HALAL FOOD, MARKET ACCESS AND EXCEPTION TO WTO LAW: NEW ASPECTS LEARNED FROM *INDONESIA — CHICKEN PRODUCTS*

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ABSTRACT

Halal is the dietary law for Muslims. Complying with its rules, which are based on Islamic religious texts, is required for practicing Muslims all over the world in the context of consuming food and other consumer products. Halal measures can have an effect on trade for halal-related concerns. Halal certification is required as a condition for the importation of certain food products into some countries. These measures can be inconsistent with the World Trade Organization (hereinafter "WTO") as shown in Indonesia — Chicken Products (2017). *However, the extent to which WTO Member States are given leeway in implementing their halal measures in order for the exceptions under the WTO vis-à-vis Article XX of General Agreement on Tariffs and Trade (hereinafter "GATT") to apply needs to be examined. Based on these premises, this paper seeks to discuss the legal issues in the GATT/WTO context arising from the halal measures. The measures will be conceptualised before the application of GATT/WTO rules to such measures is assessed. The interplay between Article XX of GATT and halal*

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measures will be explored. This will be followed by an analysis of the decision of the WTO Panel in the Indonesia — Chicken Products *case.*

KEYWORDS: *halal law, trade liberalization, WTO case law, SMEs and WTO law, trade and religion*

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I. INTRODUCTION

Halal means what is lawful and permitted by the Lawgiver, in accordance with Shariah law.[1] Relating such a concept to what can be consumed as food, halal can thus be a reflection on the dietary law for Muslims. Complying with its rules which are based on Islamic religious texts is required for practicing Muslims all over the world, with or without legal sanctions, in the context of consuming not only food but also other consumer products. As put by Fischer, "halal is no longer simply a set of regulations for food and food preparation; it is a growing market that involves producers, consumers and certifying authorities, which extends beyond the Muslim population".[2] Many countries in the world, mostly the Muslim ones, have introduced halal regulations and measures. According to the 2016 Halal Food Indicator Index (HFI), out of the top 15 halal user countries in the world,[3] three scored the highest, namely Malaysia (obtaining a score of 89), United Arab Emirates (obtaining a score of 67) and Pakistan (obtaining a score of 60).[4] Halal measures can have an effect on trade. Importation of certain food products, for example, has been banned for halal-related concerns. Halal certification is required as a condition for importation of certain food products into some countries. These measures can be inconsistent with the World Trade Organization (hereinafter "WTO") as shown in the decision of the WTO Panel in *Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products* (hereinafter "*Indonesia — Chicken Products*").[5] However, more needs to be done in explicating the extent to which WTO Member States are given leeway in implementing their halal measures.

Based on these premises, this paper seeks to discuss the legal issues that arise from the halal measures. These issues are encapsulated into a determination of the nature and scope of halal measures. This will be followed by a discussion on how WTO law applies to the halal measures. This discussion will draw upon the analysis of the decision of the WTO Panel

[1] Karijn Bonne & Wim Verbeke, *Religious Values Informing Halal Meat Production and the Control and Delivery of Halal Credence Quality*, 25(1) AGRIC. & HUM. VALUES 35, 38 (2008); Michelle Limenta et al., *Disabling Labeling: The WTO Consistency of the Indonesian Mandatory Halal Labeling Law* 1 (World Trade Inst., Working Paper No. 2016/08, 2016).

[2] Johan Fischer, *Religion, Science and Markets. Modern Halal Production, Trade and Consumption*, 9(9) EMBO REP. 828, 829 (2008).

[3] The countries are Malaysia, United Arab Emirates, Pakistan, Oman, Brunei, Singapore, Sudan, Saudi Arabia, Jordan, Kuwait, Indonesia, Qatar, Iran, Bahrain and Bangladesh.

[4] *Index Score of the Leading Halal Food Markets Worldwide in 2016*, STATISTA, https://www.statista.com/statistics/737175/halal-food-index-score-by-country-worldwide/ (last visited Sept. 9, 2018).

[5] Panel Report, *Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products*, WTO Doc. WT/DS484/R (adopted Nov. 22, 2017) [hereinafter *Indonesia — Chicken Products* Panel Report].

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in the *Indonesia — Chicken Products* case. The decision will shed some lights on what are new aspects emerging from the application of the prohibitions and their exceptions under the WTO, particularly the General Agreement on Tariffs and Trade (hereinafter "GATT") to halal.

