhibit IDN-1), Article 40, and MoT 72/2019, (Exhibit IDN-2), Article 15(A).

[299] See Samples of Import Recommendation and Import Approval, (Exhibit IDN-44). As Brazil points out, both documents also contain a reference to sanctions applying if the importer does not comply with the relevant regulations, see Brazil's comments on Indonesia's response to Panel question No. 28, para. 106. (emphasis added)

[300] Panel Report, *Indonesia – Chicken*, Table 3 after para. 7.177. (emphasis added)

[301] Panel Report, *Indonesia – Chicken*, para. 7.326.

[302] Brazil's comments on Indonesia's response to Panel question No. 28, para. 108.

[303] MoT 72/2019, (Exhibit IDN-2); see also MoT 29/2019, (Exhibit BRA-15).

[304] See Brazil's response to Panel question No. 29, paras. 81-82; see also Brazil's comments on Indonesia's response to Panel question No. 28, para. 108. We note that the correct reference should be Article 13(1)(c), not (d).

[305] Brazil's response to Panel question No. 29, paras. 81-82.

that list, which does not refer to intended uses. Indonesia explains that the reference to evidence of control of cold storage contained in the list in Article 13 concerns the cold storage of the importer itself, not of the distributor or retailer who buys from the importer.[306]

7.168. Article 28(a) concerns data or information that the importer submits in order to obtain the Import Approval. If that data or information is proven to be incorrect, Article 28(a) applies. We understand the term "data" to refer to "an item of information" and the term "information" to refer to "knowledge communicated concerning a particular fact".[307] The question is whether, and if so, in which circumstances, an importer selling to a market or other place that does not have cold storage facilities could be considered to have submitted incorrect data or information concerning that sale at the moment of applying for the Import Approval. We understand both parties to accept that Article 13 of MoT 29/2019 is the provision that contains the "requirements" to be submitted for obtaining an Import Approval. Article 13 states as follows:

> (1) ...
>
> d. Evidence on the control of cold storage and refrigerated transportation equipment to Import products as listed in Appendix III and IV, except for the import of processed meat ready for distribution which does not require refrigerated facilities, as described in the information labels on products, or other processed products that do not need refrigerated facilities;
>
> …
>
> (1a) In addition to attaching the requirements as referred to in paragraph (1), Importers holding NIB that apply as API must also attach:
>
> a. Recommendation from the Minister of Agriculture or officials appointed by the Minister of Agriculture on the Importation of Animal Types and Animal Products as listed in Appendix II and Appendix III which are an integral of this Ministerial Regulation; ...[308]

7.169. In respect of this list, the parties have discussed the relevance of the reference to cold storage in Article 13 letter (d) of MoT 29/2019 as amended. We agree with Indonesia that the reference to evidence of control of cold storage in Article 13(1)(d), contrary to what Brazil argues, is not the cold storage requirement that we are considering here. As noted in paragraph 7.161 above, this provision refers to an importer's own cold storage obligation for transport and warehouse; it is, thus, different from the cold storage requirement set out in Article 22 of MoT 29/2019 as amended, which refers to the market or other place to which the importer sells the frozen chicken.

7.170. The list contained in Article 13(1), therefore, does not contain a direct reference to the buyer's cold storage requirement as derived from Article 22. However, it contains an indirect reference to that requirement elsewhere in the provision: Article 13(1a)(a) as set out above, requires the importer to submit an Import Recommendation when applying for the Import Approval. As noted previously, Article 40(k) of MoA 42/2019 requires that the Import Recommendation contains the intended use, and that reference not only lists all the general purpose uses but also explicitly refers to the requirement that the market or other place in question needs to have cold chain facilities.[309] The importer in submitting the Import Recommendation with its application for the Import Approval therefore provides information on the commitment it has undertaken to sell only to places with cold chain facilities.

7.171. To the extent it can be proven that the importer lied about that commitment – by intending to sell to a place without cold chain facilities – the information submitted would be incorrect. On the

[306] Indonesia's comments on Brazil's response to Panel question No. 29, para. 33.

[307] Oxford English Dictionary Online, definition of "data", available at: <http://www.oed.com, https://oed.com/view/Entry/296948?rskey=YueFdz&result=1&isAdvanced=false#eid, definition of "information", https://oed.com/view/Entry/95568?redirectedFrom=information#eid, accessed 29 April 2020.

[308] See MoT 72/2019, (Exhibit IDN-2).

[309] See above, para. 7.162

basis of this reading, we, therefore, conclude that Article 28(a) would apply to a breach by the importer of the cold storage requirement contained in Article 22.

Whether Article 31 of MoT 29/2019 as amended applies to breach of cold storage requirement

7.172. Before examining the meaning of Article 31 of MoT 29/2019 as amended, we first need to address Indonesia's objection to Brazil raising this provision only at the Panel meeting. In its comments on Brazil's responses, Indonesia submits that invoking this provision so late is a clear breach of its due process rights and contrary to paragraph 3(1) of the Panel's Working Procedures.[310] Brazil, for its part, considers that Indonesia's due process rights have not been infringed as Indonesia was well aware of the sanction provision and had an opportunity to comment on Brazil's argument.[311]

7.173. Paragraph 3(1) of our Working Procedures requires the parties to "transmit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel". One could read this provision, as Indonesia seems to do, as a requirement to submit all arguments (and *a fortiori* claims) in the two written submissions before the panel meeting and not at any other, later, point. However, in our view, paragraph 3, rather than constituting a requirement in its own right, is an expression of – and therefore has to be read together with – the due process principle, which requires a panel to give parties adequate opportunity and time to respond to arguments.[312] Due process needs to be respected, and this generally means that parties have to set out their case before they come to the hearing. However, in individual cases, due process may still be respected even if that case was not set out in full before the hearing. In other words, a "breach" of paragraph 3 of our Working Procedures is not independent from, but rather depends on, whether there is a breach of the due process requirement.[313]

7.174. In this case, we do not see such a breach of the due process requirement. While Brazil did not mention Article 31 in its written submissions, it did describe it in its opening statement at the Panel's meeting with the parties. In turn, Indonesia could (and did) respond to Brazil's argument at the meeting with the parties. Indonesia was also given the opportunity – through a question from the Panel – to set out its views in writing, both in its own responses and in its comments on Brazil's responses to the same question. In these circumstances, we do not agree with Indonesia that there was a breach of due process and paragraph 3(1) of the Working Procedures.

7.175. Having addressed Indonesia's objection we turn to examining the meaning of Article 31 of MoT 29/2019 as amended which states as follows:

> (1) Exporters or Importers that carry out Export or Import activities of Types of Animals and / or Animal Products not in accordance with the provisions in this Ministerial Regulation are subject to sanctions in accordance with the provisions of the laws and regulations.

