TINJAUAN HUKUM ISLAM MENGENAI KASUS PEMBATASAN IMPOR HORTIKULTURA OLEH PEMERINTAH INDONESIA

(Studi Kasus Gugatan New Zealand terhadap Indonesia ke WTO terkait Kebijakan Indonesia terhadap Pembatasan Impor Hortikultura)

SKRIPSI

DIAJUKAN KEPADA FAKULTAS SYARI'AH DAN HUKUM

UNIVERSITAS ISLAM NEGERI SUNAN KALIJAGA YOGYAKARTA

UNTUK MEMENUHI SEBAGIAN SYARAT-SYARAT MEMPEROLEH GELAR SARJANA STRATA SATU DALAM ILMU HUKUM ISLAM

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NIM : 13380004

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YOGYAKARTA

2017

ABSTRAK

Penelitian ini bertujuan untuk mengkaji putusan sengketa impor antara negara Indonesia dan New Zealand yang bersengketa masalah pembatasan impor yang pemerintah Indonesia lakukan terhadap barang-barang impor dari New Zealand berupa produk hortikultura, hewan dan produk hewan.

Metode yang digunakan dalam penelitian ini adalah metode jenis penelitian *library research*, yaitu penelitian yang dilaksanakan dengan mengumpulkan buku, literatur, catatan, dan laporan-laporan yang berkaitan dengan masalah yang diteliti. Penelitian ini merupakan penelitian kualitatif yang bersifat deskriptif analitis. Pendekatan yang digunakan dalam penelitian ini adalah tinjauan hukum Islam dengan menggunakan metode *maṣlaḥah* dan *fathu dzarî'ah*. Metode analisis yang digunakan adalah deduktif, yaitu analisis dari data atau kesimpulan yang bersifat umum dan selanjutnya akan dianalisis untuk mencari suatu kesimpulan yang bersifat spesifik.

Hasil penelitian ini menunjukkan bahwa pembatasan impor yang Indonesia lakukan dilatarbelakangi oleh beberapa sebab yaitu untuk melindungi industri dalam negeri, melindung petani, melindung peternak, melindungi rakyat dari barang-barang impor yang tidak sehat, dan untuk menciptakan swasembada pangan mandiri negara Indonesia. Latar belakang ini bisa kita lihat dari peraturan dan kebijakan negara Indonesia yang diberlakukan sampai saat ini. Yang sekitar ada 10 peraturan dan kebijakan dan ada 18 tindakan yang dilakukan pemerintah Indonesia untuk pembatasan impor dari luar negeri. Menurut tinjauan hukum Islam, tindakan peraturan dan kebijakan yang Indonesia berlakukan terkait dengan pembatasan impor tersebut dipandang dengan kacamata *maṣlaḥah* dan *fathu dzarî'ah* maka hal tersebut sebaiknya dilakukan oleh negara untuk melindungi ekonomi Indonesia, manfaat yang didapatkan akan lebih banyak ketika mengambil tindakan tersebut namun jika tidak melakukan hal tersebut yaitu pembatasan impor maka ekonomi dan kemakmuran rakyat Indonesia akan terancam. Maka menurut tinjauan hukum Islam dalam kasus ini hukumnya adalah sunnah yang sangat dianjurkan.

Kata Kunci: Sengketa, Peembatasan Impor, Maslahah Mursalah

Universitas Islam Negeri Sunan Kalijaga

SURAT PERSETUJUAN SKRIPSI

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Kepada:
Yth. Dekan Fakultas Syari'ah dan Hukum
UIN Sunan Kalijaga Yogyakarta
Di Yogyakarta

Assalamu'alaikum. Wr. Wb

Setelah membaca, meneliti, dan mengoreksi serta menyarankan perbaikan seperlunya, maka kami selaku Pembimbing berpendapat bahwa skripsi saudara:

Nama : Nazaruddin Ismail

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Judul Skripsi : **"TINJAUAN HUKUM ISLAM MENGENAI KASUS PEMBATASAN IMPOR HORTIKULTURA OLEH PEMERINTAH INDONESIA (STUDI KASUS GUGATAN NEW ZEALAND TERHADAP INDONESIA KE WTO TERKAIT KEBIJAKAN INDONESIA TERHADAP PEMBATASAN IMPOR HORTIKULTURA)"**

Sudah dapat diajukan kepada Fakultas Syari'ah dan Hukum Jurusan Hukum Ekonomi Syari'ah (Muamalat) UIN Sunan Kalijaga Yogyakarta sebagai salah satu syarat untuk memperoleh gelar Sarjana Strata Satu Hukum Islam.

Dengan ini kami mengharapkan agar skripsi akhir saudara tersebut di atas dapat segera dimunaqasyahkan. Atas perhatiannya kami ucapkan terima kasih.

Wassalamu'alaikum. Wr. Wb

Yogyakarta, 13 Dzulqo'dah 1438 H
5 Agustus 2017 M

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TINJAUAN HUKUM ISLAM MENGENAI KASUS PEMBATASAN IMPOR HORTIKULTURA OLEH PEMERINTAH INDONESIA

(Studi Kasus Gugatan New Zealand terhadap Indonesia ke WTO terkait Kebijakan Indonesia terhadap Pembatasan Impor Hortikultura)"

Adalah asli karya atau laporan penelitian yang saya lakukan sendiri dan bukan plagiasi dari hasil karya orang lain, kecuali yang secara tertulis diacu dalam penelitian ini dan disebutkan dalam acuan daftar pustaka

Demikian pernyataan ini saya buat dengan sebenarnya dan tanpa paksaan dari siapapun.

Yogyakarta, 13 Dzulqo'dah 1438 H
5 Agustus 2017 M

Yang menyatakan,

METERAI TEMPEL
TGL. 20
04492AEF482761378
6000
ENAM RIBU RUPIAH

Nazaruddin Ismail
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MOTTO

Jangan Lewatkan Kesempatan Waktu Luangmu Tanpa Belajar Dan Mencari Ilmu.

Karena Akan Datang Masanya Ketika Engkau Tidak Lagi Akan Bisa Belajar Dan Mencari Ilmu Karena Waktumu Sudah Habis...

Waktu Kita Terbatas

Maka Manfaatkan Waktumu Sebaik Mungkin….

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Skripsi ini kupersembahkan untuk Ibuku Tercinta Tuminah dan Ayahku Saiful Udin, mereka yang sangat berjasa dalam hidupku, mendidik, membimbing, merawat, membesarkan ku dengan penuh kasih sayang tanpa pamrih dan tak pernah lelah untuk memanjatkan do'a dengan penuh keikhlasan demi kebaikan dan kebahagian ku. Semoga Allah SWT senantiasa melindungi, meridhai dan memberkahi keluarga kami…

Keluarga Besarku yang selalu memberikan motivasi dan dukungan untuk menyelesaikan studiku…

Sahabat-sahabat terbaik yang selalu menemani dikala suka dan duka….

Serta almamaterku Universitas Islam Negeri Sunan Kalijaga Yogyakarta Fakultas Syari'ah dan Hukum Jurusan Hukum Ekonomi Syari'ah….

PEDOMAN TRANSLITERASI ARAB-LATIN

Berdasarkan Transliterasi Arab Indonesia, pada Surat Keputusan Bersama Menteri Agama dan Menteri Pendidikan dan Kebudayaan Republik Indonesia Nomor: 158/1997 dan 0543b/U/1987.

A. Konsonan Tunggal

Huruf Arab	Nama	Huruf Latin	Keterangan
ا	Alif	Tidak dilambangkan	Tidak dilambangkan
ب	bâ’	B	Be
ت	tâ’	T	Te
ث	śâ’	Ś	es (dengan titik di atas)
ج	Jim	J	Je
ح	ḥâ’	Ḥ	ḥa (dengan titik di bawah)
خ	khâ’	Kh	ka dan ha
د	Dâl	D	De
ذ	Żâl	Ż	żet (dengan titik di atas)
ر	râ’	R	Er
ز	Zai	Z	Zet
س	Sin	S	Es
ش	Syin	Sy	es dan ye
ص	Ṣâd	Ṣ	es (dengan titik di bawah)
ض	Ḍâd	Ḍ	de (dengan titik di bawah)
ط	ṭâ’	Ṭ	te (dengan titik di bawah)
ظ	ẓâ’	Ẓ	zet (dengan titik dibawah)
ع	‘ain	‘	koma terbalik (di atas)

غ	Gain	G	ge dan ha
ف	fâ’	F	Ef
ق	Qâf	Q	Qi
ك	Kâf	K	Ka
ل	Lâm	L	El
م	Mîm	M	Em
ن	Nûn	N	En
و	Wâwû	W	We
ه	hâ’	H	Ha
ء	Hamzah	’	Apostrof
ي	yâ’	Y	Ye

B. Konsonan Rangkap

Konsonan rangkap yang disebabkan oleh syaddah ditulis rangkap.

contoh :

نزّل	Ditulis	Nazzala
بهنّ	Ditulis	Bihinna

C. Ta’ Marbutah di akhir Kata

1. Bila dimatikan ditulis h

حكمة	Ditulis	Hikmah
علة	Ditulis	‘illah

(ketentuan ini tidak diperlukan bagi kata-kata Arab yang sudah terserap dalam bahasa Indonesia, seperti salat, zakat dan sebagainya kecuali dikehendaki lafal lain).

2. Bila diikuti dengan kata sandang ‘al’ serta bacaan kedua itu terpisahh maka ditulis dengan h.

كرامةالأولياء	Ditulis	Karâmah al-auliyâ’

3. Bila ta’ marbutah hidup atau dengan harakat fathah, kasrah dan dammah ditulis t atau h.

زكاة الفطر	Ditulis	Zakâh al-fiţri

D. Vokal Pendek

َ فعل	fathah	Ditulis ditulis	A fa’ala
ِ ذكر	kasrah	Ditulis ditulis	I Żukira
ُ يذهب	dammah	Ditulis ditulis	U Yażhabu

E. Vokal Panjang

1	Fathah + alif فلا	Ditulis ditulis	Â Falâ
2	Fathah + ya’ mati	Ditulis	Â

	تنسى	ditulis	Tansâ
3	Kasrah + ya’ mati تفصيل	Ditulis ditulis	Î Tafsîl
4	Dlammah + wawu mati أصول	Ditulis ditulis	Û Uṣûl

F. Vokal Rangkap

1	Fathah + ya’ mati الزحيلي	Ditulis ditulis	Ai az-zuḥailî
2	Fatha + wawu mati الدولة	Ditulis ditulis	Au ad-daulah

G. Kata Pendek yang Berurutan dalam Satu Kata Dipisahkan dengan Apostrof

أأنتم	Ditulis	A’antum
أعدت	Ditulis	U’iddat
لئن شكرتم	Ditulis	La’in syakartum

H. Kata Sandang Alif dan Lam

1. Bila diikuti huruf qomariyyah ditulis dengan menggunakan huruf “l”

القرأن	Ditulis	Al-Qur’ân
القياس	Ditulis	Al-Qiyâs

2. Bila diikuti huruf Syamsiyyah ditulis dengan menggunakan huruf Syamsiyyah yang mengikutinya, dengan menghilangkan huruf l (el) nya.

السماء	Ditulis	As-Samâ’
الشمس	Ditulis	Asy-Syams

I. Penulisan Kata-kata dalam Rangkaian Kalimat

Ditulis menurut penulisnya

ذوي الفروض	Ditulis	Żawî al-furûḍ
أهل السنة	Ditulis	Ahl as-sunnah

KATA PENGANTAR

Segala puji bagi Allah SWT, atas rahmat, taufiq dan hidayah-Nya penyusun dapat menyelesaikan skripsi ini. Shalawat dan salam semoga dilimpahkan kepada Nabi Muhammad SAW, beserta keluarga, sahabat dan para pengikut sampai hari kiamat nanti. Sehingga penulis dapat menyelesaikan skripsi yang berjudul "**TINJAUAN HUKUM ISLAM MENGENAI KASUS PEMBATASAN IMPOR HORTIKULTURA OLEH PEMERINTAH INDONESIA (Studi Kasus Gugatan New Zealand terhadap Indonesia ke WTO terkait Kebijakan Indonesia terhadap Pembatasan Impor Hortikultura)"**

Terlepas dari keterbatasan dan hambatan yang ada, dalam proses pengerjaannya, penulis tidak dapat mengenyampingkan pihak-pihak yang senantiasa memberikan pengarahan, bimbingan, motivasi, serta do'a. Oleh karena itu, tiada suatu kata yang patut untuk disampaikan kepada semua pihak melainkan ucapan terimakasih yang sebesar-besarnya kepada:

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8. Untuk kakak dan adek-adekku yang telah senantiasa memberikan doa, semangat kepada penulis serta membantu memenuhi kebutuhan materi penulis selama duduk dibangku perkuliahan.
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teman seperjuangan dan seperbimbingan Iqdam, Ratna, Lutfi, Ilham, Deny, David, Wirda. Sahabat-sahabat yang selalu menanyakan kapan wisuda Mas Asep, Arjun, dan Mas Hadi. Sahabat-sahabat MPR dan MPD.

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Yogyakarta, 5 Agustus 2017
13 Dzulqo'dah 1438 H

Penyusun,

Nazaruddin Ismail

NIM: 13380004

DAFTAR ISI

LAMPIRAN-LAMPIRAN

BAB I

PENDAHULUAN

A. Latar Belakang Masalah

Ekonomi dalam kajian keilmuan dapat dikelompokan menjadi dua, yaitu makro dan mikro (*macro economy and micro economy)*. Makro ekonomi mempelajari bagaimana perilaku tiap-tiap individu yang berperan dalam setiap unit ekonomi baik sebagai konsumen, pekerja, investor, pemilik tanah dan lain-lain. Mikro ekonomi menjelaskan *how and why* sebuah pengambilan keputusan dalam ekonomi itu dilakukan. Contohnya, bagaimana seorang konsumen membuat keputusan dalam pemilihan terhadap suatu produk ketika ada perubahan harga atau pendapatan.[1] Ekonomi adalah suatu hal yang tidak akan lepas dari apa yang namanya negara, karena negara mempunyai rakyat yang kebutuhannya harus dipenuhi oleh negara tersebut.

Salah satu negara yang memiliki jumlah penduduk yang padat di dunia ini adalah negara Indonesia. Negara Indonesia merupakan salah satu negara yang memiliki jumlah penduduk terpadat di dunia, tercatat per 30 Juni 2016 jumlah penduduk Indonesia adalah 257.912.349 jiwa[2].

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[1] Adiwarman Karim, *Ekonomi Mikro Islam,* cet ke-2 (Jakarta : IIIT Indonesia, 2003) hlm. 1.

[2] http://jateng.tribunnews.com/2016/09/01/*data-terkini-jumlah-penduduk-Indonesia-2579-juta-yang-wajib-ktp-1825-juta,* pada tanggal 20 februari 2017 pukul 21.03.

Dengan kondisi masyarakat Indonesia yang memiliki kepadatan penduduk begitu tinggi maka berdampak pada kebutuhan konsumtif masyarakat di Indonesia terhadap kebutuhan primer, sekunder dan tersier yang tinggi juga. Kebutuhan primer manusia adalah kebutuhan akan sandang, pangan dan papan. Kebutuhan sekunder adalah kebutuhan manusia yang bisa dipenuhi ketika kebutuhan primer sudah tercukupi seperti pendidikan, rekreasi, pariwisata, dan lain-lain. Kebutuhan tersier adalah kebutuhan manusia akan barang-barang mewah dan bersifat hiburan dan kebutuhan ini dapat dipenuhi ketika kebutuhan primer dan sekunder sudah terpenuhi.

Dalam rangka pemenuhan kebutuhan primer khususnya di bidang pangan negara Indonesia masih belum sanggup secara mandiri untuk memenuhi kebutuhan pangan tersebut. Penyebab utama kenapa negara Indonesia tidak bisa memenuhi kebutuhan pangan penduduknya adalah karena iklim yang tidak mendukung di Indonesia dalam beberapa waktu yang hasilnya para petani tidak bisa memanen kebutuhan pangan secara maksimal saat iklim tidak mendukung bahkan sama sekali tidak membuahkan hasil. Selain itu perhatian pemerintah terhadap infrastruktur pertanian dan organisasi-organisasi tani yang harusnya memberikan edukasi kepada para petani di Indonesia masih sangat kurang. Akibatnya hasil-hasil pertanian tidak membuahkan hasil yang maksimal dan hal tersebut berdampak pada kurangnya pasokan pangan di Indonesia yang di peroleh dari dalam negeri. Untuk mengatasi masalah kekurangan pangan

tersebut pemerintah Indonesia memberikan solusi dengan melakukan impor produk hortikultura, hewan ternak dan produk-produk makanan seperti daging sapi dari negara lain.[3]

Adapun pengertian dari produk hortikultura menurut UU No. 13 Tahun 2010 tentang Hortikultura adalah segala hal yang berkaitan dengan buah, sayuran, bahan obat nabati, dan florikultura, termasuk di dalamnya jamur, lumut, dan tanaman air yang berfungsi sebagai sayuran, bahan obat nabati, dan/atau bahan estetika.[4] Dari hasil mengimpor produk dari luar negeri secara khusus yaitu negara New Zealand maka kebutuhan pangan di negara Indonesia bisa tercukupi.

Dalam hukum Islam jual beli merupakan suatu bentuk muamalah sesama manusia, sama halnya ekspor dan impor yang merupakan suatu transaksi jual beli.[5] Dalam kaidah hukum Islam jual beli itu ada yang hukumnya boleh dan ada jual beli yang hukumnya haram yaitu jual beli yang tidak memenuhi rukun dan syarat jual beli dan juga bertentangan dengan syari'at agama Islam.

Dalam kaidah hukum Islam prinsip dasar jual beli adalah boleh.

... الأصْل في الْمعاملات الحْلّ والاباحة...[6]

Maksud kaidah di atas ialah semua akad dipandang halal, kecuali ada dalil yang mengharamkannya. Dalam persoalan muamalah,

[3] http://www.kompasiana.com/ferrynang/indonesia-negara-penghasil-pangan-yang-masih-impor-bahan-pangan_550a1d6e8133117f1cb1e72d, diakses pada 17 Agustus 2017 pukul 14.55.

[4] Undang-undang Republik Indonesia Nomor 13 Tahun 2010 tentang Hortikultura.

[5] Ahmad Azhar Basjir, *Asas-Asas Hukum Muamalat Hukum Perdata Islam* (Yogyakarta: UII Press, 2000), hlm. 16.

[6] Enang Hidayat, *Fiqih Jual Beli* (Bandung: PT Remaja Rosdakarya, 2015), hlm. 51.

"pintu" terbuka luas. Setiap muamalah baik yang datang kemudian atau yang terdahulu prinsip dasarnya adalah boleh. Tidak boleh seorang mengintervensi hukum kebolehan tersebut kecuali ada dalil yang sahih dan jelas yang melarangnya. Dengan demikian prinsip tersebut keluar dari hukum asal.

