

Agricultural Trade Law in the Republic of Indonesia: Challenges from International Law

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Abstract

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As Indonesia still struggles with the poverty that is prevalent in rural areas where most of the population depends on agriculture, the Indonesian government perceives the role of agricultural trade as one of the mechanisms to improve farmers' incomes. However, Indonesia's agricultural trade instruments are still deemed to be problematic. Despite the effort of the Indonesian government to support its farmers, its agricultural trade instruments are widely challenged by the international world and are often referred to as ineffective and even deemed illegal, and compliance with international trade law is expected. This study will examine Indonesia's agricultural trade laws and policies in connection with international law to discover what can be done by both the relevant international organizations and Indonesia to serve its interest but also overcome the global challenges. The methodologies that will be used in this study are documentary research and the qualitative method. Relevant laws, policies, regulations, and documents related to Indonesia's agricultural trade will be analyzed. Interviews will be conducted to obtain a comprehensive understanding of government officials and stakeholders' perspectives. The study

will provide useful material that will allow Indonesian policymakers and stakeholders to develop a better understanding of the current conditions and challenges of agricultural trade law as well as which policies must be addressed. It will also serve as an alternative academic source for relevant international organizations to address concerns related to agricultural reform in light of a developing country's distinctive interests, which in this case is Indonesia.

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Chapter 1

Introduction

1. BACKGROUND

International trade is essential to the development of a nation, as it is viewed as “the best hope for growth and poverty alleviation.”¹ More specifically, in developing countries, the agriculture sector is the largest source of employment, the largest source of GDP, and the largest source of exports and foreign exchange earnings.² For example, in Indonesia, despite the declining percentage, agriculture still accounts for a substantial employment share as well as a significant source of GDP. Moreover, Indonesia’s struggle against rural poverty and food self-sufficiency accentuates the urgency of agricultural development in Indonesia.³

Despite the importance of agricultural trade to the developing world, the agriculture sector has been known to be a sensitive topic in world trade due to its multifunctional nature. In addition to trade concerns, agriculture includes non-trade concerns, such as rural employment, food security, and environmental protection. Thus, the nature of agriculture has made its trade law complex. Each group of countries, namely developed and developing countries, has different levels of national interest. For example, some countries may focus on trade concerns such as exporting their commodities, but for other countries, agriculture may play a larger role, such as a role in the livelihood of citizens, including employment and stable food supply.

¹ WTO News - DDA June/July 2006 Modalities: Summary 24 July, TALKS SUSPENDED. “TODAY THERE ARE ONLY LOSERS.” (2006), https://www.wto.org/english/news_e/news06_e/mod06_summary_24july_e.htm (last visited Dec 13, 2017).

² JOHN NASH & MERLINDA INGCO, *AGRICULTURE AND THE WTO: CREATING A TRADING SYSTEM FOR DEVELOPMENT* (First Edition 2004).

³ Peter Timmer, *Agriculture and Pro-Poor Growth: An Asian Perspective*, CENTER FOR GLOBAL DEVELOPMENT WORKING PAPER NO. 63, WASHINGTON DC (2005).

The summary of this situation reflects the crossroads that the Indonesian government is facing in designing its agricultural trade laws and policies. On the one hand, the Indonesian government argues that its laws and policies are necessary to achieve national interests, namely food self-sufficiency and rural development. On the other hand, Indonesia is experiencing international pressure to change its laws and policies. As it is perceived that there is a gap between domestic and international interests, Indonesia's agricultural trade law, as well as international agricultural trade law, should be reviewed to determine whether a shift on the law and policy is needed as well as to what extent. Moreover, the question regarding how the change could help Indonesia achieve its goals after considering domestic and international interests must be assessed. Therefore, Indonesia's agricultural trade law and policy in connection to international trade law is the core focus of this dissertation, which aims to analyze the current agricultural trade policies of Indonesia related to global trade law in addressing its national objectives while considering both domestic and international factors.

2. STATEMENT OF PROBLEMS

Agriculture is the source of livelihood for a majority of the Indonesian population and vital to the national economy in which small-scale and subsistence farming are predominant. In 2016, Indonesian agriculture contributed to 13.95% of the GDP,⁴ which is the highest among Southeast Asia five central economies and accounted for 34% of the employment share.⁵ Further, in Indonesia, about 11% of the population still live below the nationally defined poverty line.⁶ Table 1.1 shows the steady number of national poverty and the slowing pace of poverty reduction in Indonesia. However, it is important to note that the Indonesian government employs relatively

⁴ OECD, AGRICULTURAL POLICY MONITORING AND EVALUATION 2017: INDONESIA (2017).

⁵ *Id.*

⁶ *Id.*

easy terms and conditions regarding the definition of the poverty line. In 2016, the Indonesian government-defined poverty line at a monthly per capita income of IDR 354,386 or approximately USD \$26.6, which is about 88 cents a day. This is a very low standard of living, even for Indonesian standards. If the poverty threshold by the World Bank is used, which is USD \$1.25 a day, the percentage below will increase by a couple of percentage points.⁷ If the Indonesian government takes into account the population who live on less than USD \$2 a day, the proportion will jump sharply, reaching 40%.⁸

	2012	2013	2014	2015	2016
RELATIVE POVERTY (% OF POPULATION)	11.7	11.5	11.0	11.1	10.9
ABSOLUTE POVERTY (IN MILLIONS)	29	29	28	29	28
RURAL POVERTY (% LIVING BELOW RURAL POVERTY LINE)	14.3	14.4	13.8	14.2	14.1

Table 1.1 Indonesian Poverty 2012-2016

Source: The Indonesian Central Bureau of Statistics (BPS)

Further analysis showed that poverty is prevalent in rural areas in which most of the population depends on agriculture. Globally, around 75% of poor people live in rural areas in which they are dependent on agriculture.⁹ Indonesia displays the same pattern. The majority of the poor in Indonesia live in rural areas where they mainly work in low-productivity jobs in

⁷ Indonesia Investments, POVERTY IN INDONESIA (2017), <https://www.indonesia-investments.com/finance/macroeconomic-indicators/poverty/item301?> (last visited Mar 14, 2018).

⁸ Priasto Aji, *Summary of Indonesia's Poverty Analysis*, ADB WORKING PAPER No. 04, MANILA (2015).

⁹ NASH AND INGCO, *supra* note 2.

agriculture. In 2002, 57.69% of the poor in Indonesia were employed by the agricultural sector.¹⁰ In 2008, the share was still more than 50%.¹¹ In 2010, over 60% of those earning less than \$1.25 per day lived and worked in an agriculture setting.¹² In Indonesia, three of five Indonesians still live in rural areas with farming as their primary employment.¹³ Inevitably, poverty leads to undernourishment. According to the World Food Programme (WFP), Indonesia and India are home to one-quarter of all the undernourished people.¹⁴

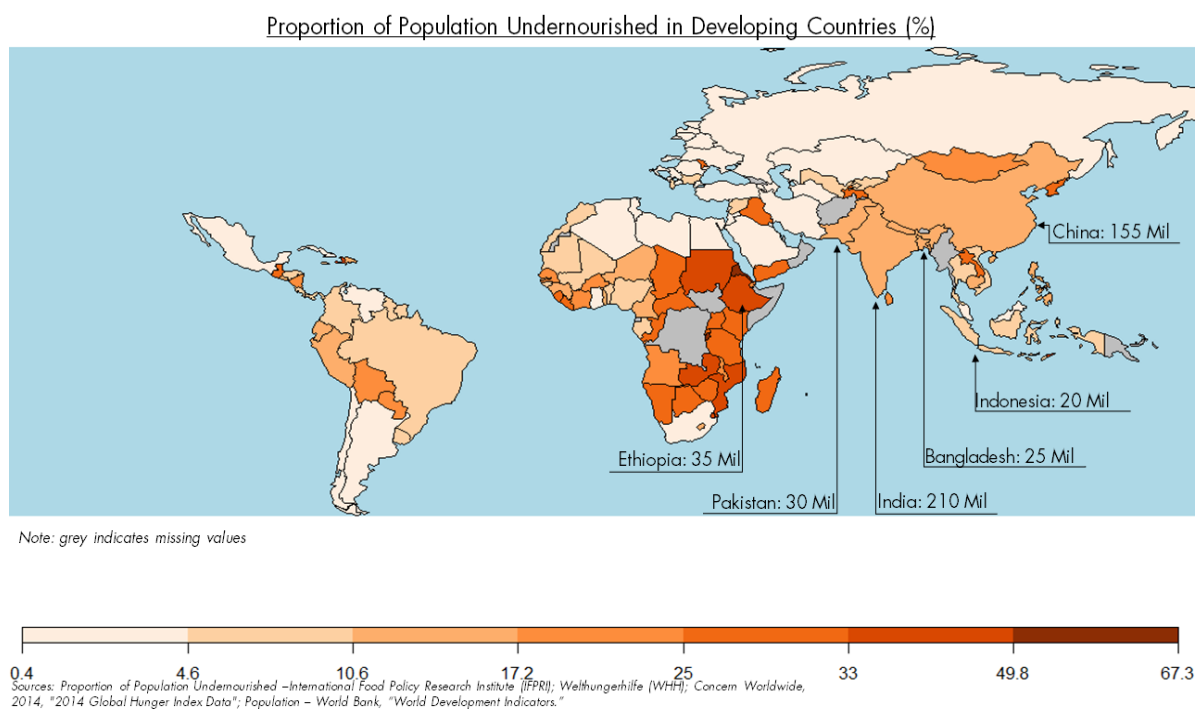


Figure 1.1 2014 Global Hunger Index Data
 Source: World Bank

From 2014-2016, the rate of undernourishment in Indonesia was 7.6%, which is only half the rate a decade ago. According to the Food and Agriculture Organization of the United Nations

¹⁰ Asep Surhayadi & Gracia Hadiwidjaja, *The Role of Agriculture in Poverty Reduction in Indonesia*, SMERU RES. INST. (2011).

¹¹ *Id.*

¹² Eric Quincieu, SUMMARY OF INDONESIA'S AGRICULTURE, NATURAL RESOURCES, AND ENVIRONMENT SECTOR ASSESSMENT (2015).

¹³ World Bank, PRIORITY ISSUES FOR INDONESIAN AGRICULTURE (2005).

¹⁴ World Food Programme, *Proportion of Population Undernourished: 2014 Global Hunger Index Data*, Rome (2014).

(FAO), there were 26.9 million undernourished people between 2010 and 2012 in Indonesia, the highest in Southeast Asia.¹⁵ Child malnutrition showed an alarming rate, with 37.2% of Indonesian children under five years in 2013 compared to 12% across all of East Asia and the Pacific region.¹⁶ Most of the districts that are severely vulnerable to food and nutrition insecurity are located in Eastern Indonesia.¹⁷

Accordingly, the Indonesian government enacted relevant laws, such as Law 7/2014 on Trade, Law 18/2012 on Food, Law 13/2010 on Horticultural Products, and Law 19/2013 on the Protection of Farmers. However, currently in the WTO, most of the disputes in which Indonesia has been sued involve the agricultural sector, and beginning in 2013, seven of 10 cases filed with the WTO with Indonesia as Respondent are agricultural disputes. Moreover, the WTO panel has ruled against Indonesia on at least two recent cases, which are DS477 brought by the U.S. parallel to DS478 by New Zealand and DS484 by Brazil. For DS477 and DS478, the WTO found that 18 regulations placed on various agriculture products violated the WTO Agreement. The WTO's rulings led to legal repercussions on Indonesia's agricultural trade policies. As the most active international dispute settlement mechanism in the world, the WTO produces a binding ruling. When a panel or the Appellate Body concludes that the measure in question is inconsistent with the agreement covered by the WTO, the Member must bring the measure into conformity with the agreement.¹⁸ "Prompt compliance" is essential¹⁹ and required.²⁰ In the case of non-compliance, the

¹⁵ Food and Agriculture Organization of the United Nations, *COUNTRY FACT SHEET ON FOOD AND AGRICULTURE POLICY TRENDS: Indonesia*, 1–6 (2017).

¹⁶ World Bank, *The Double Burden of Malnutrition in Indonesia*, April 23, 2015, <http://www.worldbank.org/en/news/feature/2015/04/23/the-double-burden-of-malnutrition-in-indonesia> (last visited Mar 4, 2018).

¹⁷ Jeff Neilson & Joseph Wright, *The state and food security discourses of Indonesia: feeding the bangsa*, 55 INST. AUST. GEOGR. 131 (2017).

¹⁸ WTO Agreement on Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU), Art. 19.

¹⁹ DSU Art. 21.

²⁰ DSU Art. 22(8).

prevailing party could request compensation and the suspension of concessions²¹ until the inconsistent measure is removed or the losing party provides another “mutually satisfactory solution.”²² Consequently, Indonesia is compelled to comply with the ruling by taking the laws and regulations to conformity.

Failure to make changes to the laws and policies will make Indonesia vulnerable to WTO litigation, which could lead to negative results. First, WTO litigation is costly.²³ Second, it is well-known that this type of regulation will not be upheld in the WTO sphere, which defines the principles of liberalizations. Third, if Indonesia does not comply with the current agreement and the ruling, it must compensate for the loss or will be subject to retaliation.²⁴ Due to this uncertain situation, the Indonesian government is at a crossroads. The consequences are not only detrimental to Indonesia’s position in the sphere of international trade law but also directly affect the Indonesian government’s efforts to tackle its problem.

3. EXPLANATORY FRAMEWORK

To explain the basis for this research, such as the research questions, hypotheses, and the scope of the study, this section presents an overview of the explanatory framework for agriculture trade from the perspective of developing countries. The first section examines Indonesia’s legal framework for agricultural trade. The second section explains the general concept of international trade law. The third section reviews the agriculture sector in world trade law.

²¹ DSU Art 22.

²² DSU Art. 22(8).

²³ See: JOSEPH STIGLITZ & ANDREW CHARLTON, FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT (2007). Gregory Shaffer, *Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed*, 8 MINN. LEG. STUD. RES. PAP. (2008).

²⁴ DSU Art. 22.

A. Indonesia's Agricultural Trade Law

Raising farmer's welfare and achieving food self-sufficiency are the priority objectives of agricultural laws and policies laid out in Indonesian Agricultural Strategic Plan produced by the Indonesian Ministry of Agriculture (MoA).²⁵ The MoA specifically argues that Indonesian farmers are facing unfair competition with farmers who are benefiting due to tariff, non-tariff, and subsidy protection, directly or indirectly as a result of uneven application of the WTO multilateral commitment to eliminate trade barriers which distorts market.²⁶ Thus, focusing on the trade instrument, the Indonesian government enacted laws such as Law 7/2014 on Trade, Law 18/2012 on Food, Law 13/2010 on Horticulture, and Law 19/2013 on the Protection of Farmers. These laws have the following specific aims:

- To increase food production and self-sufficiency, especially for food staples;
- To improve the welfare of farmers and their competitiveness in both domestic and foreign markets;
- To improve consumer access to food at affordable prices, especially for the most malnourished; and
- To provide a diversity of food that fulfills consumers' safety, quality, and nutritional requirements.

These goals are reflected by the details of the related laws in the agriculture sector. Focusing on the trade sector as one of the instruments to achieve its goals, Article 54 of Law 7/2014 on Trade underlines the discretion of the government in restricting exports and imports based on national interests. This rule extends to a national interest in the agriculture field, namely

²⁵ Ministry of Agriculture of Indonesia, *Indonesian Agricultural Strategic Plan 2005-09*, (2006).

²⁶ *Id.*

rural livelihood, as the Indonesian government plans to protect and support domestic farmers by prioritizing domestic products over foreign products.

Article 36 of Law 18/2010 on Food states that the import of food can only be done if the domestic production is insufficient or if the food cannot be produced domestically. A restriction on imports is also explicitly contained in Article 30 of Law 19/2013 on the Protection of Farmers and prohibits anyone from importing agriculture commodities when the domestic supply is deemed sufficient. Each person who violates this law is subject to imprisonment for 2-6 years or a fine of a maximum of two billion rupiahs.²⁷ A similar restriction is found in Article 87 of Law 13/2010 on Horticulture, which explains that exports should be based on national consumption needs and that imports of horticultural products should take the food security of horticultural products and the availability of domestic horticulture products into consideration. An import is allowed only after obtaining permission and recommendations from the ministries in charge, which are the Ministry of Trade and the Ministry of Agriculture.²⁸

The favorable treatment of domestic farmers over foreign farmers is clearly reflected by Law 19/2013 on the Protection of Farmers by minimizing the competition with foreign products, as Article 15 mentions that the government is obligated to prioritize domestic products to fulfill domestic needs through import regulations. Moreover, Article 25 requires the government to create conditions that ensure profitable agricultural commodity prices for farmers.

With regards to Indonesia's involvement in the WTO, Indonesia is an original and active member since its establishment in January 1995. As part of its agricultural trade commitments, Indonesia agreed to bind 100% of its agricultural tariff lines. In terms of domestic support, Indonesia did not take an AMS commitment. Instead, *de minimis* threshold for developing

²⁷ Indonesian Law 19/2013 on Protection and Empowerment of Farmers Art. 101.

²⁸ Indonesian Law 13/2010 on Horticulture Products Art. 88(2).

countries, which is 10%, applies to every product and agriculture as a whole. In the current WTO negotiation, there has been a shared concern between developing members. With the WTO's goal to promote free trade, developing countries worry about the potential costs for their citizens due to substantial and immediate trade liberalization, especially in agriculture, which is crucial to them.²⁹ Moreover, the widely known fact that developed countries have been heavily subsidizing their agriculture sector causes developing countries to be concerned about opening their markets. According to OECD, in 2009, the support payments to agricultural producers by EU was about \$120 billion and the U.S. had about \$86 billion.³⁰ Opening the markets of developing countries, which did not get such support, to “dumped” agricultural imports from developed countries can negatively affect their domestic markets and put small agricultural producers out of business.³¹ Therefore, developing members have requested a safety net to counter this issue. Indonesia as coordinator of the G33³² has endorsed the provision of a Special Products, Public stockholding for Food Security Purposes, and Special Safeguard Mechanism (SSM) for developing countries for a subgroup of agricultural products based on some objectives including rural livelihood, employment objectives, and food security.³³

²⁹ Ivan Roberts, Benjamin Buetre & Frank Jotzo, *Agricultural Trade Reform in the WTO: Special Treatment for Developing Countries*, Two in REFORMING AGRICULTURAL TRADE FOR DEVELOPING COUNTRIES.