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[310] Indonesia's comments on Brazil's response to Panel question No. 29, para. 37, and No. 33, paras. 44-46. We note that Indonesia has not argued that Brazil's reference to Article 31 would be outside our terms of reference. We have considered this issue on our own motion and have come to the conclusion that it is covered. Article 31 itself does not feature in Brazil's panel request. However, Brazil describes the measure at issue, *inter alia*, as "stricter sanctions that apply to importers deviating from the limitation on the allowed uses…". The description of the measure at issue, in the panel request, is followed by an open ("inter alia") list of provisions that reflect the measure. In these circumstances, we consider that the measure at issue is sufficiently well described to give Indonesia adequate notice that Brazil might raise other sanction provisions, such as Article 31, that fit the same description. We, therefore, consider that Brazil's reference to Article 31 is covered by our terms of reference.

[311] Brazil's response to Panel question No. 33, paras. 104 and 105.

[312] Appellate Body Report, *Australia – Salmon*, para. 278: "A fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it."

[313] We find support for our view that paragraph 3 of the Working Procedures is an expression of, and dependent on respect for, due process, in Appellate Body Report, *EC – Fasteners*, para. 574, where the Appellate Body treated the breach of a similar provision in the Working Procedures on a par with a breach of due process of law.

> (2) Imported Animals Species and / or Animal Products not in accordance with the provisions in this Ministerial Regulation must be recalled from distribution and destroyed by the Importer.
>
> (3) The costs for carrying out the recall from distribution and destruction as referred to in paragraph (2) shall be borne by the Importer.[314]

7.176. Brazil submits that selling imported chicken in a market without cold storage would mean that the imported chicken is sold in breach of the intended use condition and thus not in accordance with Article 22 of MoT 29/2019, which triggers the sanction under Article 31.[315] In such a case, the importer would have to recall the chicken from distribution (Article 31(2)) and have it destroyed at its own expense (Article 31(3)).[316]

7.177. Indonesia argues that Article 31(2) is only applicable when the type of animals and/or animal products is not in accordance with provisions of MoT 29/2019. Indonesia explains that the sanction applies for SPS and for import administration purposes. By way of example, Indonesia refers to a hypothetical case of an importer importing chicken when the Import Approval had been given for deboned beef; because the chicken has not been approved for imports, it would have to be recalled at the importer's expense. Indonesia also points out that Brazil has not made a link between Article 31 and the intended use requirement in Article 22.[317]

7.178. We understand the first paragraph of Article 31 to be an overall reference to sanctions applicable *inter alia* to importers that carry out import activities in breach of the Regulation. Article 28 is one such provision foreseeing revocation of the Import Approval. The second and third paragraphs of Article 31, which are the focus of Brazil's arguments, provide for sanctions involving the imported good: product recall from distribution at the cost of the importer.[318]

7.179. Paragraphs (2) and (3) provide for that sanction if the imported product is "not in accordance with the provisions in this Ministerial Regulation". We note that it is the product itself that has to be "not in accordance", rather than, for example the actions of the importer (as in paragraph (1)). However, we do not see in the wording the limitation that Indonesia refers to, namely that this only concerns the *type* of product. In particular, we do not see why, to refer back to Indonesia's example, chicken would have to be recalled if the Import Approval was for a different product but would not need to be recalled if it were sold in a market without cold storage facilities. In either case, the chicken is sold in breach of the terms set out in the Import Approval and is thus not in accordance with the Ministerial Regulation itself. We, therefore, conclude that the wording of Article 31 is in no way limited to particular types of violations, but rather it is broad and all-encompassing enough to also include breach of the cold storage requirement in Article 22. Finally, contrary to what Indonesia contends we note that Brazil does make an express link between a breach of Article 22 and the sanction in Article 31.[319]

7.180. Concluding on the question whether the two sanction provisions raised by Brazil are applicable to the situation of an importer selling to a market or other place that does not have cold chain facilities, we find that this is the case both with regard to Articles 28(a) and 31(2) and (3) of MoT 29/2019 as amended.[320]

7.181. We are conscious that our finding is based on a reading of Articles 28(a) and 31(2) and (3) of MoT 29/2019 that differs from Indonesia's reading of its legislation. However, Article 11 of the DSU requires us to make an objective assessment of the facts. We have therefore completed our analysis, relying on the text of the relevant provisions, which is also a reading that gives meaning

[314] See MoT 29/2019, (Exhibit BRA-15), pp. 25-26.
[315] Brazil's response to Panel question No. 29, para. 86.
[316] Brazil's response to Panel question No. 29, para. 86; see also Brazil's comments on Indonesia's response to Panel question No. 29, para. 116.
[317] Indonesia's response to Panel question No. 29; see also Indonesia's comments on Brazil's response to Panel question No. 29, para. 35.
[318] Brazil's arguments are also focussed on these two paragraphs, see Brazil's response to Panel question No. 29, para. 85.
[319] See Brazil's opening statement at the meeting of the Panel, para. 76; and response to Panel question No. 29.
[320] One member of the Panel disagrees with the reading of Article 28(a) respectively Article 31(2)(3) set out above. See dissenting opinion in 7.5.3.1.4 below.

to other provisions of the legislation.[321] Central to this analysis is the cold storage requirement set out in Articles 22 of MoT 29/2019 as amended and 43 of MoA 42/2019, which has played an important role in the recent history of Indonesia's import regulation and which has not changed since the original proceeding. The cold storage requirement conditions the Import Approval on selling to a buyer with cold storage facilities. A reading of the legal text that exempts the cold storage requirement from the enforcement provisions, without express reference to such an exemption, is not supported by the text or the design of the Regulation.

Whether the sanctions result in less favourable treatment contrary to Article III:4 of the GATT 1994

7.182. We now turn to the question whether these sanctions result in less favourable treatment contrary to Article III:4 of the GATT 1994.

7.183. A violation of Article III:4 requires that three elements are met: (1) the imported and domestic products at issue are "like products"; (2) the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution or use"; and (3) the imported products are accorded "less favourable" treatment than that accorded to like domestic products.[322]

7.184. We do not need to dwell on the first two of these elements. Indonesia does not oppose Brazil's reliance, in this respect, on the original panel's findings and we agree that these findings remain applicable here. Thus, the like products in question are imported and domestic frozen and chilled chicken meat and chicken products and the intended use requirement discussed here affects the internal sale, offering for sale, etc., in the market.[323] The question left, therefore, is whether there is less favourable treatment.