Dalam dunia perdagangan internasional terdapat organisasi yang mengatur tentang perdagangan internasional yang dilakukan antar negara dalam pemenuhan kebutuhan negaranya. Organisasi tersebut bernama *World Trade Organisation* (WTO) atau Organisasi Pedagangan Dunia. WTO adalah badan antar-pemerintah, yang mulai berlaku 1 Januari 1995 untuk menggantikan GATT (*General Agreement on Tariff and Trade*), persetujuan setelah Perang Dunia II untuk meniadakan hambatan perdagangan internasional. Prinsip dan persetujuan GATT diambil oleh WTO, yang bertugas untuk mendaftar dan memperluasnya.

Tugas utamanya adalah mendorong perdagangan bebas, dengan mengurangi dan menghilangkan hambatan-hambatan perdagangan seperti tarif dan non tarif (misalnya regulasi), menyediakan forum perundingan perdagangan internasional, penyelesaian sengketa dagang dan memantau kebijakan perdagangan di negara-negara anggotanya.

Salah satu peraturan yang harus ditaati oleh anggota yang tergabung dalam organisasi WTO adalah *Free Trade Agreement* (FTA) atau Perjanjian Perdagangan Bebas. Perjanjian perdagangan bebas adalah perjanjian antara dua negara atau lebih untuk membangun sebuah area

perdagangan bebas di mana perdagangan dalam bentuk barang dan jasa dapat dilakukan dengan melampaui batas-batas umum (misalnya batas geografis), tanpa tarif atau penghalang. FTA adalah rezim aturan yang kompleks, karena di dalamnya bersangkut paut dengan rezim ekonomi, rezim politik dan rezim ideologi.

Sebenarnya perjanjian atau kesepakatan perdagangan bebas dapat dibagi kedalam tiga jenis, yaitu perjanjian multilateral (*multilateral free trade agreements*/MFTA), perjanjian bilateral (*bilateral free trade agreements*/BFTA) dan perjanjian regional (*regional free trade agreements*/RFTA). Multilateral adalah pada WTO (*World Trade Organization*) yang seringkali disebut sebagai sebuah *multilateral trade negotiation* (MTN). Dalam hal bilateral, maka secara umum dibagi ke dalam tiga jenis, yaitu bilateral negara-dengan-negara, misalnya Indonesia-Jepang EPA; bilateral negara-dengan-blok kawasan, misalnya Indonesia dengan Uni Eropa; dan bilateral blok-kawasan-dengan blok kawasan, misalnya ASEAN dengan Uni Eropa, AFTA (ASAN *Free Trade Area*) dan NAFTA (*North American Free Trade Area*).[7] Perlu dipahami bahwa aturan-aturan di FTA yang bersifat bilateral maupun regional, berinduk kepada perjanjian-perjanjian di WTO yang brsifat multilateral. Dan hal tersebut selalu ditekankan pada setiap kesepakatan FTA.

Negara Indonesia dan negara New Zealand adalah negara yang termasuk anggota dalam organisasi WTO yang artinya Indonesia dan New

[7] Bonnie Setiawan, *WTO dan Perdagangan Abad 21* (Sleman: Resist Book, 2013), hlm. 75.

Zealand juga harus mentaati peraturan yang dibuat oleh WTO yaitu FTA atau Perjanjian Perdagangan Bebas. Atas dasar peraturan tersebut antara Indonesia dan New Zealand seharusnya dapat mengadakan jual beli tanpa adanya hambatan-hambatan yang diberikan oleh salah satu atau kedua negara tersebut.

Namun kita lihat terjadi permasalahan antara kedua negara tersebut yaitu negara Indonesia dan New Zealand yang terkait dengan peraturan WTO yaitu perjanjian perdagangan bebas. Indonesia dan New Zealand sudah mengadakan transaksai jual beli produk hortikultura termasuk daging sapi dan hewan ternak sapi sejak lama. Namun pada tahun 2010 Indonesia mulai membuat peraturan-peraturan yang dinilai oleh New Zealand membatasi impor produk hortikultura termasuk daging sapi dari negaranya. Oleh karena itu New Zealand menganggap Indonesia telah melanggar peraturan WTO yaitu Perjanjian Perdagangan bebas terhadap New Zealand. Dan masalah tersebut dibawa ke pengadilan WTO.

Peraturan-peraturan yang Indonesia buat tersebut dimaksudkan untuk memperketat barang-barang impor yang masuk ke negara Indonesia dan bukan membatasi impor dan melanggrar peraturan WTO yaitu perjanjian perdagangan bebas.

Dalam ushul fikih terdapat kaidah yang menyebutkan bahwa kemudharatan harus dihilangkan. Pembatasan yang dilakukan Indonesia dengan cara membuat peraturan-peraturan terkait impor hortikultura tersebut adalah salah satu upaya menghilangkan kemudharatan yang ada,

dan hal tersebut melihat dari kemaslahatan yang didapatkan oleh Indonesia lebih besar karena untuk melindungi petani-petani dan peternak-peternak di Indonesia.

Secara etimologi, *maṣlaḥah* sama dengan manfaat, baik dari segi lafal maupun makna. *Maṣlaḥah* juga berarti manfaat atau suatu pekerjaan yang mengandung manfaat. Apabila dikatakan bahwa perdagangan itu suatu kemaslahatan dan menuntut ilmu itu juga suatu kemaslahatan, maka hal tersebut berarti bahwa perdagangan dan menuntut ilmu itu penyebab diperolehnya manfaat lahir dan batin. Imam Ghazali mengemukakan bahwa pada prinsipnya *maṣlaḥah* adalah "mengambil kemanfaatan dan menolak kemudharatan dalam rangka memelihara tujuan-tujuan syara'."[8]

Tujuan syara' yang harus dipelihara tersebut menurut al-Ghazali, ada lima bentuk yaitu: memelihara agama, jiwa, akal, keturunan, dan harta. Apabila seseorang melakukan suatu perbuatan yang pada intinya untuk memelihara kelima aspek tujuan syara' di atas, maka dinamakan *maṣlaḥah.* Di samping itu, upaya untuk menolak segala bentuk kemudharatan yang berkaitan dengan kelima aspek tujuan syara' tersebut juga dinamakan *maṣlaḥah.*[9]

Dalam ilmu ushul fikih *maṣlaḥah* merupakan salah satu metode untuk menemukan hukum dan ini termasuk dalam sumber hukum Islam. Menurut Ahli Ushul, *maṣlaḥah* diartikan kemaslahatan yang tidak disyari'atkan oleh Syar'i dalam wujud hukum, dalam rangka menciptakan

[8] H. Nasrun Haroen, *Ushul Fiqh 1* (Jakarta: Logos Publishing House, 1996), hal. 114.
[9] *Ibid.*, hlm. 114.

kemaslahatan, disamping tidak terdapat dalil yang membenarkan atau menyalahkan. Karenanya *maṣlaḥah* itu disebut mutlak lantaran tidak terdapat dalil yang menyatakan benar atau salah.[10]

Berdasarkan dari latar belakang tersebut, penulis akan meneliti lebih lanjut mengenai pembatasan impor produk hortikultura, hewan dan produk hewan dari negara New Zealand yang dilakukan oleh negara Indonesia dengan studi kasus gugatan New Zealand kepada Indonesia ke WTO. Penulis mengambil judul :

TINJAUAN HUKUM ISLAM MENGENAI KASUS PEMBATASAN IMPOR HORTIKULTURA OLEH PEMERINTAH INDONESIA (Studi Kasus Gugatan New Zealand terhadap Indonesia ke WTO terkait Kebijakan Indonesia terhadap Pembatasan Impor Hortikultura).

B. Pokok Masalah

Berdasarkan latar belakang yang penyusun kemukakan, maka masalah yang akan diangkat dalam skripsi ini adalah :

1. Apa sajakah faktor yang melatarbelakangi Indonesia mengeluarkan peraturan-peraturan yang membatasi impor?
2. Bagaimana tinjauan hukum Islam terhadap pembatasan impor yang Indonesia lakukan?

[10] Masdar Helmy, *Ilmu Ushulul Fiqh* (Bandung: Gema Risalah Press, 1996), hlm. 142.

C. Tujuan dan Kegunaan

Tujuan dari penelitian ini adalah :

1. Mendeskripsikan faktor apa sajakah yang melatarbelakangi Indonesia untuk membuat peraturan dan kebijakan yang dianggap membatasi impor dari negara New Zealand.
2. Menjelaskan bagaimana tinjauan hukum Islam tentang peraturan dan kebijakan Indonesia yang dianggap membatasi impor dari negara New Zealand.

Sedangkan Kegunaan penelitian ini adalah :

1. Penelitian ini diharap mendapatkan hasil yang nantinya dapat dimanfaatkan atau digunakan dalam mengambil keputusan atau kebijakan-kebijakan oleh pemerintah khususnya dalam hal impor.
2. Untuk mengaplikasikan ilmu yang telah diperoleh selama menempuh pendidikan di Perguruan Tinggi dengan membuat laporan penelitian secara ilmiah dan sistematis.
3. Bagi akademisi, penelitian ini diharap dapat dijadikan salah satu referensi dalam penelitian-penelitian yang lain dengan tema yang bersangkutan.

D. Telaah Pustaka

Berdasarkan hasil penelusuran terhadap beberapa literatur-literatur ilmiah yang meliputi buku, skripsi maupun tesis yang mempunyai

relevansi dengan pembahasan dalam skripsi ini. Diantaranya literatur-literatur tersebut adalah:

Skripsi yang berjudul "Pandangan Etika Bisnis IslamTerhadap Larangan Proteksi Barang Impor Oleh *World Trade Organization* (WTO)"[11], karya Talkhayati. Dalam skripsi ini dibahas tentang bagaimana pandangan Islam terhadap peraturan perdagangan internasional yaitu barang impor yang masuk dari negara ke negara lain yang termasuk anggota WTO tidak boleh ada proteksi apapun yang bisa menghalangi barang tersebut masuk. Selain itu pada skripsi ini dibahas juga konsep dasar tentang etika bisnis dalam Islam yang digunakan untuk memandang masalah tidak boleh adanya proteksi terhadap barang impor yang masuk ke negara lain.

Skripsi yang berjudul "Kebijakan Non-Tarif *World Trade Organization* (WTO) Menurut Prespektif Hukum Islam"[12]. Membahas tentang kebijakan non-tarif yang diberlakukan oleh *World Trade Organization* (WTO) untuk mengatasi hambatan-hambatan dalam pengimporan barang yang akan masuk ke negara lain. Kebijakan ini di lihat dengan prinsip perdagangan dalam Islam apakah bertentangan dengan prinsip dagang Islam atau tidak. Skripsi ini berkesimpulan bahwa kebijakan non-tarif tersebut tidak bertentangan dalam hukum dagang Islam

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[11] Talkkayati, *Pandangan Etika Bisnis IslamTerhadap Larangan Proteksi Barang Impor Oleh World Trade Organization (WTO)", skripsi,* Fakultas Syariah dan Hukum Universitas Islam Negeri Sunan Kalijaga Yogyakarta (2010)

[12] Dede Rahmat Ali, "*Kebijakan Non-Tarif World Trade Organization (WTO) Menurut Prespektif Islam*", *skripsi,* Fakultas Syariah dan Hukum Universitas Islam Sunan Kalijaga Yogyakarta (2009).

karena menghendaki kebaikan diantara kedua belah pihak yang melakukan kesepakatan.

Skripsi yang berjudul "Pengaturan Perdagangan Jasa Dalam WTO Menurut Prespektif Hukum Islam"[13] karya Nurjannah Triastuti Rahajeng. Membahas tentang peraturan *World Trade Organization* (WTO) jual beli jasa yang berskala internasional. Bagaimanakah ekonomi Islam memandang jual beli jasa dan peraturan yang diberlakukan oleh *World Trade Organization* (WTO) terkait jual beli jasa. Dan kesimpulan dari skripsi ini adalah bahwa pengaturan perdagangan jasa dalam WTO tidak lah bertentangan dengan hukum Islam karena terdapat prinsip non diskriminatif dan transparansi kemudian prinsip kerelaan juga terdapat dalam prinsip persetujuan WTO.

Buku yang berjudul "Sanksi Dagang Unilateral di bawah Sistem Hukum WTO"[14] karya Rusli Pandawa Membahas tentang sanksi yang diberikan atas negara yang melanggar peraturan-peraturan dagang di bawah sistem hukum WTO. Dan membahas juga penyelesaian sengketa yang terjadi antar negara-negara yang sedang berselisih.

Dari hasil pustaka di atas, sepanjang yang penyusun ketahui belum ada penelitian yang spesifik membahas dan menganalisa tentang kasus kasus pembatasan impor hortikultura oleh pemerintah Indonesia.

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[13] Nurjannah Triastuti Rahajeng, *Pengaturan Perdagangan Jasa Dalam WTO Menurut Prespektif Hukum Islam*, *skripsi*, Fakultas Syariah dan Hukum Universitas Islam Sunan Kalijaga Yogyakarta (2008).

[14] Rusli Pandika, *Sanksi Dagang Unilateral di bawah Sistem Hukum WTO* (Bandung: PT. Alumni, 2010).

E. Kerangka Teori

Telah menjadi ketetapan Allah SWT bahwa manusia tidak akan bisa hidup sendiri tanpa bantuan orang lain sesama manusia. Manusia sesuai yang Allah SWT takdirkan pasti akan memerlukan bantuan manusia yang lain, maka dari itu manusia harus bermasyarakat, tunjang-menunjang, topang-menopang dan tolong-menolong antara sesama manusia agar dapat bertahan hidup.

Fikih Islam adalah merupakan kumpulan dari berbagai macam aturan hidup, dimana ia memberikan ketentuan-ketentuan hukum terhadap semua keadaan, yang mencakup hubungan hamba dengan Khaliqnya dan hubungan hamba dengan hamba, baik dalam urusan pribadi perseorangan atau dalam hubungannya sebagai bangsa atau hubungan antar negara, yang lazim disebut dengan hubungan internasional.[15]

Dalam bermuamalah dengan sesama manusia Allah SWT menganjurkan agar manusia saling tolong-menolong dalam suatu kebaikan apapun dan melarang tolong-menolong dalam hal yang tidak baik yang yang melanggar dan menimbulkan dosa. Hal ini dilakukan agar manusia dapat mencapai kemajuan hidup, cita-cita dan juga tujuan hidupnya. Seperti dalam firman Allah :

...وتعاونوا على البرِ والتَّقوى ۖ ولا تعاونوا على الإِثم والعدوان ۚ...[16]

[15] Asjumuni Abdurrahman, *Qaidah-Qaidah Fiqh*, cet-1 (Yogyakarta: UII Press, 2004), hlm. 16.

[16] Q.S. Al-Maidah 5) : 2

Di firman Allah yang lain yang berbicara tentang larangan memakan harta sesama manusia dengan cara yang buruk:

يٰأيها ٱلَّذين ءامنواْ لا تأكلوٓاْ أموٰلكم بيٰنكم بٱلبٰطل إلَّآ أن تكون تجٰرة عن ...[17]

...تراضٍ مِنكم

Jual beli merupakan salah satu bentuk muamalat yang diperbolehkan Allah SWT. Akan tetapi dalam pelaksanaannya, proses muamalat harus selalu mengingat prinsip-prinsip muamalat, yang dapat dirumuskan sebagai berikut :

1. Pada dasarnya segala bentuk muamalat adalah mubah, kecuali yang ditentukan oleh Al-Qur'an dan Sunnah Rasul.
2. Muamalat dilakukan atas dasar sukarela tanpa ada unsur paksaan.
3. Muamalat dilakukan atas dasar pertimbangan mendatangkan manfaat dan menghindarkan madharat dalam hidup masyarakat.
4. Muamalat dilakukan dengan memelihara nilai-nilai keadilan, menghindari unsur-unsur pengambilan kesempatan dalam kesempitan.[18]

Apabila seorang dipaksa untuk menjual atau membeli barang dengan cara tidak benar, maka transaksi itu batal, karena menyalahi prinsip "Saling Merelakan". Tetapi apabila seorang dipaksa menjual barangnya dalam kebenaran, yakni suatu yang dibenarkan oleh syara' maka transaksi itu sah. Misalnya dipaksa menjual barang untuk menutupi

[17] Q.S. An-Nisa 4) : 29

[18] Ahmad Azhar Basjir, *Asas-Asas Hukum Muamalat Hukum Perdata Islam* (Yogyakarta: UII Press, 2000), hlm. 16.

hutangnya atau atau untuk memberikan nafkah kepada keluarganya yang menjadi kewajiban baginya.

Dalam Islam hukum-hukum ibadah dan muamalah sebagian telah dijelaskan di dalam *naṣṣ* al-Qur'an dan as-Sunnah, sedangkan sebagian lainnya belum dijelaskan secara spesifik karena penjelasan yang ada masih secara umum. Namun demikian, syariat Islam telah membuat dalil dan tanda-tanda bagi hukum tersebut, sehingga seorang Mujtahid dengan media dalil dan tanda-tanda tersebut mampu melahirkan ketetapan dan penjelasan tentang hukum yang belum dijelaskan tersebut.dari kumpulan hukum-hukum syar'iyah yang berhubungan dengan segala tindakan manusia, baik berupa ucapan atau perbuatan, yang diambil dari *naṣṣ - naṣṣ* yang ada, atau dari meng-*istinbat* dalil-dalil syariat Islam lain bagi kasus yang tidak terdapat *naṣṣ*nya terbentuklah ilmu fikih.

Jadi, definisi ilmu Fikih menurut istilah syara ialah pengetahuan tentang hukum-hukum syariat Islam mengenai perbuatan manusia, yang diambil dari dalil-dalilnya secara rinci. Atau dengan kata lalin yurisprudensi atau kumpulan-kumpulan hukum syariat Islam mengenai perbuatan manusia, yang diambil dari dalil-dalil secara rinci.[19]

Adapun ilmu ushul fikih menurut syara' adalah pengetahuan tentang kaidah-kaidah dan pembahasan-pembahasan yang dijadikan sebagai acuan dalam pengetahuan hukum syari'at mengenai perbuatan manusia mengenai dalil-dalil yang terinci. Atau kumpulan kaidah-kaidah

[19] Moh. Abu Zahroh, *Kaidah-Kaidah Hukum Islam (Ilmu Ushulul Fiqh)*, (Jakarta: PT Raja Geafindo Persada, 1996), hlm. 1-2.

dan pembahasan-pembahasan yang dijadikan sebagai acuan di dalam pengambilan hukum syari'at tentang perbuatan mausia berdasarkan dalil-dalil yang terinci.[20]

Dalam ilmu ushul fikih terdapat dalil yang digunakan sebagai dasar-dasar dalam pengambilan hukum atau penentuan hukum dalam suatu masalah. Pengertian dari dalil itu sendiri dalam bahasa Arab artinya orang yang menunjukan kepada apa saja baik apa yang dapat dicerap oleh panca indera maupun yang berada dalam jiwa tentang baik dan buruk. Adapun arti menurut istilah ushul yaitu apa yang berdasarkan pandangan yang benar terhadap hukum syar'i yang berkenaan dengan perbuatan atas jalan *qat'i* (pasti) atau *dzan* (persangkaan).