II. THE NATURE AND SCOPE OF HALAL MEASURES

What is important for halal measures is their wholeness.[6] Halal measures must govern the whole production chain from the time a product is produced, processed or manufactured until it is consumed by the end user. Even at the early stages of the production, processing or manufacturing of such product, the halalness of the inputs of the product (*e.g.* raw materials used) will be put to question. Further, being halal is not merely about the outcome (*i.e.* the product) but also the process. Thus, the rules that halal law prescribes do not only look at the properties of the product but they also sanction the process of making such a product. The industries within which such measures can apply include halal foods and slaughtering, halal tourism and hospitality, halal logistics and handling process, halal management, halal packaging, halal pharmaceuticals, cosmetics and personal care.[7] With regards to foods, the goods subject to halal measures are no longer limited to food consumed by humans as animal foods have now been subject to halal requirements. The concerns of halal are essentially:

1. A product which contains any physical element of animals which are prohibited from being consumed is non-halal. Examples of such animals are swine, dogs and other types of animals whose consumption is prohibited.
2. A product which contains any physical element of animals which are permitted to be consumed but are not slaughtered according to the Islamic rites is also non-halal, and
3. A product (particularly food) which contains any element of liquor is also non-halal. However, more lenient juristic opinions are for permitting alcohol content in non-food products such as perfumes.

In the context of international trade, halal measures can take different forms depending on the functions and objectives of such measures. Halal certification and labelling, and other procedures leading thereto, are one of them,[8] which can be explained by the following example. A food product,

[6] Mohd Hafiz Zulfakar et al., 10th ANZAM Operations, Supply Chain and Services Management Symposium: Halal Food Supply Chain Integrity: From a Literature Review to a Conceptual Framework 3, (June 14-15, 2011).

[7] Apnizan Abdullah, *The Halal Regulatory Framework in Malaysia Should Be Consolidated: A Proposal*, 7(3) ISLAM & CIVILISATIONAL RENEWAL 422, 423 (2016).

[8] Zalina Zakaria, *Tapping into the World Halal Market: Some Discussions on Malaysian Laws and Standards*, 16 SHARIAH J. 603, 608-10 (2008); Ismail Abd Latif et al., *A Comparative Analysis of Global Halal Certification Requirements*, 20 J. FOOD PRODUCTS MARKETING 85, 89-90 (2014).

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for want of a halal certification (logo), requires the components of that product, in terms of its ingredients or inputs, not to originate from non-halal sources. Additionally, certain procedures and standards must be followed with regards to how the product is produced, processed, packaged, transported, and sold to consumers. Part of such measures involves how the relevant players can meet the conditions and comply with the procedures, which can be through testing and inspections by the relevant authorities.

Apart from halal certification and labelling requirements, States have also imposed restrictions on the importation of products based on the halal criteria.[9] Conditions on the country of origin and exporting entity (company, enterprise or individual) can be imposed, in addition to the substantive and procedural conditions for a product to meet such (halal) criteria.

It needs to be stressed that halal criteria may come hand in hand with hygiene and good manufacturing criteria, which seek to elevate the quality and standard of a product. This phenomenon is best explained by the practice in some Muslim countries like Malaysia known as "halalan thaiyyiban". *Halalan thaiyyiban* is an Arabic word which means "halal and good". The concept of *halalan thaiyyiban* presupposes that the compliance with hygiene and/or good manufacturing practices may be a precondition to the issuance of halal certificates and labels.[10]

The halal regulatory framework adopted by a particular State differs from one to another. Certain countries like Indonesia has a comprehensive and centralized halal law. Malaysia, on the other hand, lacks comprehensive halal legislation and centralized halal law enforcement. Malaysia's halal regulations are found in general legislation such as the Trade Description Act 2011 which seeks to prevent misleading trade descriptions in the supply of halal goods and services.[11] The 2011 Act created two related regulations. Firstly, the Trade Descriptions (Definition of Halal) Regulations 2011, which defines "halal". Secondly, the Trade Descriptions (Certification and Halal Labeling) Regulations 2011, which has provisions on halal certification procedures, the use of halal logos (including those issued by foreign certification bodies) and the standardization of halal logos. The process starts with an application to the relevant agency for a halal product certification. In Malaysia, the agencies are the federal Islamic Development Department (JAKIM) and States' (States here refer to the subnational entities within the Federation of Malaysia) Islamic Religious authorities. There is no centralized body because according to the Malaysian Federal Constitution,

[9] Limenta et al., *supra* note 1, at 4.
[10] Hadi Akhbar Dahlan & Norrakiah Abdullah Sani, *Comparison and Challenges in the Implementation of Halal Food Laws in Malaysia, the Netherlands and United States of America*, 21 MALAYSIAN J. L. & SOC'Y 53, 53 (2017).
[11] *See* Nor`Adha Abdul Hamid et al., *Malaysian Halal Laws: Issues and Challenges*, 13(3) SOC. SCI. 769, 770 (2018); Abdullah, *supra* note 7, at 422-23.