7.185. To show less favourable treatment, Brazil relies on the original panel's analysis, including as regards the comparison with sanctions applying to domestic sellers and distributors.[324] The original panel found that "domestic sellers who would sell frozen or chilled chicken without respecting the cold storage requirement, d[id] not face a comparable sanction – if any sanction at all" and that "Indonesia ha[d] not referred to any sanction that could apply to the domestic distributor who sold the frozen chicken to the seller in the traditional market".[325] In its response to Panel questions following the meeting with the parties, Indonesia submits that the sanctions applicable in domestic law are set out in MoA 14/2008 and that these sanctions apply irrespective of the origin of the animal product in question.[326]

7.186. We note that Indonesia did not refer to MoA 14/2008 in the original proceeding, even though this legal instrument was already in existence at that time. Furthermore, Indonesia has not submitted the text of MoA 14/2008. Consequently, neither Brazil in its comments to the answers nor the Panel can examine its content.[327] As we cannot examine the content of this regulation and therefore cannot verify Indonesia's argument, we cannot take it into account.[328]

7.187. In the absence of proof to the contrary, we accept Brazil's reliance on the relevant finding of the original panel, that there are no comparable sanctions, if any sanctions at all. On this basis, we find that there is less favourable treatment of imported frozen and chilled chicken meat and

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[321] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.445 (citing Appellate Body Report, *India – Patents (US)*, para. 66).

[322] Appellate Body Report, *Korea – Various Measures on Beef*, para. 133; see also Panel Report, *Indonesia – Chicken*, para. 7.298.

[323] Panel Report, *Indonesia – Chicken*, paras. 7.190, 7.299, and 7.322.

[324] Brazil's first written submission, para. 112 (citing Panel Report, *Indonesia – Chicken*, para. 7.326); Brazil's second written submission, para. 146 (citing Panel Report, *Indonesia – Chicken*, para. 7.326); Brazil's opening statement at the meeting of the Panel, para. 77.

[325] Panel Report, *Indonesia – Chicken*, para. 7.326.

[326] Indonesia's response to Panel question No. 30; Indonesia's comments on Brazil's response to Panel question No. 31, para. 43.

[327] See also Brazil's comments on Indonesia's response to Panel question No. 30, para. 123.

[328] Appellate Body Reports, *US – Wool Shirts and Blouses*, pp. 14-16, DSR 1997:I, 323, at 335-337; and *EC – Hormones*, para. 109. We leave open whether Indonesia would have been allowed to re-open this factual issue despite the relevant finding of the panel in the original proceeding.

chicken products in respect of sanctions applying to a breach of the cold storage requirement on sales in the market.

Whether the sanctions are inconsistent with Article XI:1 of GATT 1994

7.188. Brazil also raised a claim under Article XI:1 of the GATT 1994 arguing that the enforcement provisions of the intended use requirement constituted a restriction having limiting effect on importation. Indonesia asks us to dismiss the claim on the same factual grounds as above (i.e. inapplicability of the sanctions) but also requests us to apply judicial economy to this claim.[329]

7.189. The panel in the original proceeding applied judicial economy to Article XI:1 after having made a finding of violation under Article III:4. The panel did so on the grounds that the outcome of its analysis under Article XI:1 would be the same as that under Article III:4 and sketched out a number of reasons for this.[330]

7.190. Brazil invites us not to follow the original panel's approach. Brazil submits that Article XI, both in scope and content, is a different obligation and therefore should be ruled on.[331]

7.191. Given our factual findings above, what would potentially be left of this claim is the question whether the sanctions applying to the breach of the cold storage requirement constitute restrictions on importation. Brazil has not developed any arguments in its submissions (which were focused on sanctions applying to switching uses) or in its responses to questions (which only developed arguments under Article III:4) on this aspect of its claim. We would, therefore, be inclined to reject Brazil's claim on the basis that it has not developed a *prima facie* case.

7.192. In any event, even if we were to accept Brazil's initial arguments as sufficient, we would follow the original panel's approach despite Brazil's insistence on the difference in scope and content between Article III:4 and Article XI:1. That difference is of course there.[332] However, in our view, that difference alone does not determine whether a panel may exercise judicial economy. As the original panel recalled, a panel may refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute.[333] The question, therefore, is what is sufficient to resolve a dispute. In our view, findings of inconsistency are necessary where they matter in implementation. If an additional finding potentially makes a difference in implementation, a panel should not exercise judicial economy. We therefore asked Brazil whether a finding on Article XI:1 would make a difference in implementation. In reply, Brazil did not point us to any potential differences in implementation.[334] In these circumstances, we see no reason *not* to exercise judicial economy.

7.193. We conclude, therefore, that even if Brazil established a valid *prima facie* case on an Article XI:1 violation, we would not consider it, but would instead apply judicial economy. Given that, just like the panel in the original proceedings, we leave open the question whether the application of Article XI:1 is excluded because of the applicability of Article III:4.

7.5.3.1.3 Conclusion on current version

7.194. The majority of us, therefore, conclude that Articles 28(a) and 31(2) and (3) of MoT 29/2019 as amended, insofar as they apply to a breach of the cold storage requirement, violate Article III:4.

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[329] Indonesia's request for a preliminary ruling, paras. 25-27.

[330] Panel Report, *Indonesia – Chicken*, para. 7.336.

[331] Brazil's second written submission, para. 161; Brazil's response to Panel question No. 34 (referring to Appellate Body Report, *US – Tuna II (Mexico),* para. 405).

[332] Indeed, the difference is such that it raises the systemically important question whether these two provisions are not mutually exclusive.

[333] Panel Report, *Indonesia – Chicken*, para. 7.159, citing to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

[334] Instead Brazil refers to Indonesia's alleged "moving target strategy" and "unusual conduct". See Brazil's response to Panel question No. 34, paras. 107-108.

7.5.3.1.4 Dissenting opinion

7.195. While I am in agreement with my colleagues on this Panel with respect to the findings on all other claims, I must respectfully disagree with their analysis regarding the issue of the cold storage requirement and applicable sanctions in the current version of the intended use requirement. In my view, this Panel should not have concluded on a violation of Article III:4 of the GATT 1994 for the reasons set out below.

7.196. Maintaining cold chain is an important safety and health issue; too important to be reduced to a minor element of the intended use requirement. It is vital to preserve the safety and quality of refrigerated foods in order to comply with the legislative directives and industry codes of practice in handling frozen food. Control of cold chain requirements for frozen food is therefore of utmost importance for the maintenance of quality and safety of these food products. A break in the chain may promote growth of pathogenic microorganisms and/or bacterial toxins leading to health hazard and cannot be considered as merely "deviating from the limitation on the allowed uses"[335], or the general term of "violating obligations related to intended use requirements".[336] I, therefore, find convincing Indonesia's explanation that the cold storage requirement (outside the importer's own warehouse and transportation) is regulated in Indonesia's internal market legislation and not in its import regulations.[337]

7.197. The claim of "intended use" as raised by Brazil did not focus on sanctions for selling to a buyer without cold storage facilities until very late in the proceedings. In my opinion, therefore, the Panel should not have considered the issue of sanctions applying to a breach of the cold storage requirement in the market. My understanding comes from the following: In its panel request, its first written submission, and its second written submission Brazil focused its arguments regarding the intended use requirement on the distribution plan, the restriction on switching between end uses, or the question of changing the intended use stated in an Import Approval. It was only after the second written submission that Brazil changed the focus of its claim to sanctions related to selling without a cold storage facility.