Dalil syar'i yang digunakan sebagai dasar penentuan hukum ada sepuluh sesuai kesepakatan para ulama ushul. Empat diantaranya yang disepakati untuk dijadikan sebagai dalil/dasar hukum dan enam lainnya masih terdapat perbedaan pendapat dikalangan para ulama ushul. Berikut sepuluh dalil yang dijadikan sebagai dasar pengambilan hukum.[21]

Dalil yang pertama yaitu al-Qur'an. Al-Qur'an adalah perkataan Allah yang diturunkan kepada *Ruhul Amin* ke dalam hati Rasulullah Muhammad bin Abdullah, dengan lafadz bahasa arab berikut artinya. Agar menjadi *hujjah* bagi Rasulullah SAW bahwa dia adalah seorang utusan Allah SWT. Menjadi undang-undang dasar bagi orang-orang yang mendapat petunjuk dengan petunjuk Allah SWT.

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[20] Abdul Wahab Khalaf, *Ilmu Ushulul Fiqh*, (Bandung: Gema Risalah Press, 1996), hlm. 22.

[21] Abdul Wahab Khallaf, *Ilmu Ushul Fikih*, (Jakarta: Rineka Cipta, 2012), hlm. 17-111.

Dalil kedua yaitu as-Sunnah. As-Sunnah adalah sesuatu yang datang dari Rasulullah, baik *qauliyah(*ucapan), *fi'liyah*(perbuatan), atau *taqrir*(persetujuan). As-Sunnah *qauliyah* ialah hadits-hadits Rasulullah yang berupa ucapan di dalam berbagai tujuan dan permasalahan. As-Sunnah *Fi'liyah* ialah perbuatan Rasulullah misalnya perbuatan melakukan shalat lima kali lengkap dengan cara melakukannya dan rukunnya. As-Sunnah *Taqririyah* ialah perbuatan sahabat-sahabat nabi yang disetujui oleh nabi dan tidak diingkari oleh nabi baik mengenai ucapan atau perbuatan.

Dalil ketiga yaitu Ijmak. Ijmak menurt istilah ushul adalah sepakat para mujtahid Muslim memutuskan suatu masalah sesudah wafatnya Rasulullah terhadap hukum syar'i pada suatu peristiwa. Apabila terjadi suatu peristiwa, maka peristiwa itu dikemukakan kepada semua mujtahid dan semua mujtahid memutuskan hukumnya dengan tidak berbeda hukumnya. Kesepakatan mereka itu dinamakan Ijmak.

Dalil keempat yaitu *al-Qiyas*. Menurut ulama' ushul al-Qiyas adalah menyamakan suatu kejadian yang tidak ada *naṣṣ* kepada kejadian lain yang ada *naṣṣ*nya pada *naṣṣ* hukum yang telah menetapkan lantaran adanya kesamaan diantara dua kejadian tersebut dalam '*illat*(sebab terjadinya) hukumnya.

Dalil kelima yaitu *al-Istiḥsan*. *Al-Istiḥsan* menurut bahasa adalah mengembalikan sesuatu kepada yang baik. Menurut istilah ushul yaitu

memperbandingkan, dilakukan oleh mujtahid dari *qiyas jalli*(jelas) kepada *qiyas khaf*(tersembunyi).

Dalil keenam yaitu *al- Maṣlaḥah.* Secara bahasa artinya yang mutlak. Secara istilah ushul adalah kemaslahatan yang tidak disyariatkan oleh syari' dalam wujud hukum, dalam rangka menciptakan kemaslahatan, disamping tidak terdapat dalil yang membenarkan atau menyalahkan. Karenanya *maṣlaḥah* itu disebut mutlak lantaran tidak terdapat dalil yang menyatakan benar atau salah.

Dalil ketujuh yaitu *al-Urf*. *Al-Urf* adalah apa yang saling diketahui dan yang saling dijalani oleh orang. Berupa perkataan, perbuatan, atau meninggalkan. *Al-Urf* juga bisa kita sebut dengan adat, karena ulama menyamakan antara keduanya.

Dalil kedelapan yaitu al-Istisḥab. Secara bahasa adalah pelajaran yang terambil dari sahabat Nabi SAW. dan menurut istilah ushul adalah hukum terhadap sesuatu dengan keadaan yang ada sebelumnya, sampai adanya dalil untuk mengubah keadaan itu. Atau menjadikan hukum yang tetap di masa yang lalu itu, tetap dipakai sampai sekarang, sampai ada dalil untuk mengubahnya.

Dalil kesembilan yaitu syariat dari orang yang sebelum kita. Al-Quran dan as-Sunnah Shahih itu telah mengisahkan tentang salah satu dari hukum syar'i, yang disyariatkan Allah kepada umat yang telah dahulu dari kita. Ada hal-hal dan *naṣṣ* - *naṣṣ* yang disampaikan kepada Nabi juga oleh Tuhan telah disampaikan kepada umat-umat dahulu kala. Ada hal-hal yang

yang tidak berbeda menurut apa yang disyariatkan kepadakita berupa peraturan yang wajib kita ikuti.

Dalil kesepuluh yaitu Mazhab sahabat. Setelah Rasul wafat yang memberikan fatwa kepada kaum muslimin waktu itu adalah sahabat. Mereka itu mengetahui fikih ilmu pengetahuan an apa-apa yang biasa disampaikan oleh Rasulullah SAW. Memahami al-Qur'an dan hukum-hukumnya. Inilah yang menjadi sumber fatwa-fatwa dalam bermacam-macam masalah yang terjadi.

Dalil kesebelas *fathu dzarî'ah, fathu dzarî'ah* juga merupakan salah satu metode untuk menemukan hukum dan ini termasuk dalam sumber hukum Islam. Ibn Qayyim al-Jauziyyah dan Imam al-Qarafi, mengatakan *dzarî'ah* itu adakalanya dilarang, disebut dengan *sadd al-dzarî'ah,* dan adakalanya dianjurkan, disebut dengan *fathu dzarî'ah*. Yang mereka maksud dengan *fathu dzarî'ah* adalah suatu perbuatan yang dapat membawa kepada sesuatu yang dianjurkan, bahkan diwajibkan syara'. Misalnya shalat Jum'at itu hukumnya wajib, maka berusaha untuk sampai ke masjid dengan meninggalkan segala aktivitas lain juga diwajibkan.

Itulah kesebelas dalil yang menjadi dasar hukum dalam penentuan hukum-hukum terkait kepada suatu masalah. Penelitian ini akan mengambil dasar hukum *maṣlaḥah* dan *fathu dzarî'ah* sebagai dasar hukum untuk penentuan hukum dalam masalah yang terjadi di penelitian ini.

Dalam melakukan transaksi ekspor-impor tersebut dikenakan berbagai ketentuan atau pembatasan pada jenis barang/komoditi ekspor-impor, dan persyaratan-persyaratan khusus pada komoditi-komoditi tertentu termasuk tata cara penanganan dan pengamanannya.

Setiap negara mempunyai peraturan serta sistem perdagangan yang berbeda-beda, karena itu, merka yang terlibat dalam transaksi ekspor-impor tersebut, baik para pengusaha atau petugas-petugas bank, sangat perlu mengikuti perkembangan-perkembangan peraturan serta sistem perdagangan luar negeri, baik yang berlaku di Indonesia maupun di pelbagai negara lain.[22]

Transaksi jual beli yang dilakukan oleh negara bisa dilakukan di wilayah domestik dan bisa dilakukan di wilayah luar negaranya atau luar negeri yaitu yang dinamakan dengan ekspor dan impor. Transaksi perdagangan luar negeri yang lebih dikenal dengan istilah ekspor dan impor pada hakikatnya adalah suatu transaksi yang sederhana dan tidak lebih dari membeli dan menjual barang antara pengusaha-pengusaha yang bertempat di negara-negara yang berbeda. Namun dalam pertukaran barang dan jasa yang menyeberangi laut dan darat ini tidak jarang timbul berbagai masalah yang kompleks antara pengusaha-pengusaha yang mempunyai bahasa, kebudayaan, adat istiadat dan cara yang berbeda-beda.

Pengaruh keseluruhan dari perdagangan ekspor-impor ini tanpa memandang penyebab-penyebabnya adalah untuk memberikan

[22] Roselyne Hutabarat, *"Transaksi Ekspor Impor"* (Jakarta: Penerbit Erlangga, 2006), hlm. 1-2.

keuntungan bagi negara-negara yang mengimpor dan mengekspor. Transaksi ekspor-impor secara langsung berpengaruh terhadap pertumbuhan ekonomi dari negara-negara yang terlibat di dalamnya.

Bagi perkembangan perekonomian Indonesia, transaksi ekspor-impor ini pun merupakan salah satu kegiatan ekonomi yang penting. Dalam situasi perekonomian dunia yang masih belum menggembirakan saat ini berbagai usaha telah dilaksanakan pemerintah Indonesia yang diharapkan dapat meningkatkan pencarian sumber-sumber devisa yang antara lain adalah meningkatkan transaksi-transaksi ekspor dan menekan pengluaran-pengeluaran devisa dengan cara membatasi aktivitas-aktivitas impor.

Khusus dalam usaha untuk meningkatkan volume ekspor Indonesia, pemerintah Indonesia berapa tahun terakhir ini telah melakukan berbagai deregulasi di bidang perdagangan dan perbankan dengan mengeluarkan berbagai peraturan yang memberi kemudahan, dimulai dengan paket ekspor tahun 1982, sistem imbal beli (*count trade*), Inpres tahun 1985 tentang penyemburnaan cara penanganan ekspor-impor untuk efisiensi dan peningkatan hasil negara, yang diperkuat lagi dengan penyediaan kredit ekspor yang terbuka juga bagi PMA dengan bunga 9% per tahun, yang sebelumnya hanya diberikan untuk penguaha nasional.

Dalam bidang impor, yang diperlukan untuk menunjang barang-barang ekspor tadi, umumnya yang diimpor adalah bahan baku industri, mesin-mesin, bahan-bahan kimia, ditambah dengan barang-barang modal

untuk pelaksanaan pembangunan. Selain itu impor juga menyangkut bahan atau barang kebutuhan konsumsi yang belum dapat diproduksi di dalam negeri.

Dalam melakukan transaksi ekspor-impor tersebut dikenakan berbagai ketentuan atau pembatasan pada jenis barang/komoditi ekspor-impor, dan persyaratan-persyaratan khusus pada komoditi-komoditi tertentu termasuk tata cara penanganan dan pengamanannya.

Dalam jual beli ekspor dan impor terdapat perjanjian yang bernama *Free Trade Agreement* (FTA) yang perjanjian tersebut harus dipatuhi oleh negara-negara yang akan melakukan ekspor dan impor ke negara lain dan negara tersebut telah bergabung dengan organisasi dagang internasional yaitu *World Trade Organization* (WTO).

Free Trade Agreement (FTA) merupakan suatu perjanjian perdagangan bebas yang dilakukan antara suatu negara dengan negara lainnya. Pembentukan berbagai FTA merupakan akibat dari liberalisasi perdagangan yang tidak dapat dihindari oleh semua negara sebagai anggota masyarakat internasional. Hal inilah yang mendorong terbentuknya blok-blok perdagangan bebas. FTA dapat dibentuk secara bilateral, misalnya antara Amerika Serikat dengan Singapura, Amerika Serikat dengan Chile, Japan dengan Singapura, maupun regional seperti

ASEAN *Free Trade Area* (AFTA), *North America Free Trade Area* (NAFTA) dan Uni Eropa.[23]

F. Metode Penelitian

Metode penelitian yang digunakan dalam skripsi ini adalah metode penelitian kualitatif. Adapun agar dapat memudahkan dalam memahami penelitian ini akan diuraikan perangkat penelitian sebagai berikut:

1. Jenis Penelitian

   Penelitian ini menggunakan penelitian pustaka *(Library Research)*, yakni menggunakan buku-buku dan karya tulis ilmiah, selanjutnya diuraikan dan disimpulkan dengan menggunakan metode berfikir deduktif yaitu menganalisa data yang bersifat umum kemudian ditarik kesimpulan yang bersifat khusus.

2. Sifat Penelitian

   Penelitian ini adalah penelitian kualitatif, dan sifat penelitian ini adalah bersifat *deskriptif-analisis*, yaitu menjelaskan permasalahan sudut pandang hukum Islam dalam mengkaji kasus peraturan-peraturan pemerintah Indonesia yang dinilai membatasi impor terhadap produk hortikultura, hewan dan produk hewan dari negara New Zealand yang bertentangan dengan peraturan WTO yaitu Pasal 11 ayat (1) GATT 1994 kemudian dikaji dan dianalisis secara sistematis.

[23] https://www.kemenkeu.go.id/Kajian/free-trade-agreement-fta-dan-economic-partnership-agreement-epa-dan-pengaruhnya-terhadap-arus, pada 20 Juli 2017 pukul 23.25.

3. Pendekatan Penelitian

Pendekatan Penelitian yang digunakan untuk pembahasan penelitian ini adalah pendekatan kualitatif yaitu menekankan analisisnya pada proses penyimpulan deduktif dan induktif serta pada analisis terhadap dinamika hubungan antarfenomena yang diamati, dengan menggunakan logika ilmiah.[24] Penelitian berdasarkan studi kasus yang mana studi kasus merupakan metode di mana di dalamnya periset evaluasi menyelidiki secara cermat suatu program, peristiwa, aktivitas, proses, atau sekelompok individu. Kasus-kasus dibatasi oleh waktu dan aktivitas, dan peneliti mengumpulkan informasi secara lengkap dengan menggunakan berbagai prosedur pengumpulan data berdasarkan waktu yang telah ditentukan.[25]

4. Teknik Pengumpulan Data

Karena penelitian ini bersifat pustaka, maka penelitian ini didasarkan atas studi kepustakaan. Adapun data kepustakaan dari penelitian ini dengan data yabg bersifat sekunder. Data yang bersifat tersebut adalah Surat Putusan dari WTO atas sengketa Indonesia melawan New Zealand, buku-buku kontemporer maupun klasik, jurnal, makalah dan lainnya.

5. Analisis Data

Setelah data terkumpul seluruhnya maka akan dilakukan analisis dengan menggunakan metode analisis kualitatif, yaitu dengan

[24] Saifudin Azwar, *Metode Penelitian* (Yogyakarta: Pustaka Pelajar, 2005), hlm. 5.
[25] Samsul Hadi, *Metode Riset Evaluasi* (Yogyakarta: akbang Grafika, 2011), hlm 224.

melakukan analisis terhadap semua data-data yang sudah terkumpul secara utuh sehingga terlihat gambaran yang sistematis dan faktual. Dari hasil analisis tersebut, penyususn menarik kesimpulan yang akan menjawab pokok permasalahan yang telah disebutkan di atas, kemudian analisis ini diakhiri dengan saran atau masukan terhadap isu tersebut.

G. Sistematika Pembahasan

Sistematika pembahasan penulisan skripsi dalam penelitian ini akan dibagi ke dalam beberapa bab. Bab pertama merupakan bab pendahuluan yang terdiri dari latar belakang masalah, pokok masalah, tujuan dan manfaat, telaah pustaka, kerangka teori, metode penelitian dan sistematika pembahasan.

Bab kedua merupakan studi teoritis yang menjelaskan tentang landasan teori ekspor-impor. Pada bagian ini terdapat sub-sub pembahasan tentang objek pambahasan masalah yakni gambaran umum tentang ekspor-impor, syarat-syarat ekspor-impor, peraturan-peraturan dan kebijakan pemerintah Indonesia, dan peraturan-peraturan dan kebijakan WTO terkait ekspor-impor.

Bab ketiga peneliti akan memaparkan tentang gambaran umum tentang kasus pembatasan impor produk hortikultura, hewan dan produk hewan yang terjadi antara Indonesia melawan New Zealand yang disengketakan melalui pengadilan di WTO.

Bab keempat peneliti akan memaparkan mengenai analisa data kasus pembatasan impor produk hortikultura, hewan dan produk hewan yang dilakukan Indonesia terhadap New Zealand berdasarkan tinjauan hukum Islam. Analisa data ini untuk mengetahui alasan Indonesia membuat peraturan-peraturan dan kebijakan pembatasan impor dari negara lain.

Bab kelima dalam sistematika pembahasan ini adalah bagian penutup, dalam bagian pebutup ini terdapat kesimpulan yang akan menjawab rumusan masalah, serta terdapat saran untuk dijadikan sebagai masukan untuk penelitian yang akan datang.

BAB V

PENUTUP

A. Kesimpulan

Berdasarkan penjelasan pada bab-bab sebelumnya dan analisis pada bab IV maka dapat ditarik kesimpulan sebagai berikut:

1. Faktor yang melatarbelakangi negara Indonesia mengeluarkan peraturan-peraturan pembatasan impor produk hortikultura, hewan dan produk hewan adalah sebagai berikut:
   a. Melindungi industri dalam negeri
   b. Melindungi petani lokal Indonesia
   c. Melindungi peternak lokal Indonesia
   d. Melindungi rakyat Indonesia dari barang-barang impor yang tidak sehat
   e. Menciptakan Swasembada pangan negara Indonesia.
2. Menurut tinjauan hukum Islam kasus dengan menggunakan metode ushul fikih yaitu *maṣlaḥah* dan *fathu dzarî'ah,* pembatasan impor produk hortikultura, hewan dan produk hewan yang negara Indonesia lakukan hukumnya adalah sangat dianjurkan atau sunnah yang sangat dianjurkan karena dengan pembatasan impor maka negara akan terbebas dari kesempitan dan kesukaran. Dengan memberlakukan peraturan dan kebijakan tersebut Indonesia bisa mengambil kemaslahatan atau kemanfaatan sebanyak mungkin bagi negara untuk kemakmuran rakyatnya.

B. Saran

1. Pemerintah Indonesia sebaiknya menyiapkan sumber daya manusia yang berkompeten sebagai negoisator. Karena ketika terjadi konflik atau sengketa perdagangan seperti dalam kasus ini negoisator yang baik dan pintar akan dapat menyampaikan argumen-argumen yang bisa menyakinkan hakim dalam persidangan. Dengan begitu diharapkan dapat memenangkan konflik atau sengketa yang dihadapi negara Indonesia.
2. Pemerintah Indonesia juga sebaiknya memperjelas peraturan-peraturan impornya kepada eksportir-eksportir yang akan mengekspor barang-barangnya ke Indonesia. Menjelaskan dibuatnya peraturan impor tersebut karena keadaan ekonomi dan rakyat negara Indonesia terancam jika terlalu banyak barang impor masuk. Dengan begitu diharapkan negara-negara yang akan mengekspor ke Indonesia tidak akan mempermasalahkannya sampai di pengadilan.