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Islamic matters are under the States jurisdiction. If the procedures are complied with, the Malaysian halal logo can be used on the product concerned. For importation of meat, the Animals Act 1953, together with its Regulations and the Abattoir (Privatization) Act 1993, provide for the regulation of slaughterhouses, including those abroad, and the procedures for the halal certification application process for meat imports.[12] Finally, the Customs (Prohibition of Imports) Order is the relevant regulation that prohibits the importation of non-halal meat, except pork.[13]

There can be two different types of halal measures, voluntary halal measures and non-voluntary halal measures. Voluntary halal measures are reflected in the operation of halal certification and labeling rules by which industry players are not forced to apply for halal certificates and labels for their products. They are allowed to produce, market and sell non-halal products but once they want to do the same with regards to products that are represented as halal they have to get halal certificates and use approved halal labels, and hence need to comply with the necessary rules and procedures.[14] Occasionally these rules and procedures only act as de facto halal measures *i.e.*, they are designed not as part of halal law but law against fraud. Such a measure can be seen in the United States (hereinafter "U.S.").[15]

Non-voluntary halal measures, on the other hand, are imposed when producers, marketers or sellers are not allowed to bring any products into the market other than halal products. Non-halal products are completely or partially restricted from being sold to consumers in the market. The banning or partial restriction of sales of non-halal products such as pork and liquor are found in many Muslim countries.[16] In the context of international trade, non-voluntary halal measures can be in the form of banning or restricting the importation of non-halal products. Halal certification can also be part of non-voluntary halal measures if the requirement to get halal certification becomes a mandatory condition for the importation or sale of a type of product.[17] Certain products do not require halal certification in order to be legally sold in the market. Instead, a halal logo can be placed on a product merely in response to market demand. But to prevent deceptive practices, once the product is declared halal, all the procedures and requirements must be followed. However, where the failure of getting such certification leads to

[12] *Id.* at 772.
[13] Hamid et al., *supra* note 11, at 772.
[14] Zakaria, *supra* note 8, at 604.
[15] Dahlan & Sani, *supra* note 10, at 56.
[16] This can be seen in the case of Saudi Arabia and such total ban has given rise to concerns under the WTO law. *See generally* Raj Bhala, *The Intersection of Islam and the WTO: Three Sharia Issues in the WTO Accession of Saudi Arabia*, 21 L. CONTEXT: A SOCIO-LEGAL J. 152 (2003).
[17] *See generally* Zoura Junita Khasahab, The Implementation of Halal Food Labeling Based on the Technical Barriers to Trade (TBT) Agreement by Indonesia (2017), (unpublished B.A. Theses, Syiah Kuala University) (on file with ETD Unsyiah); Limenta et al., *supra* note 1, at 2.

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prohibition of the entry of such product into the market, certification becomes rather mandatory for market access. As will be seen below, it can be difficult for a country to apply the prohibition or restriction across the board, hence it is more often applied to products that are consumed the most, such as meat and meat products.

III. HOW WTO LAW APPLIES TO HALAL MEASURES?

While a State that applies halal measures could argue that it has a sovereign right to do so,[18] the implementation of such measures can raise compliance issues with regards to GATT/WTO rules.

Measures that force producers to adopt halal techniques (with non-compliance meaning their products are prevented from getting market access) can be argued to run counter to the spirit and philosophy of the WTO, which seeks to remove trade barriers. Halal measures themselves can arguably constitute trade barriers.

Malaysia, being a Muslim country, is one of the users of halal measures, and the fact that in 2005 it suspended imports of meat products from New Zealand for the use of thoracic sticking and electric immobilization during slaughter[19] indicates that it is high time for the scope of WTO-compliance for States' halal measures to be delineated (Malaysia argued that such slaughtering techniques did not comply with halal procedures).[20] Malaysia also faced complaints from the United States with regards to several measures namely: (1) its law that requires all meats (except pork), whether imported or locally sourced, to be halal (2) the MS 1500:2009 which is the Malaysian Standard for food products is stricter than the Codex Alimentarius (MS 1500:2009 requires special and separate facilities for halal and non-halal products at the slaughtering place as well as separate storage and transportation which are also required—but under Codex Alimentarius, the same facilities can be used for halal purposes provided that Islamic cleansing rites are done), (3) the Draft Protocol for Halal Meat and Poultry Productions 2011 which imposes mandatory halal audit on meat and poultry exporters to Malaysia (the US claimed that up till 2013, only 1 US exporter managed to get through the audit), and (4) a 2012 rule that bans imports of cat food that contained porcine.[21]