7.198. The sanctions contained in MoT 29/2019 as amended and MoA 42/2019 do not apply to selling without cold storage. There is no reference to "buyer" or "seller" in either of these legal instruments. The references to "hotels, restaurants, caterings, industries, markets with cold chain facilities, and other special needs" in the legislation are simply enumerations of examples of places where cold storage is expected and would fit for distribution of chilled/frozen chicken. It is not proof of a requirement on the importer, much less of a sanction applying to the importer in respect a breach of cold storage.

7.199. Regarding Article 28(a) of MoT 29/2019 as amended, the reference to the intended use cold storage requirement contained in the Import Recommendation is not sufficient to constitute a requirement within the meaning of Article 13 of MoT 29/2019 as amended. Therefore, the cold storage requirement is not data or information that the importer submits when applying for an Import Approval. Consequently, Article 28(a) does not apply to the breach of the intended use cold

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[335] The issue of "intended use" was defined by the complainant in the panel request as:
The enforcement provisions of the intended use requirement applicable with respect to imported products include: stricter sanctions that apply to importers *deviating from the limitation on the allowed uses*, including, for instance, the importer's suspension; the commitment to certain intended uses (to obtain an MoA Import Recommendation, for instance), which restricts the importer to not selling elsewhere; and the burden and cost arising from having to submit a distribution plan and a weekly distribution report.

[336] See Brazil's first written submission, para. 101, where Brazil summarizes its claim as follows:
Indonesia's revised measure does not:

> (i) eliminate the requirement that importers must submit a distribution plan in their request for an MoA Import Recommendation;
> (ii) allow modification of the distribution plan after an MoA Import Recommendation is issued;
> (iii) change the penalties if and when the importer does not carry out the sales as set out in the distribution plan;
> (iv) revoke the severe penalties on importers for *violating obligations related to the intended use requirement*; or
> (v) change the fact that the Import Recommendation shall state the purpose of usage of the products.

[337] Indonesia's response to Panel question Nos. 28 and 30.

storage requirement. The majority's reading, in practice, would require proving the importer's knowledge of a breach of the cold storage requirement at the time of application, which is impracticable.

7.200. Regarding Article 31 of MoT 29/2019 as amended, Brazil raised this provision too late in the proceeding. I also find plausible Indonesia's explanation that a breach of the cold storage requirement does not mean that the product itself is "not in accordance with the Ministerial Regulation" as required in Article 31(2). Instead, it is an action of the importer captured by Article 31(1), which does not contain a sanction on its own. The absence of applicable sanction provisions regarding breach of the cold storage requirement supports Indonesia's argument that the importer's responsibility for cold storage ends at the warehouse and that all aspects of cold storage in the market are governed by internal market law. The cold storage requirement as stated in Article 22(1) of MoT 29/2019 as amended, therefore, is merely descriptive in nature and does not constitute a licence condition for the Import Approval.

7.5.3.2 As enacted through MoA 34/2016 as amended (version at panel establishment)

7.201. We now turn to the version of the intended use requirement and its enforcement provisions that was in force at panel establishment. This version was enacted through MoA 34/2016 as amended.

7.202. As Brazil explains in its first written submission, this version, while no longer containing a requirement to submit a weekly distribution report, still contains the requirement to submit a distribution plan.[338] As noted above, the distribution plan required the importer to detail the country of origin, type of meat, to whom the goods would be sold, in what quantity, and at what price.[339] Brazil also points to a number of sanction provisions, which remain as they were at the time of the original proceeding[340] or were only slightly modified.[341] On the basis of these provisions, Brazil submits that the three grounds for violation of Article III:4 of the GATT 1994 that the original panel found continue to exist. On the same three grounds, Brazil also alleges violation of Article XI:1 of the GATT 1994.

7.203. Indonesia does not rebut Brazil's factual or legal arguments regarding this version. However, as we noted above, the absence of a rebuttal by Indonesia does not relieve us from the duty to examine if Brazil has made a successful *prima facie* case.[342]

7.204. In respect of Brazil's claim under Article III:4, we recall that the original panel found a violation of that obligation on three grounds: (1) stricter sanctions in respect of the cold storage requirement; (2) the impossibility to switch uses and (3) the administrative cost and burden of reporting. In our view, Brazil has presented a valid *prima facie* case in respect of two of these three grounds.[343] First, by showing that the requirement to submit a distribution plan still exists and is also still enforced through strict sanctions, while no such requirement exists on the domestic side, Brazil has demonstrated the continued impossibility of switching uses. Second, Brazil has demonstrated *prima facie* that the administrative burden of presenting a distribution plan is unmatched on the domestic side and therefore results in less favourable treatment. On this basis we conclude that there is a continued violation of Article III:4.

7.205. In respect of Brazil's claim under Article XI:1, we refer to our discussion above in paragraph 7.192. On this basis we follow the original panel's approach and apply judicial economy to this claim

[338] Brazil refers to Article 22(1)(l) of MoA 34/2016 as amended, see Brazil's first written submission, para. 97.
[339] See para. 7.138 above.
[340] Brazil refers to Article 38(1) and 38(3)(b) of MoA 34/2016 as amended; see Brazil's first written submission, para. 112.
[341] Brazil refers to Article 38(4) which provides for a sanction of temporary suspension of the Import Approval for six months, if reporting obligations set out in Article 32A are violated. See Brazil's first written submission, para. 113.
[342] Panel Reports, *US – Shrimp (Ecuador)*, para. 7.9; and *US – Shrimp (Thailand)*, para. 7.21. See also Appellate Body Report, *EC – Hormones*, para. 109.
[343] Brazil did not refer in its first written submission specifically to sanctions applying to the breach of the cold storage requirement. The discussion of sanctions by Brazil relates primarily to the impossibility of switching uses.

leaving open the question whether the application of Article XI:1 is excluded because of the applicability of Article III:4.

7.5.4 Conclusion

7.206. With respect to the enforcement provisions of the intended use requirement as enacted through MoA 42/2019 and MoT 29/2019 as amended, we find that Articles 28(a) and 31(2) and (3) of MoT 29/2019 as amended, insofar as they apply to a breach of the cold storage requirement, are inconsistent with Article III:4 of the GATT 1994. We apply judicial economy with respect to the claim under Article XI:1 of the GATT 1994.