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Surat Putusan DBS WTO tentang *Sengketa Pembatasan Impor Hortikultura* Nomer WT/DS477/R/Add.1

LAMPIRAN I

TERJEMAHAN AL-QURAN, HADITS DAN ISTILAH-ISTILAH

Hal.	Nomor Footnote	Ayat al-Quran dan Hadits	Terjemahan Ayat
BAB I			
3	6	Kaidah dalam Muamalah	Hukum asal mengajukan syarat dalam muamalah adalah halal dan mubah, kecuali jika ada dalil
12	16	Q.S. (5) al-Maidah : 2	Dan tolong-menolonglah kamu dalam (mengerjakan) kebajikan dan takwa, dan jangan tolong-menolong dalam berbuat dosa dan pelanggaran
13	17	Q.S. (4) an-Nisa : 29	Hai orang-orang yang beriman, janganlah kamu saling memakan harta sesamamu dengan jalan yang batil, kecuali dengan jalan perniagaan yang berlaku dengan suka sama-suka di antara kamu
BAB II			
50	50	Hadis Arbain ke-32	Dari Abu Sa'id, Sa'ad bin Sinan Al-Khudri radhiallahuanhu, sesungguhnya Rasulullah Shallallahu'alaihiWasallam bersabda : "Tidak boleh melakukan perbuatan (mudharat) yang mencelakakan diri sendiri dan orang lain"

			(Hadits hasan diriwayatkan oleh Ibnu Majah dan Daruqutni serta selainnya dengan sanad yang bersambung, juga diriwayatkan oleh Imam Malik dalam Muwattho' secara mursal dari Amr bin Yahya dari bapaknya dari Rasulullah Shallallahu'alaihi wasallam, dia tidak menyebutkan Abu Sa'id. Akan tetapi dia memiliki jalan-jalan yang menguatkan sebagiannya atas sebagian yang lain).
50	51	Q.S.(4) an-Nisa : 28	Allah hendak memberikan keringanan kepadamu, dan manusia dijadikan bersifat lemah
51	52	Q.S. (2) al-Baqarah : 185	Allah menghendaki kemudahan bagimu, dan tidak menghendaki kesukaran bagimu
BAB IV			
76	58	Q.S. (5) al-Maidah : 2	Lihat Footnote ke-14
93	61	Hadis Arbain ke-32	Lihat Footnote ke-47

LAMPIRAN II

CURRICULUM VITAE

A. Profil

Nama	: Nazaruddin Ismail
Tempat, tanggal lahir	: Sleman, 15 Juni 1995
Jenis Kelamin	: Laki-laki
Agama	: Islam
Kewarganegaraan	: Indonesia
Alamat	: Pogung Dalangan RT.08 RW.50 No. 09 Sinduadi Mlati Sleman Yogyakarta 55284
Email	: ismail.nazaruddin@gmail.com
No.telp	: 0856-4317-2430

B. Riwayat Pendidikan

Formal:

SD Negeri Sinduadi Timur	2002-2007
MTS Negeri 1 Yogyakarta	2007-2010
MAN 1 Yogyakarta	2010-2013

Pengalaman Organisasi

Ketua 1 Karya Ilmiah Remaja	2012-2013
Anggota Bantara Pramuka	2012-2013

Demikian *Curriculum Vitae* ini saya buat dengan sebenar-benarnya, semoga dapat dipergunakan sebagaimana mestinya.

Hormat Saya.

Nazaruddin Ismail

LAMPIRAN III

BIOGRAFI TOKOH

1. Al-Tufi

Nama lengkap ulama ini adalah Najamuddin Abu ar-Rabi' Sulaiman bin Abd al-Qawi bin Abd al-Karim bin Sa'id at-Tufi as-Sarsari al-Bagdadi al-Hanbali, yang terkenal dengan nama at-Tufi. Sebenarnya Tufi adalah nama sebuah desa di daerah sarsar Irak, dan di desa itulah tokoh ini dilahirkan. Di samping tokoh tersebut terkenal dengan nama at-Tufi, juga populer dengan nama Ibn Abu 'Abbas.

At-Tufi lahir diperkirakan pada tahun 657 H (1259 M) dan meninggal pada tahun 716 H (1318 M). Berdasarkan keterangan ini, jelaslah bahwa tokoh ini lahir setahun setelah serbuan pasukan Mongol ke kota Bagdad yang dipimpin oleh Khulagu Khan pada tahun 1258 M. Jatuhnya kota Bagdad oleh serangan tentara Mongol tersebut merupakan peristiwa yang paling menentukan dalam sejarah kaum muslimin, sebuah pertanda awal kehancuran kaum muslimin. Jatuhnya Bagdad di atas dilukiskan sebagai seluruh dunia Islam gelap tak berdaya. Tidak seorangpun yang dapat membayangkan bencana yang lebih dahsyat daripada malapetaka ini. Akibatnya adalah integritas politik dunia Islam betul-betul berantakan.

Karya-karya tulis at-Tufi dimaksud dapat diklasifikasikan kepada lima bidang, yaitu kelompok ilmu Al-quran dan Hadis, Kelompok ilmu usuluddin (teologi), kelompok fiqh, kelompok usul al-fiqh dan kelompok bahasa, sastra dan lain-lain.

WORLD TRADE ORGANIZATION

WT/DS477/R/Add.1
WT/DS478/R/Add.1

22 December 2016

(16-6997)

Original: English

INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to E to the Report of the Panel to be found in documents WT/DS477/R and WT/DS478/R.

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LIST OF ANNEXES

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UNITED STATES

INDONESIA

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IMPORT LICENSING PROCEDURES FOR HORTICULTURAL PRODUCTS AND FOR ANIMALS AND ANIMAL PRODUCTS

ANNEX A-1

PRELIMINARY RULING OF THE PANEL

1 PROCEDURAL BACKGROUND

1.1. On 11 December 2015, Indonesia submitted to the Panel a request for a preliminary ruling concerning the consistency of New Zealand's and the United States' panel requests and first written submissions with the requirements of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[1] Specifically, Indonesia sought a ruling from the Panel finding that:

a. the co-complainants' "apparent" claims under Article III:4 of the GATT 1994 and Article 3.2 of the Agreement on Import Licensing Procedures (Import Licensing Agreement) are outside the Panel's terms of reference; and

b. the co-complainants' failure in their panel requests as well as their first written submissions to meet the requirements of Article 6.2 of the DSU has "clearly prejudiced, and continues to prejudice" the preparation of Indonesia's defence, thereby violating Indonesia's right to due process in these proceedings.[2]

1.2. In response to the Panel's invitation to provide their views on Indonesia's request, the United States and New Zealand provided a joint communication on 21 December 2015.[3] The Panel also provided third parties with an opportunity to comment on the preliminary ruling request prior to the submission of Indonesia's first written submission and therefore before the date specified in the Panel's timetable for third party submissions. Only Australia and Brazil took advantage of this opportunity and submitted to the Panel on 6 January 2016 their comments on Indonesia's preliminary ruling request.

1.3. Having carefully considered Indonesia's request, the written comments of the co-complainants and of the above-mentioned third parties, and given Indonesia's request that we rule on this matter before the first substantive meeting[4], the Panel decided to communicate its conclusions on Indonesia's request on 27 January 2016, which was prior to the first substantive meeting. At that time, the Panel indicated that, following prior practice[5] and in the interest of the efficiency of proceedings, more detailed reasons in support of those conclusions would be provided as soon as possible and, in any event, prior to the date of issuance of the Interim Report.[6] Our ruling is set forth below and includes the conclusions issued to the parties on 27 January 2016.

2 MAIN ARGUMENTS OF THE PARTIES AND THE THIRD PARTIES

2.1 Main arguments of the parties

2.1.1 Indonesia

2.1. Indonesia requests the Panel to issue a preliminary ruling finding that the first written submissions of the United States and New Zealand are inconsistent with the requirements of the DSU.[7] Specifically, Indonesia contends that the co-complainants' "potential claims" under Article 3.2 of the Import Licensing Agreement and Article III:4 of the GATT 1994 were "not properly identified" in their respective panel requests and, therefore, the Panel should "exclude

[1] Indonesia's request for a preliminary ruling, para. 1.
[2] Indonesia's request for a preliminary ruling, para. 28.
[3] Co-complainants' joint comments on Indonesia's preliminary ruling request.
[4] Indonesia's request for a preliminary ruling, para. 3.
[5] See, for instance, Panel Reports, *Canada –Renewable Energy/Canada –Feed in Tariff Program*, para. 7.8; and *United States – Lamb*, paras. 5.15-5.16.
[6] Conclusions of the Preliminary Ruling by the Panel, 27 January 2016, para. 1.3. These conclusions will form part of the Interim Report of the Panel.
[7] Indonesia's request for a preliminary ruling, para. 1.

these potential claims" from its terms of reference.[8] For Indonesia, the inconsistencies between the panel requests and the first written submissions have prejudiced and continue to prejudice the preparation of Indonesia's defence and compromise the due process objectives of the DSU, in particular, of Article 6.2.[9]

2.2. Indonesia submits that under Article 7.1 of the DSU, for a party's claim to fall within the Panel's terms of reference, the complainant must "sufficiently identify" the claim in the panel request[10], that is, it must refer to the specific measure(s) at issue and the legal basis of the complaint. Indonesia finds support in the panel's findings in *EC – Tube or Pipe fittings*[11] as well as the Appellate Body's findings in *EC and Certain Member States – Large Civil Aircraft* and *China – Raw Materials*, where, according to Indonesia, it was determined that failure to list or refer to specific measures or claims in the panel request would result in the claims being outside the Panel's jurisdiction.[12]

2.3. Indonesia argues that the co-complainants' panel requests only "describe" claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, but[13] their first written submissions "raised new claims", namely, Article III:4 of the GATT 1994 in the case of New Zealand, and Article 3.2 of the Import Licensing Agreement in the case of both New Zealand and the United States.

2.4. Indonesia considers that the claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement were not properly identified because these provisions were only mentioned in footnotes to the panel requests and, to the extent the co-complainants refer to possible violations of these provisions by Indonesia, they do so in "conditional and ambiguous language".[14] In its view, this has resulted on Indonesia and third parties being "left to wonder" whether the co-complainants "meant to include" claims under these provisions within their panel requests or not.[15] Indonesia relies on the following definition of "footnote" found in the Oxford Advanced Learner's Dictionary: "(1) an extra piece of information that is printed at the bottom of a page in a book or (2) (of an event or a person) that may be remembered but only as something/somebody *that is not important*".[16] Indonesia observes that the identification of the legal basis of claims in a panel request is "<u>very important and</u> not <u>an extra piece of information</u>."[17] According to Indonesia, the Panel should therefore find that these claims are outside its terms of reference.[18]

2.5. Indonesia further argues that, should the Panel consider that "putting the legal basis of a claim in the footnotes is acceptable"[19], it nevertheless contends that those claims are not sufficiently identified. Indonesia reproduces footnotes 5, 7, 8, 12 and 14 of the panel requests, noting that they "only repeat treaty provisions" and arguing that there is "no proper or sufficient explanation" of how the measures at issue are inconsistent with Article III:4 of the GATT 1994 or Article 3.2 of the Import Licensing Agreement.[20] Indonesia recalls that in *China—Raw Materials*, the Appellate Body determined that the claims were not sufficiently identified because the complainants "merely 'challeng[ed] some (groups of) measures as inconsistent with some (groups) of the listed WTO obligations'" and therefore the complainants did not "'provide the basis on which the Panel and China could determine with sufficient clarity what 'problem' or 'problems' were alleged to have been caused by which measures.'"[21] Indonesia asserts that the situation in the

[8] Indonesia's request for a preliminary ruling, para. 1. Indonesia refers to "apparent claims" in paras. 13-14 and 27-28.

[9] Indonesia's request for a preliminary ruling, para. 2.

[10] Indonesia's request for a preliminary ruling, para. 5.

[11] Indonesia's request for a preliminary ruling, para. 6 (referring to Panel Report, *EC – Tube or Pipe Fittings*, para. 7.14).

[12] Indonesia's request for a preliminary ruling, para. 6 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft,* para 640, and Appellate Body Report, *China – Raw Materials*, para. 219).

[13] Indonesia's request for a preliminary ruling, para. 7.

[14] Indonesia's request for a preliminary ruling, para. 10.

[15] Indonesia's request for a preliminary ruling, para. 10.

[16] Indonesia's request for a preliminary ruling, para. 11. (emphasis original)

[17] Indonesia's request for a preliminary ruling, para. 12. (underlining original)

[18] Indonesia's request for a preliminary ruling, para. 13.

[19] Indonesia's request for a preliminary ruling, para. 14.

[20] Indonesia's request for a preliminary ruling, paras.14-20.

[21] Indonesia's request for a preliminary ruling, para. 20.

present dispute is "exactly the situation here" because the complainants only repeat the treaty provisions in a footnote and do not explain how the measures at issue, which consist of various laws and regulations, violate the said provisions.[22]

2.6. For Indonesia, the "confusion" resulting from this lack of clarity is compounded by the fact that the panel requests are identical, but the first written submissions are different with respect to the two relevant provisions. Indonesia explains that while the United States' first written submission only "appeared to advance" a claim under Article 3.2 of the Import Licensing Agreement, New Zealand's first written submission "attempted to invoke" both Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement.[23]

2.7. Indonesia also argues that it has suffered prejudice because it "does not sufficiently understand the new claims"[24] under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement that were raised by the co-complainants in their first written submissions. Indonesia asserts that it is "critical" that a panel request provide the responding party "with sufficient clarity of the case it has to answer" and that a party's submissions during panel proceedings cannot cure a defect in a panel request.[25] In Indonesia's view, these "apparent" claims were not sufficiently identified in the panel requests. Indonesia submits that the fact that these claims were only mentioned in footnotes and that the footnotes only repeated the legal provisions "without ever explaining why" the measures at issue violate these two provisions are "acts of WTO inconsistency that clearly prejudice Indonesia's ability to defend itself" in this dispute.[26]

2.1.2 New Zealand and United States (co-complainants)

2.8. In a joint communication, the co-complainants assert that Indonesia's arguments "lack merit" and submit that the panel requests "on their face" satisfy the requirements of Article 6.2 of the DSU with respect to the claims under Article 3.2 of the Import Licensing Agreement and Article III:4 of the GATT 1994. The co-complainants request the Panel to find that the claims at issue are properly within its terms of reference.[27]

2.9. Concerning Indonesia's argument that the relevant claims were not properly identified because they were included in footnotes, the co-complainants submit that Indonesia offers no analysis as to why the use of footnotes in discussing the claims is, by itself, inconsistent with Article 6.2 of the DSU. They observe that Indonesia does not explain why specifying a provision alleged to be breached in a footnote "would itself render the identification of that provision unclear"[28] and note that Indonesia "simply suggests" that placement in a footnote renders the language "not important".[29] The co-complainants point out that "[s]imply characterizing" a footnote as "not important" runs contrary the "general usage of footnotes in treaties and international agreements", and they provide the example of footnote 1 to Article 4.2 of the Agreement on Agriculture, which conveys key aspects of the legal obligation therein.[30] The co-complainants further assert that in determining whether a panel request complies with Article 6.2 of the DSU, a panel must evaluate the request "as a whole" and "on the basis of the language used".[31] In the co-complainants' view, nothing in Article 6.2 indicates that a complainant's claims would "somehow be limited by the format" in which those claims are presented.[32] In support of their position, the co-complainants also refer to *US – Products from China* where the Appellate

[22] Indonesia's request for a preliminary ruling, paras. 20-21.
[23] Indonesia's request for a preliminary ruling, para. 22.
[24] Indonesia's request for a preliminary ruling, para. 27.
[25] Indonesia's request for a preliminary ruling, para. 25.
[26] Indonesia's request for a preliminary ruling, para. 27.
[27] Co-complainants' joint comments on Indonesia's preliminary ruling request, paras. 1-2.
[28] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 10.
[29] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 10.
[30] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 10.
[31] The co-complainants refer to Appellate Body Reports, *China – HP-SSST*, para. 5.13*; EC – Fasteners*, para. 562*; US – Carbon Steel*, para. 127 (stating that compliance with Article 6.2 is determined "on the merits of each case having considered the panel request as a whole, and in light of attendant circumstances"). Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 11.
[32] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 11.