³⁰ Thomas Schoenbaum, *Fashioning a New Regime for Agricultural Trade: New Issues and the Global Food Crisis*, 14 J. INT'L. ECON. L. 593 (2011).

³¹ *Id.*

³² G33 is the largest coalition of developing countries in the WTO consisting of 48 members that focuses in agriculture sector. G33 was established prior to 2003 Cancun Ministerial Conference and have been coordinating during the Doha Round Negotiation until now.

³³ International Centre for Trade and Sustainable Development, *G33 proposal: early agreement on elements of the draft Doha accord to address food security* (2013).

B. The Concept of International Trade Law

The endeavor to regulate international trade originated from the signatory of the General Agreement on Tariffs and Trade (GATT) by 23 nations³⁴ in Geneva on October 30, 1947. The GATT contained tariff concessions, which were agreed upon during the first round of multilateral trade negotiations. The rules that followed the concessions were also enacted to prevent members from utilizing restrictive trade measures to undermine the tariff concessions agreed upon. During the eighth round of multilateral trade negotiations held in Punta Del Rey, Uruguay, which took 87 months to conclude, the WTO was established as the successor of the GATT. The original GATT text of 1947 is still in effect under the WTO framework, subject to the modification of GATT 1994. As most of the nations in the world have joined the WTO,³⁵ giving it more authority, the WTO becomes the only formal international organization governing trade between members and has the essential function to operate a system of trade rules. The WTO has become a platform to negotiate and pass trade agreements and to settle trade disputes. The creation of the WTO is recognized as the most important development in the history of international trade law.

Because the WTO itself originated from negotiations and all WTO actions are a result of negotiations, negotiation is an essential aspect of the WTO. At its core are the WTO agreements that are negotiated and signed by the members of the WTO. These agreements contain the legal rules and provide the legal ground for international trade. In other words, WTO agreements are contracts that legally bind members to uphold their trade laws and policies according to the agreement.

³⁴ The 23 founding members were Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, United Kingdom, and the United States.

³⁵ The current members of the WTO include 164 nations.

Through what they refer to as the multilateral negotiation round, members of the WTO meet to discuss passing new agreements for international trade law. WTO agreements are renegotiated from time to time and the new agreement can amend the previous ones or become supplemental. If a member violates the agreement, and it adversely affects the rights of another member, a dispute can be submitted to the Dispute Settlement Body to be further adjudicated. Indeed, the creation of the WTO as a replacement of the GATT and its more legalistic dispute settlement system in 1995 is considered the most notable achievement in the international trade field. Before the establishment of the WTO, the dispute settlement system under the GATT treaty was rarely used by its members because under the GATT model, a ruling is only enforceable if it is agreed upon by the consensus of GATT members. This model caused major concerns regarding enforceability because the losing party can block the ruling, therefore making it unenforceable so that no further action can be taken against the violator of the agreement. Although some members supported the old model,³⁶ eagerness to implement a more legalized system has become prevalent.

Compared to other international institutions, through its dispute settlement system, the WTO has established the core channel to impose international trade law that incorporates a high level of legalization.³⁷ The legalized dispute settlement system under the WTO provides an enforceable report by the panel and the Appellate Body that can only be blocked by a consensus of WTO members, including the prevailing parties. Panels issue findings of fact and law in dispute cases, and when a party appeals, the Appellate Body reviews the Panels' interpretation of WTO agreements.³⁸ When a Panel or the Appellate Body decide that a measure is in violation of a

³⁶ See William J. Davey, *Dispute Settlement in GATT*, 11 *FORDHAM INT'L L. J.* 51 (1987). Richard Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 *AM. J. INT'L L.* 247 (2004).

³⁷ Christina Davis & Sarah Borneo, *Who Files? Developing Country Participation in GATT/WTO Adjudication*, 71 *J. POL.* 1033 (2009).

³⁸ DSU Art. 17.

covered agreement, it will recommend the member concerned to bring the measure into conformity with the agreement,³⁹ and immediate compliance is essential to ensure an “effective resolution of disputes” for the benefit of all members.⁴⁰ The WTO dispute settlement system has evolved to be one of the most active international dispute settlement mechanisms in the world, and since 1995, it has received more than 500 disputes and issued 350 rulings.

C. The International Trade Law of Agriculture

Discussions and debates on agriculture trade laws and policies related to world trade are not new. The agriculture sector was excluded from the first four negotiation rounds of the GATT. By the fifth round, which was the Dillon Round, members agreed on the oilseed tariff, though nothing beyond it.⁴¹ During the next two rounds, the Kennedy Round and the Tokyo Round, the U.S. demanded that an agreement on agriculture be required for concessions in other sectors; however, because an agreement on agriculture could not be achieved and for the sake of other important sectors, agriculture was eventually excluded to establish concessions in other areas.⁴²

The Uruguay Round marks the first-time agriculture was comprehensively included in the negotiation agenda. As with previous experiences, deliberating on agriculture was complex for the WTO, which became more evident in this round. Thus, from the beginning, there was already pessimism regarding the conclusion of the Uruguay Round. When it passed the deadline for completion, the Uruguay Round appeared to be a failure. As anticipated, the delay was caused by EU and U.S. disagreements on agricultural trade.⁴³ Remarkably, the Uruguay Round was

³⁹ DSU Art. 19.

⁴⁰ DSU Art. 21(1).

⁴¹ Alex F. McCalla, *Liberalizing Agricultural Trade: Will It Ever Be a Reality?*, 28 J. AGRIC. RESOURCES. ECON. 419 (2003).

⁴² *Id.*

⁴³ Minju Kim & Hyo-young Lee, *Looking Beyond the Doha Negotiations: A Possible Reform of the WTO Agricultural Subsidies Rules*, 12 ASIAN J. WTO INT'L HEALTH L. POL'Y 171 (2017).

completed after seven and a half years of negotiation, which was four years after the initial deadline. The WTO members successfully agreed on bringing agriculture under WTO law through the Agreement on Agriculture (AoA). The AoA contains a commitment from members to reduce distortion on agriculture trade caused by high tariffs, domestic support, and export subsidies. Known as the three pillars, the focus of the AoA are domestic support, market access, and export restrictions. The main goals of market access provisions are to apply the tariffs-only principle of the GATT and to reduce tariffs. The tariffs-only principle, which is also known as the “tariffication” of non-tariff market access barriers (NTBs), is outlined in AoA Article 4.2.

The reduction of domestic support, when a state subsidizes their agricultural domestic industries, is also a major issue addressed by the AoA. Although the AoA does not explicitly define domestic support, it employs the technical language (subsidies) defined by the Subsidies and Countervailing Measures (SCM) agreement. The goal of the Uruguay Round was to reduce government support that distorts trade. Thus, the AoA defines the measures according to the level of distortion a measure may cause. The first is the amber box measure, which is the highest trade-distorting government support. Members that committed to reduce their domestic support must set the maximum level of support per year in their “annual and final bound commitment level.”⁴⁴ The second category is the blue box measure, which Article 6.5 defines as direct payments under production-limiting programs that will not be subject to the commitment to reduce domestic support if: i) such payments are based on a fixed area and yields, ii) such payments are made on 85% or less of the base level of production, and iii) livestock payments are made on a fixed number of head. The final measure is the green box measure in which no or minimal trade-distorting effects are exempted from any reduction commitment.

⁴⁴ WTO Agreement on Agriculture (AoA), Art. 6.1.

Article 8 of the AoA states that members cannot provide export subsidies that are otherwise in conformity with the agreement and their schedules. Following the Ministerial Decision on Export Competition adopted in Nairobi in 2015, developed countries are required to immediately remove export subsidies except for a few agricultural products, while developing countries must do so by 2018 with a possibility of an extension in some limited cases. Based on the consensus reached in Nairobi, the majority of WTO members do not anticipate that export competition will be the priority outcome in the upcoming negotiation round. The current priority is to oversee the implementation of the decision regarding export subsidy elimination.

4. OBJECTIVES OF THE STUDY

Between the importance of agriculture to Indonesia's development and inevitable international pressure on Indonesia's agricultural trade law and policy, the Indonesian government needs to take necessary steps in tackling these issues. Thus, focusing on trade instruments, this study aims to evaluate Indonesia's agricultural trade law and policy in conjunction with the international law. It examines how international trade law itself can be structured so that international and domestic law can be applied hand in hand in resolving Indonesia's concern while simultaneously learn the strategy and methods available for Indonesian government. Indonesia's laws and regulations related to agricultural trade and policies, the international challenges that Indonesia currently faces, the need to restructure both the international and domestic laws and policies, and strategies that can be used to reform the laws and policies will be examined.

5. RESEARCH QUESTIONS

This study will primarily evaluate the following question:

What can be done by the WTO and Indonesia to overcome the gap in its agricultural trade law?

In answering this key question, the following related questions will be addressed:

- What type of agricultural trade laws does Indonesia currently have?
 - i. What is the legal framework of Indonesia's agricultural trade laws?
 - ii. What is the purpose of those measures?
 - iii. What led Indonesia to implement these laws and policies?
- What are the agreements concerning agriculture sector in the WTO?
 - iv. How do the WTO agreements address the issue of rural livelihood in developing countries specifically Indonesia?
 - v. What are the debates about those agreements?
 - vi. How is the current agriculture negotiation in the WTO?
- How is Indonesia's experience in the WTO?
 - i. What are the agricultural cases involving Indonesia in the WTO?
 - ii. What are the rulings of those cases?
 - iii. What is the reasoning from the WTO panel and Appellate Body?
 - iv. What are the responses of the Indonesian government?
 - v. What are the gaps identified in those cases?
- What strategy feasible to the Indonesian government in restructuring its agricultural trade to close the gap but still serve Indonesia's interests in rural poverty?
 - i. To what extent does Indonesia need to restructure its agricultural trade laws?
 - ii. Which considerations should Indonesia take into account at both the domestic and international levels to address the gap?
 - iii. How can the new structure serve Indonesia's objective?
 - iv. How does climate change impact the agricultural productivity in Indonesia?
 - v. What are the observed impacts of climate change in Indonesia?

- vi. How does it specifically affect the agricultural sector and rural livelihood in Indonesia?

6. METHODOLOGY

The methodologies utilized in this research will be documentary research and the qualitative method. First, desk research and review of existing literature on the subject will be undertaken followed by qualitative research through interview for certain parts of the study. A detailed analysis of the data collected will be employed.

A. Research Design & Data Collection

This research will utilize the qualitative method. There are diverse data collection strategies as follow:

- Existing literatures
- Collection and analysis of existing data sources
 - i. Indonesian laws and policies related to agricultural trade
 - ii. WTO agreements related to agricultural trade
 - iii. WTO panel and Appellate Body's rulings on Indonesia's agricultural cases
 - iv. Archives and documents on the WTO agricultural negotiations
 - v. Agricultural reports provided by Indonesian government and international organizations
- Qualitative fieldwork including interviews

This research project will use multiple sources of data by means of documentary sources, archival records, and qualitative fieldwork. Concerning documentation, the study will use key legal documents such as the laws, regulations, scholarly book, and journal articles. Archival data will include agricultural reports from international organizations such as the WTO, OECD, UN, and the World Bank as well as the negotiations report and proposals of the WTO agricultural

negotiation. The researcher will systematically record and analyze these materials by paying attention to the important themes. The documentary resources and the database will be provided by the University of Washington Marian G. Gallagher Law Library, the Suzzallo and Allen Library, the Indonesian Ministry of Trade and Ministry of Agriculture archives and reports, the World Trade Organization, Westlaw, Lexis-Nexis, and other official websites of relevant organizations. Because the data and reports fall within the “Public Data Sets” category, it is not required to be reviewed or approved by the University of Washington Institutional Review Board (UWIRB).

In order to best capture the issues and objectives of Indonesia agricultural trade laws, in-depth interviews will be conducted mainly in Indonesia using a sample of government officials from the Ministry of Foreign Affairs, Ministry of Trade, and Ministry of Agriculture, Indonesia’s delegation in the WTO, legal scholars and experts from the Indonesian academic institutions, and farmers organizations. The primary focus of the fieldwork is to explore the dynamics of the implementation of the Indonesian agricultural trade laws and policies. Some specific questions are aimed to: i) identify factors that affect Indonesian agriculture sector; ii) clarify the reasons why the Indonesian government implements the current agricultural trade laws and policies; iii) understand Indonesia’s attitude toward the disputes that is currently facing in the WTO. The interview process is subject to review and approval by the UWIRB.

B. Indonesia as Case Study Location

This study uses Indonesia as the research site for the following reasons. Economically, Indonesia is characterized as a developing country that still depends significantly on the agriculture sector. With regards to the global trade, Indonesia is an original and active member of the WTO. In litigation, there is a notable increase of agricultural disputes involving Indonesia since 2013. The WTO panel and Appellate Body has ruled against Indonesia in at least the two recent cases.

Thus, this provides a puzzle on why Indonesia is facing the challenge in the WTO despite the fact that its trade instruments are aimed at protecting its farmers who are experiencing loss of income.

Moreover, in the agricultural negotiation, Indonesia is the coordinator of the G33 coalition which is the largest coalition of developing countries. In the negotiation, the G33 has been actively promoting the interests of developing countries such as rural livelihood and food security. Thus, to understand the interests of Indonesia may give a meaningful insight of the interests of other developing countries in the G33 coalition. These factors are important reasons for choosing Indonesia as a fieldwork location.

7. SIGNIFICANCE AND CONTRIBUTION

The focus of this research is on Indonesia's experience in structuring its agricultural trade laws to support and protect its domestic farmers. While most of the study of agricultural trade is currently focusing on the liberalization of agricultural trade, there are few, if any, accounts of the specific experience of developing countries that are facing the challenge of rural poverty and food self-sufficiency such as Indonesia. The significance and originality of this study are based on the incorporation of normative and empirical scholarship at both the domestic and international levels in relation to agricultural trade laws and policies specifically in a developing country. This study is also an opportunity to develop further and expand the analysis of the interests of developing countries that are struggling on facing the challenge that international order imposes. This proposed research aims to posit the idea that agriculture in developing countries has different and vital role than another group of nations namely, developed countries; thus, in structuring their agricultural trade laws and policies, this particular need has to be taken into consideration.

The study will provide useful material that can influence laws and assist policymakers and stakeholders in Indonesia in understanding and evaluating the challenges that Indonesia is

currently facing to allow for reshaping Indonesia's agricultural trade laws and policies with the appropriate model to achieve Indonesia's objectives. The research will also provide considerations and recommendations for Indonesia to develop more effective laws and policies to support Indonesia's goals. Finally, the study will serve as an alternative academic source for the WTO to obtain insights into specific circumstances that developing country members are facing, especially Indonesia, which is few in numbers.

8. SCOPE OF THE STUDY

This study will focus on Indonesia's agricultural trade laws and policies regarding its domestic purpose and objectives and the international challenges and laws surrounding it. First, Indonesia's current agricultural trade laws and policies will be reviewed based on the legal frameworks governing agricultural trade. The driving forces behind Indonesia's agricultural trade laws and policies will also be examined. Second, regarding the international order in the agricultural sector, the study will focus on the law of WTO and Indonesia's experiences in the WTO related to both litigation and negotiation. The research will focus on the WTO, as it is the only global international organization that deals directly with the rules of trade between nations. The WTO has served as a platform for negotiation on trade rules between countries, and its dispute settlement system grants authority to the WTO to enforce the rules. Finally, the study will evaluate and analyze the findings of the previous two parts of reviewing Indonesia's agricultural trade laws and policies and the current global order to determine the necessity of restructuring Indonesia's agricultural trade laws and policies as well as to identify new policies that Indonesia could adopt both domestically and internationally.

9. DISSERTATION OUTLINE

The structure of this study will be divided into seven chapters, as follows.

Chapter 1 will set out the introduction and outline of the study. It will also examine the background of the study, statement of problems, objectives, and significance of the study, research questions, methodology of research, and overview of the chapters. It will serve as the road map for the research.

Chapter 2 will review Indonesia's laws and policies at both the domestic and international levels in detail. For domestic policies, price support, subsidies, credit schemes, and infrastructure will be analyzed, while for international policies, tariffs, import licensing, and export licensing will be reviewed.

Chapter 3 will look at the structure of the WTO and the WTO laws on agriculture. It will also look at the current dynamics and controversy of trade laws and policies on the WTO Agriculture sector.

Chapter 4 will lay out the tension between Indonesia's agricultural trade law and policy with the international trade regime. The tension between the domestic regulations and the international law has emerged as legal disputes brought by several members of the WTO, and in those cases, Indonesia is found to violate the WTO Agreements. This chapter will review the major cases related to agriculture that Indonesia is facing in the WTO Dispute Settlement System. This chapter will unfold the analysis of the WTO panel and Appellate Body regarding the challenged regulations in Indonesia's agricultural trade regime.

Chapter 5 will present critiques to the structure of the WTO as an institution generally and the WTO Agreement on Agriculture specifically. In terms of the structure of the WTO, this chapter will focus on the function of the WTO decision-making that is through negotiation and litigation.

This chapter will also analyze the current AoA and propose some changes in order to be more developmental centered that will also fulfill one of the principles of the WTO, which is to encourage development.

In addition to changes in the international trade regime, as proposed in chapter 5, chapter 6 will provide some domestic actions that Indonesia can do to improve the productivity and competitiveness of the agriculture sector. In the midst of undeniable pressure from international trade regime, and the time that it will take to reform of international agricultural trade law, it is important for Indonesia to do what it could do to help its farmers. By focusing on the current threat of climate change, this chapter will focus on government support related to the environment as well as strengthening the coordination between the related stakeholders.

Chapter 7 will provide a conclusion and recommendations.

Chapter 2

Indonesian Agricultural Trade Policies and Laws

This chapter presents an overview of Indonesia, its trade policy generally, and the agriculture sector specifically. The later part of this section reviews the policy and the legal framework of Indonesia's agricultural trade at both the domestic and international levels in detail. Domestically, Indonesia utilizes policy tools such as price support, subsidies, credit schemes, and infrastructure, while internationally, tariffs, import licensing, and export licensing are used in achieving its policy objective.