7.207. With respect to the enforcement provisions of the intended use requirement as enacted through MoA 34/2016 as amended and MoT 29/2019, we find that they were inconsistent with Article III:4 of the GATT 1994 insofar as they resulted in the impossibility to switch uses and an increased administrative burden on the importer. We apply judicial economy to Brazil's claim under Article XI:1 of the GATT 1994.

7.6 Fixed licence terms

7.6.1 Introduction

7.208. In this section we address Brazil's claim concerning fixed licence terms. In line with the panel's description in the original proceeding, Brazil refers to the measure as "limit[ing] the ability of importers to modify an MoA Import Recommendation and an MoT Import Approval after their issuance".[344]

7.209. Brazil claims that importers continue to be prevented from modifying these licence documents and that, therefore, the measure continues to restrict imports of poultry to Indonesia in violation of Article XI:1 of the GATT 1994. Indonesia requests us to reject the claim.

7.210. As in other sections of this report, we start by recalling the relevant findings of the panel in the original proceeding. We then briefly describe the measure that Indonesia has taken to comply with that panel's findings and introduce the main arguments relating to the consistency of that measure with Article XI:1. We follow with our analysis of the parties' positions.

7.6.2 Relevant findings in the original proceeding

7.211. The relevant provisions at issue in the original proceeding prohibited importers from requesting or making any changes to the terms of an Import Recommendation or an Import Approval. Brazil challenged that measure under Article XI:1 of the GATT 1994, Article 4.2. of the Agreement on Agriculture and Article 3.2 of the Import Licensing Agreement.

7.212. The panel found the measure to be inconsistent with Article XI:1 insofar as it impeded importers from modifying the initially declared port of entry or the quantity of imported products.[345] According to the panel, the inability of an importer to modify either of these terms was a restriction on the importation of chicken products, because in some circumstances arising in the normal course of business an importer may be required to change one or both of them.[346] In drawing this

[344] Request for the establishment of a panel by Brazil, WT/DS484/19, para. 13. See also Panel Report, *Indonesia – Chicken*, para. 7.361: "[T]he fixed licence terms relate to the limitation imposed by the relevant regulations of MoA and MoT on the possibility of an importer to modify certain aspects of an MoA Import Recommendation and an MoT Import Approval".

[345] By contrast, the panel did not view as a restriction similar limitations on the possibility to amend the country of origin and the business unit where the products came from. See Panel Report, *Indonesia – Chicken*, para. 7.395. In this dispute, Brazil is not making claims about the possibility to adjust these two aspects of an Import Recommendation and an Import Approval. See Brazil's response to Panel question No. 46, para. 166.

[346] Panel Report, *Indonesia – Chicken*, para. 7.396. The panel rejected Indonesia's defence under Article XX(d) of the GATT 1994 that fixing the licence terms was necessary to secure compliance with Indonesia's laws and regulations addressing halal, public health, consumer protection, as well as customs enforcement relating to halal and safety. See Panel Report, *Indonesia – Chicken*, paras. 7.441-7.449. This issue does not arise in this dispute, as Indonesia is not raising any affirmative defence with respect to the challenged measures.

conclusion, the original panel took into account the severe sanctions for deviating from the terms stated in the licence documents.[347]

7.213. The panel also held that it did not need to address Brazil's claim under Article 4.2 of the Agreement on Agriculture and Article 3.2 of the Import Licensing Agreement and exercised judicial economy on these claims.[348] The panel examined various iterations of the measure and reached the same conclusions for all of them.[349]

7.6.3 Whether the fixed licence terms are consistent with Article XI:1 of the GATT 1994

7.214. With a view to implementing the DSB's recommendations and rulings on fixed licence terms, Indonesia introduced a procedure enabling importers to modify certain terms of an Import Recommendation and an Import Approval.[350] Among these terms are the port of entry and the quantity of imported products. Indonesia enacted these changes through MoA 34/2016 as amended and MoT 29/2019.[351] Subsequently, Indonesia carried over the provisions allowing modifications of import licence terms to the legal instruments that are currently in force, namely MoA 42/2019 and MoT 29/2019 as amended.[352] Therefore, despite the change in applicable legal instruments, the conditions for amending the terms of an import licence have essentially remained the same as at panel establishment. This is why our findings on the current version of the measure apply equally to its version existing at the time of panel establishment.[353]

7.215. Turning to the amendment procedure itself, it allows online filing of requests to adjust certain terms of an Import Recommendation and an Import Approval.[354] To modify an Import Recommendation, an importer has to provide a valid existing Import Recommendation and a stamped certificate stating the reasons for requesting the change (statement of reasons).[355] Such a request "can be accepted if it fulfils importation requirements".[356] If the request is accepted, the Ministry of Agriculture has five working days to make the changes.[357] Once the modification to an Import Recommendations is made, an importer can request changes to the Import Approval, which the Ministry of Trade should make within two business days.[358]

7.6.3.1 Outline of the parties' arguments

7.216. The parties' arguments focus on the procedure to amend the terms of the Import Recommendation as set out in Article 44 of MoA 42/2019. Brazil takes issue with two aspects of this procedure that, it argues, deprive poultry importers of a genuine possibility to modify the port of entry or the quantity of imported products.[359] Firstly, Brazil asserts that Indonesia's authorities enjoy undefined discretion to accept or reject a request for modifications to an Import Recommendation,

[347] Panel Report, *Indonesia – Chicken*, para. 7.396.
[348] Panel Report, *Indonesia – Chicken*, para. 7.433.
[349] Panel Report, *Indonesia – Chicken*, paras. 7.441-7.449.
[350] Communication by Indonesia, WT/DS484/18 (Compliance Communication), (Exhibit IDN-8), p. 2; Communication by Indonesia, WT/DS484/18/Add.10 (Compliance Communication), (Exhibit IDN-24), p. 2.
[351] MoA 34/2016 as amended, (Exhibit BRA-10), Article 32; and MoT 29/2019, (Exhibit BRA-15), Articles 16-18.
[352] MoA 42/2019, (Exhibit IDN-1), Article 44 and MoT 29/2019 as amended, (Exhibit BRA-15), Articles 16 through 18.
[353] Contrary to Brazil's assertion, Indonesia did contest that the version of the measure existing at panel establishment was inconsistent with Article XI:1 of the GATT 1994. Indonesia explained that "[t]he requirements for amendments of Import Recommendation under MoA 23/2018 [are] similar to the requirements under MoA 42/2019"; see Indonesia's second written submission, para. 26. Thus, we understand Indonesia's arguments concerning fixed licence terms to apply to both versions of the measure.
[354] MoA 42/2019, (Exhibit IDN-1), Article 44(1) and MoT 29/2019 as amended, (Exhibit BRA-15), Article 16(2).
[355] MoA 42/2019, (Exhibit IDN-1), Article 44(2).
[356] MoA 42/2019, (Exhibit IDN-1), Article 44(3).
[357] MoA 42/2019, (Exhibit IDN-1), Article 44(4).
[358] MoA 42/2019, (Exhibit IDN-1), Article 44(4) and MoT 29/2019 as amended, (Exhibit BRA-15), Article 16(3).
[359] Brazil's first written submission, para. 222; see also Brazil's second written submission, para. 181; Brazil's responses to Panel question Nos. 49, para. 171, and 56, para. 180; and Brazil's opening statement at the meeting of the Panel, para. 86.