Body observed that "footnotes are part of the text of a Panel request, and may be relevant to the identification of the measure at issue or the presentation of the legal basis of the complaint".[33]

2.10. Concerning Indonesia's argument that the language setting out the claims under Articles 3.2 of the Import Licensing Agreement and III:4 of the GATT 1994 is "conditional and ambiguous", the co-complainants submit that it lacks merit because Indonesia failed both to identify the allegedly conditional and ambiguous language and to explain the reasons why the language does not meet the requirements of Article 6.2.[34] While considering that the Panel may reject Indonesia's argument on that basis alone, the co-complainants also argue that, to the extent that Indonesia is arguing that the relevant claims are outside of the Panel's terms of reference because they are conditional claims, this argument lacks any legal basis and the Panel should reject it.[35] The co-complainants contend that nothing in the DSU precludes a complainant from pursuing conditional or alternative claims and they refer to the observation of the panel in *Korea – Commercial Vessels* that raising complementary or alternative claims is very common in WTO dispute settlement. The co-complainants affirm that, as with any claim, a claimant intending to pursue complementary or alternative claims "simply must", by the terms of Article 6.2, refer to each of the relevant provisions in the panel request.[36]

2.11. The co-complainants also find no merit in Indonesia's argument that the sufficiency of the panel requests was undermined because, despite identical panel requests, New Zealand pursued its claim under Article III:4 of the GATT 1994 in its first written submission, while the United States did not. The co-complainants consider that a complainant is not required to pursue all the claims referenced in its panel request, and they maintain that a decision not to pursue a claim is not relevant in determining whether a claim falls within a panel's terms of reference.[37]

2.12. The co-complainants also reject Indonesia's argument that the panel requests did not provide sufficient explanation of how the measures are inconsistent with the cited provisions. According to the co-complainants, Indonesia misstates the requirements of Article 6.2 of the DSU.[38] Referring to the Appellate Body's findings in *China—HP–SSST*, the co-complainants argue that to comply with Article 6.2, one need only state the claim at issue; argumentation "as to why and precisely how" the measure breaches the relevant provision is not required.[39] They maintain that the panel requests properly identify the claims under Article 3.2 of the Import Licensing Agreement and Article III:4 of the GATT 1994: they identify the measures imposed as relevant to the claims, describe their operation, set forth the legal bases for the claims by listing and summarizing the provisions of the covered agreements with which these measures are inconsistent, and connect the aspects of the measures relevant to the claims to the relevant provisions. As such, the requirements of Article 6.2 of the DSU are satisfied.[40]

2.13. The co-complainants further argue that Indonesia misunderstands the difference between arguments and claims and they assert that the disputes referenced by Indonesia do not support the conclusion that the panel requests do not meet the standard of Article 6.2.[41] The co-complainants point out that in *EC – Tube or Pipe Fittings*, the panel found that the panel request did not identify claims under Articles 6.9, 6.13, 9.3, and 12.1 of the Anti-Dumping Agreement because it referred generally to Articles 6, 9, and 12, and those provisions contain multiple and diverse obligations that relate to subject-matters different from the obligations in Articles 6.9, 6.13, 9.3 and 12.1.[42] The co-complainants contrast the panel requests in this dispute, observing

[33] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 11.
[34] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 13.
[35] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 13.
[36] The co-complainants refer to the Panel Report, *Korea – Commercial Vessels*, paras. 7.2.28-7.2.29. Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 14.
[37] In support of this statement, the co-complainants quote the Panel Report, *China – Raw Materials*, para. 7.23; and the Appellate Body Report, *EC – Bananas III*, para. 145. Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 15.
[38] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 19.
[39] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 19.
[40] Co-complainants' joint comments on Indonesia's preliminary ruling request, paras. 19-23.
[41] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 24.
[42] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 25 (referring to Panel Report, *EC – Tube or Pipe Fittings*, para. 7.14).

that they cite the specific provisions in question, summarize the relevant obligations, and describe the aspects of the challenged measures relevant to the claim.[43]

2.14. The co-complainants contend that the facts in *China – Raw Materials* can be distinguished from the present instance because, in that dispute, the panel request listed 37 legal instruments followed by a wide-ranging list of obligations, such that the problems could not be discerned from the panel request given the number of possible combinations. The co-complainants argue that, in contrast, the panel requests in these proceedings describe the challenged measures in detail, including the problematic aspects of their operation, identify the legal instruments through which each measure was imposed, set out the provisions with which the measures are inconsistent, and summarize the relevant obligation.[44]

2.15. The co-complainants rely on Appellate Body reports in arguing that, where the provision with which a challenged measure is alleged to be inconsistent consists of a single paragraph, "a simple reference to that provision may be sufficient to meet the standard of Article 6.2"[45] and that, even where a provision contains multiple obligations, a reference to that provision, along with a "brief narration of the problem" caused by the challenged measure, is "sufficient" to meet the standard of Article 6.2 of the DSU.[46] The co-complainants observe that, in this dispute, each relevant provision consists of a single paragraph and the panel requests both identify the relevant provisions and summarize the relevant obligations, thus "more than" meeting the standard of Article 6.2.[47]

2.16. Regarding Indonesia's arguments that the alleged failure by the co-complainants to adequately identify their claims in their panel requests prejudiced Indonesia's ability to defend itself in this dispute, the co-complainants respond that the panel requests "contain the information necessary" to satisfy the legal standard in Article 6.2."[48] They contend that the evaluation of the sufficiency of a panel request is "based on the face of the panel request itself" and, therefore, it would "not also be necessary" to demonstrate that the responding party was prejudiced by the inconsistency.[49] The co-complainants also submit that, "aside from the fact that prejudice to the respondent is not relevant to the inquiry", Indonesia has not been prejudiced because Indonesia was made aware of the claims under Article 3.2 of Import Licensing Agreement and Article III:4 of the GATT 1994 in the panel requests as well as in the requests for consultations.[50] In the co-complainants' view, Indonesia has provided no details in support of its allegation of prejudice and suggest that this situation is analogous to that in *Korea – Dairy*, where the Appellate Body rejected Korea's claim that it had suffered prejudice on the basis that it had "assert[ed] that it had sustained prejudice, but offered no supporting particulars in its appellant's submission nor at the oral hearing."[51]

2.2 Main arguments of the third parties

2.17. Following the Panel's invitation to the third parties to comment on Indonesia's request for a preliminary ruling, comments were received from Australia and Brazil. No comments were received from Argentina, Canada, China, the European Union, India, Japan, Korea, Norway, Paraguay, Singapore, Chinese Taipei, or Thailand. We summarise below the arguments presented by Australia and Brazil.

[43] Co-complainants' joint comments on Indonesia's preliminary ruling request, para 25.

[44] Co-complainants' joint comments on Indonesia's preliminary ruling request, para 26.

[45] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 27 (referring to Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.19; Appellate Body Report, *China – HP-SSST*, para. 5.22; and Appellate Body Report, *US – Products from China*, para. 4.21.

[46] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 27 (referring to Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.28; Appellate Body Report, *China – HP-SSST*, para. 5.34).

[47] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 27.

[48] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 28.

[49] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 29 (referring to Appellate Body Report, *China – Raw Materials*, para. 233).

[50] Co-complainants' joint comments on Indonesia's preliminary ruling request, paras. 29-30.

[51] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 31 (referring to Appellate Body Report, *Korea – Dairy*, para. 131).

2.2.1 Australia

2.18. Australia is of the view that the co-complainants' claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement were "sufficiently identified" in the panel requests to fall within the Panel's terms of reference.[52] Australia points out that it was aware of and understood the claims under these provisions.[53] For Australia, there is nothing in the text of Article 6.2 of the DSU that suggests that footnotes are not part of a panel request, nor that this provision imposes any formatting or structural requirements.[54] Referring to the Appellate Body Report in *US – Carbon Steel*, Australia explains that compliance with the requirements of Article 6.2 "must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances."[55] Australia further submits that it understood the claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement "to be complementary, alternative or additional claims to those contained in the body of the text" and hence it was "reasonable for the Complainants to include these claims in footnotes to their panel requests."[56]

2.19. Regarding Indonesia's argument that the claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement use "conditional and ambiguous language", Australia observes that the language of the panel requests "reasonably reflects" that these claims can be considered complementary, alternative or additional claims to those in the text.[57] Australia notes that in *Korea – Commercial Vessels*, the panel indicated that if a party wishes to pursue claims under multiple provisions, whether complementarily or alternatively, it is not only permitted by Article 6.2 to refer to these claims in its panel request, but it is required to do so.[58] According to Australia, by notifying Indonesia of the complementary, alternative or additional claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement, the co-complainants' panel requests "served to fully inform" Indonesia of the nature of their case.[59]

2.20. Australia disagrees with Indonesia's argument that the co-complainants' panel requests merely challenged some groups of measures as inconsistent with some groups of the listed WTO obligations and argues that the claims in each footnote disputed by Indonesia "clearly relate" to the measures in the section containing that footnote.[60] Australia also disagrees with Indonesia's position that the co-complainants have "only repeat[ed] treaty provisions" in the Panel request with the result that these provisions fall outside the Panel's terms of reference.[61] Australia argues that complainants are not required to set out the arguments supporting their claims in their panel requests and relies on the Appellate Body Report in *EC – Bananas III* referring to the distinction between claims and arguments and noting that Article 6.2 of the DSU requires that the claims, but not the arguments, be specified sufficiently in the panel request in order for the defending party and the third parties to know the legal basis of the complaint.[62] Australia also refers to the Appellate Body Report in *Korea – Dairy*, which stated that the "mere listing" of provisions alleged to have been breached "may be sufficient" to meet the requirements of Article 6.2, depending on whether the respondent's ability to defend itself was prejudiced.[63] Australia thus argues that the panel requests "have clearly exceeded the minimum requirements" because the claims are "linked to specific Indonesian measures, identify the specific articles that these measures violate, and also provide a brief explanation of why the measures violate the relevant articles."[64] For Australia, the information provided in the panel requests "clearly exceeds by a considerable margin" the standard articulated in *EC –Biotech Products* that a party is not required to explain, in the panel

[52] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 3.
[53] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 5.
[54] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, paras. 6-7.
[55] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 7 (referring to Appellate Body Report, *US – Carbon Steel*, para. 127).
[56] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 8.
[57] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 9.
[58] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 10 (referring to Panel Report, *Korea — Commercial Vessels*, para. 7.2).
[59] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 10.
[60] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 11.
[61] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 12.
[62] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, paras. 12-13. (referring to Appellate Body Report, *EC – Bananas III*, paras. 141-143).
[63] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 13 (referring to Appellate Body Report, *Korea — Dairy*, paras. 124 and 127).
[64] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 14.

request, the reasons for identifying particular treaty provisions, or whether all of the provisions listed are alleged to apply to the same aspect of a particular measure, or whether some provisions are alleged to apply to different aspects of the same measure.[65]

2.21. Regarding Indonesia's argument that it has suffered prejudice, Australia asserts that the co-complainant's panel requests fulfilled the due process objective of notifying Indonesia of the nature of the complaints and that Indonesia's ability to defend itself has not been prejudiced.[66] Australia recalls that in assessing a claim of prejudice in *Thailand – H-Beams,* the Appellate Body observed that "the fundamental issue in assessing claims of prejudice is whether a defending party *was made aware* of the claims presented by the complaining party, sufficient to allow it to defend itself."[67]According to Australia, Indonesia has not argued that it was unaware of the claims regarding Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement in the panel requests and it contends that the panel requests "fully notif[ied]" Indonesia of "all the claims" that the co-complainants could raise in their first written submissions.[68]

2.2.2 Brazil

2.22. Brazil asserts that nothing in the text of Article 6.2 of the DSU imposes a specific format for the presentation of claims in panel requests and, accordingly, the presentation of claims in footnotes "does not, by itself" violate the obligation under Article 6.2 of the DSU, "as long as the claim is clearly presented."[69] Brazil "fails to see" how the fact that the claims were presented in footnotes "would affect their nature or their clarity", and observes that there are several footnotes in WTO Agreements "that are crucial for the definition of the set of rights and obligations of the Members … and some of them are also essential for the interpretation of the extent of some multilateral obligations."[70] Brazil explains that a footnote provides "a piece of additional information" related to a specific issue such that a claim established in a footnote could be read as "in addition" to those established in the text of the panel request itself."[71] In Brazil's view, excluding a claim from the scope of a panel's jurisdiction based only on the fact that it was presented in a footnote would amount to endorsing "an overly formalistic approach that is contrary to the main objective of the DSU, which is to secure a prompt and positive solution to a dispute."[72] Thus for Brazil, the "fundamental question" before the Panel is whether the panel request, "be it in a footnote or elsewhere, satisfies the objective of providing notice to the Respondent and to third parties regarding the precise nature of the dispute."[73]

2.23. Brazil also argues that the fact that conditional language was used does not mean that the problem was not presented clearly. For Brazil, as long as the challenged measure is "discernible" in the panel request and "the legal basis of the complaint is clearly identified", there would be "no solid reason" to dismiss the panel request and "impede the procedure from taking its course with regard to those claims."[74] Brazil considers that the challenged measure is discernible in the panel request and the legal basis of the complaint is clearly identified.[75] In Brazil's view, the task before the Panel is to objectively assess whether the claims introduced by the co-complainants in the panel requests fulfill the requirements of Article 6.2 of the DSU, "regardless of the fact that they were presented in footnotes or in conditional language" which, according to Brazil, is "very common in WTO dispute settlement proceedings."[76]

2.24. Brazil relies on the Appellate Body Reports in *EC – Customs Matters* and *US – Continued Zeroing* in contending that, for the purposes of Article 6.2 of the DSU, it "suffices that the panel request sets out the 'claims' with enough precision to allow the responding party to understand

[65] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 15.
[66] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 18.
[67] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 19 (referring to Appellate Body Report, *Thailand – H-Beams*, para. 95). (emphasis original)
[68] Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 20 (referring to Appellate Body Report, *Thailand – H-Beams*, para. 95).
[69] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 6.
[70] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 7.
[71] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 8.
[72] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 9.
[73] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 10.
[74] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 13.
[75] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 13.
[76] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 14.

with clarity" the alleged violations and, relying on *EC—Bananas III*, highlights that there is no obligation to develop in the panel request the legal arguments that support the claims or to provide a detailed explanation as to why and how the measures are inconsistent with the relevant WTO provisions.[77] Brazil considers that the requirements of Article 6.2 of the DSU were fulfilled in the current dispute because the specific measures at issue with regard to Article 3.2 of Import Licensing Agreement and Article III:4 of GATT 1994 "were duly identified" and the relevant provisions, including the specific obligations under each of them, "were indicated."[78] Furthermore, Brazil considers that there is "no ambiguity or lack of clarity" in the language of the panel requests, which is sufficient to "present the problem clearly."[79] In Brazil's view, "nothing in the way the panel requests were drafted jeopardized Indonesia's ability to identify the measures and claims" and to present its defence.[80]

3 EVALUATION BY THE PANEL

3.1 Introduction

3.1. The Panel is tasked with determining whether the co-complainants' claims pursuant to Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement are within the Panel's terms of reference. To do so, we need to examine whether the panel requests comply with the requirements set out in Article 6.2 of the DSU, which reads as follows:

> 2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

3.2. As recapped by the Appellate Body in *China – Raw Materials*, Article 6.2 of the DSU serves a "pivotal function" in WTO dispute settlement and sets out two key requirements that a complainant must satisfy in its panel request, namely, that it must (i) identify the specific measures at issue and (ii) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[81] According to the Appellate Body, these two elements constitute the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[82] If either element is not "properly identified", the matter would not fall within the panel's terms of reference.[83] Fulfilment of these requirements is "not a mere formality"[84]; on the contrary, as the Appellate Body has clarified, a panel request serves two essential purposes: (i) to define the scope of the dispute and (ii) to serve the due process objective of notifying the respondent and third parties of the nature of the complainant's case.[85]

3.3. Indonesia's objections refer to the adequacy of the panel requests in meeting the requirements of Article 6.2 with respect to two claims, namely, those pursuant to Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement. Thus Indonesia's objections do

[77] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, paras. 15-17 and footnote 11 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 130, Appellate Body Report, *US – Continued Zeroing*, para. 169, and Appellate Body Report, *EC--Bananas III*, para. 141).

[78] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 18.

[79] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 20.

[80] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 21.

[81] Appellate Body Report, *China — Raw Materials*, para. 219. Article 6.2 of the DSU also requires that the request be made in writing and indicate whether consultations were held.

[82] Appellate Body Report, *EC and certain member States — Large Civil Aircraft*, para. 639 (referring to Appellate Body Report, *Guatemala – Cement I*, paras. 72 and 73; Appellate Body Report, *US – Carbon Steel*, para. 125; Appellate Body Report, *US – Continued Zeroing*, para. 160; Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; and Appellate Body Report, *Australia – Apples*, para. 416).

[83] Appellate Body Report, *China — Raw Materials*, para. 219 (referring to Appellate Body Report *US – Carbon Steel*, para. 125).

[84] Appellate Body Report, *China — Raw Materials*, para. 219 (referring to Appellate Body Report, *Australia – Apples*, para. 416).

[85] Appellate Body Report, *EC and certain member States — Large Civil Aircraft*, para. 639 (referring to Appellate Body Report, *US – Carbon Steel*, para. 126, in turn, referring to Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, 167, at 186; Appellate Body Report, *EC – Chicken Cuts*, para. 155; and Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108).

not raise issues under the first element; they concern only the second requirement of Article 6.2 of the DSU, i.e. to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. We recall that, for the purposes of Article 6.2 of the DSU, a claim refers to an allegation "that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement".[86]

3.4. The Appellate Body has underscored that, at a minimum, a panel request must list the article(s) of the covered agreement(s) claimed to have been violated.[87] Indeed, the "[i]dentification of the treaty provisions claimed to have been violated by the respondent is always necessary" if the legal basis of the complaint is to be "presented at all."[88] In addition, in order "to present the problem clearly", a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".[89]

3.5. It is also well settled that, while a panel request must set out the claims, there is no requirement in Article 6.2 that a complaining party include in its panel request arguments that seek "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision".[90] Hence a "brief summary" of the legal basis of the complaint "aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question"[91] and is to be distinguished from arguments in support of a particular claim." The Appellate Body has indicated that whether such a brief summary is "sufficient to present the problem clearly" is to be assessed on a case-by-case basis, keeping in mind the nature of the measure(s) at issue, and the manner in which it is (or they are) described in the panel request, as well as the nature and scope of the provision(s) of the covered agreements alleged to have been violated.[92]

3.6. As we explained above, Indonesia argues, *inter alia*, that the way that the co-complainants set out and later argued the two claims at issue prejudices its ability to defend itself in this dispute.[93] We agree with the Appellate Body that due process is an essential feature of the WTO dispute settlement system[94] and that, in addition to constituting the basis for a panel's terms of reference, a panel request serves the due process objective of notifying the respondent and third parties of the nature of the complainant's case.[95] We are mindful of the Appellate Body's clarification that due process "is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction".[96]

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[86] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.8 (referring to Appellate Body Report, *Korea – Dairy*, para. 139).

[87] Appellate Body Reports, *Korea – Dairy*, paras. 123 and 124 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *EC – Bananas III*, paras. 145 and 147; and *Indonesia – Patents (US)*, paras. 89, 92, and 93); *US – Carbon Steel*, para. 130. *See also* Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.8.

[88] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.8 (referring to Appellate Body Report, *Korea – Dairy*, para. 124 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *EC – Bananas III*, paras. 145 and 147; and *India – Patents (US)*, paras. 89, 92, and 93)).

[89] Appellate Body Report, *China — Raw Materials*, para. 220 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

[90] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.8 (referring to Appellate Body Report, *Korea – Dairy*, para. 139 (referring to Appellate Body Reports, *EC – Bananas III*, para. 141; *India – Patents (US)*, para. 88; and *EC – Hormones*, para. 156)).

[91] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (italics original; underlining added)). In *EC – Selected Customs Matters*, the Appellate Body also stated that "Article 6.2 of the DSU requires that the *claims* – not the *arguments* – be set out in a panel request in a way that is sufficient to present the problem clearly". (Ibid., para. 153 (referring to Appellate Body Reports, *EC – Bananas III*, para. 143; *India – Patents (US)*, para. 88; *Korea – Dairy*, para. 139; and *Dominican Republic – Import and Sale of Cigarettes*, para. 121)).

[92] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9.

[93] Indonesia's request for a preliminary ruling, para. 27.

[94] Indeed, "[d]ue process protection guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute". Appellate Body Report, *US – Continued Suspension*, para. 433.

[95] Appellate Body report, *US – Countervailing Measures (China)*, para. 4.6.

[96] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640. *See also* Appellate Body Report, *China – Raw Materials*, para. 233. *See also*, Appellate Body Report, *US – Countervailing Measures (China)*, footnote 435.