1. INDONESIA: AN OVERVIEW

Indonesia is the world's largest island country with more than sixteen thousand islands stretching along the equator of Southeast Asia and at 1,916,862,20 square kilometers. According to the latest census in 2010,⁴⁵ the population of Indonesia reached 237,641,003, making Indonesia the fourth most populous country in the world.⁴⁶ The annual growth rate of the population from 2000-2010 was 1,49%, while for 2010-2017, the annual growth was 1,34% based on the result of Indonesia Population Projection 2010-2035 mid-year.⁴⁷

Apart from being an archipelago country, Indonesia is also usually referred to as an agrarian country due to its rich agricultural commodities and significant labor in the agricultural sector. Although there is a downward trend both in GDP and labor, the agriculture sector remains important to Indonesia. The main food crops such as rice, maize, sugar, soybeans, and some horticultural products are used for domestic consumption, while other commodities such as palm oil, coconut, rubber, cocoa, coffee, and tea are exported. Although Indonesia produces large

⁴⁵ Central Bureau of in Indonesia Statistics (BPS) is the authorized agency that undertakes Indonesia's census. The census conducted every ten with the latest one was done in May 2010.

⁴⁶ Central Bureau of Statistics (BPS), STATISTICAL YEARBOOK OF INDONESIA 2018 (2018).

⁴⁷ *Id.*

amounts of its food crops, the production cannot keep up with the population growth; therefore, Indonesia still needs to import some of its food crops.

Among all of the commodities, rice is deemed as the most politically sensitive crops. Rice in Indonesia is mostly produced in Java, and although Indonesia is the third-largest rice producer in the world, Indonesia still imports rice every year. Indonesia is also the biggest importer of wheat in the world. Since Indonesia only produces wheat in a small number, Indonesia is entirely reliant on wheat imports to fulfill its demand for wheat flour-based foods.⁴⁸ Similar to rice and wheat, some major food crops such as sugar, soybeans, maize, and other horticultural products are still being imported to Indonesia under strict regulations.

Type of Commodities	Rank in Global Production	Region of Production	Import Volume in 2016 (in tons)
Wheat	-	-	10,534,672
Sugar Raw Centrifugal	#11	Java	4,599,050
Soybeans	#13	Java	Soybeans Cake – 4,011,839 Soybeans – 2,261,803
Rice	#3	Java	1,282,427
Maize	#8	Across Indonesia mainly in Java and Sumatra.	1,139,694

Table 2.1: Indonesia's Import Commodities

Source: FAO and Indonesian Statistical Agency

While some of the food crops are still imported, Indonesia exports other agricultural commodities. Palm oil is still the primary commodity for agricultural exports. Indonesia and Malaysia together account for around 85% to 90% of total global palm oil production. Indonesia itself is the largest producer and exporter of palm oil and its derivatives, providing half of global

⁴⁸ Thom Wright, *Indonesia Grain and Feed Annual Reports 2017*, USDA Foreign Agricultural Service Report, Washington DC (2017).

supply.⁴⁹ 70% of plantations are located in Sumatra, while the remaining 30% are in Borneo. In 2016, the value of palm oil export reached \$18.6 billion.⁵⁰ Besides palm oil, Indonesia is also one of the top producers of coconut behind the Philippines and has been exporting dried coconut and coconut oil.

Behind Malaysia, Indonesia is the second-largest producer of natural rubber in the world. Approximately 85% of Indonesia's rubber production is exported while the automotive industry absorbs the domestic production.⁵¹ In order to control the world price of natural rubber, Indonesia, with other top rubber producers Thailand and Malaysia, established the International Tripartite Rubber Council (ITRC) exclusively for the major exporting countries.

In 2016, Indonesia was the third-largest cocoa producer and exported 28,329 tons of cocoa beans and 109,540 tons of cocoa butter.⁵² As one of the top producers, Indonesia is a member of the International Cocoa Organization (ICO), which is an organization for both exporting and importing countries of cocoa. The ICO aims to achieve a sustainable world cocoa economy that is mostly focusing on remunerative prices for the cocoa farmers.⁵³ Besides cocoa, Indonesia is among the world's top coffee producer. In the 2016-2017 crop season, Indonesia was in the top four coffee bean producers in the world behind Brazil, Vietnam, and Colombia.⁵⁴ Sumatra is the region that accounts for most of Indonesia's coffee production.⁵⁵ Similar to cocoa, Indonesia is also a member of the International Coffee Organization. The Coffee Organization Member Governments

⁴⁹ Indonesia Investments, PALM OIL, <https://www.indonesia-investments.com/business/commodities/palm-oil/item166> (last visited Nov 18, 2018).

⁵⁰ *Id.*

⁵¹ Indonesia Investments, RUBBER (NATURAL), <https://www.indonesia-investments.com/business/commodities/rubber/item185?> (last visited Nov 18, 2018).

⁵² FAO, FAOSTAT: TOP 20 COUNTRY, EXPORT QUANTITY OF COCOA, BEANS (2016)

⁵³ International Cocoa Organization, INTERNATIONAL COCOA ORGANIZATION: ABOUT US, <https://www.icco.org/about-us/about-the-icco.html> (last visited Nov 18, 2018).

⁵⁴ FAO, FAOSTAT: TOP 10 COUNTRY PRODUCTION OF COFFEE, GREEN (2016).

⁵⁵ Indonesia Investments, COFFEE, <https://www.indonesia-investments.com/business/commodities/coffee/item186>.

represent 98% of world coffee production and 67% of world consumption. The organization consists of forty-four exporting member countries and six importing member countries.⁵⁶ Meanwhile, with regards to tea, in the last decade, there has been a downward trend in tea production. While in 2000 Indonesia's total tea plantation size was estimated at 153,675 hectares, the size had fallen 26% to 113,808 in 2018.⁵⁷ This is due to the failing size of Indonesia's tea plantation. Thus, the export of tea has been under pressure.

Type of Commodities	Rank in Global Production	Region of Production	Export Volume in 2016
Palm Oil	#1	Borneo and Sumatra Island	27 million tons
Coconut including oil	#2	Mostly in Sulawesi	Coconut oil (copra): 602,318 tons Coconut: 531,438 tons
Rubber (Natural)	#2	Sumatra island	2,58 million tons
Cocoa	#3	Across Indonesia mainly in Sulawesi	27,500 tons
Coffee	#4	Sumatra and some at Sulawesi	400,000 tons
Tea	#7	Java (West Java accounts for around 70% national tea production)	51,317 tons

Table 2.2: Indonesia's Export Commodities

Source: FAO and Indonesia Investments.

2. INDONESIAN AGRICULTURAL TRADE POLICY

Indonesia's international trade policy overall has endured changes in the last 60 years. Indonesia's level of development, unstable global circumstances, and the evolving rules of the multilateral, regional, and bilateral trade agreements affect this change. While the general policy

⁵⁶ International Coffee Organization, MEMBERS OF THE INTERNATIONAL COFFEE ORGANIZATION, http://www.ico.org/members_e.asp (last visited Nov 18, 2018).

⁵⁷ Indonesia Investments, COMMODITY WATCH INDONESIA: TEA PRODUCTION, EXPORT UNDER PRESSURE (2018), <https://www.indonesia-investments.com/news/news-columns/commodity-watch-indonesia-tea-production-export-under-pressure/item8868> (last visited Nov 18, 2018).

of Indonesia's trade changes over time, Indonesia's agricultural policy shows the relatively same goal that is to achieve national self-sufficiency and help farmers' welfares. This also shows that while food self-sufficient just gained increased attention in some countries in the wake of the 2007-08 international food crisis,⁵⁸ Indonesia's self-sufficiency is an ideology that already embedded ever since the independence of Indonesia. The first part of this chapter is intended to provide a review of the history of Indonesia's trade policy, including in the agriculture sector. The review is divided into four phases. The first phase is the period of the Old Order lead by President Sukarno which ended in chaos. The second phase is under the administration of President Suharto, the longest-serve President in Indonesian history. The third phase is after the 32-year regime of President Suharto, accompanied by the Asian Financial Crisis. The last phase is the more recent times. Build upon the agricultural trade policy elucidated in the more recent times, the latter part of this chapter discusses the current legal framework of the trade instruments utilized by the Indonesian government to achieve its objectives.

A. The Old Order

Shortly after the conclusion of World War II in 1945, Indonesia announced itself as an independent republic. The newly created parliament elected Sukarno, the prominent nationalist figure who fought for independence, as the first, and the lifetime President of Indonesia.⁵⁹ During his era, which also known as the Old Order (*Orde Lama*), economic nationalist forces were reacting against colonial-era liberalization. The notion of free trade was seen as largely reflect the interests of the dominant, Global North states.⁶⁰ Through the principle of Guided Democracy and

⁵⁸ Jennifer Clap on her work "Food self-sufficiency: Making sense of it, and when it makes sense" states that following the 2007-08 food price crisis, countries as diverse as Senegal, India, the Philippines, Qatar, Bolivia and Russia have all expressed interest in improving their levels of food self-sufficiency.

⁵⁹ SIMON BUTT & TIM LINDSEY, *THE CONSTITUTION OF INDONESIA: A CONTEXTUAL ANALYSIS* (2012).

⁶⁰ Benjamin Cantrell, *Food, the State, and Development: A Political Economy of Agriculture and Trade in Indonesia* (2015).

Self-Reliance (*Berdikari*) introduced by President Sukarno, Indonesia attempted to be self-sufficient and formally disengaged from the international economy.⁶¹

The primary economic goal of these principles was national self-sufficiency. In order to achieve the national self-sufficiency, the Indonesian government attempted to strengthen national production and loosen dependency ties to the global system via foreign trade. This goal then transformed into the economic policy that focused on centralized planning, nationalization, and full government control of foreign trade.⁶² With absolute control over foreign trade, the Indonesian government imposed import restrictions. Imports were also replaced by domestic products wherever possible, and the state-owned enterprises were used as the base for industrial development. Altogether, this new regime attempted to spur national economic growth through a heavily regulated and bureaucratic approach.

Trade during the Old Order was marked by complex and continually changing regulations on exchange rates, import and export duties, and quantitative restrictions. Exports were mainly resource-based. Eight commodities accounted for 80%-90% of export, with the two most important were rubber and oil and oil products.⁶³ The other export commodities were tobacco, tea, coffee, palm, oil, copra, and tin ore.⁶⁴

During the first three quarters of 1965, Indonesia's export declined sharply because of low prices, increased competition in the world commodity market, and rising competing economic blocs that provide discriminatory tariff preferential.⁶⁵ The agriculture production also continued to stagnate or decline hindering the national self-sufficiency goal. Although the early of the Green

⁶¹ M. Chatib Basri & Hal Hill, *Indonesia - Trade Policy Review 2007*, 31 THE WORLD ECON. 1393 (2008).

⁶² MARI PANGESTU, *INDONESIAN TRADE POLICY: A PERSPECTIVE* (1989).

⁶³ Mari Pangestu, Sjamsu Rahardja & Lili Yan Ing, *Fifty Years of Trade Policy in Indonesia: New World Trade, Old Treatments*, 51 BULLETIN OF INDONESIAN ECON. STUD. 239 (2015).

⁶⁴ *Id.*

⁶⁵ *Id.*

Revolution⁶⁶ assisted the national agricultural development in terms of the improved seeds and cultivation techniques, most of the improvements only existed in Java. Broader benefits of the Green Revolution were hindered by the lack of extension and other sectoral investments.

With the growing population, Indonesia's stagnant food production failed to keep pace in meeting the growing demand; national self-sufficiency then soon became an unreachable goal. The condition was worsened by the decline of the production of the commercial crop, which was the cornerstone of foreign exchange and capital development at that time. This trend turned Indonesia to become a major importer of rice and other food products to fulfill its needs. This was a significant blow to the country's self-sufficiency efforts.

The Old Order ended in chaos both politically and economically. As the economy worsened due to the compound foreign debt, and rapid inflation levels, President Sukarno also encountered political unrest which was the attempt of the communist coup on 30 September 1965. Scholars concurred that while President Sukarno attempted to disconnect Indonesia from the Western influence and reduced reliance on the global trade established during the colonial era, there was not much done to ensure Indonesia's survival outside this system.⁶⁷ Being a military strategist and revolutionary, rather than an economic thinker, President Sukarno pursued a state and military sponsored development that perpetuated the economic patterns of the colonial era.⁶⁸

B. The New Order

After the failed communist coup on 30 September 1965, President Suharto took over the government, and this marked the era of the New Order (*Orde Baru*). Widely supported by the

⁶⁶ The Green Revolution refers to an agricultural and technological transfer occurring between 1950 and the late 1960s. The initiatives resulted in high-yielding varieties (HYVs), increased fertilizer and pesticide usage, methods of cultivation. All of this technology helps lengthen the growing season and make use of marginalized lands; hence, increasing agricultural production across the world.

⁶⁷ Cantrell, *supra note* 60.

⁶⁸ *Id.*

Global North, President Suharto began the rehabilitation and stabilization program with advice from Western-trained economists.⁶⁹ It also should be noted that there was a remarkable amount of development funding and foreign aid entering Indonesia during his presidency.⁷⁰ Based on the advice, President Suharto sought to substantially liberalize trade and investment policies. The Indonesian government removed the import bans and introduced the high import tariffs on competing goods.⁷¹ In this period, Indonesia's economics and politics were significantly improved mainly because of the oil boom⁷² that helped the foreign exchange shortages and raised the public revenues as shown in Figure 2.1.⁷³ From the late 1960s to 1981, receipts from the export of crude petroleum, refined products, and natural gas amounted over \$20 billion.⁷⁴



⁶⁹ Pangestu, Rahardja, and Yan Ing, *supra* note 63.

⁷⁰ *Id.*

⁷¹ MARI PANGESTU, *ECONOMIC REFORM, DEREGULATION, AND PRIVATIZATION: THE INDONESIAN EXPERIENCE* (1996).

⁷² Back at 1970s-1980s, Indonesia's export was dominated by oil. During April 1972 to January 1974, the oil price was tripled providing a significant income to Indonesia.

⁷³ ALICIA SCHRIKKER & JEROEN TOUWEN, *PROMISES AND PREDICAMENTS: TRADE AND ENTREPRENEURSHIP IN COLONIAL AND INDEPENDENT INDONESIA IN THE 19TH AND 20TH CENTURIES* (2015).

⁷⁴ Anne Booth, *Indonesia's Economy: Performance and Policy Option in Post-OPEC World*, *SOUTHEAST ASIAN AFFAIRS* 122-136 (1986).

Figure 2.1: Indonesia's Annual GDP 1968-2017

Source: World Bank 2018

Under President Suharto's New Order, Indonesia still held the national self-sufficiency as the development objective of its agriculture sector. Indonesia indeed achieved the rice self-sufficiency briefly, which President Suharto stated as his highest achievement as the President of Indonesia. While part of this success is because of the Green Revolution, the Indonesian government soon faced the challenge on how to implement the Green Revolution programs effectively to keep up with the increased population. The government mostly struggled with distribution problems, poor governance, planning and implementation of the projects, and inadequate agricultural infrastructure.⁷⁵

Attempting to solve the distribution and governance issues, in 1967, President Suharto established BULOG, which functioned as the Indonesia Logistics Bureau. The primary objective of BULOG was to manage the distribution and to be involved in the market intervention to preserve price stability. BULOG acted to safeguard the food supplies so that political instability could be avoided. Although in the beginning BULOG's impact was positive, with its significant authority to designate distributors and contracts, BULOG was seen as an institution for domestic corporate capital. BULOG turned into a significant resource for funding the bureaucrats who controlled it in President Suharto's era.⁷⁶

In the infrastructure side, President Suharto pursued the national development programs. With most of the fund borrowed from foreign investors, New Order development programs invested in large-scale infrastructure capital such as building bridges, roads, and irrigation projects.

⁷⁵ Cantrell, *supra* note 60.

⁷⁶ RETNOWATI ABDULGANI-KNAPP, SUHARTO: THE LIFE AND LEGACY OF INDONESIA'S SECOND PRESIDENT (1st Ed. 2007).

Despite the efforts, had been rife with transparency and corruption, Indonesia fell from the food self-sufficiency goal again.

In the 1980s, the debt crisis that struck other developing countries was also felt in Indonesia although it was somewhat belatedly. With the debt accumulated from the national development projects and weakened oil prices that significantly reduced export earnings and budget revenues, Indonesia could not avoid the debt crisis. During 1980-1985, the economy grew much slower by 3.7% per annum than 7.5% during the period 1975-1980 as shown in figure 2.1.⁷⁷ To address the debt, Indonesia acquired multilateral and IMF emergency bailout loans referred to the Structural Adjustments Programs (SAPs).⁷⁸ SAPs commonly attached to the emergency bailout loans during the time of crisis, and it required terms such as political economy reforms, austerity measures, privatization, and freedom of capital movements.⁷⁹

Due to the pressures from the Global North that provided a significant amount of aid to Indonesia, economic nationalist slowly surrendered to neoliberal macroeconomic reforms based on the free market model promoted by the Global North and the development principles of the era. Indonesia then began to promote foreign-investment and reduce trade barriers including in the agricultural sector. Indonesia reduced tariffs in some commodities but still retained only a few of the non-tariff barriers (NTBs). Indonesia also shifted from the import substitution to export orientation.⁸⁰

The late 1980s to early 1990s, which is the end of the cold war marked by the collapse of the Union Soviet, has brought significant change to the global trading system. At that time, the

⁷⁷ Hadi Soesastro & M. Chatib Basri, *The Political Economy of Trade Policy in Indonesia*, 22 ASEAN ECON. BULLETIN 3–18 (2005).

⁷⁸ HIROYOSHI KANO, *INDONESIAN EXPORTS, PEASANT AGRICULTURE, AND THE WORLD ECONOMY, 1850-2000: ECONOMIC STRUCTURES IN A SOUTHEAST ASIAN STATE* (2009).

⁷⁹ *Id.*

⁸⁰ Soesastro and Basri, *supra* note 77.