These complaints have been consistently made by the US, showing that it has an interest in the use of halal measures. They also show that the

[18] Limenta et al., *supra* note 1, at 16.
[19] *Malaysia May Overturn Rejection of NZ Halal Beef*, THE BEEF SITE (Apr. 17, 2007), http://www.thebeefsite.com/news/16593/malaysia-may-overturn-rejection-of-nz-halal-beef/.
[20] *Id. See also* Bhala, *supra* note 16, at 9.
[21] *2013 National Trade Estimate Report on Foreign Trade Barriers*, OFF. U.S. TRADE REPRESENTATIVE (2013), https://ustr.gov/sites/default/files/2013%20NTE%20Malaysia%20Final.pdf.

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measures have effect on the market access of products such as meat from the US. So far, there have not been any reports that Malaysia has bowed to those complaints by relaxing its halal laws and regulations. However, legal means has not been the option taken by the US against Malaysia as the former still prefers to use diplomatic channels. This is unlike Indonesia, whose halal laws and regulations have now been subject to WTO adjudications.

A. Halal and the WTO Exceptions

The WTO concerns arising from the taking of halal measures have been documented in many studies.[22] These concerns range from claims that the halal measures are restrictions that violate general GATT provisions such as Article XI which prohibits quantitative restriction and Article III on national treatment, and claims that the measures taken by States are not consistent with specific provisions on import licensing, technical barriers to trade (hereinafter "TBT") and sanitary and phytosanitary measures (hereinafter "SPS").

The compatibility of halal measures has been raised in at least two cases—*Indonesia — Importation of Horticultural Products, Animals and Animal Products* (hereinafter "*Indonesia — Import Licences Regime*")[23] and *Indonesia — Chicken Products*. The latter deals more directly with halal laws and regulations whereas the former touches upon Indonesia's import licensing measures on beef and horticulture products. Halal was used to justify the taking of those measures, requiring the State that uses them to rely on Article XX of GATT particularly its paragraphs (a), (b) and (d). Article XX provides that nothing in GATT shall preclude Member States from taking measures which are (a) necessary to protect public morals, (b) necessary to protect human, animal and plant life and health, and (d) necessary to secure compliance with laws and regulations. However, the States concerned must fulfill the conditions in the chapeau of Article XX. This is on top of the necessity test that must be proven that requires no reasonable alternative that is less trade restrictive to achieve the objectives of Article XX(a), (b) and (d). The WTO jurisprudence shows that relying on Article XX is not easy.

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[22] *See generally* Limenta et al., *supra* note 1; Bhala, *supra* note 16; Pablo Lizarreta Barrios, *Halal Certification and Labelling Requirements and the TBT Regime: A Case Study of the Indonesian Halal Act 33/2014*, 45(3) LEGAL ISSUES ECON. INTEGRATION 271 (2018); Alberto Alvarez-Jimenez, *The International Law Gaze: Indonesia — Import Licensing Regimes (New Zealand)*, 2017 N.Z. L.J. 260, 260-63 (2017).

[23] Panel Report, *Indonesia — Importation of Horticultural Products, Animals and Animal Products*, WTO Doc. WT/DS477/R, WT/DS478/R (adopted Nov. 22, 2017) [hereinafter *Indonesia — Import Licensing Regimes* Panel Report]; Appellate Body Report, *Indonesia — Importation of Horticultural Products, Animals and Animal Products*, WTO Doc. WT/DS477/AB/R, WT/DS478/AB/R (adopted Nov. 22, 2017).