rendering the amendment procedure illusory.[360] Secondly, Brazil contends that the requirement to produce an affidavit explaining the reasons for changes to an Import Recommendation and to pay stamp duty is an administrative burden and cost that "is in and of itself is a restriction on importation".[361] Because these two elements of the measure inhibit the ability of importers to amend licence terms, Brazil asserts that Indonesia maintains the restriction on the importation of poultry that the original panel found to violate Article XI:1.[362] Brazil adds that the inability of importers to amend licence terms is reinforced by severe sanctions for deviating from these terms.[363]

7.217. Indonesia submits that it has removed any impediment to modifying import licence terms with the introduction of the amendment procedure.[364] Indonesia specifically contests the alleged existence of undefined discretion on the part of its authorities. Rather, Indonesia contends that the criteria for accepting an application for changes to an import licence are objective and clearly stated in MoA 42/2019. Indonesia also argues that the cost of modifying an Import Recommendation and the overall administrative burden of the procedure are negligible.[365] Finally, Indonesia points to ways other than amending existing licence terms, that, it argues, allow importers to respond to market developments and changing business opportunities.[366]

7.6.3.2 Whether importers are deprived of a genuine possibility to amend the terms of an import licence

7.218. Two questions arise for us from the parties' arguments. The first is whether Indonesia's authorities enjoy undefined discretion to accept or reject a request for amendment of an Import Recommendation. The second is whether the cost and administrative burden of submitting a statement of reasons and a stamp duty is such that it denies poultry importers the possibility to modify import licence terms resulting in a restriction on imports. We need to answer either of these questions in the affirmative to accept Brazil's claim. We address them in turn.

7.219. Finally, because Brazil's claim relates specifically to changes of the port of entry and the quantity of products imported, these are the two terms that we will focus the analysis on and address in our findings.[367]

7.6.3.2.1 Whether Indonesia's authorities have undefined discretion to accept or reject a request for amendment to an Import Recommendation

7.220. Brazil infers the existence of "undefined" or "unfettered" discretion from the text of MoA 42/2019.[368] Indonesia contests that such discretion follows from the language of the regulation and submits an example of an amended Import Recommendation to support this understanding.

7.221. Because the parties' arguments reflect a disagreement on the meaning of Indonesia's law, it is our task to examine its meaning objectively and based on the available evidence.[369] Brazil's reasoning relies solely on the text of the regulation and does not offer other evidence, such as consistent application of the regulation, pronouncements of domestic courts on its meaning, opinions of legal experts and the writings of recognized scholars. This is understandable given that the regulation had only been issued a few months before submissions in this proceeding were due. Thus

[360] Brazil's first written submission, paras. 225-226; see also Brazil's second written submission, paras. 173-176.
[361] Brazil's first written submission, para. 225; see also Brazil's response to Panel question No. 49, para. 169.
[362] Brazil's second written submission, paras. 179-181.
[363] Brazil's first written submission, para. 224; see also Brazil's response to Panel question No. 50, para. 173.
[364] Indonesia's second written submission, para. 24.
[365] Indonesia's first written submission, para. 68; Indonesia's response to Panel question No. 52 and comments on Brazil's response to Panel's question No. 49, para. 58.
[366] Indonesia's first written submission, para. 34.
[367] Brazil's response to Panel question No. 46.
[368] Brazil's response to Panel question No. 56, paras. 176-180.
[369] Appellate Body Report, *Thailand – Cigarettes*, fn 253; Panel Report, *China – Intellectual Property Rights*, para. 7.28. We examine the meaning of the relevant provisions of Indonesia's regulation for the sole purpose of assessing consistency of the measure with Article XI:1.

there is hardly any evidence regarding the implementation of the regulation.[370] We therefore need to examine Brazil's contention on the basis of the text of the regulation alone and determine whether, on its face, it shows the existence of undefined discretion to accept or reject a request for changes to an import licence. Should the meaning of the text of the regulation not be clear on its face, given the absence of evidence regarding its application, we would need to rule in favour of Indonesia, consistent with the accepted rules on burden of proof.[371]

7.222. Article 44 of MoA 42/2019 is the relevant provision that sets out the procedure for amending an Import Recommendation. It reads as follows:

> (1) If there is a change in the Recommendation as referred to in Article 40, except for letter a and b, Business Actors can request for the change in the Recommendation online to General Director through the Head of PPVTPP.
>
> (2) Business Actors as referred to in paragraph (1) in requesting for change in Recommendation must attach:
>
> a. Recommendation that is still valid; and
>
> b. Statement letter with a stamp duty stating the reasons for requesting a change in the Recommendation.
>
> (3) Recommendation change request as referred to in paragraph (1) can be accepted if it fulfils importation requirements.
>
> (4) For the Recommendation change request as referred to in paragraph (1), General Director, on behalf of the Minister, issued the Recommendation change within 5 (five) working days after the request has been fully and properly received.[372]

7.223. Brazil contends that the phrase "can be accepted" in paragraph (3) is discretionary and does not instruct Indonesia's authorities to accept a properly filed application for modifications.[373] Brazil links this language to the requirement to provide a statement of reasons for requesting a change, which, it believes, reinforces the discretion.[374] Indonesia, for its part, explains that the Bahasa term translated as "can" means "having sufficient power, skill or resources to do something", here to accept the application.[375] Indonesia submits that the exercise of this power is circumscribed by objective parameters: whether the request meets the importation requirements in Chapter II of MoA 42/2019 and whether an importer has attached two documents, a statement of reasons and a valid Import Recommendation.[376] If this is the case, the application is "complete and proper" and will be accepted.[377] On this basis, Indonesia denies the existence of undefined discretion in processing requests for amendments.[378]

7.224. It follows from both parties' explanations that the phrase "can be accepted" in Article 44(3) is not mandatory in the sense that applications must necessarily be accepted in every case. The question, however, is whether the authority's decision to accept the request or not is framed by objective parameters. To answer this question, we need to read the language of the provision in its proper context.