U.S. eagerly promoted the freer trade. In 1989, the term Washington Consensus was first introduced as a set of economic policy recommendations for developing countries, particularly Latin America. It is called Washington Consensus, referring to the IMF, World Bank, and the U.S. Department of the Treasury as Washington D.C. based institutions that shared the same view. According to the Washington Consensus, an operation of the free market and the reduction of state interferences were crucial to the development in Global South.

Soon after, the U.S. signed a preferential trade agreement with Canada and Mexico (NAFTA) that later went into effect in 1994. A multilateral trade negotiation that started in 1986 in Punta del Este, Uruguay was also finally concluded in 1994 producing the WTO as the successor of GATT and embracing 123 countries as contracting parties to the WTO. The conclusion of the Uruguay Round is also crucial for the agricultural trade as the members agreed to enact the Agreement on Agriculture.

During this period, Indonesia could not avoid the wave of globalization. In 1992, Indonesia finally supported the creation of the ASEAN Free Trade Agreement (AFTA). Later in 1994, in the APEC Economic Leaders' Meeting, President Suharto issued an important statement that whether Indonesia liked it or not, and whether it was ready or not, it had to face the more integrated and interconnected world including the trade.⁸¹ In 1995, Indonesia joined the WTO and as consequence, Indonesia must further reduce its tariffs.

Despite the reform, corruption favoring those who close with President Suharto including his family increased.⁸² In 1996, for example, the Indonesian government enacted a policy that allowed a joint venture between one of the President Suharto's sons and Korea's Kia Motors. Kia

⁸¹ Pangestu, Rahardja, and Yan Ing, *supra* note 63.

⁸² According to Global Transparency Report made by Transparency International in 2004, it is estimated that President Suharto embezzled \$15 billion to \$25 billion throughout his presidency making him one of the most corrupt leaders in the world.

Motors was given the duty-free privilege in importing built cars into Indonesia. Other countries with big automotive industries such as Japan, the European Union (EU), and the U.S. protested Indonesian discriminatory actions that are prohibited under the WTO.⁸³ Indonesia was found in violation of the WTO agreement and was instructed to abolish the discriminatory regulation. This WTO case provided a lesson to the President Suharto that its membership of the WTO came with a cost: Indonesia needed to start disciplining its international trade policy.

C. Asian Financial Crisis and the Aftermath

When the Asian Financial Crisis of 1997 hit Indonesia, Indonesia struggled with enormous inflation, currency devaluation, bank closures, and food price crisis.⁸⁴ The government introduced a deregulation package in September 1997 before it resorted to an IMF loan program once again to rebuild business confidence.⁸⁵ As occurred previously, in order to receive the IMF's aid, Indonesia was required to further liberalize its economy, especially in the agriculture sector. However, it is important to note that the IMF's aid for Thailand did not require any trade reform.⁸⁶ The IMF program dominated this phase along with the removal of all import restrictions, including in agricultural products, a reduction of tariffs, and significant institutions changes, including the BULOG.

In the structural reform program of 15 January 1998, the domestic trade in agricultural products was fully deregulated.⁸⁷ Indonesia had to gradually reduce import tariffs, especially for chemical products, iron and steel, and fisheries products. Most of the NTBs were removed except

⁸³ Appellate Body WTO, WTO - DS54 (1998), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds54_e.htm (last visited Sep 6, 2018).

⁸⁴ ELIZABETH F. COLLINS, *INDONESIA BETRAYED: HOW DEVELOPMENT FAILS* (2007).

⁸⁵ Pangestu, Rahardja, and Yan Ing, *supra* note 63.

⁸⁶ Soesastro and Basri, *supra* note 77.

⁸⁷ Richard R. Barichello, *Impact of Asian Crisis on Trade Flows: A Focus on Indonesia and Agriculture*, Proceedings of the 5th Agricultural and Food Policy Systems Information Workshop (2000).

for those related to health, safety, environmental, and security grounds.⁸⁸ Some specific commodities such as wheat, wheat flour, soybean, and garlic were allowed to be imported freely under a General Importer License. BULOG's monopoly concerning all commodities except for the politically sensitive commodity rice was removed. Indonesia has since become a relatively open economy and deserves much credit for its unilateral liberalization.⁸⁹ This phase is also to be said as the boldest trade reform undertaken in Indonesia's history.⁹⁰

The reform, however, was not well received among Indonesians. Scholars have noted that for many in Indonesia, neoliberal reform, such as opening trade, is strongly associated with the national economic and financial crisis. Some argue that if Indonesia had not gone so far in liberalizing its economy, had it retained some basic controls such as limits on capital account transactions, the outcome of the crisis could have been different.⁹¹ Additionally, the anti-globalization sentiment triggered in part by Indonesia's perceived unjust treatment at the hands of the IMF and western donors, namely neighboring country Thailand that was not required to undertake trade reform.⁹² Consequently, the term liberalization is met with skepticism, distrust, and unpopular politically.⁹³

Soon after Indonesia paid off its debts and with advocates who blamed the liberalization as the cause of crises in Indonesia still held some key positions in both government and private sectors, trade protectionism was on the rise. The BULOG's functions as the sole importer for sugar and cattle were restored. The government also reintroduced the requirement of certain licensed

⁸⁸ Pangestu, Rahardja, and Yan Ing, *supra* note 63.

⁸⁹ Soesastro and Basri, *supra* note 77.

⁹⁰ M. Chatib Basri & Arianto A Patunru, *How to Keep Trade Policy Open: The Case of Indonesia*, 48 BULLETIN OF INDONESIAN ECON. STUD. 191 (2012).

⁹¹ Ginandjar Kartasasmita, *Globalization and the Economic Crisis: The Indonesian Story*, WCFIA WORKING PAPER 01-03 (2011).

⁹² Basri and Hill, *supra* note 61.

⁹³ Cantrell, *supra* note 60.

import in sugar, steel, and textiles. However, these measures were less obvious for at least two reasons. First, the level of protection in Indonesia was still lower than in other Southeast Asian countries such as Thailand.⁹⁴ Second, in terms of tariff, Indonesia was able to maintain an average of less than 10%.⁹⁵

The Asian financial crisis was eventually accompanied by a political crisis. The social unrest due to food shortages and unemployment quickly spread across Indonesia. On May 21, 1998, President Suharto resigned after 32 years of his reign. This marked the end of the autocratic and centralized regime and the beginning of the Reform Period (*Era Reformasi*). The country suddenly lurched from an authoritarian regime to a democratic state with under-developed institutions, and a greatly weakened national government struggling with the fiscal, financial, and social aftermath of the crisis.⁹⁶

During this transition period, Indonesia had three different presidents in the first three years. Although the administration constantly changed, there were two critical events that are important to underline; first is the establishment of general elections and political decentralization through the enactment of national law. Second is the formation of the constitutional court. Clearly, the steps taken by Indonesia show Indonesia's effort to not repeat the past and brought Indonesia closer to the democratic system.

In 2004, Indonesia held its first general election with President Susilo Yudhoyono won the presidential election defeating the incumbent President Megawati Soekarnoputri. The focus of President Yudhoyono's administration in trade and investment was to regain confidence, attract investment, and rebuild the real sector.⁹⁷ He made a substantial institutional change by separating

⁹⁴ M. Chatib Basri & Hal Hill, *Indonesian Growth Dynamics*, 6 ASIAN ECON. POL'Y REV. 90 (2011).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Pangestu, Rahardja, and Yan Ing, *supra* note 63.

the Ministry of Trade from the Ministry of Industry. The Ministry of Trade was tasked to focus on increasing investment and creating a conducive investment climate. It also aimed to increase export growth and to improve the efficiency of domestic distribution. With the tariffs that were already low, the government sought to strengthen decision-making on tariff and export duties through its Tariff Team, which was chaired by Sri Mulyani⁹⁸ as the Ministry of Finance and co-chaired by Mari Pangestu⁹⁹ as the Ministry of Trade. Under the new administration, Indonesian expanded the trade agreement under the ASEAN framework. By January 2010, Indonesia was a signatory to several ASEAN Plus One FTAs with six key trading partners: Australia, New Zealand, China, India, Japan, and Korea.

The Yudhoyono era was not immune to a crisis. Just as previous crises that had a significant economic impact in Indonesia, the 2006-08 global food crisis pushed the Indonesian government to adopt a more stringent approach to the agricultural trade sector. At this time, also, many peasant farming organizations emerged into existence and promoted agrarian reform and food sovereignty. For example, the La Via Campesina¹⁰⁰ and other peasant farming organizations demanded the right

⁹⁸ At this time, both the Ministry of Finance and the Ministry of Trade were held by the technocrats. On their paper, Basri and Patunru define technocrat as those who are pro-reform with a market-friendly approach. Sri Mulyani in which Basri and Patunru elucidated as “one of the most able technocrats in the history of Indonesian economic policy making” was appointed as the Minister of Finance. She receives her master and doctorate in economics from the University of Illinois at Urbana-Champaign and worked in the U.S. as a consultant for USAID, visiting professor in Georgia State University, and executive director on the board of the IMF. Sri Mulyani resigned in 2010 due to what some connected to the political pressure placed on her over the provision of a bail-out for the troubled Bank Century, but some also argued she resigned to take position in the World Bank as the Managing Director. She is reappointed in the current administration.

⁹⁹ Mari Pangestu whose market-friendly approach had made her an icon of the Indonesian technocrat tradition lead the Ministry of Trade until she was replaced in 2011. She receives her master from the Australian National University and her doctorate in economics from the University of California, Davis. As the Minister of Trade, she was sometimes criticized by domestic industry group for supporting trade-promotion measures rather than protect the domestic producers. In 2012, Pangestu was one of the candidates to replace Lamy as the WTO chief but eliminated in the round of selection process.

¹⁰⁰ La Via Campesina is an international movement found on 1993 in Belgium by farmers organizations from Africa, Asia, Europe, and the Americas. Currently, La Via Campesina comprises 182 local and national organizations in 81 countries. Altogether, it represents about 200 million farmers. It is claimed as independent movement and disconnected from any political party, economic, or other type of affiliation. They are advocating for: i) food sovereignty; ii) peasants’ rights; iii) agroecology and peasants’ seeds; iv) land, water and territories; v) climate and

of the nation to control its food systems, including the market. The idea of food sovereignty became the alternative to the neoliberal model of agricultural trade at that time.¹⁰¹

Although the crisis ended in 2008, global food prices continued to increase until 2013, especially for rice. In response to the global food crisis, in the period from 2012 to 2014, there were three major laws enacted by the Indonesian government in the agricultural sector and trade. First, in 2012, the national food law was passed, giving the state a greater authority in controlling its food production and safety. Some goals were set, among them is the food self-sufficiency and the farmers' welfares. Align with the national food law and the increased attention on farmers' welfares, in 2013, the Indonesian government passed the law on protection and empowerment of farmers. To attain the objectives, the Indonesian government utilized trade instruments such as agricultural subsidies and price support.

In 2014, the government passed the 2014 trade law which is the very first law on trade since Indonesia's independence. The 2014 trade law is seen as the need for Indonesia to balance protection, nationalist sentiments, and openness.¹⁰² The 2014 trade law explicitly gives the Ministry of Trade a greater control over import and export regulations on quotas and bans,¹⁰³ regulates that

environmental justice; vi) dignity for migrants and waged workers; and vii) international solidarity. La Via Campesina Website: <https://viacampesina.org/en/>

¹⁰¹ In the last few decades, the policymakers across the world use the concept of food security as introduced by FAO. According to FAO, "food security exists when all people, at all times, have physical and economic access to sufficiency, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life."¹⁰¹ For some groups such as La Via Campesina, this definition, however, neglects the question on how, by, and for who food was produced. In 2007, La Via Campesina defined the guiding principles of food sovereignty which are:¹⁰¹ i) local people have the rights to define their own food, agricultural systems, and biodiversity; ii) the locals, not the corporations and markets, that have the decision-making on production, distribution, and consumption; iii) priority must be given to local, national economies and markets, and should empower peasant and family farmer driven agriculture and artisanal fishers; iv) there is a transparency in food trade.

¹⁰² Pangestu, Rahardja, and Yan Ing, *supra* note 63.

¹⁰³ Indonesian Law 7/2014 on Trade, Art. 41(1): "The Minister can delay Import or Export if there is a force situation."

the parliament must approve trade negotiations,¹⁰⁴ and enables a temporary changing of the tariff to improve domestic competitiveness.¹⁰⁵

The 2014 trade law together with 2012 food law and 2013 protection and empowerment of farmers are seen as a confirmation of Indonesia's rejection in adopting a free market approach in order to achieve its national development objectives such as food self-sufficiency and farmers' welfares. These new laws invited contention, especially from global actors arguing that Indonesia's new trade policy put Indonesia the risk of repeating the past mistakes.¹⁰⁶

In multilateral trading negotiation, Indonesia's position with regards to agricultural trade is crystal clear. Throughout the negotiation of the Doha Round until now, Indonesia emphasizes the importance of food security and rural development. The Indonesia government sees that imposing trade protection in relation to these matters are justifiable.¹⁰⁷ Indeed, agriculture, especially related to the special product has become Indonesia's main defensive issue in the WTO negotiation.

D. Recent Times

A new nationalist spirit often expressed in an increasingly bellicose rejection of alleged foreign interference in Indonesia's affairs and demands for greater recognition of Indonesia's power and status, is visible in Indonesia.¹⁰⁸ It is evident in the 2014 presidential election that nationalism became the center of the campaign. One of the two contestants, Prabowo Subianto, a

¹⁰⁴ Law 7/2014 on Trade, Art. 84(1)-(7) lays out the enactment of trade agreement in the parliament.

¹⁰⁵ Law 7/2014 on Trade, Art. 49(4): "In the context of increasing national competitiveness, the Minister can propose waivers or additions to the imposition of import duties on temporarily imported goods."

¹⁰⁶ Titik Anas, INDONESIA'S NEW PROTECTIONIST TRADE POLICIES: A BLAST FROM THE PAST (2012), <http://www.eastasiaforum.org/2012/06/18/indonesia-s-new-protectionist-trade-policies-a-blast-from-the-past/> (last visited Oct 31, 2018). Vikram Nehru, INDONESIA'S NEW TRADE POLICY RISKS REPEATING PAST MISTAKES <https://carnegieendowment.org/2012/07/30/indonesia-s-new-trade-policy-risks-repeating-past-mistakes-pub-48965> (last visited Oct 31, 2018).

¹⁰⁷ Soesastro and Basri, *supra* note 77.

¹⁰⁸ Edward Aspinall, *The New Nationalism in Indonesia*, 3 ASIA & THE PACIFIC POL'Y STUD. 72 (2015).

retired military general and the former son-in-law of President Suharto who also played a significant role in the New Order regime, built his campaign appeal almost exclusively on a nationalist platform. On his campaign, Prabowo repeatedly stated Indonesia's national resources have been exploited by the foreign investors and even further calling Indonesia had become nation of slaves (*bangsa kacung*).¹⁰⁹ Prabowo also tried to portray himself as President Sukarno by wearing an old-fashioned military suit modeled like those worn by President Sukarno on his heyday.¹¹⁰

Prabowo's rival, the ultimately elected President Joko Widodo (Jokowi), who assumed office from a position in local government, although with a less rough approach, promoted a fundamentally nationalist platform through his emphasizes on political sovereignty, economic autarchy, and cultural renaissance.¹¹¹ On his campaign President Jokowi mentioned that his administration would focus on the agricultural production, and imports have to be cut and eventually eliminated to further protect the vulnerable agriculture domestic producers.¹¹²

The Indonesian Ministry of Agriculture (MoA) under President Jokowi's administration published the Strategic Plan of 2015-2019. Below is the overview of the vision, missions, objectives and strategic goals of the MoA.¹¹³

¹⁰⁹ *Id.*

¹¹⁰ Edward Aspinall, *Oligarchic Populism: Prabowo Subianto's Challenge to Indonesian Democracy*, 99 PROJECT MUSE 1 (2015).

¹¹¹ Marcus Mietzner, *Reinventing Asian Populism: Jokowi's Rise, Democracy, and Political Contestation in Indonesia*, Policy Review No. 72, East West Center, Honolulu (2015).

¹¹² Deti Mega Purnamasari & Markus Junianto Sihaloho, *Joko Widodo Lays Out Agricultural Manifesto for Indonesia*, April 27, 2014, <https://jakartaglobe.id/news/joko-widodo-lays-agricultural-manifesto-indonesia/> (last visited Oct 22, 2018).

¹¹³ Ministry of Agriculture of Indonesia, *Indonesian Agricultural Strategic Plan 2015-19* (2015).

Broader Vision	Missions	Objectives	Strategic Goals
<i>“The realization of a sustainable bio-industrial agriculture system which produces a variety of healthy food and high value products local resource based for food sovereignty and farmer welfare.”</i>	1. To achieve food sovereignty	<ul style="list-style-type: none"> Improving the availability and diversification of food toward food sovereignty 	<ul style="list-style-type: none"> To achieve self-sufficiency in rice, corn, and soybean as well increasing meat and sugar production To improve food diversification
	2. To achieve sustainable agriculture-bioindustry system	<ul style="list-style-type: none"> Increasing the value-added and competitiveness enhancing agricultural food products 	<ul style="list-style-type: none"> To enhance value-added commodities, competitive in accomplishing export market and import substitution
		<ul style="list-style-type: none"> Developing raw materials availabilities for bioindustry and bioenergy 	<ul style="list-style-type: none"> To provide raw materials for bioindustry and bioenergy
	3. To achieve farmers’ welfares	<ul style="list-style-type: none"> Improving farmers’ incomes and welfares 	<ul style="list-style-type: none"> To improve income of household farmers
	4. To achieve bureaucracy reform	<ul style="list-style-type: none"> Improving the quality of performance of agricultural government stakeholders trustworthily and professionally 	<ul style="list-style-type: none"> To achieve the good accountability of government stakeholders

Table 2.3: Strategic Plan of the Ministry of Agriculture 2015-2019

Source: Ministry of Agriculture Website

As seen above, the current administration of President Jokowi has the realization food sovereignty which includes food self-sufficiency a concept that President Jokowi said different

with food security.¹¹⁴ The Indonesian government officially defines food sovereignty as “the right of the state and nation to independently decide the food policies that guarantee the right to food for the people and that will give the right for the public to determine the food system in accordance with the potential of local resources.”¹¹⁵ Moreover, President Jokowi underlines the importance of food sovereignty by further stating that: “If we are sovereign in our food production, any disturbances abroad will not have a significant impact on our food reserve and we can have adequate supply to feed our people.”¹¹⁶ The government also defines the welfare of farmers as “a decent living condition for farmers and their families as the leading actor of agricultural businesses derived from their farming business activities.”¹¹⁷ The policy tools that are used to achieve its objectives along with the legal framework will be discussed carefully in the next section.