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B. The Indonesia — Chicken Products *Case*

The WTO-consistency of halal measures and the application of general exceptions under Article XX are found in *Indonesia — Chicken Products* (a 2017 WTO Panel case). Compared to *Indonesia — Import Licenses Regime,* which involves the halal issue in the context of import licenses, the *Indonesia — Chicken Products* case involves scrutiny of halal both directly and indirectly. In this case, Brazil alleged that some of Indonesia's prohibitions on the importation of chicken meat and chicken products from Brazil were inconsistent with GATT/WTO rules.[24] Some of the import prohibitions were contained in the different regulations taken by Indonesia on halal slaughtering and labelling requirements for imported chicken meat and chicken products. [25] More specifically, the regulations govern the surveillance and implementation of halal slaughtering and labelling requirements whose problem lies in the claim by Brazil that surveillance and implementation of requirements for imported chicken products were stricter than those applied to domestic production in Indonesia.[26]

While all chicken meat whether imported or locally produced must be halal, both exporters and importers must follow specific licensing procedures with regards to importation to Indonesia. The exporting country whose product seeks to get into the Indonesian market must get a Country of Origin approval and the exporter from that country must apply for a Business Unit approval. The importer who resides in the importing country (Indonesia) will need to make an application for the Ministry of Agriculture (hereinafter "MoA") Import Recommendation and another one to the Ministry of Trade (hereinafter "MoT") for Import Approval. With the MoA Import Recommendation, the MoA will ensure that the product originates in a country approved under the Country of Origin approval concept and the producer or exporter of the product is entity approved under the Business Unit approval concept. Only when these two conditions are met can an Import Recommendation be issued by the MoA, which is a condition precedent to the issuance of MoT Import Approval.

Few aspects of these import licensing procedures have been subject to scrutiny but since not all are relevant to halal, only those which are relevant will be discussed in this paper. One of them is the positive list requirement. The positive list requirement causes a particular product not mentioned in the "list" to not be permitted access into the Indonesian market. With regards to chicken meat, only carcass is mentioned in the list. Therefore, imports of chicken cuts which Brazil intended to export to Indonesia are not allowed to be brought into Indonesia.

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[24] *Indonesia — Chicken Products* Panel Report, *supra* note 5, ¶ 2.3(a).
[25] *Id.* ¶ 2.3(g).
[26] *Id.* ¶ 2.6(a).

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The positive list requirement was argued to be a prohibition on imports that violated Article XI:1 of the GATT 1994.[27] That article of GATT 1994 does not allow WTO Members to restrict imports other than through tariffs, duties or other charges. The prohibited measures included in Article XI are quotas, import licenses and export licenses. The term prohibition was construed by the Panel as a legal ban and the same Panel found that the positive list was a legal ban.[28]

At this juncture, the halal objective was used to justify the positive list requirement. In its defense of the requirement based on Article XX(d) of GATT 1994, Indonesia argued that the positive list requirement was necessary to secure compliance with its laws and regulations dealing with halal requirements, deceptive practices and halal enforcement by the customs authority.[29] While the scope of the halal requirements was limited to the process of certification,[30] the positive list requirement served to ensure the traceability of imported chicken to specific foreign establishments that obtained the certificates.[31] In other words, the import ban in question was introduced to prevent non-halal chicken cuts from being passed as halal. Here the consistency of the substantive halal rules was not questioned on the WTO plane. In fact, Brazil acknowledged the importance of halalness to Indonesia being a predominantly Muslim country.[32] However, the link between the import ban and the halal rules was questioned. The WTO Panel found that the risk of such matter (the passing of non-halal product as halal) was minimal (only three cases since 1999 through out Indonesia) and the ban on all imports of chicken cuts prevented access of consumers to halal chicken cuts counteracting the main objective of halal rules which is to ensure full compliance with the halal criteria.[33] The Panel also had to decide on the necessity of the positive list requirement *i.e.*, whether the contribution of the requirement to the halal objective is not trade restrictive. Referring to *Brazil — Retreaded Tyres*, the Panel found that an indiscriminate ban on both non-halal and halal meat was too severe to be considered less trade restrictive. Finally, the Panel discussed on whether there was a reasonably available alternative that was less trade restrictive than the positive list requirement that contributed to the respective halal objective. The reasonably available alternative must be proven by the halal complainant Member and it is important that the alternative measure does not impose an undue burden on the relevant Member, such as prohibitive costs of substantial technical

[27] *Id.* ¶ 7.113.
[28] *Id.* ¶ 7.116.
[29] *Id.* ¶ 7.119.
[30] *Id.* ¶ 7.125.
[31] *Id.* ¶ 7.126.
[32] *Id.* ¶ 7.139.
[33] *Id.* ¶¶ 7.141-42.

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difficulties.[34] As contended by Brazil, a less trade restrictive measure that was reasonably available is halal certification in the slaughterhouses of the exporting countries.. The Panel held that Brazil did not need to prove the matter because the halal certification requirement does not apply to the products concerned *i.e.*, chicken cuts as they are totally banned from the Indonesian market.