7.225. The phrase "can be accepted" in Article 44(3) is conditioned upon fulfilling "importation requirements". Reading the provision in its context we agree with Indonesia that the term

[370] Indonesia has provided a single example of an amended Import Recommendation. Although this single instance shows that it is possible to amend certain licence terms, it is not enough to actually prove how Indonesia's authorities apply Article 44 of MoA 29/2019 in practice.

[371] Appellate Body Report, *US – Carbon Steel*, para. 157; Panel Reports, *US – Section 301 Trade Act*, para. 7.14 and *Colombia – Ports of Entry*, para. 7.97.

[372] MoA 42/2019, (Exhibit IDN-1), p. 77.

[373] Brazil's response to Panel question No. 56, para. 177.

[374] Brazil's comments on Indonesia's response to Panel question No. 52, paras. 164-165.

[375] Indonesia's second written submission, para. 30; Indonesia's response to Panel question No. 55.

[376] Indonesia's response to Panel question No. 55.

[377] Indonesia's second written submission, para. 28; Indonesia's response to Panel question No. 48.

[378] Indonesia's second written submission, para. 27; Indonesia's second written submission, para. 38;

"importation requirements" refers to Chapter II of MoA 42/2019. This chapter sets out the administrative requirements and technical animal health and veterinary public health requirements that an importer needs to prove compliance with when applying for an Import Recommendation.[379] We also note and accept Indonesia’s explanation that, with respect to changes to the port of entry or an increase in the quantity of imports, there is no need to verify compliance with the requirements of Chapter II, since such requirements have been fulfilled in the initial application for the Import Recommendation.[380] By contrast, such verification could be necessary when the amendment concerns other items, such as the country of origin.[381] Thus, Article 44(3) sets forth some objective criteria for accepting or rejecting applications.[382]

7.226. However, for Brazil this merely means that the authorities are "able" to accept any application that fulfills importation requirements, not that they are "required" to accept it.[383] Brazil refers to the statement of reasons that the importer is required to submit pursuant to Article 44(2) as contradicting the above conclusion. Brazil sees no rational purpose for the statement other than taking the reasons for modifications into account in deciding whether to accept a request or not.[384] We understand Brazil, therefore, to be contending that the existence of the statement of reasons proves the existence of the discretion vested in Indonesia's authorities through the language of paragraph (3).[385] Indonesia explains that stating reasons for a modification is required for "administrative purpose", such as tracking changes in importers' addresses or market fluctuations.[386]

7.227. We do not draw the same conclusion from the text of the regulation as Brazil. The phrase "can be accepted" in paragraph (3) refers directly to fulfilling the importation requirements and not to the statement of reasons in paragraph (2). Therefore, we do not see the same link between the phrase "can be accepted" and the requirement to state reasons that Brazil does. Moreover, in the absence of discernible practice, due to the recent adoption of the regulation, there is no evidence indicating that Indonesia's authorities take into account the reasons stated by importers in deciding whether to accept or reject a request. In the absence of such evidence, Brazil's argument is speculative, and thus not sufficient to accept Brazil's reading of the regulation over that advanced by Indonesia.

7.228. In sum, we cannot conclude based on the text of Article 44 of MoA 42/2019 alone that Indonesia's authorities enjoy undefined discretion to accept or reject a request to amend the terms of an import licence. Because the parties' arguments regarding the meaning of the regulation remain in equipoise, and because Brazil is the party asserting the existence of unfettered discretion, we have to give Indonesia the benefit of the doubt.[387] We underline that we make this finding in the absence of compelling evidence showing how Indonesia's authorities apply the relevant provisions in practice.[388] That said, we note Indonesia's explanations and attach importance in particular to its statement[389] that "all complete and proper applications will be accepted" with "complete" meaning inclusion of a valid Import Recommendation and stamped letter of reason, and "proper" meaning limited to the fulfilment of the requirements in Chapter II of MoA 42/2019.[390]

7.6.3.2.2 Whether the requirement to state reasons and pay a stamp duty is burdensome

7.229. We now turn to the question whether the obligation to state reasons for modifying the licence terms is burdensome enough to deny the possibility to amend licence terms. In the previous section, we addressed a different aspect of the requirement to produce a statement of reasons that Brazil is

[379] MoA 42/2019, (Exhibit IDN-1), Articles 7 and 8 through 18.

[380] Indonesia's response to Panel question No. 54(a).

[381] Indonesia's response to Panel question No. 54(a).

[382] Indonesia's second written submission, para. 27.

[383] Brazil's comments on Indonesia's response to Panel question No. 48, para. 160.

[384] Brazil's first written submission, para. 225; see also Brazil's opening statement at the meeting of the Panel, para. 91.

[385] Brazil's comments on Indonesia's response to Panel question No. 48, para. 160.

[386] Indonesia's response to Panel question No. 52.

[387] Appellate Body Report, *US – Carbon Steel*, para. 157; Panel Report, *US – Section 301 Trade Act*, para. 7.14.

[388] We note that Indonesia has produced a single example of an amended Import Recommendation. Although this single instance shows that it is possible to amend certain licence terms, it is not enough to actually prove how Indonesia's authorities apply Article 44 of MoA 29/2019 in practice.

[389] See Panel Report, *US – Section 301 Trade Act*, paras. 7.118-7.126.

[390] Indonesia's responses to Panel question Nos. 48 and 54(c).

challenging – that it reinforces discretion of Indonesia's authorities. Here we focus on what we understand to be another prong of Brazil's argument, namely that the requirement is burdensome and thus "in and of itself, a restriction".[391]

7.230. In response to our queries to expound the latter line of argument, Brazil points out that importers must produce an affidavit and pay the stamp duty even for making small changes to the original import licence terms.[392] As a result, they incur an administrative burden and cost "every time business opportunities change".[393] This, in Brazil's view, is "an element of the design and structure of Indonesia's regulations that continue to prevent importers from making adjustments to licence terms."[394]

7.231. Indonesia submits that the stamp duty for a statement of reasons is the equivalent of 40 US cents.[395] Brazil does not contest this. Nor does it deny that an importer can make both the request and the payment online.[396]

7.232. These requirements do not seem to us particularly burdensome; all the more so, in the context of international trade in goods, which implies certain routine import-related formalities. Not every such formality, or charge, amounts to a restriction on imports inconsistent with Article XI:1 of the GATT 1994.[397] As the complainant, Brazil has to demonstrate that the burden or cost on importers is of such nature and extent as to preclude or, at the very least, dissuade them from requesting changes to the import documents. Yet, Brazil has not explained why or how attaching a brief statement of reasons and paying the equivalent of 40 US cents would do so. We, therefore, disagree with Brazil that the procedure for amending an Import Recommendation is enough of a burden to prevent importers from requesting changes to an import licence and, as a result, to restrict imports.