3. POLICY TOOLS AND ITS LEGAL FRAMEWORKS

There is a significant difference between law and policy. A policy outlines what a government wants to achieve. A law is passed to put in place the necessary institutional and legal frameworks to accomplish the goals as set out in the policy. Like the example above, the Indonesian government has its policy in the agriculture sector and sets out the broader vision, missions, objectives, and strategic goals through its related ministry. Based on that, it is necessary for the Indonesian government to decide the policy tools and to pass the laws that will specifically regulate how the institutions work to achieve the objective of its policy.

¹¹⁴ On his official Facebook page, President Jokowi posted: “Food security is different from food sovereignty. Food security is simply the availability of foodstuffs (logistically) in warehouses and in the market regardless of the origin whether from import or from locally produced. Food sovereignty means we produce and make our foodstuffs ourselves while the surplus of agricultural crops is exported.” Food Sovereignty Discourse in Southeast Asia: Helpful or Disruptive? By Jonatan Lassa and Maxi Shrestha <http://www.rsis.edu.sg/wp-content/uploads/2014/11/CO14231.pdf>

¹¹⁵ Ministry of Agriculture of Indonesia, THE VISION AND MISSION OF THE MINISTRY OF AGRICULTURE, <http://www.pertanian.go.id/home/?show=page&act=view&id=5> (last visited Oct 8, 2018).

¹¹⁶ Lassa and Shrestha, *supra* note 114.

¹¹⁷ Ministry of Agriculture of Indonesia, *supra* note 115.

Based on the agriculture policy, this section discusses the policy instruments and the laws and regulations as the underlying legal framework. More specifically, the policy tools that will be reviewed are those closely related to trade. At the domestic level, policy instruments that directly received by the producers, such as price support measures, subsidies, credit schemes, and infrastructure, will be reviewed whereas, on the international level, the policy tools are tariffs, import, and export measures.

With regards to law and regulations, Law 12/2011 on the Formulation of Laws and Regulations sets out the legislative hierarchy and guides the formulation of laws and regulations.

Type of Laws	Authority that Enacts the Laws
The 1945 Constitution of Indonesia	Enacted by the People’s Consultative Assembly that consists of the members of People’s House of Representatives (<i>Dewan Perwakilan Rakyat, DPR</i>) and the members of Regional Representative Council (<i>Dewan Perwakilan Rakyat, DPD</i>). ¹¹⁸
Resolution of the People’s Consultative Assembly	Enacted by the People’s Consultative Assembly.
Law/Interim Law	The blueprint of the law needs to be discussed by the People’s House of Representative (DPR) and the President. After the blueprint is agreed, DPR works together with Ministry of Law and Human Rights to produce it. ¹¹⁹ The interim law is only passed under emergency situation and has to be ratified by the People’s House of Representative. ¹²⁰
Government Regulation (<i>Peraturan Pemerintah, PP</i>)	Government Regulation is used to implement Laws and can only be made in relation to a particular law. Similar to Law, Government Regulation is developed by the DPR with Ministry of Law and Human Rights. ¹²¹
Presidential Regulation (<i>Peraturan Presiden, PERPRES</i>)	Presidential Regulation is issued to implement a higher regulation that stipulated by a Law of Government Regulation. ¹²²

¹¹⁸ Law 12/2011 on the Formulation of Laws and Regulations, Art. 3.

¹¹⁹ *Id.*, Art. 72.

¹²⁰ *Id.*, Art. 1(4).

¹²¹ *Id.*, Art. 1(5).

¹²² *Id.*, Art. 1(6).

Province Regulation	Similar to Law, the blueprint of the Province Regulation must be agreed by both People’s House of Representative in the Province and the Governor. ¹²³
City Regulation	The blueprint of the City Regulation must be agreed both by People’s House of Representative in the City with the Mayor. ¹²⁴

Table 2.4: Hierarchy of Law and Regulation in Indonesia.

Source: Law Number 12/2011 on the Formulation of Laws and Regulations

The Indonesian constitution that acts as the highest law through Article 33 mandates the government to control any production that is important to the state and affecting the livelihood of many people. Article 33(3) also states that "the earth and water and natural resources contained therein are controlled by the state and are used for the greatest prosperity of the people." Therefore, based on this mandate, the Indonesian government enacts law related to the food and its trade that is essential to the livelihood of its people. In the context of agriculture and trade in Indonesia, there are at least four prominent laws: Law 18/2012 on Food, Law 7/2014 on Trade, Law 13/2010 on Horticulture, and Law 19/2013 on Empowerment and Protection of Farmers. These laws altogether provide the procedure to attain the objective policy of the Indonesian agricultural sector that is to obtain food sovereignty, including food self-sufficiency and farmers’ welfares.

It is important to underline that although a minister regulation is not explicitly stated in the hierarchy of law, Article 8(1) of Law 12/2011 recognizes the legitimacy of minister regulation. A minister regulation has binding legal force insofar as it is ordered by higher legislation or established based on their authority. Based on the four laws above, the Indonesian government, through the Ministry of Finance, the Ministry of Trade, and the Ministry of Agriculture, enacted numerous regulations to oversee the agricultural trade law in Indonesia.

¹²³ *Id.*, Art. 78.

¹²⁴ *Id.*, Art. 80.

A. Domestic Policy Tools

I. Price Support

Indonesia has maintained its price support measures for several commodities through the Indonesian Logistics Bureau (BULOG). BULOG was established in 1967 under President Suharto's regime to secure food supply following the chaos at the end of President Sukarno's era. Later in 1969, the Indonesian government expanded BULOG authorities to price stabilization by using a combination of a price band, which were a guaranteed floor price for producers and a ceiling price for consumers and control over export and import to maintain the domestic market price. In 1987, BULOG oversaw more commodities than the previous years including rice, sugar, wheat, maize, and soybeans. However, in 1998 Financial Crisis, through Presidential Decree 19/1998 the scope of commodities managed by BULOG was narrowed in line with the agreement taken by the government with the IMF as contained in the Letter of Intent. In the Presidential Decree 19/1998, the main task of BULOG was limited to only rice whereas other commodities have been released to follow the market system.¹²⁵

In the most recent Presidential Regulation 48/2016 on the Assignment of BULOG in the Context of National Food Security, BULOG is tasked to stabilize food prices at both the consumer and the producer level and to maintain food availability especially staples food.¹²⁶ In the regulation, there are ten commodities categorized as food staples: rice, maize, soybean, sugar, oil, flour, shallot, chili, beef, chicken, and eggs.¹²⁷ Out of the ten commodities, BULOG has the sole authority over the rice, maize, and soybeans, whereas the other commodities will be subject to the decision

¹²⁵ BULOG, SEKILAS PERUM BULOG, <http://www.bulog.co.id/sejarah.php> (last visited Oct 22, 2018).

¹²⁶ Presidential Regulation 48/2016 on BULOG in the Context of National Food Security, Art. 2(1).

¹²⁷ *Id.*, Art. 2(2).

of the Ministry of Agriculture whether to assign the task to BULOG or other state-owned enterprises.¹²⁸

In terms of price stabilization, on the coordination meeting, the Minister of Agriculture decides the amount of government food reserves, including rice that will be managed by BULOG and the government reference price.¹²⁹ Food reserves are usually distributed as part of their subsidized rice program for low-income households or as part of relief efforts to areas that affected by natural disasters. The effort to stabilize price in the producer level is made through food purchases by BULOG according to the government reference price. If the average local market price at the producer level is below the government purchase price, BULOG buys according to the reference price.¹³⁰ However, if the average market price at the producer level is higher than the government reference price, BULOG is given the flexibility for the purchase price.¹³¹ The amount of flexibility to reference price and the period of giving the flexibility to reference price is determined by the decision in the coordination meeting.¹³² Meanwhile, at the consumer level, the price stabilization is done by BULOG through a market operation where BULOG ensures that the retailers sell their rice at or below the highest retail price decided by the Minister.¹³³

In addition to that, BULOG also controls the availability and distribution of commodities. To ensure the availability, BULOG needs to prioritize domestic product.¹³⁴ In the case of domestic product is not sufficient to fulfill the stock, to stabilize the domestic price, or to fulfill other needs based on government request, the import can be done only by BULOG but has to be carried out

¹²⁸ *Id.*, Art. 2(3).

¹²⁹ *Id.*, Art. 4(3).

¹³⁰ *Id.*, Art. 5(2).

¹³¹ *Id.*, Art. 5(3).

¹³² *Id.*, Art. 5(4).

¹³³ *Id.*, Art. 5(6).

¹³⁴ *Id.*, Art. 7(1).

while maintaining the interests of domestic producers and consumers.¹³⁵ With regard to distribution, BULOG has the authority to distribute some commodities for specific needs. Rice can be distributed to low-income people. Maize is distributed for the animal feed industry, and soybean is for tofu and tempeh industry.¹³⁶

The sources of funding for BULOG in carrying out their duty are: i) national budget; ii) BULOG funds; iii) loan from domestic financial institutions; iii) other funds as regulated by the laws.¹³⁷ In the context of the loan, the government provides a credit guarantee to BULOG. The national government and the regional government are also obligated to provide an easier process for licensing, deduction or exemption from licensing fees, utilization of public property, and tax and customs facilities in accordance with statutory provisions.¹³⁸

II. Subsidies

In the international trade law, subsidies are generally covered in the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The definition of subsidies contains three basic elements: i) financial contribution; ii) by a government or any public body; and iii) which confers a benefit. The SCM Agreement lays out what could fall into financial contribution. The financial contribution could be in the form of: i) direct transfer of funds such as grants, loans, and equity infusion, potential direct transfers of funds or liabilities such as loan guarantees; ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits); iii) good or services other than general infrastructure or purchases goods; iv) funding mechanism or entrusts or directs a private body to carry out one or more of the type of

¹³⁵ *Id.*, Art. 7(2).

¹³⁶ *Id.*, Art. 9(1).

¹³⁷ *Id.*, Art. 10(1).

¹³⁸ *Id.*, Art. 13.

functions illustrated from i to iii¹³⁹; v) any form of income or price support.¹⁴⁰ The Indonesian government is known to have been providing a financial contribution, especially for fertilizer and seed to domestic farmers.

a) Fertilizer Subsidies

According to the Indonesian government, the distribution of the fertilizer subsidy is motivated by two objectives. The first one is to increase agricultural productivity and preserve national food security.¹⁴¹ Second is to encourage farmers to apply an adequate amount of fertilizer.¹⁴² Other objectives that not stated officially but also could be noticed are maintaining farmers' welfares, poverty alleviation, or a price stabilizer.

Indonesia began subsidizing fertilizer in 1971 as part of a broad range of policies to utilize the new, high-yielding rice varieties that were available due to the Green Revolution. Although the initial objective of the subsidy was directed exclusively toward the expansion of rice supply, the subsidized fertilizer is now provided for other commodities as well. The expenditure on fertilizer subsidies has increased significantly at the beginning of 2000. In fact, fertilizer subsidy has become one of the most significant spending items in the agriculture sector. OECD reported that Indonesia's expenditure on fertilizer subsidy is accounted for 37% of the total support to agriculture in 2006-2010.¹⁴³

The implementation of fertilizer subsidy is based on the Regulation of the Minister Agriculture and the Minister of Trade that is issued each year. The Indonesian government subsidies urea (nitrogen), zinc ammonia (ZA), SP-36 (phosphate), NPK (compound fertilizer), and

¹³⁹ WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), Art. 1(a)(1).

¹⁴⁰ *Id.*, Art. 1(a)(2).

¹⁴¹ Camilo Gomez Osorio et al., *Who Is Benefiting from Fertilizer Subsidies in Indonesia?*, World Bank Policy Research Working Paper (2011).

¹⁴² Tahlim Sudaryanto, FERTILIZER SUBSIDY POLICY IN INDONESIA: IMPACTS AND FUTURE PERSPECTIVES (2014), http://ap.ffc.agnet.org/ap_db.php?id=365 (last visited Oct 23, 2018).

¹⁴³ OECD, OECD REVIEW OF AGRICULTURAL POLICIES: INDONESIA (2012).

organic fertilizer.¹⁴⁴ Only small farmers with 2 hectares or less land and a member of the farmer groups are allowed to buy government-supported fertilizer.¹⁴⁵ The government explicitly prohibits the subsidized fertilizer to be sold to any food crop, horticulture, plantation, livestock, or aquaculture companies.¹⁴⁶

Each year, farmers through the farmer's group submit a Definitive Plan of Group Needs (RDKK), which is a proposal of their fertilizer needs based on their land size. The proposal from the farmers' group is compiled into a proposal for the districts, provinces, and at the national level. The total demand for the fertilizer is used as a reference to the Ministry of Agriculture that communicates the needed fertilizer to the fertilizer companies and the budget of the subsidy to the Ministry of Finance.

The distribution process of the subsidized fertilizer is usually problematic as there was an experience of leakage of the subsidized fertilizer before. The Indonesian government then tried to streamline the distribution system by introducing the new tightly controlled zoning pattern with predetermined distribution areas for each manufacturer.¹⁴⁷ There are four lines in the distribution chain with each specific zoning. The first line (Line 1) is the national fertilizer warehouse.¹⁴⁸ The imported fertilizer is also stored at this warehouse. The second line (Line 2) is the fertilizer warehouse in the province that acts as the Fertilizer Packing Unit.¹⁴⁹ The third line (Line 3) is a

¹⁴⁴ Regulation of the Ministry of Trade Number 15/M-DAG/PER/4/2013 on Procurement and Distribution of Subsidized Fertilizer for the Agricultural Sector, Art. 1(1).

¹⁴⁵ Regulation of the Ministry of Agriculture Number 47/Permentan/Sr.310/12/2017 on Allocation and Highest Retail Price of Subsidized Fertilizer for the Agricultural Sector in the 2018 Fiscal Year, Art. 5(1).

¹⁴⁶ Decree of the Ministry of Agriculture Number 47/2017, Art. 5(3).

¹⁴⁷ OECD, *supra* note 143.

¹⁴⁸ Regulation of the Ministry of Trade Number 15/2013, Art. 1(17).

¹⁴⁹ Regulation of the Ministry of Trade Number 15/2013, Art. 1(18).

warehouse located in the territory of the district.¹⁵⁰ The fourth line (Line 4) is the warehouse or retail kiosks on district or village that is established by the distributor.¹⁵¹

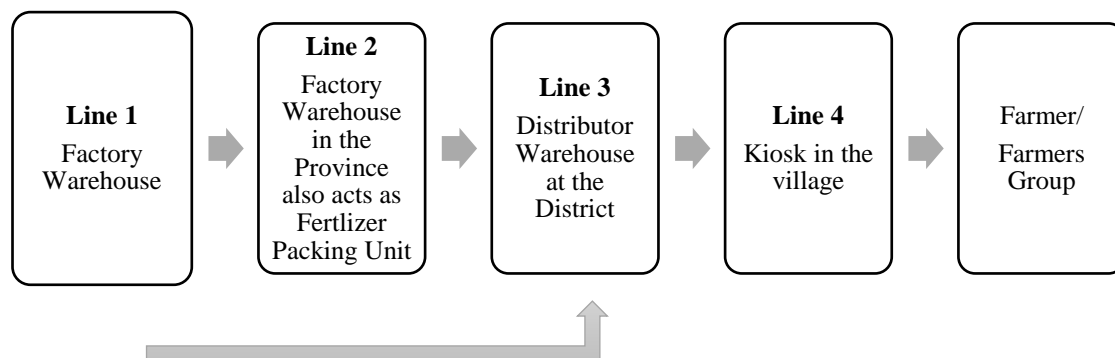


Figure 2.2: The Distribution Line of Subsidized Fertilizer

Source: Decree of the Ministry of Agriculture Number 47/Permentan/Sr.310/12/2017

In the case that Line 1 and Line 3 are located in the same district, Line 3 distributor can redeem fertilizers directly at the Line 1 warehouse. Line 2 warehouse in the province can only provide for Line 3 distributor at the district. Similarly, Line 3 can only pass the fertilizer to the kiosks in Line 4. The distribution system ends at Line 4 that sells the subsidized fertilizer to the farmers or the farmer groups in their area. The farmers and farmers group can only buy the subsidized fertilizer at the specified kiosk. Regarding the price, the prices paid by farmers in Line 4 are considered as the highest retail prices decided by the government each year. Data shows that the Indonesian government has been subsidizing the fertilizers around 50% - 75% of the market price.¹⁵²

Besides redesigning the distribution chain, the government addresses the issue of leakage by forming a specific Supervisory Team (TP2B) in the central government and Supervisory Commission (KP3) at the provincial level and district level. However, even with arguably tighter

¹⁵⁰ Article 1 (19) on Regulation of the Ministry of Trade Number 15/2013.

¹⁵¹ Article 1 (20) on Regulation of the Ministry of Trade Number 15/2013.

¹⁵² Sudaryanto, *supra* note 142.

regulations, millions of dollars worth of subsidized fertilizers are being sold to big plantations such as palm oil and rubber.¹⁵³ Another problem is when distributors and retailers hold on their stock, and when there is scarcity, they sell it at higher prices small farmers cannot afford. The Ministry of Agriculture has encouraged the farmers to report any misconduct to the Supervisory Commission while also order the Supervisory Committee and Commission to strengthen its control.

b) Seed Subsidies

Similar to fertilizer, seeds are also important agricultural inputs. With the objective of increasing productivity, especially in anticipation of extreme climate¹⁵⁴ and farmers' welfares¹⁵⁵, the Indonesian government promotes the use of good quality seeds. The Indonesian government provides subsidized superior seed only for rice, maize, and soybean.¹⁵⁶ There are three methods in providing the subsidized seed to the farmers.