Unlike in *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (hereinafter "*Korea — Beef* "),[35] the complainants had to raise what are the reasonably available alternative measures that can achieve the required objective in a less trade restrictive way.[36] To deny this duty of the complainant to find the relevant alternative measure may mean that it would become more difficult for Indonesia to justify the import ban.

No regard was also paid by the Panel in *Indonesia — Chicken Products* to the importance of the common interests or values protected by the law or regulation at issue *i.e.*, the halal law. In *Korea — Beef*, this factor was highlighted as something that needs to be balanced with other factors such as "the contribution made by the compliance measure to the enforcement of the law or regulation at issue" and "the accompanying impact of the law or regulation on imports or exports".[37] While the balancing test was not consistently found in WTO jurisprudence,[38] further discussion should be made in relation to how States determine the level of protection against halal-related deceptive practices. *Indonesia — Chicken Products* shows that, it is the severe impact of the import ban on trade, not the importance of the ban in preventing non-halal product from being passed as halal that influenced the findings in that case.

Interestingly, Indonesia did not rely on the general exception under Article XX(a) *i.e.*, measures to be justified for being necessary to protect public morals. This is unlike *Indonesia — Import Licences Regime* in which Indonesia relied on the defence of public morals behind its import restrictions for halal-related reasons.[39] Derogation from the GATT/WTO norms in the name of halal can be justified on the ground of public morals because the latter concept may include the consideration of the religious

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[34] Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 7.150, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Dec. 11, 2000) [hereinafter *Korea — Beef* Appellate Body Report].

[35] In *Korea—Beef*, the US and Australia complained that Korea's dual retail system discriminated between imported and local beef. Korea argued that the measure was necessary to secure compliance with its unfair competition law against deceptive practices. *See id.* ¶¶ 152-55.

[36] *Id.* ¶ 168.

[37] *Id.* ¶ 164.

[38] *See generally* Donald H. Regan, *The Meaning of "Necessary" in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6(3) WORLD TRADE REV. 347 (2007).

[39] In that case Indonesia argued that its storage requirements for imports was to enable access to halal products and was necessary to protect public morals. The WTO Panel however rejected such a contention. *See Indonesia — Import Licensing Regimes* Panel Report, *supra* note 23, ¶ 7.660.

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conscience over food among certain groups within a country. If the measure imposed is an import ban, the stringent requirements underscored by Article XX will cause difficulty to the country that imposes such measure. However, Indonesia did not impose an import ban on non-halal chicken products per se. It only banned the importation of certain types of chicken products because they could cause confusion among consumers. What if the ban is only on non-halal products? As shown in *Indonesia — Chicken Products*, Brazil as the complainant did not raise any concerns as to the legitimacy of Indonesia's halal laws and if such laws restricted the importation of non-halal products, a question can still arise as to whether the laws breached Article XI. This proposition remains untested. The public morals discourse on the other hand, can be relevant despite the complexities resulting from the overall reading of Article XX(a).

The next issue relevant to halal raised in *Indonesia — Chicken Products* concerned the approval of veterinary health certificates for importation of poultry from Brazil to Indonesia. Brazil argued that there was undue delay in such approval. In reply, Indonesia argued that such delay was caused by Brazil's failure to provide halal-related information to Indonesian veterinary authorities. While this excuse sounds logical, the WTO Panel separated the requirement to provide halal information from the SPS requirements that had to be met by Indonesia (the approval of veterinary health certificates qualified as an SPS measure). The WTO Panel noted "the competent body is required to take an action or proceed, despite the irregularities in the application, to the extent practical as opposed to waiting for the submission of all relevant information".[40] If the body delays the procedure for want of unnecessary information under Annex C(1)(c), the delay becomes undue.[41] What was not submitted was the relevant information on the halal assurance system in Brazil.[42] However, since halal information was found to be unrelated to SPS (halal slaughtering requirements were also found to be unrelated to SPS),[43] the delays by Indonesia were held to be undue.

This can have a profound impact on the treatment of halal measures, including the ones that relate to animal slaughtering as an SPS measure. If halal information is not related to SPS, halal measures will be out of scope should FTAs create an exclusion for halal on the ground of SPS so that the measures might not be subject to deeper liberalization. This can be seen in the Trans-Pacific Partnership Agreement (TPP) which provides the exclusion via the SPS Chapter. The reiteration that halal information is unrelated to SPS may make the exclusion unworkable unless the WTO accepts that halal information can be different from the whole halal measure.

[40] *Indonesia — Chicken Products* Panel Report, *supra* note 5, ¶ 7.522.
[41] *Id.* ¶ 7.530.
[42] *Id.* ¶ 7.507.
[43] *Id.* ¶ 7.527.