7.233. Concluding our analysis under Article XI:1 of the GATT 1994, we find that Brazil has not demonstrated that the measure prevents or severely limits the importers' ability to modify the port of entry or the quantity of imported products in the normal course of business.

7.234. In light of this conclusion, we do not see the need to address the parties' arguments concerning sanctions for deviating from the terms of an import licence. Brazil refers to these sanctions as an element "enforce[ing] the continued inability of importers to amend licence terms", which we just found Brazil has not demonstrated. The situation we are dealing with is thus unlike the one before the original panel, when importers had no choice but to breach the terms of a licence if they wanted to change the port of entry or quantity of products.

7.6.4 Alternatives to amending import licence terms

7.235. Finally, we recall that Indonesia points to ways other than amending import licence terms that, it argues, would allow importers to respond to market developments and changing business opportunities. These are the possibility to apply for new and for multiple Import Recommendations and Import Approvals.[398]

7.236. The availability of such alternatives would matter for our assessment if Brazil had demonstrated that poultry importers do not have a genuine possibility of modifying the terms of an import licence. In that case, the question would arise whether Indonesia may have achieved substantive compliance in other ways than through providing amendment procedures. However, in the preceding section we have found that Brazil has not demonstrated that there is no genuine

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[391] Brazil's first written submission, para. 225; see also Brazil's response to Panel question Nos. 49, para. 169, and No. 51, para. 174.

[392] Brazil's response to Panel question No. 49, para. 169.

[393] Brazil's response to Panel question No. 49, para. 169.

[394] Brazil's response to Panel question No. 49, para. 168.

[395] Indonesia's response to Panel question No. 52.

[396] Indonesia's comments on Brazil's response to Panel question No. 49, para. 58.

[397] Appellate Body Report, *Argentina – Import Measures*, para. 5.217. See also Panel Reports, *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, para. 7.224 and *China – Raw Materials*, para. 7.917. We note that the Import Licensing Agreement governs administrative procedures used for the operation of import licensing regimes and contains specific requirements for import-related formalities.

[398] Indonesia's second written submission, para. 34.

possibility to amend licence terms. In light of that finding, we do not see the need to explore the alternatives put forward by Indonesia.

7.6.5 Conclusion

7.237. We conclude that Brazil has not demonstrated that the fixed licence terms as enacted both at panel establishment and in their current version constitute a restriction on the importation of poultry in violation of Article XI:1 of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, we conclude as follows:

a. In respect of Indonesia's request for a preliminary ruling:

   i. the Panel finds that Brazil's claims under Article 4.2 of the Agreement on Agriculture regarding the positive list requirement and under Article XI:1 of the GATT 1994 concerning enforcement provisions of the intended use requirement are within the Panel's terms of reference;

   ii. the Panel finds that Brazil is not barred from challenging the positive list requirement under Article 4.2 of the Agreement of Agriculture and the intended use requirement under Article XI:1 of the GATT 1994 in this compliance proceeding.[399]

b. In respect of the delay in the approval of the veterinary health certificate:

   i. the Panel finds that Indonesia has caused further undue delay in the approval of the veterinary health certificate, inconsistent with Article 8 and Annex C(1)(a) of the SPS Agreement.

c. In respect of the positive list requirement:

   i. the Panel finds that Brazil has not demonstrated that the positive list requirement as enacted through MoA 42/2019 and MoT 29/2019 as amended is a prohibition or a restriction on the importation of chicken products inconsistent with Article XI:1 of the GATT 1994;

   ii. the Panel finds that Brazil has not demonstrated that the positive list requirement as enacted through MoA 42/2019 and MoT 29/2019 as amended is a quantitative import restriction on agricultural products prohibited in Article 4.2 of the Agreement on Agriculture;

   iii. the Panel finds that the positive list requirement as enacted through MoA 34/2016 and MoT 29/2019 constituted a prohibition on the importation of other prepared or preserved chicken meat, chicken offal or blood inconsistent with Article XI:1 of the GATT 1994;

   iv. having found the version of the positive list requirement enacted through MoA 34/2016 and MoT 29/2019 to be inconsistent with Article XI:1 of the GATT 1994, the Panel does not find it necessary to rule on Brazil's claim under Article 4.2 of the Agreement on Agriculture with respect to this version of the measure to secure a positive solution to this dispute.

[399] Indonesia requested that the Panel also exercise judicial economy on the claims pertaining to Article 4.2 of the Agreement on Agriculture regarding the positive list requirement and Article XI:1 of the GATT 1994 regarding the enforcement provisions of the intended use requirement, as was done in the original proceeding. The Panel rejected this request, stating it was premature, at that stage in the proceedings, to decide on whether to exercise judicial economy with regard to these claims; see para. 1.15 above. The Panel's decision on this point is contained in paras. 8.(c)(iv), as well as 8.(d)(ii) and (iv) below.

d. In respect of the intended use requirement and its enforcement provisions:

  i. the Panel finds that the enforcement provisions of the intended use requirement as enacted through MoA 42/2019 and MoT 29/2019 as amended are inconsistent with Article III:4 of the GATT 1994 insofar as they apply to a breach of the cold storage requirement;

  ii. having found these enforcement provisions to be inconsistent with Article III:4 of the GATT 1994, the Panel does not find it necessary to rule on Brazil's claim under Article XI:1 of the GATT 1994 with respect to this version of the measure to secure a positive solution to this dispute;

  iii. the Panel finds that the enforcement provisions of the intended use requirement as enacted through MoA 34/2016 as amended and MoT 29/2019 were inconsistent with Article III:4 of the GATT 1994 insofar as they resulted in the impossibility to switch uses and in an increased administrative burden on the importer; and

  iv. having found these enforcement provisions to be inconsistent with Article III:4 of the GATT 1994, the Panel does not find it necessary to address Brazil's claim under Article XI:1 of the GATT 1994 with respect to this version of the measure to secure a positive solution to this dispute.

e. In respect of the fixed licence terms:

  i. the Panel finds that Brazil has not demonstrated that the fixed licence terms constitute a restriction on the importation of chicken products inconsistent with Article XI:1 of the GATT 1994.

8.2. We therefore conclude that, to the extent that the Panel has found the measures at issue to be inconsistent with the relevant provisions of these agreements, Indonesia has failed to implement the recommendations and rulings of the DSB and to bring its measures into conformity with its obligations under the SPS Agreement and the GATT 1994.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with certain provisions of the GATT 1994 and the SPS Agreement, they have nullified or impaired the benefits accruing to Brazil under those agreements.

8.4. To the extent that Indonesia has failed to comply with the recommendations and rulings of the DSB in the original dispute, those recommendations and rulings remain operative.

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