The first one is the traditional method in which the government provides subsidies to the two state-owned enterprises, PT Sang Hyang Seri and PT Pertani. The two companies then sell the seeds to the farmers at lower prices. The second method is through the National Seed Reserve (CBN) that began in 2004.¹⁵⁷ The CBN provides free certified seeds that can only be used in an emergency situation when the planting is damaged by natural disaster sor pest disease. The National Seed Reserve is provided only by PT. Sang Hyang Sari that acts as Public Service Obligation.

¹⁵³ Randy Fabi & Christina Munthe, *Subsidy sham: Fertilizers reach Indonesia plantations, not small farmers*, REUTERS, February 14, 2016, <https://www.reuters.com/article/us-indonesia-fertilizers/subsidy-sham-fertilizers-reach-indonesia-plantations-not-small-farmers-idUSKCN0VN127>.

¹⁵⁴ Presidential Regulation Number 12/2011 on Direct Superior Aid and Fertilizer, Art.1(1).

¹⁵⁵ Introduction of the Regulation of the Ministry of Agriculture Number 46/Permentan/OT.140/10/2006.

¹⁵⁶ Presidential Regulation Number 12/2011, Art. 21.

¹⁵⁷ OECD, *supra* note 143

The last and relatively new procedure is the Direct Superior Seed Aid (BLBU) introduced in 2007. The BLBU is launched due to a lack of real absorption by farmers through the traditional method. In the BLBU, the government tries to supply the certified seed for free. However, due to budgetary constraints, the government can only provide 25% of the seeds demanded by the farmers.¹⁵⁸ To solve this issue, the government decides not to provide free seed for two consecutive years. If a farmer group receives an allocation of free seed on that year, they cannot receive any free seed in the next year. They may receive another free seed in the third year but for a different type of crop.¹⁵⁹ Farmers also must participate in the field school as the requirement to receive free seeds.

c) *Credit Schemes*

Indonesia has a long history of credit policies provided to farmers to support them with capital for purchasing fertilizers, seeds, and other production inputs. In 1985, Credit for Farm Enterprises (*Kredit Usaha Tani*, KUT) was introduced. In the early years, farmers were allowed to borrow at 12% interest that was half of the commercial rates of around 20%-24%. Facing the 1997-1998 financial crisis and harvest failure, the government made some fundamental changes in the KUT. The total available credit and the maximum borrowing level for farmers increased, and the debts incurred over 1985-1995 were forgiven. This, however, eventually led to the disbandment of KUT in 2001 due to the high level of non-repayment.¹⁶⁰

To replace the KUT, the government established Food Security Credit (*Kredit Ketahanan Pangan*, KKP), which distributed through commercial banks. Shortly after that, the Indonesian

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Pemerintah Hapus Tunggalan Kredit Usaha Tani, ANTARA NEWS, March 3, 2008, <https://www.antaranews.com/berita/95313/pemerintah-hapus-tunggalan-kredit-usaha-tani> (last visited Oct 24, 2018).

government replaced the KKP with Food Security and Energy Credit (*Kredit Ketahanan Pangan dan Energi*, KKP-E). KKP-E covers broader types of crop, higher credit limit per applicant (from Rp. 15 million [\$1500] to Rp. 25 million [2600]), higher land limit per applicant (from two hectares to four), longer credit period (from three years to five), and a higher annual budget (from Rp. 2.083 trillion [\$ 215 million] to Rp. 10.863 trillion [\$ 1.1 billion]).¹⁶¹

Besides KKP-E, the government also created a different loan interest subsidy such as BioEnergy Development and Plantation Revitalization Credit (*Kredit Pengembangan Energi Nabati dan Revitalisasi Perkebunan*, KPEN-RP).¹⁶² This subsidized credit is to support smallholders' plantations, specifically palm oil, cocoa, and rubber, and to introduce the energy diversification. Another type of credit is People's Business Credit (*Kredit Usaha Rakyat*, UKR), which is a guaranteed credit program. In UKR, the government takes the 70% risk and the implementing bank 30%. UKR is to provide those with a sustainable business but does not have the collateral to meet the banks commercial lending requirements.¹⁶³

The last type of credit is the Rural Agribusiness Development Program (*Pengembangan Usaha Agribisnis Perdesaan*, PUAP) is distributed in the type of grant. The objective if PUAP is to reduce poverty and unemployment level in rural areas. The government supplies a grant of Rp. 100 million to federated farmer groups in each village that intended as seed money for revolving credit facility to support both on and off-farm activities.¹⁶⁴

¹⁶¹ OECD, *supra* note 143.

¹⁶² Regulation of the Ministry of Finance Number 117/PMK 06/2006 on Credit on Bio-Energy Development and Plantation Revitalization Credit.

¹⁶³ OECD, *supra* note 143.

¹⁶⁴ *Id.*

d) Infrastructure

Along with fertilizer subsidies, the expenditure on infrastructure, especially irrigation, including operation and maintenance, rehabilitation, and expansion is one of the significant parts of the national agricultural budget. Technical irrigation is the key to increase yield and production stability, especially for high-yielding rice and other food crops that require continuous water availability for a good harvest.¹⁶⁵ Much of Indonesia's significant increased rice production between 1977 and 1982 and brief self-sufficiency in 1984 due to the huge investment in irrigation development.¹⁶⁶ However, since the mid-1980s, in particular in 1987-1990, the government spending on irrigation fell drastically.¹⁶⁷ This trend continued until the early 2000s when a study by Simatupang and Timmer shows that 22% of canals serving some 6.8 million hectares of irrigated paddy field were damaged, including 5% that were severely damaged, and 273 large dams were also severely damaged.

The task of maintaining irrigation is divided into three levels of government. Large irrigation schemes that cover more than 3000 hectares are managed by the central government; medium irrigation with a common area larger than 1000 hectares and lower than 3000 hectares are managed by the provincial government, and the small irrigation schemes that are less than 1000 hectares are managed by districts government.¹⁶⁸

Regarding funding, since 2005, the Ministry of Finance has been providing the local government with special funds targeting the agricultural projects in addition to those budgeted explicitly for irrigation. The types of programs that are funded mostly relate to infrastructure but

¹⁶⁵ Pantjar Simatupang & Peter Timmer, *Indonesia Rice Production: Policies and Realities*, 44 BULLETIN OF INDONESIAN ECONOMIC STUDIES 65–79 (2008).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Song Sumaryanto, AGRICULTURAL WATER MANAGEMENT SYSTEMS IN INDONESIA: CURRENT STATUS AND POLICY DIRECTION, http://www.fftc.agnet.org/library.php?func=view&id=20140304101739&type_id=4.

change every year, depending on the need of each district under the guidance of the Ministry of Agriculture.

However, despite the changes in management and funding, the irrigation network still needs much attention. While the government has been focusing on maintenance, there is a lack of new irrigation development. Water availability becomes even more complicated as Indonesia has been hit by the extreme climate.

B. International Policy Tools

Indonesia through its national law number 7/1994 ratified the Agreement Establishing the World Trade Organization. The WTO as the only international organization overseeing the global trade requires its member to comply with the agreement. Thus, Indonesia's trade policy in almost every sector including agriculture needs to comply with the WTO agreements. The international policy tools discussed below are within the context of Indonesia's commitment to the WTO agreement.

I. Tariffs

As discussed above, trade in agricultural products across countries is heavily influenced by government policy. A tariff is explicitly under the control of the Indonesian Ministry of Finance. It is known that the Ministry of Finance prefers an open economic policy, whereas line Ministries like the Ministry of Agriculture that has greater influence in imposing non-tariff barriers (NTBs) are generally more protectionist due to influence by interest groups. Therefore, it is common to see a relatively low tariff barrier with pressure for NTBs.

In the global trading system, as an institution that promotes trade openness, the WTO strongly encourages its members to utilize tariffs. This is to make the trade more transparent and predictable. As a result, when the Agreement on Agriculture was enacted in 1995, the WTO

members need to do “tariffication” that is to decide tariffs on their commodities and submit it as a schedule to the WTO.

Indonesia imposes a relatively low tariff in the agriculture sector. As aforementioned, this shows the less restraint economic policy that is preferred by the Ministry of Finance. According to the WTO Tariff Profiles 2017, the average of Indonesia’s applied most favored nation (MFN) agricultural tariff¹⁶⁹ was 8.4% while the average of the bound tariff¹⁷⁰ was 47.1%.¹⁷¹ The three highest bound tariffs are 210% for milk powder, 160% for rice, and 150% for liquors such as beer and wine. In fact, most of the MFN applied tariff is 5%. It is the MFN applied tariffs of 90-150% for liquors that increase the overall average of MFN applied tariffs.

As it can be noticed, the difference between the bound tariff and the applied tariff is quite significant. The gap between the bound and applied MFN rate is called the binding overhang. While trade economists argue that a large binding overhang makes a country’s trade policies less predictable¹⁷², it is perceived that in international agreement including trade, some flexibility is required.¹⁷³

It is important to underline that instead of imposing *ad valorem*¹⁷⁴ tariffs, Indonesia applies specific tariffs¹⁷⁵ for two commodities that Indonesia categorizes as highly sensitive products: rice

¹⁶⁹ MFN tariff is what WTO member promises to impose on imports from other members. The tariff should apply the same to all the WTO members unless there is a preferential agreement between the specified members such as free trade agreement or customs union.

¹⁷⁰ Bound tariffs are a specific commitment made by individual WTO members. The bound tariff, as it is called, is the maximum MFN tariff that WTO members can impose on other members. The bound tariff is not necessarily the applied tariff, but a member can raise their tariff as long as it does not exceed the bound tariff that WTO members have agreed.

¹⁷¹ WTO, ITC & UNCTAD, WTO TARIFF PROFILES 2017 250 (2017), available at: https://www.wto.org/english/res_e/booksp_e/tariff_profiles17_e.pdf.

¹⁷² World Integrated Trade Solution, TYPES OF TARIFFS, available at: https://wits.worldbank.org/wits/wits/witshelp/content/data_retrieval/p/intro/c2.types_of_tariffs.htm.

¹⁷³ Krzysztof J. Pelc, *Seeking Escape: The Use of Escape Clauses in International Trade Agreements*, 53 INT’L STUD. Q. 349 (2009).

¹⁷⁴ Ad valorem tariff is the most common tariff used, which is “a tariff rate charges as a percentage of the price.” An example of the ad valorem tariff is the MFN and bound tariff, as mentioned above.

¹⁷⁵ Specific tariff is “a tariff rate charged as a fixed amount per quantity such as \$100 per ton.”

and sugar. These two highly sensitive commodities also are excluded from Indonesia's preferential trade agreements. For rice, on January 1, 2000, due to pressures from farmers, the government imposed a specific tariff on rice and rice flour of Rp. 430/kg (\$51/ton) to replace a 5% ad valorem rate. After a dramatic increase in domestic rice prices, the tariff was reduced to Rp. 200/kg (\$22/ton). There were more changes between March and May 2007 in which the specific tariff was raised to Rp. 450/kg (\$49/ton) and further raised between September 2007 and February 2008 to Rp. 550/kg (\$60/ton). It returned to Rp. 450/kg, but in the first three months of 2011, the import tariffs were lifted briefly due to price pressure on the domestic market. Per 2016, Indonesia still applies a specific tariff of Rp. 450/kilogram equivalent to ad valorem tariff of 10% using the average export price for 15% broken rice from Thailand in 2010.¹⁷⁶

Similar to rice, sugar also experiences some tariff changes. In January 2000, Indonesia raised the tariff for sugars from 0% to 20% on raw sugar for cane and industrial grade and 25% on raw sugar for human consumption. On 3 July 2002, the government began to impose a specific tariff of Rp. 550/kg (\$59/ton) for raw sugar from cane and Rp. 700/kg (\$ 75/ton) for beet sugar and refined sugar. Between May to October 2006, as a response to rising international prices, the import duty on raw sugar was removed for a maximum of 5,180,00 tons.¹⁷⁷ Tariff on sugars was lowered from October 2009 to April 2010 before returning to the previous level on 1 May 2010.¹⁷⁸ Currently, for sugar, there is 95% of the bound tariff, but in practice, it employs specific a tariff of Rp. 790/kilogram equivalent to ad valorem tariff of 18% using the international Sugar Association average daily price for 2010.

¹⁷⁶ OECD, *supra* note 143.

¹⁷⁷ Regulation of the Minister of Finance Number 240/KMK.010/2006 on Removal of Import Duty on Raw Sugar by Refined Sugar Industry.

¹⁷⁸ Regulation of the Minister of Finance Number 150/PMK.011/2009 on Decision on Import Tariff of Sugar.

II. *Import*

While tariff regulated by the Ministry of Finance is straightforward and predictable, the NTBs such as import policy is a complex one. As Basri and Patunru observe, while tariff rates have decreased or at least steady, some NTBs have proliferated since 2000, especially in the agriculture sector.¹⁷⁹ Sensitive products such as rice, sugar, cloves, corn, and soybean have been subject to special import licensing from relevant Ministries. For the former three, only domestic producers have exclusive import rights. The Ministry of Agriculture and the Ministry of Trade regularly coordinate in laying out detailed regulations on the importation of agricultural products. The country wishes to export its commodity products to Indonesia needs to obtain a recommendation from the Ministry of Agriculture and import approval from the Ministry of Trade.

a) Recommendation by the Ministry of Agriculture

The Ministry of Agriculture Regulation Number 38/2017 lays out the issuance of the recommendation to import horticultural products. In Article 3, the aims of this regulation are: i) to increase the effectiveness and efficiency of the management on horticulture imports; ii) to provide certainty in the issuance of recommendation; and iii) to encourage the production of domestic horticultural products. The recommendation is issued for fresh horticultural products for consumption purposes and raw horticultural products for industrial purposes.¹⁸⁰

The protection of domestic products by the Ministry of Agriculture is seen in Article 7 of this regulation. Article 7 states that the import of horticultural products needs to be integrated with the development of local horticultural products. The development of the horticultural products is to anticipate the dependence on importation and to stabilize the supply of the product.¹⁸¹ The focus

¹⁷⁹ M. Chatib Basri & Arianto A Patunru, *supra note*. 90.

¹⁸⁰ Regulation of The Ministry of Agriculture Number 38/PERMENTAN/HR.060/11/2017, Art. 4(1).

¹⁸¹ *Id.*, Art. 7(1) and (2).

of the horticultural products on this context are onions and shallots that have significant economic value, could affect the inflation, and potentially developed domestically.¹⁸² Import of horticultural products is done within a certain period of time decided by the Minister of Agriculture that is outside of the pre-harvest, harvest, and after harvest.¹⁸³ In terms of stabilizing supply and prices, imports of some horticultural products for consumption purposes can only be done by State-Owned Enterprises as authorized by the Ministry of State-Owned Enterprises.¹⁸⁴ The recommendation is issued twice a year.¹⁸⁵ For companies that wish to obtain the recommendation for the following year can submit the application in November on the current year.¹⁸⁶ The regulation also emphasizes that besides the recommendation by the Ministry of Agriculture, the import of approval by the Ministry of Trade is required.¹⁸⁷ The recommendation application process as regulated in Article 18-26 is as followed:

¹⁸² *Id.*, Art.7(3) and (4).

¹⁸³ *Id.*, Art. 6.

¹⁸⁴ *Id.*, Art. 14 (1) and (2).

¹⁸⁵ *Id.*, Art. 10(1).

¹⁸⁶ *Id.* Art. 10(4).

¹⁸⁷ Regulation of the Ministry of Agriculture Number 16/2018, Art. 13(3).

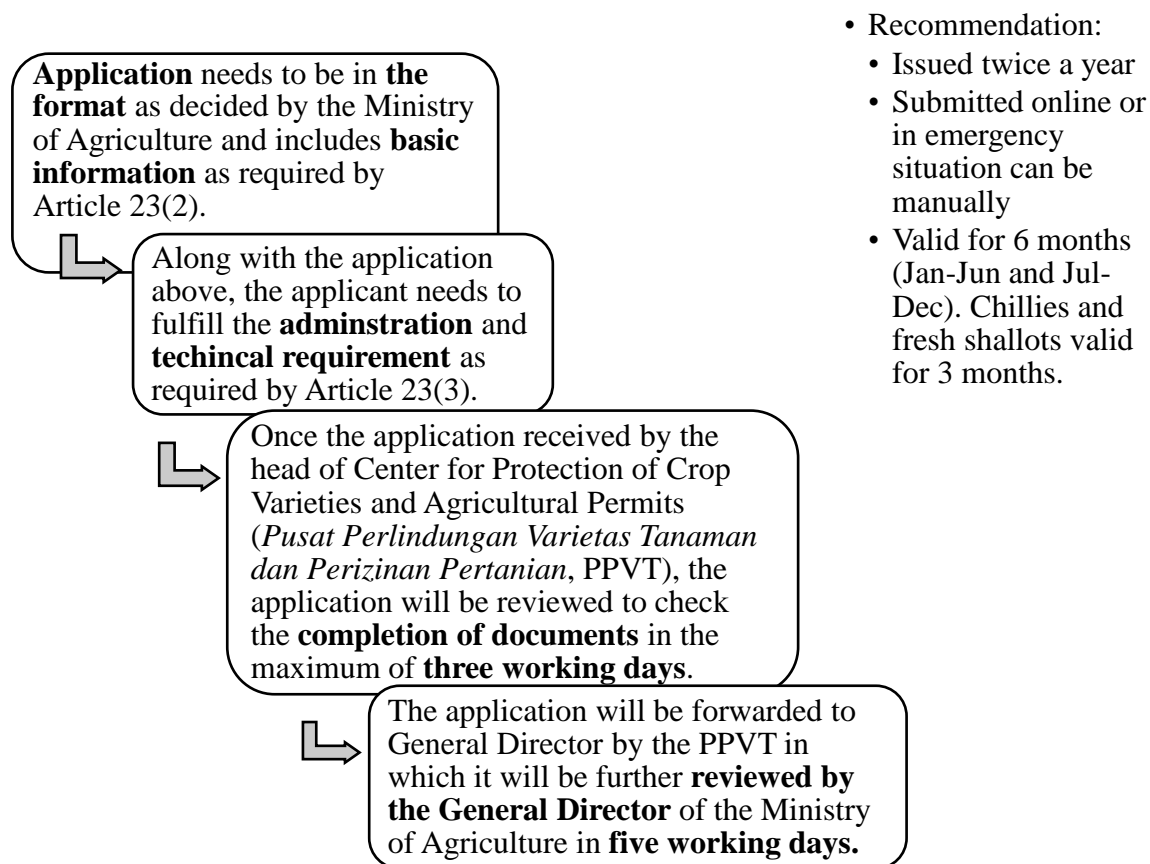


Figure 2.3: The Process of Obtaining Import of Recommendation from the Ministry of Agriculture
 Source: Regulation of Minister of Agriculture Number 38/PERMENTAN/HR.060/11/2017

b) *Import Designator & Approval by the Ministry of Trade*

Once the importer obtains the recommendation from the Ministry of Agriculture, it needs the import approval from the Ministry of Trade. In general, the import regime is governed by the Regulation of the Ministry of Trade Number 70/M-DAG/PER/9/2015. Article 2 of this regulation states that import can only be done by importers that obtain Importer Identification Number (*Angka Pengenal Impor*, API). There are two types of API: i) General API (*API Umum*, API-U) is granted to companies involved in trading; and ii) Producer API (*API Produsen*, API-P) is granted to companies that use the import goods in its production process.