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The final issue relevant to halal raised in *Indonesia — Chicken Products* is Indonesia's halal labelling requirements and its inconsistency with the WTO. It must be noted that under Indonesian law, all chicken meat sold in Indonesia, whether domestic or imported must be halal.[44] By virtue of Law 33/2014 Concerning Halal Product Assurance, products that enter, circulate and are traded in Indonesia must be certified halal.[45] This provision is a continuity from Articles 2(1) and 10(1) of Government Regulation No. 69/1999 on Food Labelling and Advertisement which stipulate that imported halal products have to bear a halal label. The same law (Law 33/2014) also requires business operators who have received a halal certification to include a halal label on (a) the product's packaging, (b) a specific part of the product, and/or (c) a specific place of the product.[46] Getting a halal label is not the only thing required. Before being allowed to use a required halal label, a business operator has to comply with the laws requiring verification of the halalness of certain products by an entity authorized to conduct such verification.[47]

The contestation by Brazil was because Law 33/2014 exempts domestic chicken from halal certification for a period of five years. An exception from labelling requirement is also given to meat sold in small quantities. These according to Brazil breach the National Treatment provision *i.e.* Article III:4 of the GATT 1994. However, the first argument (exemption for domestic chicken in the first five years) was rejected by the Panel. While the grace period was given to domestic products, the halal requirements as administered under the regime prior to the coming into force of Law 33/2014 were still good and applicable to those products (domestic chicken).[48]

The second argument concerned the exception from labelling requirements given to meat sold to consumers in small quantities. This refers to the practice in traditional markets where chicken is not sold pre-packed but instead, packed before buyers. Brazil argued that such an exception discriminates against imported chicken. This is because (fresh) chicken sold in traditional markets in Indonesia i.e. directly sold and packed before buyers in a small number did not need to bear the halal labels under Article 63(b) of Government Regulation 69/1999.[49] Imported chicken, because it is frozen, must first be packaged and labelled before reaching the market. Thus Brazil claims that its products could not benefit from such an exception. Brazil also claimed that the halal labelling requirement imposes additional costs to Brazilian exporters.[50]

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[44] *Id.* ¶ 7.537.
[45] *Id.* ¶ 7.540.
[46] *Id.* ¶ 7.541.
[47] *Id.* ¶ 7.538.
[48] *Id.* ¶¶ 7.558-63.
[49] *Id.* ¶ 7.565.
[50] *Id.* ¶ 7.574.

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To assess whether the above measure is inconsistent with Article III:4 of the GATT 1994, one must determine whether (1) the imported and domestic products are like products, (2) the measure at issue is a law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution or use, and (3) the imported products are accorded "less favourable" treatment than that accorded to like domestic products.[51]

But the analysis by the Panel was steered by another ingredient of Article III:4, that is, the requirement of a genuine relationship between the measure at issue and its adverse impact on competitive opportunities for imported against like domestic products.[52] Drawing upon this ingredient, the Panel found that Brazil could not establish a genuine relationship between Article 63(b) of Government Regulation 69/1999, which gives exception to fresh local products that are pre-packaged and sold directly to consumers, and the competitive opportunities for imported chicken which must be sold frozen, packaged and labelled. The Panel did not rule out possible discrimination between local and imported products, however, the Panel did refuse to link any predicaments faced by imported chicken products in their competitive relationship with local chicken products to the measure. Such predicaments could be caused by other measures at a point before the products reach the traditional markets. It includes the time when the chicken is slaughtered, processed, packaged and frozen before it crosses into the territory of Indonesia.

The reading of *Indonesia — Chicken Products* suggests that it is not easy to invoke Article III:4 (on national treatment). Even if imported chicken is accorded "less favourable" treatment than that accorded to like locally produced chicken, the measure in question must affect internal sale, offering for sale, purchase, transportation, distribution or use of both imported and local chicken. If the measure only applies to locally produced chicken products, Article III:4 cannot be invoked by exporting WTO member countries. A mere claim of regulatory asymmetries between local and imported products is not enough. A genuine relationship must exist between the loss of competitive opportunities by the imported chicken and the measure that supposedly provides an exception to such microenterprises. The point at which the imported product bears the cost of the impugned measure needs to be ascertained.

In *Indonesia — Chicken Products*, the point at which the importer bore the cost of labelling was not at the time when the exception to halal labelling

[51] *Id.* ¶ 7.575.