3.7. We shall therefore proceed to examine the panel requests to ascertain their conformity with the second key requirement of Article 6.2 of the DSU with respect to the claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement. There is considerable guidance in past panel and Appellate Body reports on how we should proceed with such an examination. Bearing this guidance in mind, we will carefully scrutinize the language used in the panel requests[97] and will be mindful that compliance with the requirements of Article 6.2 must be demonstrated on the face of the panel requests and be determined on the merits of this particular case, having considered the panel requests as a whole and in the light of attendant circumstances.[98] In doing so, we acknowledge that, although we may refer to the co-complainants' submissions in order to confirm the meaning of the words used in the panel requests[99], parties' submissions and statements during the panel proceedings cannot "cure" any defects in the panel requests.[100]

3.8. In the light of the foregoing, we proceed first to address Indonesia's contention that the claims pursuant to Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement fail to meet the requirements of Article 6.2 of the DSU and therefore fall outside our terms of reference. We will then approach Indonesia's contention that the fact that the United States did not provide argumentation on Article III:4 of the GATT 1994 in its first written submission is relevant under Article 6.2 of the DSU. Next, we will examine whether the manner in which the co-complainants have formulated their claims pursuant to Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement in their panel requests prejudices Indonesia's ability to defend itself and hence undermines its due process rights. Finally, we will address Indonesia's contention that the co-complainant's first written submissions have also failed to comply with Article 6.2 requirements.

3.2 Whether the claims pursuant to Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement fall within our terms of reference

3.9. The first question that we will address is whether, as Indonesia argues, the claims pursuant to Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement are not sufficiently identified in the co-complainants' panel requests, thus failing to meet the requirements of Article 6.2 of the DSU and falling outside our terms of reference. In particular, Indonesia argued that the claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement were not "properly and sufficiently"[101] identified because these provisions were only mentioned in footnotes to the panel requests and, to the extent the co-complainants refer to possible violations of these provisions by Indonesia, they do so in "conditional and ambiguous language".[102] Indonesia further argued that, should we consider that "putting the legal basis of a claim in the footnotes is acceptable"[103], those claims are not sufficiently identified because footnotes 5, 7, 8, 12 and 14 of the panel requests "only repeat treaty provisions" and thus contain "no proper or sufficient explanation" of how the measures at issue are inconsistent with Article III:4 of the GATT 1994 or Article 3.2 of the Import Licensing Agreement.[104]

3.10. The co-complainants responded that Indonesia offers no analysis as to why the use of footnotes in discussing the claims is, by itself, inconsistent with Article 6.2 of the DSU and contended that Indonesia's suggestion that placement in a footnote renders the language "not important"[105] goes against the general usage of footnotes in treaties and international agreements, including in the WTO.[106] Regarding Indonesia's contention that the language in such footnotes is

[97] Appellate Body Report, *China — Raw Materials*, para. 220 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 562).

[98] Appellate Body Report, *US —Carbon Steel*, paras. 127 (referring to Appellate Body Report, *Korea – Dairy*, paras. 124-127.

[99] Appellate Body Report, *China — Raw Materials*, para. 220.

[100] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 787 (referring to Appellate Body Reports, *EC – Bananas III*, para. 143; and *US – Carbon Steel*, para. 127). *See also* Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

[101] Indonesia's request for a preliminary ruling, paras. 10 and 14.

[102] Indonesia's request for a preliminary ruling, para. 10.

[103] Indonesia's request for a preliminary ruling, para. 14.

[104] Indonesia's request for a preliminary ruling, paras. 14-20.

[105] Co-complainants' joint comments on Indonesia's preliminary ruling request, paras. 9-10.

[106] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 10.

"conditional and ambiguous"[107], the co-complainants responded by arguing that Indonesia did not identify the specific language it found to be conditional and ambiguous or explained its reasons.[108] They submitted that raising complementary or alternative claims is "very common" in WTO dispute settlement[109] and that a party intending to pursue complementary or alternative claims must simply refer to each of the relevant provisions in its panel request pursuant Article 6.2 of the DSU.[110] The co-complainants further submitted that, to comply with Article 6.2 of the DSU, one need only provide the claim at issue and not detailed argumentation on the claim.[111]

3.11. We commence by examining whether the claims under Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement were not sufficiently identified because they were set out in footnotes to the panel requests.[112] In support of this contention, Indonesia relied on the Oxford Advanced Learner's Dictionary. Indonesia thus argued that the meaning of "footnote" is "(1) an extra piece of information that is printed at the bottom of a page in a book or (2) (of an event or a person) that may be remembered but only as something/somebody *that is not important.*"[113] For Indonesia, the identification of the legal basis of the claims in a panel request is "very important" and not just an "extra piece of information"[114] as "it determines the terms of reference and jurisdiction"[115] of a panel. Consequently, Indonesia requested the Panel to rule that these claims are outside the Panel's terms of reference.[116]

3.12. The co-complainants responded that nothing in Article 6.2 of the DSU indicates that a complainant's claims are limited by the format in which those claims are presented. The co-complainants draw our attention to the Appellate Body's observation that "footnotes are part of the text of a panel request, and may be relevant to the identification of the measure at issue or the presentation of the legal basis of the complaint".[117]

3.13. We proceed to examine the wording of Article 6.2 of the DSU to ascertain whether there is any requirement regarding how claims are to be presented in panel requests. As we explained in Section 3.1 above, Article 6.2 of the DSU requires a complaining party to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. We agree with the co-complainants and the third parties[118] that, apart from the requirement that the panel request be made in writing, Article 6.2 does not include a requirement that such summary be presented in any particular form. In fact, as clarified by the Appellate Body, complying with this provision as far as the presentation of the legal claims is concerned, is achieved by listing the article(s) of the covered agreement(s) claimed to have been violated[119] with the necessary degree of precision depending on the obligation(s) contained in the given provision(s), and plainly connecting the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed.[120] We thus find no support in the wording of Article 6.2 of the DSU for Indonesia's interpretation that setting out the legal basis of a complaint in the footnotes of a panel request signals that the matter is considered unimportant or ancillary. Nor do we find any basis to

[107] Indonesia's request for a preliminary ruling, para. 10.

[108] Co-complainants' joint comments on Indonesia's preliminary ruling request, para 13.

[109] Co-complainants' joint comments on Indonesia's preliminary ruling request, para 14 (referring to Panel Report, *Korea – Commercial Vessels*, para. 7.2.28).

[110] Co-complainants' joint comments on Indonesia's preliminary ruling request, para 14. Panel Report, *Korea – Commercial Vessels*, para. 7.2.29.

[111] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 19 (referring to the Appellate Body Report, *China—HP–SSST*, para. 5.14).

[112] Indonesia's request for a preliminary ruling, para. 10.

[113] Indonesia's request for a preliminary ruling, para. 11. (emphasis original)

[114] Indonesia's request for a preliminary ruling, para. 12. (underlining original)

[115] Indonesia's request for a preliminary ruling, para. 12. (underlining original)

[116] Indonesia's request for a preliminary ruling, para. 13.

[117] Co-complainants' joint comments on Indonesia's preliminary ruling request, para 11 (referring to Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para 4.39).

[118] Co-complainants' joint comments on Indonesia's preliminary ruling request, para. 11; Australia's comments on Indonesia's preliminary ruling request of 11 December 2015, paras. 6-7; Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, para. 6.

[119] Appellate Body Reports, *Korea – Dairy*, paras. 123 and 124 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *EC – Bananas III*, paras. 145 and 147; and *Indonesia – Patents (US)*, paras. 89, 92, and 93); *US – Carbon Steel*, para. 130. *See also* Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.

[120] Appellate Body Report, *China — Raw Materials*, para. 220 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

conclude that including claims in footnotes would result in such claims being "not properly and sufficiently described" as required by Article 6.2 of the DSU. We find no reason, nor does Indonesia offer one, to conclude that placing a claim in a footnote, as opposed to the body of the request, in and of itself, affects the clarity of the claim.

3.14. Our interpretation is in line with the Appellate Body's view that "footnotes are part of the text of a panel request, and may be relevant to the identification of the measure at issue or the presentation of the legal basis of the complaint".[121] We also find support for our approach in the general usage of footnotes in the covered agreements. As mentioned by the co-complainants[122] and Brazil[123], footnotes are important in establishing the nature and scope of the rights and obligations in the covered agreements. This is evident in footnote 1 to Article 4.2 of the Agreement on Agriculture, a provision relevant to this dispute, which serves to clarify the types of measures that fall under the scope of this provision. A similar argument could be made regarding footnotes found in other covered agreements, such as, for instance, footnotes 1 to 5[124] to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and footnotes 1 to 6[125] to the Agreement on Subsidies and Countervailing Measures (SCM Agreement).[126]

3.15. In sum, we find that nothing in the wording of Article 6.2 of the DSU precludes a complainant from setting out claims in footnotes to its panel request and the fact that the co-complainants have set out claims pursuant to Article III:4 of the GATT 1994 and Article 3.2 of the Import Licensing Agreement in footnotes 5, 7, 8, 12 and 14 of their panel requests does not render these requests inconsistent with the requirements of Article 6.2 of the DSU.

3.16. We now proceed to examine Indonesia's contentions pertaining to the language used in the relevant footnotes. In particular, we need to determine whether the co-complainants have failed to comply with Article 6.2 of the DSU because, as argued by Indonesia, footnotes 5, 7, 8, 12, and 14 contain conditional and ambiguous language and, by only repeating treaty provisions, provide no proper or sufficient explanation of how the measures at issue are inconsistent with Article III:4 of the GATT 1994 or Article 3.2 of the Import Licensing Agreement.[127] We understand that Indonesia considered that the panel requests do not meet the requirement in Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[128] As we explained in Section 3.1 above, the Appellate Body has clarified that a brief summary of the legal basis of the complaint "aims to explain succinctly *how* or *why* the measure at

[121] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para 4.39.

[122] Co-complainants' joint comments on Indonesia's preliminary ruling request, para 10.

[123] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, fn. 7.

[124] Footnote 1 of the SPS Agreement makes reference to Article XX(b), including also the chapeau of that Article. Footnote 2 describes the circumstances when there is scientific justification for the purposes of paragraph 3 of Article 3. Footnote 3 describes the circumstances when a measure is not more trade-restrictive than required for purposes of paragraph 6 of Article 5. Footnote 4 defines the terms "animal", "plant", "wild flora", "pests" and "contaminants". Footnote 5 sets out the scope of the sanitary and phytosanitary regulations covered under paragraph 1 of Annex B.

[125] Footnote 1 of the SCM Agreement describes measures that are not to be deemed a subsidy in accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of the SCM Agreement. Footnote 2 defines the terms "objective criteria or conditions" as used in Article 2. Footnote 3 sets out that, in considering other factors to assess whether a subsidy is specific, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered. Footnote 4 sets out that a subsidy is contingent in fact when, without having been made legally contingent upon export performance, it is in fact tied to actual or anticipated exportation or export earnings. It also establishes that the mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of Article 3 of the SCM Agreement. Footnote 5 set outs that measures referred to in Annex I of the SCM Agreement as not constituting export subsidies shall not be prohibited under Article 3.1(a) or any other provision of the SCM Agreement. Footnote 6 provides that any time periods mentioned in Article 4.4 may be extended by mutual agreement.

[126] Brazil's comments on Indonesia's preliminary ruling request of 11 December 2015, fn. 7.

[127] Indonesia's request for a preliminary ruling, paras. 14-20.

[128] See also Indonesia's request for a preliminary ruling, para. 2, referring to Article 6.2.

issue is considered by the complaining Member to be violating the WTO obligation in question".[129] We also recall that, while a panel request must set out the claims, there is no requirement in Article 6.2 that a complaining party include in its panel request arguments that seek "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision".[130]

3.17. We observe that the co-complainants' panel requests, as set out in documents WT/DS477/9 and WT/DS478/9, are identical but for the references to each of the co-complainants' names. The panel requests are divided into three main sections referring to challenges relating to (i) horticultural products[131], (ii) animals and animal products[132], and (iii) the sufficiency of domestic production.[133] Sections I and II are in turn sub-divided into three subsections presenting the challenges to (i) "Indonesia's Trade-Restrictive Import Licensing Regime"[134]; (ii) the "Prohibitions and Restrictions … Made Effective Through Indonesia's Import Licensing Regime"[135], and (iii) the "Prohibitions and Restrictions on Importation Relating to the Use, Sale, Offering for Sale, Distribution, Storage, or Transportation … Made Effective Through Indonesia's Import Licensing Regime".[136] The panel requests include Annexes I and II listing the legal instruments through which Indonesia maintains the measures set out in the panel requests.

3.18. The co-complainants' claims under Article 3.2 of the Import Licensing Agreement are presented in footnotes 5 and 8, contained in Sections I(a) and II(a) of the panel requests, respectively. The co-complainants' claims under Article III:4 of the GATT 1994 are presented in footnotes 7, 12, and 14. Footnote 7 is contained in Section I(c), while footnotes 12 and 14 are found in Sections II(b) and II(c), respectively. We now turn to scrutinize the wording of the relevant footnotes to determine whether they meet the requirements of Article 6.2 of the DSU.

3.2.1 Footnotes 5 and 8

3.19. Footnote 5 provides as follows:

> To the extent that Indonesia's import licensing regime for horticultural products falls within the scope of the disciplines of Article 3 of the Import Licensing Agreement, [the United States][New Zealand] considers that the import licensing requirements and procedures, as described above and as set out in sections I(b) and I(c), would be inconsistent with Article 3.2 of the Import Licensing Agreement because they have trade-restrictive or trade distortive effects additional to those caused by imposition of the restriction, do not correspond in scope and duration to any measure they could be implementing, and are more administratively burdensome than absolutely necessary to implement any such measure. To the extent that Indonesia's import licensing regime falls within the scope of Article 2 of the Import Licensing Agreement, [the United States][New Zealand] considers that Indonesia's import licensing requirements and procedures, as described above and as set out in sections I(b) and I(c), would be inconsistent with Article 2.2(a) of the Import Licensing Agreement because they are administered in such a manner as to have restricting effects on imports.

3.20. As Indonesia's contention does not concern the claim pursuant to Article 2.2(a) of the Import Licensing Agreement, we will focus our analysis on the wording pertaining to the claim under Article 3.2 (that is, from the beginning of the footnote until "any such measure.").

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[129] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (italics original; underlining added)). In *EC – Selected Customs Matters*, the Appellate Body also stated that "Article 6.2 of the DSU requires that the *claims* – not the *arguments* – be set out in a panel request in a way that is sufficient to present the problem clearly". (Ibid., para. 153 (referring to Appellate Body Reports, *EC – Bananas III*, para. 143; *India – Patents (US)*, para. 88; *Korea – Dairy*, para. 139; and *Dominican Republic – Import and Sale of Cigarettes*, para. 121))

[130] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.8 (referring to Appellate Body Report, *Korea – Dairy*, para. 139 (referring to Appellate Body Reports, *EC – Bananas III*, para. 141; *India – Patents (US)*, para. 88; and *EC – Hormones*, para. 156)).

[131] Section I.

[132] Section II.

[133] Section III.

[134] Sections I(a) and II(a).

[135] Sections I(b) and II(b).

[136] Sections I(c) and II(c).

Korea – Beef considered this argument under Article III:4 of the GATT 1994 and found that "the intervention of some element of private choice does not relieve [a Member] of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product." Previous panels have found that this principle applies to Article XI:1. Further, Indonesia's assertion that the measures are "decisions of private actors" is inaccurate.

19. Regarding the *application windows and validity periods*, Indonesia is wrong that importers *decide* not to ship their products after a certain date. Under Indonesia's regulations, imported products that arrive after the end of the period for which their import approval is valid will not be accepted. Thus, exporters must stop shipping far enough in advance of the end of the period for their goods to clear customs by the last day. Importers do not "choose" to stop importing at the end of one validity period and the beginning of another, or to reduce their imports accordingly. That choice is *forced* on them by Indonesia's regulatory requirements.

20. With respect to the *fixed license terms*, Indonesia's assertion that permit terms "are at the complete discretion of the importers" is incorrect. The restrictions imposed by Indonesia's import licensing regime severely curtail the ability of importers to determine the terms included in their permit applications. Further, the co-complainants are challenging not the specific terms of any importer's license but the inability of importers, once a validity period has begun, to respond to market conditions by importing products different than those specified on their import permits. This inability is the result of the requirements maintained in Indonesia's regulations.

21. Indonesia is also wrong that the *realization requirement* is "a function of importers' own estimates." Importers must import 80 percent of the products on their Import Approval or lose eligibility to import. The threat of ineligibility for future permits incentivizes importers to be conservative in the quantities of products that they apply to import, which reduces total imports during any import period, compared to normal market conditions. Thus, importers' decision to reduce the quantities they apply for is a forced response to the realization requirement.

22. Indonesia's claim that any limitation caused by the *storage capacity requirement* "is self-imposed" also fails. Importers seeking to import horticultural products for sale are allowed to apply to import only up to the capacity of the storage facilities that they own, on a 1:1 ratio. This means that they are required to *own* enough storage to hold, at one time, all of the products that they will import for the entire semester. Under market conditions, fruit and vegetable inventories turn over many times during a semester, such that importers would fill, empty, and refill their facilities multiple times. Thus, Importers do not *choose* to limit the products they apply to import to their owned storage capacity; their decision is a compelled by Indonesia's measure.

II. INDONESIA'S IMPORT LICENSING REGIMES ARE INCONSISTENT WITH INDONESIA'S OBLIGATIONS UNDER ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

23. The United States has demonstrated that all of the challenged measures are inconsistent with Indonesia's obligations under Article 4.2 of the Agreement on Agriculture. Indonesia's arguments in response are legally and factually incorrect.

24. First, Indonesia's argument that its import licensing regimes are "automatic" and, as such, are outside the scope of Article 4.2 is based on an incorrect legal premise. Article 4.2 covers "any measures of the kind which have been required to be converted into ordinary customs duties." The only measures that are *excluded* from Article 4.2 are "ordinary customs duties"; all other types of measures are potentially covered. The Appellate Body confirmed the broad scope of Article 4.2 in *Chile – Price Band System*, stating that Article 4.2 was the "legal vehicle" for the conversion of all "market access barriers" into ordinary customs duties. Further, the text of Article XI:1 of the GATT 1994 is explicit that "import or export licenses" *can* impose restrictions on importation within the meaning of Article XI:1.

25. Additionally, as a factual matter, Indonesia's import licensing regimes are not "automatic." Indonesia's argument is based on an incorrect definition of "automatic" that, if accepted, would mean Members could impose, through import licensing, *any* substantive restriction on importation, as long as import licensing agents could not exercise discretion in issuing licenses and licenses eventually were granted after all legal requirements were met. This definition of "automatic" has no support in the text of any of the covered agreements. Further, the suggestion that licensing

regimes such as Indonesia's are immune from scrutiny would undermine the prohibitions of Articles XI:1 and 4.2, because it would allow Members to impose substantive restrictions on importation under the guise of legitimate licensing procedures.

26. Second, Indonesia's argument that the Reference Price requirements are not "minimum import price[s]" is incorrect. The requirements clearly fall within the definition of a "minimum import price" because they prohibit all importation when prices are below a set level. Moreover, Indonesia's Reference Price requirements also are inconsistent with Article 4.2 because they are "quantitative import restrictions" or "similar border measures." Thus, Indonesia has not rebutted the *prima facie* case that the Reference Price requirements are inconsistent with Article 4.2.

27. Indonesia's other arguments under Article 4.2 are essentially the same as its arguments under Article XI:1 of the GATT 1994 and, therefore, fail for the same reasons.