Horticultural products can only be imported by: i) companies that have API; and ii) state-owned enterprise that is authorized by the Ministry of State-Owned Enterprises.¹⁸⁸ The category of API affects the type of products that they can import. This also results in a different requirement for the application process. State-owned enterprise imports horticultural products only to ensure the supply and price stability and upon recommendation from the Ministry of Trade after coordination with other related Ministers.¹⁸⁹ The process of obtaining import approval by the Ministry of Trade is as followed:

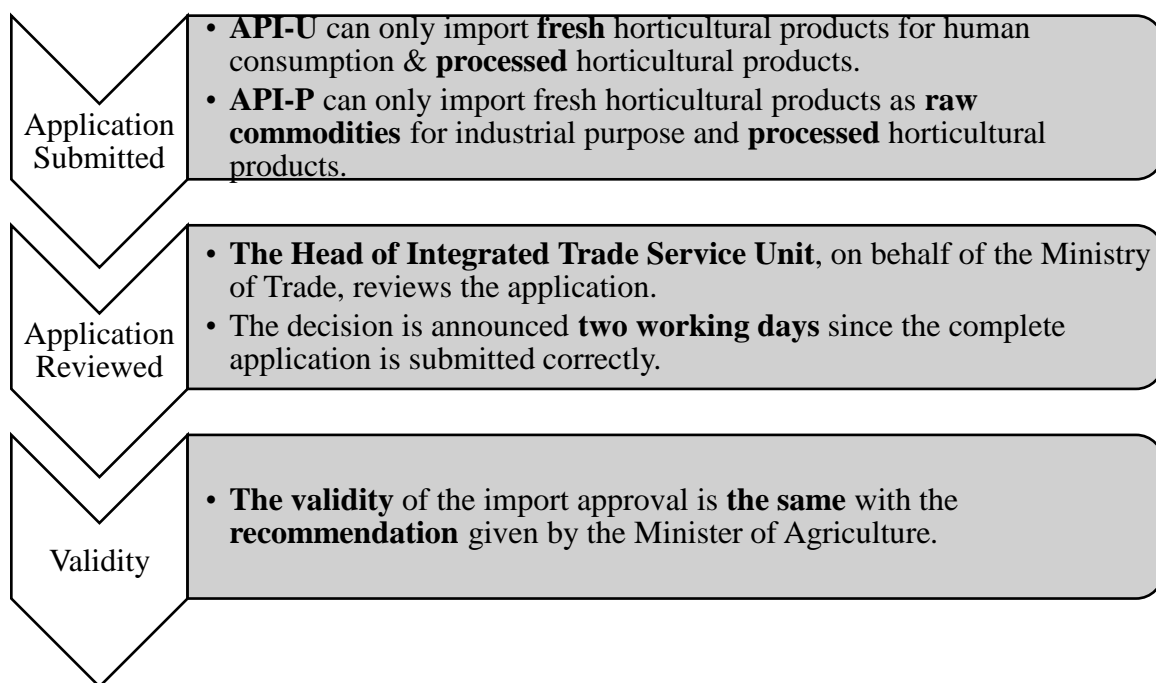


Figure 2.4: The Process of Obtaining Import Approval from the Ministry of Trade

Source: Regulation of Minister of Trade Number 30/M-DAG/PER/5/2017

iii. Technical Inquiry

After securing both the recommendation and the import approval, verification by the surveyor at the port of origin is required as part of the technical inquiry. The Minister of Trade appoints the surveyor who fulfills the requirements such as: has an official license in survey

¹⁸⁸ *Id.*, Art. 3(1).

¹⁸⁹ Regulation of the Ministry of Agriculture Number, *supra* 187, Art. 4.

business, has at least five-year experience, has branch or affiliation in other countries to support the effectivity of verification and technical inquiry, and has a good track record.¹⁹⁰ The report from the surveyor then will be used as the additional document in import customs clearance.¹⁹¹ Additionally, the surveyor needs to submit a monthly written report before the 15th of the following month to the General Director of the Ministry of Trade with regards to verification or technical inquiry of the imported products.¹⁹²

Companies that obtain the import approval also need to submit the report of their import realization. In the case that a company does not present the report twice, the government will suspend its import approval.¹⁹³ More severe punishment such as cancelation of the import approval will be given to the companies if: they import the products directly to the retailer or consumer,¹⁹⁴ violate the packaging requirement, submit the incorrect information in the application, found guilty by the court for any criminal activities, violate the regulation according to the judgment of the related institutions.¹⁹⁵

c) *Import of Sensitive Products*

While the import of most agricultural products is already protected, import of the most sensitive products such as rice and sugar are more restrictive. Only specific types of rice and sugar that can be imported and only under certain circumstances. Sugar more specifically must have a recommendation from the Minister of Industry. First, the import of rice is very limited and can

¹⁹⁰ Regulation of the Ministry of Trade Number 30/2017, Art. 16.

¹⁹¹ *Id.*, Art. 17(2).

¹⁹² *Id.*, Art. 19.

¹⁹³ *Id.*, Art. 20.

¹⁹⁴ According to Article 12, for human consumption, API-U can only import and hand the products to the distributor while the raw commodities only for industrial purposes.

¹⁹⁵ Regulation of the Ministry of Trade, *supra* note, Art. 21.

only be done for three reasons: i) general necessity; ii) grant; and iii) other necessities.¹⁹⁶ It is also limited for a specific type of rice as explained below.

1. General Necessities	2. Grant	3. Other Necessities
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> <input type="checkbox"/> Done by BULOG <input type="checkbox"/> Minister of Trade needs to coordinate with other related Ministers before giving the import approval. <input type="checkbox"/> Semi-milled or wholly milled rice, whether or not polished or glazed. Japonica rice, basmati rice, jasmine rice, and other 5% type of broken rice 	<ul style="list-style-type: none"> <input type="checkbox"/> Done by social organizations or government institutions. <input type="checkbox"/> Needs recommendation and approval from related Ministers <input type="checkbox"/> Semi-milled or wholly milled rice, whether or not polished or glazed and 5-25% broken rice 	<ul style="list-style-type: none"> <input type="checkbox"/> Done by API-P and BULOG <input type="checkbox"/> Only for raw materials for industry <input type="checkbox"/> Needs recommendation and approval from related Ministers <input type="checkbox"/> Only for 100% broken rice, 100% glutinous broken rice, rice flour, glutinous rice flour

Figure 2.5: Conditions on Import Approval for Rice Import
Source: Regulation of Minister of Trade Number 1/2018

From the figure 2.5, in principle, BULOG as the Indonesian Bureau of Logistics holds the sole permission to import rice since companies can only import rice for industry and very limited to 100% broken rice and types of flour. Amid its effort to achieve food self-sufficiency in staple foods, the Indonesian government decided to import 1 million tons of medium quality rice for the second half of 2018. The 2018 total rice imports would become 2 million, which is the highest since 2011.¹⁹⁷ This decision has been controversial since there was an argument that the domestic supplies seem to be sufficient.

¹⁹⁶ Regulation of Minister of Trade Number 1/2018 on Export and Import of Rice, Art.15.

¹⁹⁷ Adinda Normala, *This Year's Rice Imports to be Largest Since 2011.*, JAKARTA GLOBE, August 28, 2018, <https://jakartaglobe.id/business/years-rice-imports-largest-since-2011/> (last visited Oct 30, 2018).

Similar to rice, the import of sugar is limited for raw sugar, refined sugar, and plantation white sugar.¹⁹⁸ The amount of sugar imported must alienate with the domestic needs as agreed in the coordination meeting among relevant ministers.¹⁹⁹ Specifically, for plantation white sugar, the import is only intended to control the domestic supply and price stabilization.²⁰⁰ Both rice and sugar also need to go through technical inquiry at the port of origin. The process of obtaining import approval of the three types of sugar are as followed:

Plantation White Sugar	Done only by State-owned enterprise following the import approval from Minister of Trade
	Does not need recommendation from Minister of Industry
	Import only to ensure there is sufficient supply domestically and to stabilize price.
Raw Sugar	Done only by API-P following import approval by Minister of Trade
	In submitting the application, it needs a recommendation from the Minister of Industry
	Application process takes three working days
	Import only as raw commodities for the API-P industrial purpose. It cannot be sold or transfered to other parties.
Refined Sugar	Done only API-P after the import approval by Minister of Trade
	In submitting the application, it needs a recommendation from the Minister of Industry
	Application process takes three working days
	Refined sugar specifically made from imported raw sugar can only be distributed to industry and cannot be sold in the domestic market.

Figure 2.6: Conditions of Approval for Import Sugar

Source: Regulation of the Minister of Trade Number 117/M-DAG/PER/12/2015

¹⁹⁸ Regulation of the Minister of Trade Number 117/M-DAG/PER/12/2015 on Import of Sugar, Art. 2.

¹⁹⁹ *Id.*, Art. 3.

²⁰⁰ *Id.*, Art. 4.

III. Export

What it is said to be ironic by some Indonesians is that Indonesia turns from a country with a goal to be self-sufficient to a country that is net a importer of its staple foods. Dawe, on his study, argues Indonesia will continue becoming a net importer of its staple foods such as rice. This is due to Indonesia's increased population and the geography in which Indonesia is an island without dominant river deltas providing abundant water and flat land suitable for rice growing.²⁰¹

Indonesia's export commodities are mostly palm oil, cocoa, coffee, and rubber. The Indonesian government also regulates the tariff for export. For agricultural products, the export of cocoa beans and palm oil and its derivatives are taxed as regulated by the Ministry of Finance.²⁰² Like the import tariff, the export taxes are also straightforward, although it fluctuates depending on the reference price, which is defined as the international average price²⁰³ or an average price of certain commodity exchange.²⁰⁴

For cacao beans, there are four categories of export tariff: i) for reference price up to \$2000/ton, there is no export tax; ii) for reference price more than \$2000/ton to \$2750/ton, the tax rate is 5%; iii) for reference price more than \$2750/ton to \$3500/ton, the tax rate is 10%; for reference price more than \$3500/ton, the tax rate is 15%. With regard to palm oil, there are extensive types and rates. There are twenty-one categories of a product with each product that have twelve different rates depending on the reference price, starting from \$750/ton to more than \$1250/ton.

²⁰¹ David Dawe, *Can Indonesia Trust the World Rice Market?*, 44 BULLETIN OF INDONESIAN ECON. STUD. 115 (2008).

²⁰² Regulation of the Minister of Finance Number 12/PMK.010/2017 on Determination of Products with Export Tariff, Art. 2(2).

²⁰³ The international average price for cacao beans is based on the average price of Cost Insurance Freight (CIF) in Intercontinental Exchange (ICE), New York whereas for palm oil, crude palm oil, and its derivatives is based on average price of CIF of crude palm oil in Rotterdam, Malaysia's exchange, Indonesia's exchange weighting 20% from Rotterdam, 20% from Malaysia, and 60% from Indonesia.

²⁰⁴ Regulation of the Minister of Finance, *supra note*. Art. 1(6)

Concerning coffee, its exports are controlled as part of intergovernmental arrangements. Indonesia, as a member of International Coffee Organization (ICO) needs to ensure conformity with commitments under the International Coffee Agreement (ICA). Only companies recognized as either registered coffee exporter or temporary coffee exporter may export coffee.²⁰⁵ The exporter needs to obtain an approval letter of coffee export (*Surat Persetujuan Ekspor Kopi*, SPEK) from the agency in charge of trade at the regional government level. There is no requirement to submit an export plan in order to be registered as a coffee exporter and to receive approval. There is also no requirement on when, where, and how much it can be traded, but the exported coffee must fulfill the quality standard as regulated by the Minister of Trade and accompanied by Origin Form as required by the ICO.²⁰⁶ Companies need to submit the export realization report every three months to the Ministry of Trade as part of Indonesia's obligation to report to ICO as well.²⁰⁷

For rubber, the Southeast Asia region is the most suited for rubber plantation due to its constant high temperatures and wet environment. Around 70% of global production comes from Thailand, Indonesia, and Malaysia.²⁰⁸ In 2001, in response to a low price, Thailand, Indonesia, and Malaysia as three major producers of natural rubber established a rubber tripartite cooperation under the framework of the International Tripartite Rubber Council (ITRC). The objective of ITRC is to ensure fair and remunerative income to the rubber smallholders by maintaining an adequate supply of natural rubber in the market at fair prices. These three countries then try to reduce the output to boost the price. In 2002 and 2003, the three countries agreed to cut back annual production by 4%.²⁰⁹ For 2002, Indonesia was allocated an export quota of 1.23 million that soon

²⁰⁵ Regulation of the Minister of Trade Number 41/M-DAG/PER/9/2009, Art. 2(2).

²⁰⁶ *Id.*, Art. 9(1).

²⁰⁷ *Id.*, Art. 10(1).

²⁰⁸ Indonesia Investments, *supra* note. 51.

²⁰⁹ OECD, *supra* note 143.

were lifted after the price recovered. However, the price of rubber dropped on an all-time low in 2008, making the three countries to reduce their export once again to increase the price of rubber. On February 2017, they reduced output by a total of 615,000-ton equivalent to 6% of global supply that resulted in only a brief spike in prices.²¹⁰

Exporter of rubber in Indonesia needs to follow a strict quality standard required by the government. Every exporter must have a manufacturer identification number in which in order to have one they have to provide a laboratory report about the quality of the products. Five countries where Indonesia exports rubber the most are the U.S, China, Japan, Singapore, and Brazil, while most of the domestic rubber consumption is for Indonesia's manufacturer in particular automotive sector.²¹¹ It is said that a critical driver for the global rubber market is the Asia-Pacific region, where the demand is growing significantly. China is the world's largest rubber consumer that is expected to account for nearly 40% of total worldwide rubber consumption by 2021.²¹² There is also an expectation of strong growth rubber consumption to occur in Indonesia, India, Vietnam, and Thailand.²¹³

²¹⁰ Clyde Russell, *China's rubber appetite fails to boost prices amid over-supply*, REUTERS, September 19, 2017, <https://www.reuters.com/article/us-column-russell-rubber-asia/chinas-rubber-appetite-fails-to-boost-prices-amid-over-supply-russell-idUSKCN1BU1AW> (last visited Oct 30, 2018).

²¹¹ Indonesia Investments, *supra* note 51.

²¹² *Id.*

²¹³ *Id.*

Chapter 3

International Trade Law on Agriculture

1. WORLD TRADE ORGANIZATION: AN OVERVIEW

This chapter serves as a review of the structure of the World Trade Organization (WTO) generally and the WTO Agreement on Agriculture specifically. After its inception in 1995, the WTO consisting of 164 members, plays a significant role in the global trading system. Being the only international organization that oversees international trade, the existence of the WTO is critical in shaping the policy as well as the jurisprudence of international trade. The WTO agreements are seen as the law of international trade that binds all the members.

The later part of this section brings into question whether the Agreement on Agriculture as the law in global agricultural trade creates a fair-trading system. By focusing on the most contentious point, which is domestic support, it is argued that the Agreement on Agriculture institutionalizes such unfairness toward developing countries. Developed countries have been abusing the domestic support provided in the Agreement on Agriculture, resulting in an uneven level of playing field in agriculture, a sector that is crucial to the developing countries. This issue then extends to the current deadlock agricultural negotiation in the WTO, where the developing members, including Indonesia proposing a reform.

A. A Brief History of the WTO

Although the WTO was established in 1995, it has its origins in the Bretton Woods Conference at the end of World War II.²¹⁴ At the Bretton Woods, the Allied nations discussed the creation of a new international monetary system that would support the postwar reconstruction, economic stability, and peace. The Bretton Woods in 1944 resulted in the two most important

²¹⁴ Meredith Crowley, *An introduction to the WTO and GATT*, 27 *ECON. PERSP.* 42 (2003).

international economic institutions: The International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (The World Bank). After the IMF and the World Bank, there was a discussion to develop the third organization focusing on trade. In 1945, after the establishment of the United Nations (UN), multilateral trade negotiations were undertaken under the auspices of the UN Economic and Social Council. The following year, a resolution in favor of initiating International Trade Organization (ITO) and conference about ITO was adopted.²¹⁵

Conference in Geneva in 1947 was to set three objectives: i) draft an ITO charter; ii) schedule on tariff reductions; and iii) prepare a multilateral treaty containing general principles of trade, namely the General Agreement on Tariffs and Trade (GATT).²¹⁶ The countries successfully negotiated to make the GATT enforceable right away without waiting on the final rounds of negotiations to form ITO.

In the 1948 Havana Conference, a charter of the ITO was drafted, but it stalled after the support for ITO waned in the U.S Congress.²¹⁷ President Truman submitted the ITO charter to Congress, but the Republicans won the control of Congress in the 1948 election rejected the ITO formation. In 1950, the Truman Administration announced that it would stop asking for Congress approval. Without the U.S. participation, the ITO would have been greatly weakened; thus, the effort to create the organization was abandoned.