[52] Appellate Body Report, *Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines*, ¶ 134, WTO Doc. WT/DS371/AB/R (adopted July 15, 2011); *see also* Appellate Body Report, *EC — Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.101, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014).

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was given.[53] The cost was borne before the product reached the traditional market, a point where the measure no longer detrimentally affected the importers. In *Dominican Republic — Importation and Sale of Cigarettes*, the Appellate Body noted that a detrimental effect of a measure on a given imported product does not necessarily imply that the measure accords less favourable treatment to imports if the effect is explained by factors unrelated to the foreign origin of the product, such as the market share of the importer.[54] This can be used by a halal-user State to justify any leeway given to micro-enterprises. An authority in the country that takes the measure may facilitate a micro-enterprise to produce, process or sell its product without stressing the need for complying with halal rules and yet the enterprise may still not lose its customers. It will be a different story if the facilitation by the Government allows the granting of halal certificates to the microenterprise subject to compliance with "lesser" rules.

IV. CONCLUSION

The use of halal measures as it affects international trade will not be the concern of Muslims or Muslim countries alone. Since many countries which do not have majority Muslim population seek to benefit from the expanding global halal market, the need to further develop the WTO jurisprudence on halal measures is now becoming increasingly imminent. The *Indonesia — Chicken Products* case shows that merely enacting halal laws and imposing halal measures will not necessarily be inconsistent with GATT/GATT/WTO rules. This is in line with the sovereign right of a particular State in pursuing halal objectives as part of its public policy. However, the same State that enacts such laws and imposes such measures should ensure that there is a clear nexus between the laws and measures, and the halal objective. In other words, the halal measures must be to enable the purchase and consumption of a real halal product, whether imported or locally produced, by a consumer whose own choice is to such an effect. The measures cannot indiscriminately ban the entry of a product merely because consumers can be confused or cheated by a non-halal imported product which lands on the plate of a consumer who wants to eat only halal product.

The status of halal measures as TBT or SPS is still unclear. And such ambiguity continues post—*Indonesia — Chicken Products*. Many countries that use halal regulations and measures justified their regulations and measures because they protect humans from risks in the food, making them

[53] *Indonesia — Chicken Products* Panel Report, *supra* note 5, ¶ 7.577.
[54] Appellate Body Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 96, WTO Doc. WT/DS302/AB/R (adopted Apr. 25, 2005).

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related to SPS.[55] However, the food safety claims in halal should not lead to the conclusion that consumption of non-halal food can give rise to risks to human health and life[56] as this is not supported by concrete scientific evidence. Thus there objectives can be blurred with TBT being the better option because the drive for halal certifications is prompted by the need to prevent passing off, as well as deceptive practices[57] which are one of the objectives of TBT. The finding by the WTO Panel that halal measures taken by Indonesia are not part of SPS may further add to the conundrum surrounding the TBT or SPS status of halal measures. The variety of halal measures may mean that some of them fall under the category of TBT and some others fall under the SPS category.

Indonesia — Chicken Products shows that the existence of halal measures is recognised on the WTO plane. However, there is considerable reluctance on the part of the WTO Panel (or perhaps the Appellate Body) to pronounce the importance of halal interests and values to the user countries, as part of Article XX(d). Again, one may question why Article XX(d) is referred to, and not Article XX(a). Reliance on Article XX(a) (*i.e.*, on the ground of public morals) allows halal to be included as such, but this may be a big deal if States have relatively substantial freedom in determining the scope and definition of public morals within its domestic context. On the other hand, positioning halal in the context of Article XX(d) can be ground breaking because it will lead to a conclusion as to whether halal laws are in line with the WTO so that compliance with such laws can be secured in line with Article XX(d). There is a need for a more inclusive approach. Such an approach would mean that the WTO treatment of different food dietary laws and measures, such as Jewish, Hindu and other religious dietary laws, vegetarianism and organic food consumerism should be extended to halal, subject to the latter's peculiarities and specificities.

[55] For example, the Malaysian Protocol for the Halal Meat and Poultry Productions which prescribes practical guidelines for abattoir/slaughterhouse on slaughtering and stunning method was notified by Malaysia as an SPS on August 1, 2011. *See Ministries Agencies Measures*, MALAY. NAT'L TRADE REPOSITORY (2015), http://mytraderepository.customs.gov.my/ms/ntm/tbtt/Documents/AFTER_Ministries-Agencies_Measures-Rev.xls.

[56] Limenta et al., *supra* note 1, at 10.

[57] Dahlan & Sani, *supra* note 10, at 56.

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