III. INDONESIA HAS FAILED TO ESTABLISH A DEFENSE UNDER ARTICLE XX OF THE GATT 1994 WITH RESPECT TO ANY OF THE CHALLENGED MEASURES

A. None of the Challenged Measures Is "Necessary To Secure Compliance with" Any GATT-Consistent Indonesian Law or Regulation

28. To establish that one of the challenged measures is justified under Article XX(d), Indonesia must show that the measure is "designed to 'secure compliance' with laws or regulations" that are not themselves GATT-inconsistent and is "necessary to secure such compliance." Indonesia asserts that the application windows and validity periods, fixed license terms, realization requirements, and storage capacity restrictions are "necessary" for "customs enforcement" and the use, sale, and transfer restrictions on horticultural products are "necessary" to secure compliance with food safety requirements. All of Indonesia's defenses fail.

29. First, Indonesia has not identified a GATT-consistent law or regulation with which any of the challenged measures is necessary to secure compliance. Indonesia named three legal instruments, as well as ten "other relevant regulations" as being *among* the "WTO-consistent laws and regulations" with which the measures are "designed to secure compliance." But Indonesia did not submit the relevant laws or regulations for the record, did not specify what aspects of these laws were relevant to the Panel's analysis, and provided no explanation as to why any of the challenged measures were necessary to secure compliance with these laws.

30. Appellate Body reports show this is insufficient. In *Thailand – Cigarettes (Philippines)*, the Appellate Body found that Thailand's Article XX(d) defense failed because Thailand did not "identify precisely the 'laws or regulations' with which the measure . . . purportedly secures compliance. "Thailand had referred to its value-added tax law, "Chapter 4" of its Revenue Code," and "reporting requirements of its VAT and other tax laws." The Appellate Body found these references were insufficient to identify a WTO-consistent rule under Article XX(d), noting that they "encompass a myriad of provisions . . . addressing various matters." Indonesia's references are even less precise and thus fail to meet the Article XX(d) standard.

31. However, even if Indonesia identified a law or regulation on customs enforcement, its defenses would still fail because none of the measures is "to secure compliance" with such a rule. None of the regulations establishing the restrictions mentions customs enforcement as one of its purposes. Further, the import licensing regimes are administered by the Ministries of Trade and Agriculture and are distinct from Indonesia's customs regime, which is administered by the Finance Ministry. Additionally, as the co-complainants have shown, it is clear from the text, structure, and history of the import licensing regulations and their framework legislation that their actual purpose is to protect domestic producers from competition from imports.

32. But even if the Panel found that a challenged measure is "to secure compliance" with some WTO-consistent law or regulation, the "necessary" standard still would not be met.

33. With respect to the *application windows and validity periods*, Indonesia asserts that they "contribute to Indonesia's ability to allocate resources effectively" among its ports. But it is not clear that the measure would make any contribution at all in this regard. Importers do not tie their imports to a particular port. Therefore, Indonesian officials would know at the beginning of the

period only the maximum permitted imports for that period and the ports where such imports could possibly be brought in. It is unclear how resources could be allocated based on this information. Further, a less trade-restrictive way to achieve the objective of "providing advance notice of expected import volumes" would be a truly automatic import licensing regime where importers could apply on any day prior to the customs clearance of goods and receive permission to import goods of the type and quantity requested through the port specified. Such a regime could be administered in the same way as the current regime, and would, therefore, be "reasonably available." It would provide more accurately and timely notice of planned imports, and, as such, would *better* assist Indonesia in allocating resources.

34. Indonesia asserts that the *fixed license terms* also allow customs authorities "to allocate their limited resources," but it is difficult to see how this could be the case. The requirement does not provide a schedule of what products will be imported when and where; it merely places overall restrictions on the products that can be imported in a period. Any minimal contribution the measure could make to customs enforcement is not in proportion to its high level of trade-restrictiveness. Further, if Indonesia wanted information about import volumes and locations, a reasonably available alternative measure would be a truly automatic licensing system. Allowing importers to apply to import products of whatever type, quantity, and country of origin they choose and to amend or update this information would provide timely, accurate information based on which resources could be allocated.

35. Indonesia's claim that the *realization requirement* is necessary for customs enforcement because it serves as a "safeguard against importers grossly overstating their anticipated imports" similarly fails. First, Indonesia has not provided any evidence that a problem with importers overstating their anticipated imports exists or explained how, if it did exist, it would impose a burden on customs officials. Second, Indonesia's argument concerning "misallocation of limited resources" is based on the assumption that the import licensing requirements provide customs officials with relevant information about planned imports. But this is not the case. Importers are *not* required to provide details on when and where products will be imported. Third, Indonesia's argument ignores the fact that any over-estimation problem would not exist without the application windows and validity periods and the fixed license term requirements. Further, any marginal contribution the realization requirement could make to saving customs resources would be outweighed by the severe trade-restrictiveness of the measure.

36. Indonesia asserts that the *storage capacity restriction* is also necessary for customs enforcement due to Indonesia's limited resources. But Indonesia has not explained how importers' ownership of storage capacity is relevant to enforcement of its customs laws. Even assuming that problems relating to inadequate storage could arise, they would presumably do so after the products had cleared customs in Indonesia. Further, Indonesia provides no justification for the two most trade-restrictive aspects of the requirement, the *ownership* requirement and the one-to-one ratio of owned storage capacity and *total* imports allowed entry during a semester.

37. In defense of its *use, sale, and transfer restrictions*, Indonesia asserts that this measure is necessary "to secure compliance with Indonesia's food safety requirements." Indonesia does not identify any WTO-consistent law or regulation with the restrictions are necessary to secure compliance, nor does it present any evidence that the challenged measure is designed to secure compliance with such a law or regulation. Even if Indonesia had done so, the measure would not meet the "necessary" standard, as Indonesia did not explain how the distributor requirement for products imported for consumption would allow importers to better track bacteria in the food supply. And Indonesia advanced no explanation at all for the prohibition on PIs transferring or selling products not used in their own production process. Indonesia also ignores the fact that it *also* has health and sanitary and phytosanitary requirements that apply to horticultural products. Because the use, sale, and transfer requirements make no demonstrated contribution to food safety, a less trade-restrictive alternative would be to eliminate the requirements and continue to rely instead on these other requirements, which relate specifically to the objective of food safety.

38. With respect to its defense of the regimes "as a whole," Indonesia provides no further explanation. We assume that Indonesia's defense of the regime is derivative of its defenses of the regime's individual components. Thus, Indonesia's defense must fail for the same reasons as its defenses of the individual measures. Moreover, any small contribution that the regimes might make to one of these objectives would have to be "necessary" even in light of the extremely trade-restrictive effect of the regimes as a whole, which Indonesia has not shown. Elimination of the

underlying restrictions, imposition of an automatic import licensing regime and continued reliance on other more relevant measures related to food safety would provide reasonably available alternative measures Indonesia could take to remediate the inconsistencies with Articles XI:1 and 4.2.

B. None of the Challenged Measures Is "Necessary" To Protect Human Health

39. To establish that one of the challenged measure is preliminarily justified under Article XX(b), Indonesia must establish that: (1) "the objective pursued by" the measure is "to protect human, animal or plant life or health"; and, (2) the measure is "necessary" to the achievement of its objective. Indonesia has not met either element with respect to any of its defenses.

40. With respect to the *seasonal restrictions* on importation of horticultural products, Indonesia's argument that they are necessary to protect human health because oversupply of such products could have disastrous consequences" lacks merit. First, Indonesia has not shown that protection of human health is an "objective pursued by" the measure. Indonesia asserted that the measure's objective is protecting human health, but introduced no evidence supporting the assertion. Further, co-complainants have demonstrated that the actual purpose of the measure is protecting domestic producers from competition. Indonesia also has not met the "necessary" standard, as it has not presented any evidence that oversupply occurs or poses risks to human health. Thus it is not clear that the measure would make any "contribution" to its purported objective. And even if the measure made some contribution, several less trade-restrictive alternative measures are available, including confining harvest period restrictions to those regions in which the harvest was occurring. Another alternative would be to eliminate the seasonal restrictions and allow market forces to resolve any oversupply problem.

41. Indonesia's argument that the *storage capacity restrictions* for horticultural products are justified because Indonesia's limited capacity to store such products and its "equatorial climate," create a "heightened risk of spoilage" also lacks merit. Indonesia presented no evidence that the measure's objective is the protection of human health, while the co-complainants' evidence suggests that the objective of Indonesia's import licensing regime is protecting domestic producers from competition. Further, even if the measure pursued human health, it does not meet the "necessary" standard. An importer's *ownership* of storage facilities has no relationship with the *sufficiency* of storage capacity, as importers commonly lease storage. Further, importers generally empty and refill storage space several times during a semester, so requiring importers to own enough storage to hold *all* the horticultural products that they would import for the entire semester is not necessary to ensure refrigeration of an importer's products. A significantly less trade-restrictive way to achieve that objective would be to remove the ownership and one-to-one ratio requirements and to allow importers to lease storage capacity as is needed at any time.

42. Indonesia's claim that the *use, sale, and transfer restrictions* on horticultural products satisfy Article XX(b) because they limit "distribution channels" so that "Indonesian officials are better able to track the origin of products that contain pathogenic bacteria" also fails. Again, Indonesia did not point to any evidence that "the objective pursued by" the measure is the protection of human health. And even if the measure did pursue that objective, no contribution to it has been shown, and certainly not one that meets the "necessary" standard. The measure limits the *persons* to whom imported horticultural products can be sold, not the products' final destination. Imports can be sold in open air markets, provided they are *first* sold to a distributor. The requirement simply lengthens the supply chain (likely making tracking more difficult). Also, Indonesia advanced no justification of the prohibition on PIs transferring products not used in their production. Thus, because the measure makes no contribution to the objective, a less trade-restrictive alternative would be for Indonesia to eliminate the requirement and continue to rely on its health and SPS requirements for preventing the spread of pathogenic bacteria.

43. Indonesia's argument that *six-month restriction* on fresh horticultural products is "necessary for the protection of human, plant, or animal life or health" also lacks merit. The first element of Article XX(b) is not met because, as with the other challenged measures, Indonesia has presented no evidence to suggest that this measure pursues the objective of food safety. The second element is not satisfied because Indonesia has not shown how the measure would make any contribution to food safety. Indeed, Indonesia has not even asserted that the requirement is "necessary" to food safety, merely stating that authorities would "prefer" products to be stored locally. Finally, Indonesia ignores the fact that it has health and SPS requirements for horticultural products,

including the requirement that all imports be accompanied by health and SPS certificates. Since all horticultural product imports are certified as meeting Indonesia's health and SPS standards prior to their being shipped, a less trade-restrictive alternative measure would be to continue to rely on these requirements and not impose the six-month requirement, which is highly trade-restrictive and makes no contribution to food safety.

44. Similarly, with the *Reference Price* requirements, Indonesia has not referred to anything suggesting that the "objective pursued" is the protection of human health. The one exhibit Indonesia presented on its food security plan makes no mention of the Reference Price, any over-supply problem, or Indonesia's import licensing regimes. Even if human health were the objective of the measures, Indonesia has presented no evidence that the Reference Price requirements make any contribution to that objective. Indeed, Indonesia presents no evidence that an oversupply problem exists and even acknowledges that food scarcity and under-nutrition are persistent problems. Further, even if the requirement did make a contribution to human health, such contribution would not outweigh the significant trade-restrictiveness of the measure.

45. With respect to Indonesia's *end-use restrictions* on animal products, Indonesia presented no evidence that food safety is the objective for which the restrictions were imposed. Indonesia also does not explain how the end-use restrictions are "necessary" to protect human health. Indonesia, presented no evidence suggesting that imported frozen or thawed meat sold in traditional markets poses any greater risks to human health than freshly slaughtered local meat sold in those markets. Finally, to the extent that Indonesia is asserting a defense of the whole measure, the explanation relating to traditional markets has no relevance to the prohibition on importation for all retail sale (including in modern markets) of beef products.

46. Indonesia's assertion that the *domestic purchase requirement* for Appendix I products is "an integral part of Indonesia's food safety and security plan" is the entirety of Indonesia's Article XX(b) defense of this requirement. Indonesia presented no evidence to support its assertion and no evidence suggesting that the requirement makes any contribution to food safety. Indeed, it is not clear what the connection there could be between the requirement and food safety. Further, even if a small contribution could be demonstrated, it would have to be weighed against the trade-restrictiveness of the measure, which is significant.

47. Indonesia asserts that its import licensing regimes, *as a whole*, fall within the scope of Article XX(b). Indonesia does not explain or present evidence in support of these defenses. Assuming that Indonesia's defenses of the regimes as a whole derive from its defenses of the individual measures, they must fail for the same reasons. Moreover, any small contribution the regimes might make to the protection of human health would have to be weighed against the trade-restrictiveness of the regimes as a whole. The contribution would have to be significant in order to outweigh this level of restrictiveness, and Indonesia has not made such a showing.

48. Finally, Indonesia's Article XX(b) defense of the *domestic sufficiency requirement* should also fail. Beyond a bare assertion, Indonesia provides no further evidence or argumentation in support of its defense under Article XX(b). Indonesia has put forward no evidence that the objective pursued by the laws setting out the domestic sufficiency requirement is "to protect human . . . health" or that the measure makes any contribution to that objective. Further, the co-complainants have shown that the explicit goal of the laws establishing the domestic sufficiency requirement is to protect farmers from foreign competition and reduce (and eventually cease) imports. Indonesia has not rebutted this showing.

C. None of the Challenges Measures Is "Necessary to Protect Public Morals"

49. To establish that a measure is preliminarily justified under Article XX(a), Indonesia must demonstrate that "it has adopted or enforced the measure to 'protect public morals' and that the measure is 'necessary' to protect such public morals." Indonesia has not met either element with respect to any of its Article XX(a) defenses.

50. Indonesia asserts that the *use, sale, and transfer* restrictions on horticultural products are necessary to protect consumers from purchasing non-Halal horticultural products at traditional markets. While the United States agrees that upholding the Halal food requirements in Indonesia is a "public moral" under Article XX(a), Indonesia has not demonstrated that restrictions relate to

this objective. The texts of the legal instruments setting forth the restrictions contain no reference to Halal requirements at all. Moreover, Indonesia fails to provide any other evidence showing connection between the restrictions and any Indonesian Halal requirements.

51. Even if Indonesia could show that the protection of Halal requirements is an objective of the use, sale, and transfer restrictions, the restrictions are not necessary to this objective. The restrictions limit the *person* to whom the imported horticultural products may be sold upon entry, not the products' ultimate *point of sale*. Restricting the initial sale to distributors does not relate to consumers' ability to distinguish Halal products in the markets. Indonesia's argument that its measures operate by limiting imported horticultural products to "uses that naturally require some degree of labelling" is also inapposite, since no evidence suggests that distributors are subject to a stricter Halal labeling requirements. Because these restrictions bear minimal, if any, connection to the protection of Halal requirements and make no contribution to achieving that objective, a reasonably available alternative would be to remove the requirements.

52. Indonesia contends that the *end-use* restrictions on animal products are necessary to protect public morals because they "prevent[] consumers from mistakenly purchasing animals and animal products that do not conform to Halal requirements." However, other than this assertion, Indonesia has not presented any evidence to show that the objective of the end-use restrictions is to protect Halal. An even if protecting Halal requirements were an objective of the measure, the restriction fails the "necessary" standard. It is not necessary to restrict the outlets in which imported animal products can be sold, because all imported animal products, with the exception of pork, must conform to Indonesia's Halal standards and be so labeled. Thus, Indonesia's end-use restrictions are not "necessary" to protect Halal because, with the exception of pork, all imports of animal products into Indonesia *already meet Indonesia's Halal standards and labelling requirements*. Further, to the extent that Indonesia seeks to justify the entire measure, its statements concerning traditional markets do not address the prohibition on all retail sale (including in modern markets) with respect to Appendix I products.

53. Indonesia asserts that its import licensing regimes *as a whole* fall within the scope of Article XX(a). As with the Article XX(b) and XX(d) defenses of the regimes as a whole, Indonesia has failed to explain or present any evidence in support of its assertion of defense. Although the United States accepts that protection of Halal standards may constitute a public moral, Indonesia has not established that it has adopted or enforced the import license regimes to "protect public morals" or that the regimes are "necessary" to doing so.

D. The Challenged Measures Are Inconsistent with the Article XX Chapeau

54. The challenged measures are not consistent with the Article XX chapeau because they arbitrarily or unjustifiably discriminate by imposing restrictions on imports that bear no relation to the policy objectives with respect to which Indonesia seeks to justify the measures.

55. With respect to Article XX(a), the end-use and use, sale and transfer restrictions result in arbitrary and unjustifiable discrimination. The restrictions are not rationally related to the objective of protecting consumers from non-Halal food, and, without the underlying justification, they serve only to impose burdens on importation that do not exist for domestic products.

56. This is also the case with respect to Indonesia's assertions regarding Article XX(b). Indonesia's restrictions based on the domestic harvest period, importers' storage capacity, the use, sale and transfer of imported products, and the time since products were harvested, as well as the Reference Price and domestic purchase requirements, constitute arbitrary and unjustifiable discrimination. Each of these restrictions bears little, if any, relationship to the objective of protecting human, animal, and plant life or health. Because they lack any rational connection to the objective, the result of these restrictions is only to impose burdensome costs and limitations on the importation of horticultural and animal products.

57. Finally, with respect to Article XX(d), Indonesia has shown no connection between the application windows and validity periods, fixed license terms, realization requirements, storage capacity requirements, and use, sale, and transfer restrictions and the objective of securing compliance with customs laws. Because none of these restrictions relate to achieving their

purported objective, these restrictions exist solely to restrict imports and protect the domestic industry and, therefore, result in arbitrary and unjustifiable discrimination.

IV. CONCLUSION

58. The United States respectfully requests that the Panel find that the prohibitions and restrictions imposed by Indonesia's import licensing regimes, operating individually and as whole regimes, and the provisions of Indonesia's laws conditioning importation on the insufficiency of domestic production to satisfy domestic demand, are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

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59. Indonesia imposes numerous prohibitions and restrictions on the importation of certain horticultural products and of animals and animal products that are, on their face, inconsistent with Indonesia's WTO obligations. For the most part, Indonesia does not contest the existence of the measures, as described by the co-complainants. Instead, Indonesia asserts that its measures are insulated from review by the Panel and, in the alternative, that the evidence submitted by the co-complainants is insufficient to meet the co-complainants' burden of proof.

I. EACH OF THE CHALLENGED MEASURES IS INCONSISTENT WITH ARTICLES XI:1 AND 4.2

A. Indonesia's Argument That Its Import Licensing Measures Are "Automatic" and, as Such, Are Outside the Scope of Article XI:1 and Article 4.2, Is in Error

60. Indonesia's assertion that "automatic" import licensing procedures are outside the scope of Article XI:1 of the GATT 1994 and 4.2 of the Agreement on Agriculture is refuted by the text of both provisions. The text of the *Agreement on Import Licensing Procedures* ("ILA") also contradicts this argument. Article 2(a) does not "expressly permit" automatic import licensing; it merely states that automatic licensing that has "restricting effects on imports" is *not* permitted. Other provisions of the ILA confirm that import licensing procedures, including automatic procedures, are not excluded from Members' obligations under the covered agreements.

61. Further, Indonesia's argument assumes that all of its import licensing measures are "import licensing procedures" under the ILA; they are not. The ILA distinguishes between "procedures" used to operate import licensing regimes, which the ILA covers, and the substantive rules, as the Appellate Body confirmed in *EC – Bananas III*. Indonesia's import licensing regimes *include* procedures for administering the regimes but the challenged measures are much broader. Thus, Indonesia is wrong that its substantive import licensing measures fall within the scope of the ILA at all. Finally, Indonesia's import licensing regimes are, in any event, not "automatic." They impose numerous substantive restrictions on importation.

B. Indonesia's Argument that the Co-Complainants Have Not Established a *Prima Facie* Case under Article XI:1 Rests on an Incorrect Interpretation of that Provision

62. In its second written submission, Indonesia asserts that that the co-complainants have not made a *prima facie* case because they "failed to present sufficient pre- and post-implementation import data" to support their Article XI:1 claims. Indonesia's argument is incorrect. First, Article XI:1 does not require a demonstration of trade effects. The co-complainants have met the standard of Article XI:1 with respect to the challenged measures, demonstrating that each imposes a "limiting condition" or "limitation on action" with respect to importation and thus has a "limiting effect" on importation. Further, although not legally required, the co-complainants also have presented extensive evidence demonstrating the quantitative effect of Indonesia's import licensing measures on imports of the covered products.

II. INDONESIA HAS NOT ESTABLISHED THAT ANY OF THE CHALLENGED MEASURES IS JUSTIFIED UNDER ARTICLE XI:2 OF THE GATT 1994

63. In its second written submission, Indonesia asserts that the Reference Price and domestic harvest period restrictions are justified under Article XI:2(c)(ii) of the GATT 1994. However, Indonesia has not provided any evidence to show that its restrictions conform to all the elements of Article XI:2(c)(ii). Moreover, Indonesia cannot avail itself of Article XI:2(c)(ii) because the obligations of the GATT 1994 apply "subject to" the obligations of the Agreement on Agriculture. Thus, the exclusion of certain measures from the obligation in Article XI:1 could not create an implicit limitation on the scope of a provision of the Agreement on Agriculture covering similar matters. These obligations would apply cumulatively. Therefore, Indonesia cannot seek to justify restrictions not consistent with Article 4.2 under Article XI:2(c)(ii).

III. INDONESIA HAS NOT ESTABLISHED THAT ANY OF THE CHALLENGED MEASURES IS JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

64. One fatal flaw pervading Indonesia's defenses is that its claims that the challenged measures meet the first element of the subparagraphs consist almost *entirely* of unsupported assertions. Indonesia submits no evidence suggesting that the challenged measures were adopted in pursuit of the covered objectives. The Appellate Body made clear in *EC – Seal Products* that mere assertion does not satisfy the first element of the Article XX subparagraphs. And Indonesia does not address the evidence submitted by the co-complainants demonstrating that the objective of Indonesia's import licensing measures is to protect domestic producers from competition. Another critical failing is that, without exception, the exhibits Indonesia has submitted to show each measure's contribution to its purported objectives do not support the points for which they are cited. Indeed, they often serve to *confirm* the evidence and argumentation submitted by the co-complainants that the challenged measures do *not* meet the standard of Article XX.

65. Indonesia asserts that several of its import licensing measures are justified under Article XX(a). But, with respect to horticultural products, Indonesia has not even identified any relevant halal standards that the import licensing measures could protect. Further, nothing in the text, structure, or history of the instruments establishing the horticultural products measures even mentions halal, let alone suggests that the objective of the regime is to uphold halal standards. And other than unsupported and vague assertions, Indonesia has not explained *how* any of its measures contribute to the protection of halal requirement, much less shown that their contribution is approaching "indispensable" on the continuum of assessing necessity.

66. With respect to its Article XX(b) defenses, Indonesia similarly does not demonstrate that any of the measures pursues the objective of food safety. Indonesia asserts that the fact that the import licensing regulations refer to the Food Law shows that the challenged measures are food safety measures, but this is incorrect. The Food Law is broad statute that covers a variety of topics. Chapter IV, Part 5 covers "Import of Food" and its title, text, and structure, as well as the operation of Indonesia's import licensing regimes and statements by Indonesian officials, all show that this is the section relevant to Indonesia's import licensing regimes. Food safety is covered in Chapter VII, and no evidence ties the import licensing regimes to that part of the law.

67. Further, none of the evidence put forward by Indonesia suggests that the challenged measures could meet the "necessary" standard. Indonesia asserts that its regimes, as a whole, will ensure imports "are stored properly" but presents no evidence or argument as to how this would be the case. With respect to the six-month restriction, Indonesia's new evidence confirms that the measure is not "necessary" for food safety because it shows that some horticultural products can be safely stored for more than six months. Concerning the use restrictions on animal products, Indonesia's defense continues to reflect a mischaracterization of the measure, and none of its evidence suggests that frozen meat poses any greater health risk than fresh meat under the conditions in a traditional market. Finally, with respect to the positive list, neither of Indonesia's exhibit distinguishes between the prohibited and listed beef products or discusses non-beef products at all, and Indonesia provides no more explanation or support for this defense.

68. Indonesia's Article XX(d) defenses also fail. Indonesia has not adequately identified the WTO-consistent laws and regulations purportedly enforced by the import licensing measures. Indonesia identified 13 legal instruments whose compliance is allegedly secured by its import

licensing regimes, but the mere listing of legal instruments and cursory references to general provisions fall short of identifying the relevant rule under Article XX(d). Indonesia put forward almost *no* evidence that any of the challenged measures were taken "to secure compliance" with the Customs Law or any other listed legal instrument. With respect to the necessity element, Indonesia did not explain how its import licensing measures contribute to *securing compliance with* any requirement of a customs or food safety law or regulation. Merely asserting that the import licensing regimes "contributed to the monitoring of the flow of goods" is not sufficient.

69. Additionally, Indonesia cannot show that its measures meet the requirements of the chapeau of Article XX. Regarding Article XX(a), the challenged measures at issue are restrictions on *imported* products only. Indonesia offered no arguments to address the arbitrary and unjustifiable nature of these restrictions. Regarding Article XX(b), Indonesia asserts that its "distinctions . . . between imported and domestic products are not in any way more onerous than necessary" but provides no evidence or explanation of what distinctions exist or how these distinctions apply to the measures it seeks to justify. Finally, with respect to Article XX(d), Indonesia has not addressed at all the fact that Indonesia's regimes do result in discrimination against imported products vis-à-vis domestic products. Finally, Indonesia has not put forward any explanation of how the discrimination arising from the measures it seeks to justify is rationally related to the purported objectives of the measures.

impacting their competitiveness. The same conclusion was reached by the panel in *Colombia – Ports of Entry.*[5]

ARTICLE III:4 OF THE GATT 1994.

8. Next, we consider Indonesia to be maintaining an import regime that accords less favorable treatment to imported fresh horticultural products than to domestic like products. For one, importers are required to own storage facilities of appropriate capacity, and may only import volumes commensurate with that storage capacity.[6] Furthermore, importers also have to comply with restrictions on the use, sale and distribution of the imported products.[7] There are no similar restrictive measures on domestic like products.

9. The precedents show that requirements that imported and domestic like products be treated differently, such as a dual retail system for imports and exports or a requirement for imported products to be distributed through in-state wholesalers, result in "treatment ... less favorable than that accorded to like products" from domestic producers, which is inconsistent with Article III:4.[8] Therefore, we are of the view that these measures create unfair conditions for imports, and are therefore inconsistent with Article III:4 of the GATT 1994.

ARTICLE 3.2 OF THE AGREEMENT ON IMPORT LICENSING PROCEDURES

10. In its first written submission,[9] Indonesia argued that the import licensing regime is an automatic one because any importer that meets the clearly defined legal requirements would be automatically granted an import license, which makes the measures at issue fall outside the scope of Article 3.2 of the Agreement on Import Licensing Procedures. However, under these measures, certain substantial requirements and restrictions are imposed on the importers as pre-conditions to apply for Ministry of Agriculture ("MOA") Recommendations and Import Approval. For example, importers are required to demonstrate storage and transportation capacities. They are also required to comply with certain requirements such as restrictions on the use, sale and distribution of the imported products. Importers not meeting these requirements will not be able to apply for MOA Recommendations and Import Approval. Furthermore, the granting of MOA Recommendations and Import Approval is dependent on the Indonesian authorities' determination on whether all of these requirements are satisfied. Based on the above, we consider all of these prerequisite requirements as constituting a "non-automatic" import licensing procedure, resulting in the prohibition of and restrictions on imports.

11. Moreover, to establish a violation of Article 3.2, the *EC – Poultry*[10] confirms that there must be a causal link between trade distorting effect and the licensing procedures and requirements, and in this case we can see that fresh horticultural trade distortive effects are clearly attributable to Indonesia's import licensing procedures.

12. Lastly, Article 3.2 requires that a non-automatic licensing shall be no more administratively burdensome than "absolutely necessary" to administer the measure. Since the subject import licensing procedures are for quantitative restriction purposes, as the panel noted in *EEC – Import Restrictions*,[11] we believe that Indonesia's import licensing procedures are not consistent with the requirement of "absolutely necessary", as provided under Article 3.2 of the Agreement on Import Licensing Procedures.

CONCLUSION

13. In conclusion, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu supports New Zealand and the United States in their claims against Indonesia's import regime, and

[5] Panel Report, *Colombia – Ports of Entry*, paras. 7.273-75.

[6] Article 8(e) of MOT 16/2013 (Exhibit JE-8), Article 8(2)(c) of MOA 86/2013 (Exhibit JE-15), Article 13(4) of MOT 40/2015(Exhibit JE-11).

[7] Articles 7 and 15 of MOT 16/2013 (Exhibit JE-8).

[8] GATT Panel Report, *United States —Malt Beverages,* para 5.32; See also Appellate Body Report, *Korea – Beef (US)*, para 186(e).

[9] Indonesia's first written submission, paras. 175-176.

[10] Appellate Body Report, *EC - Poultry*, para 121.

[11] Panel Report, *EC —Tariff Preferences*, para 7.211.

submits that its licensing measures for fresh horticultural products are inconsistent with Article 4.2 of the Agreement on Agriculture, Article XI:1 of the GATT 1994, Article III:4 of the GATT 1994 and Article 3.2 of the Agreement on Import Licensing Procedures.[12]

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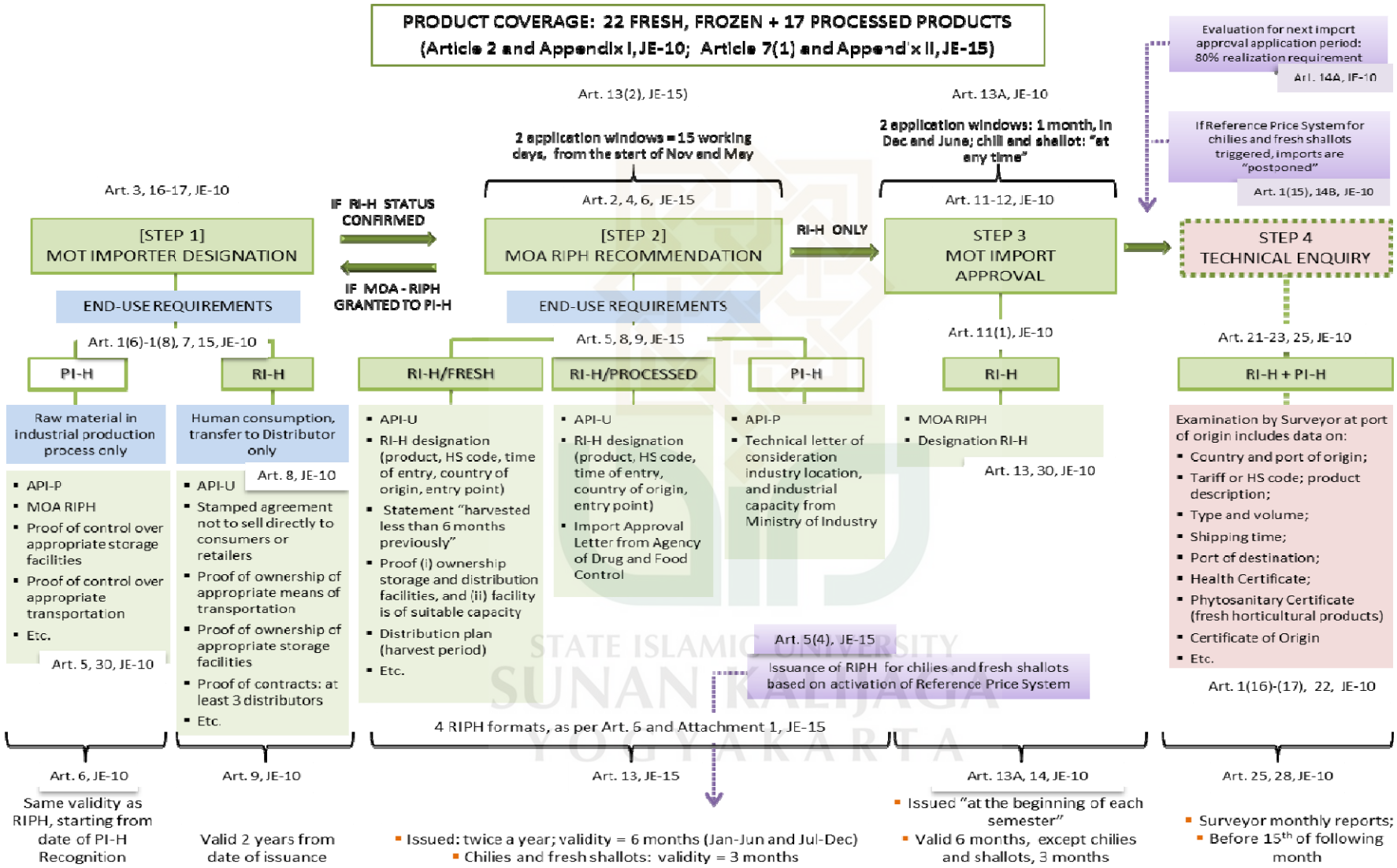
[12] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's third party submission, para 22.

ANNEX E

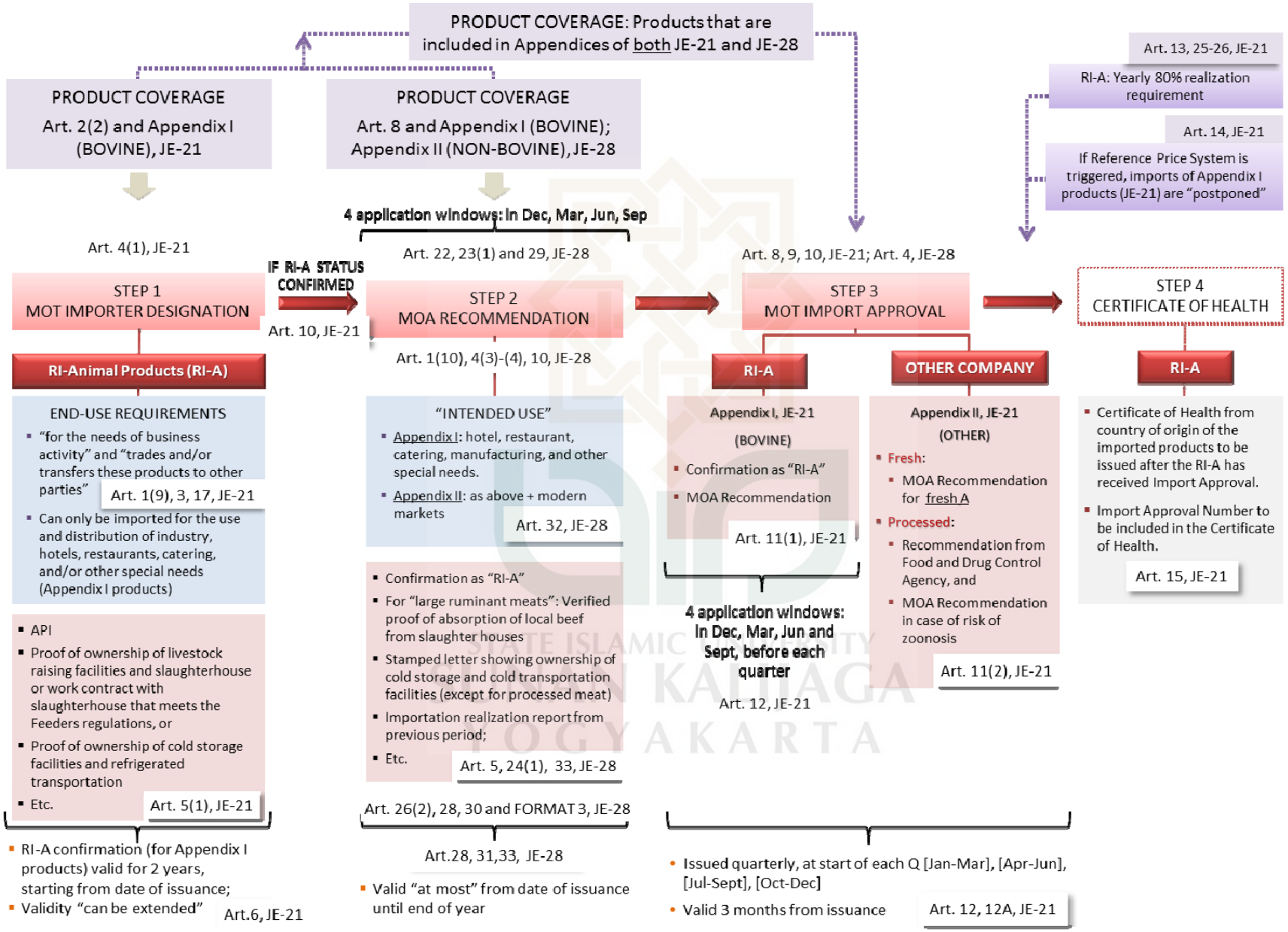
IMPORT LICENSING PROCEDURES FOR HORTICULTURAL PRODUCTS AND FOR ANIMALS AND ANIMAL PRODUCTS

ANNEX E-1



Sources: Based on MOT 16/2013 as amended by MOT 47/2013 (JE-10) and MOA 86/2013 (JE-15).

ANNEX E-2



Sources: Based on MOT 46/2013, as amended by MOT 57/2013 and MOT 17/2014 (JE-21); and MOA 139/2014, as amended by MOA 2/2015 (JE-28)