Timeline of GATT and the WTO
1944: After the formation of IMF and the World Bank, there was intention to establish another organization that focused on trade, the International Trade Organization (ITO).
1947: General Agreement on Tariffs and Trade (GATT) was created. Rather than being a formal institution, the GATT is a treaty that governs trade among 23 member countries.

²¹⁵ MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION LAW, PRACTICE, AND POLICY (Third Edition ed. 2015).

²¹⁶ *Id.*

²¹⁷ Crowley, *supra* note 214.

1950: The U.S. officially withdrew from the ITO concept after it failed to seek congressional ratification of the ITO.

1951-86: Periodic negotiating rounds occurred. In the 1980s, the discussion of reforms arises especially in the dispute resolution.

1986-94: The Uruguay Round is launched and concluded later in 1994.

1995: At the conclusion of the Uruguay Round, The WTO is created as successor of the GATT.

2018: The WTO currently consists of 164 members.

Table 3.1: Timeline of GATT and the WTO

Source: Meredith Crowley: "An introduction to the WTO and GATT"

GATT gradually filled the absence of the ITO. GATT is a set of rules to govern trade between the contracting parties and maintained reduced import tariffs for other members. The GATT did not provide a formal institution, but a small GATT Secretariat was formed in Geneva to administer various problems and complaints that might arise among members.²¹⁸ Over the next forty years, more countries signed on the GATT, and more negotiations pursued to further liberalize trade. The continuous negotiation rounds were proven to be successful in reducing tariffs. Tariffs on manufactured products fell from a trade-weighted average of roughly 35% before the creation of GATT to 6.4% at the start of the Uruguay Round.²¹⁹

Year	Place/name	Subjects covered
1947	Geneva	Tariffs
1949	Annecy	Tariffs
1951	Torquay	Tariffs
1956	Geneva II	Tariffs
1960-1961	Dillon Round (Geneva)	Tariffs
1964-1967	Kennedy Round (Geneva)	Tariffs, and anti-dumping measures
1973-1979	Tokyo Round	Tariffs, non-tariff measures, "framework agreements"

²¹⁸ *Id.*

²¹⁹ BERNARD HOEKMAN & MICHEL KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO (1995).

1986-1994	Uruguay Round	Tariffs, nontariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of the WTO, etc
2001	Doha Round	Not concluded

Table 3.2: GATT and the WTO Negotiating Rounds
Source: WTO Website, “The GATT years: from Havana to Marrakesh”
(https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm)

In the early round, the focus of the GATT negotiation was to reduce tariffs.²²⁰ In the 1960s, the Kennedy Round brought the Anti-Dumping Agreement and a section of development under the GATT agreement. The Tokyo Round was the first major attempt to tackle the trade barriers that did not come in the form of tariffs, and to improve the trading system overall.²²¹ The Tokyo Round successfully reduced custom duties to the average tariff on industrial products down to 4.7%.²²² However, the Tokyo Round failed to grips with the fundamental problems such as the dispute settlement system, farm and textile trade that were in the interests of developing countries.

In 1986, the Uruguay Round was initiated. The Uruguay Round was said to be the largest negotiation ever and, most probably, the largest negotiation of any kind in history.²²³ At the beginning of the Uruguay Round, countries were aware of the need for new agreements that would require better institutional mechanisms and a better system for resolving disputes. Based on the lesson from the Tokyo Round where many ‘side agreements’ only enforceable for countries accepting them, negotiations in the Uruguay Round wanted the new agreements came into force and binding to all GATT contracting parties.²²⁴

²²⁰ MATSUSHITA ET AL., *supra* note 215.
²²¹ WTO, THE GATT YEARS: FROM HAVANA TO MARRAKESH, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Nov 20, 2018).
²²² *Id.*
²²³ WTO, THE URUGUAY ROUND, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.
²²⁴ MATSUSHITA ET AL., *supra* note 215.

The Uruguay Round was concluded after seven and a half years of negotiation, almost twice from the original schedule. The negotiation was supposed to end in December 1990, but the disagreement between the U.S. and EU regarding agricultural trade extended the talks. The U.S. and EU settled their differences through the Blair House accord in 1992. It then opened the way to the conclusion of the Uruguay Round. The Draft Final Act included the transitional arrangements, termination of GATT 1947 and the Tokyo Round agreements that covered by the new WTO agreements. Negotiators agreed that WTO would come into force on January 1, 1995. In Marrakesh, the package of agreements was opened for signature. Under the ‘single undertaking’ approach, all agreements annexed to the WTO Agreement were binding on all members as a single body of law.

There are four annexes of the WTO agreement. Annex 1 of the WTO agreement consists of three parts. Annex 1A covers the Multilateral Agreements of Trade in Good for the following agreements:²²⁵

- General Agreements on Tariffs and Trade 1994
- Agreement on Agriculture
- Agreement on the Application on Sanitary and Phytosanitary Measures
- Agreement on Textiles and Clothing
- Agreement on Technical Barriers to Trade
- Agreement on Trade-Related Investment Measures
- Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
- Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
- Agreement on Preshipment Inspection
- Agreement on Rules of Origin

²²⁵ WTO Agreement Establishing the World Trade Organization, Art. 2:2.

- Agreement on Import Licensing Procedures
- Agreement on Subsidies and Countervailing Measures
- Agreement on Safeguards

Annex 1A also includes a General Interpretive Note that if there is a conflict between a provision in the GATT 1994 and another agreement listed in the Annex 1A, the provision of the latter controls.²²⁶

Annex 1B consists of the General Agreement on Trade in Services (GATS) and Annexes. Annex 1C is about agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). Annex 2 specifically covers the new dispute settlement system under the WTO through Understanding on Rules and Procedures Governing the Settlement of Disputes. Annex 3 consists of the Trade Policy Review Mechanism that establishes a review of each WTO members' compliance with WTO Agreements and commitments. Annex 4 is the last Annex which consists of the plurilateral trade agreements:

- Agreement on Trade in Civil Aircraft
- Agreement on Government Procurement
- International Dairy Agreement
- International Bovine Meat Agreement

Plurilateral trade agreements are binding only for the parties that have accepted them.²²⁷

Meanwhile, in 1997, the International Dairy Agreement and the International Bovine Meat Agreement were terminated.²²⁸

²²⁶ MATSUSHITA ET AL., *supra* note 215.

²²⁷ *Supra* note 225, Art. 2:3.

²²⁸ WTO, Deletion of the International Dairy Agreement WT/L/251 and WTO, Deletion of the International Bovine Meat Agreement WT/L/252.

The WTO agreement formally replaced GATT 1947 with the GATT 1994, which is a new and legally distinct agreement.²²⁹ The GATT 1994 consists of the GATT 1947, excluding the Protocol of Provisional Application, as amended by all legal instruments that entered into force under the GATT before 1 January 1995, the date when the WTO agreement came into force.²³⁰ Therefore, the WTO agreement incorporates the GATT as it existed in 1994 rather than the original GATT.

B. The Structure of the WTO

As agreed by the WTO members, the WTO is formally given the legal personality and legal capacity as an international organization.²³¹ To exercise its functions, the WTO must be accorded privileges and immunities.²³² The WTO's general function is to "facilitate the implementation, administration and operation, and further the objectives of the WTO Agreements."²³³ Specifically, the WTO has four tasks: i) to provide forum for negotiations among members for current matters and future negotiations; ii) to administer the dispute settlement system; iii) to administer the Trade Policy Review Mechanism; and iv) to cooperate, as appropriate, with IMF and the World Bank.²³⁴

The WTO has two main governing bodies: The Ministerial Conference and General Council. The Ministerial Conference, as the supreme authority, is composed of representatives of all the Members and meets at least once every two years.²³⁵ In the intervals between meetings of the Ministerial Conference, its function is conducted by the General Council. The General Council

²²⁹ WTO Agreement, Art. 2:4.

²³⁰ MATSUSHITA ET AL., *supra* note 215.

²³¹ *Supra* note 225 Art. 8:1.

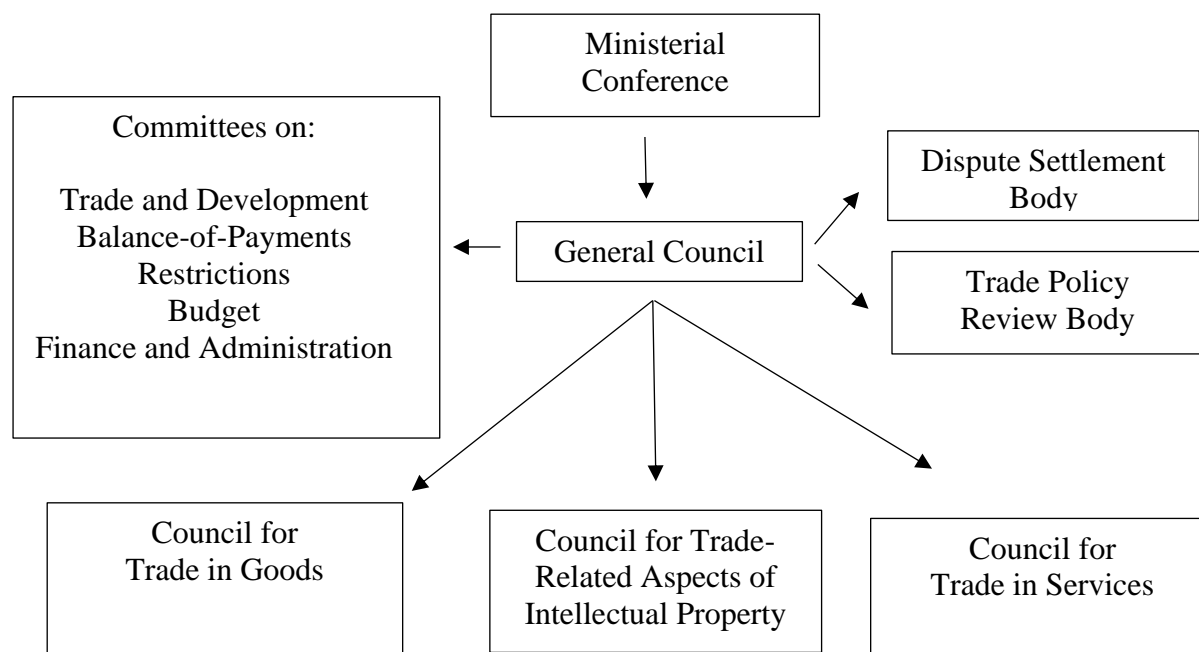
²³² *Id.*, Art. 8:2.

²³³ *Id.*, Art. 3:1.

²³⁴ *Id.*, Art. 3.

²³⁵ *Id.*, Art. 4:1.

is composed of representatives of all the Members and meet as appropriate.²³⁶ The General council discharges as appropriate the responsibilities to the Trade Policy Review Body and the Dispute Settlement Body.²³⁷ Under the guidance of the General Council, there is a Council for Trade in Goods, a Council for Trade in Services, and a Council for Trade Related Aspects of Intellectual Property.²³⁸ The Council for Trade in Goods oversees the implementation of Agreement in Annex 1A and established specific committees to work on issues stated in the Annex 1A. The Council for Services oversees the functioning of GATS. The Council for Trade Related Aspects of Intellectual Property supervises the functioning of TRIPS.²³⁹ The Ministerial Conference also established committees such as a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions, a Committee on Budget, Finance, and Administration.²⁴⁰ The detailed structure of the WTO is explained in Figure 3.1.



²³⁶ *Id.*, Art. 4:2

²³⁷ *Id.*, Art. 4:3 and :4

²³⁸ *Id.*, Art. 4:5.

²³⁹ *Id.*

²⁴⁰ *Id.*, Art. 4:7.

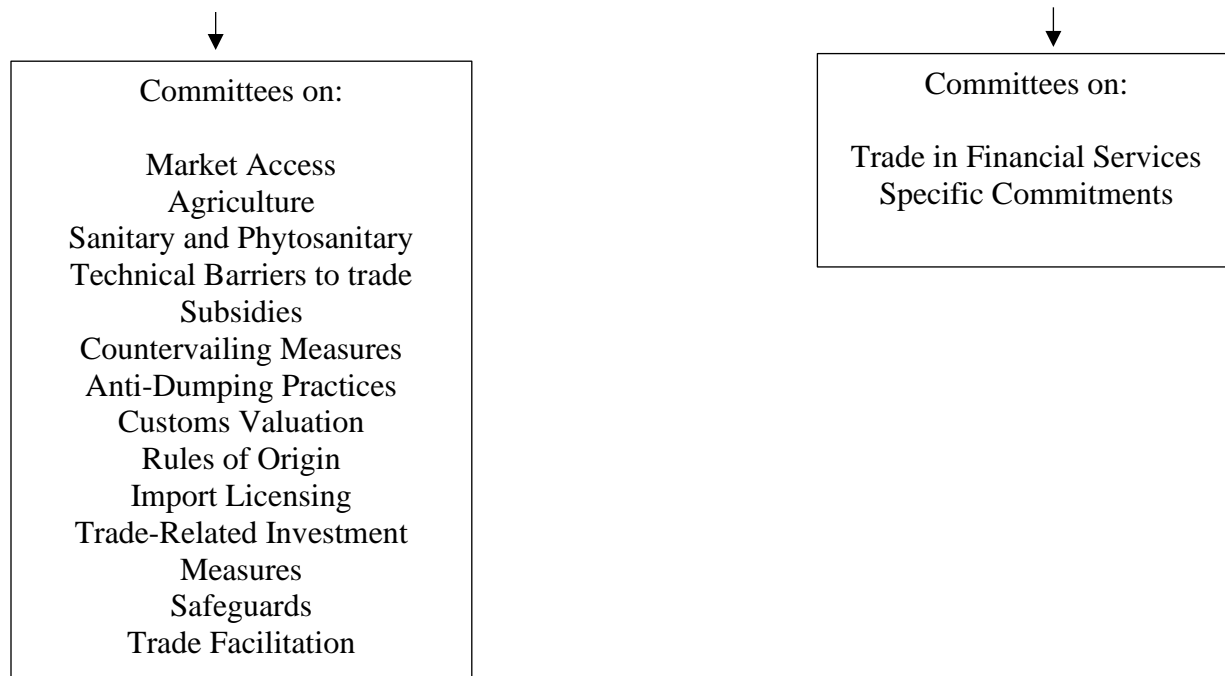


Figure 3.1: WTO Organization Chart

Source: WTO Website, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm

C. Principles of the WTO

The WTO agreements are complex since it covers a wide range of activities. It manages almost every sector from agriculture, textiles and clothing, banking, telecommunications, government purchases, industrial standard and product safety, intellectual property, and more. With so many sectors are regulated, there are some basic principles throughout all of the WTO agreements. These principles are said to be the foundation of the WTO system.

I. Non-Discrimination

One of the basic principles of the WTO is to trade without discrimination. This principle is so important that it is the first section of the GATT. There are two parts of this principle: most favored nation (MFN) and national treatment (NT). MFN is regulated in Article 1 of GATT. Under the MFN principle, countries cannot discriminate between their trading partners. Once a country grants special favor to another country, such as lower tariffs for certain products, this lower tariff

must be given to all other members as well. Thus, MFN status provides trade equality among members by ensuring that a member will not favor other members.

However, some exceptions are allowed, such as the preferential trade agreement and the Generalized System of Preferences (GSP). When a group of countries establishes a preferential trade agreement, they can apply terms of trade as they agreed in the specific trade agreement instead of the WTO agreement. Examples of the preferential trade agreement are the North America Free Trade Agreement (NAFTA) and the ASEAN Free Trade Agreement (AFTA). Parties to NAFTA and AFTA can employ their tariffs as agreed between them only to the countries who sign the agreement, and they do not have to give the same tariff rate to countries that are not a party of the NAFTA and AFTA. GSP, on the other hand, is a program by developed countries granting preferential tariffs to imports from developing countries.

Not only it is against discrimination between the WTO members, but the WTO agreement also rejects the discrimination between foreign products and domestic products. While the MFN states that there cannot be discrimination between WTO members, the NT regulates that the imported and locally produced goods should be treated equally at least after the foreign goods have entered the domestic market. It is important to underline that NT only applies once a product, service, or item of intellectual property has already in the market. Thus, charging customs duty on an import is not a violation of NT, although the domestic product is not charged an equivalent tax.

II. Freer Trade

According to the WTO, the lower trade barriers will increase global trade. Thus, it is well known that the WTO is encouraging a freer trade by lowering trade barriers. The barriers include tariffs, import bans, or quotas that restrict quantities selectively. The WTO provides the platform to negotiate on how to lower the trade barriers between countries. Since the GATT's creation,

eight rounds of trade negotiations have been completed. The first few negotiations focused on lowering tariffs, but by the 1980s, the negotiations expanded to non-tariff barriers and to new areas such as services and intellectual property as well. The WTO also realizes the adjustment needed by a country to lower their trade barriers. Thus, the WTO agreement allows countries to change gradually. Developing countries and the least developed countries are usually given a longer time to fulfill their obligations in opening their market for freer trade.

III. Predictability: Binding and Transparency

As stated by the WTO, the multilateral trading system is an attempt by the government to make the business environment stable and predictable.²⁴¹ When countries join the WTO, they “bind” their commitments such as the tariff rates. A member is also required to publish their tariff schedule and other trade rules as clear and transparent as possible. By having a binding commitment that is published, traders and investors are aware of the regulation, thus providing market security for them. The Trade Policy Review Mechanism (TPRM) is obligated to supervise members’ trade policy.

IV. Fair Competition & Encourage Development

The WTO denies the assumption that it is only a “free trade” institution. The WTO asserts that the system allows tariffs and in some limited circumstances, other forms of protection. The WTO claims that it is a system of rules dedicated to open, fair, and undistorted competition. For example, the rules on non-discrimination such as MFN and NT are in place to ensure fair conditions on trade. It is the same with other WTO agreements such as dumping and subsidies agreement that are designed to provide a fair competition between countries. The WTO agreements attempt to define what is or unfair and how the government can respond to unfair practices.

²⁴¹ WTO, PRINCIPLES OF TRADING SYSTEM, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#seebox (last visited Nov 27, 2018).

As mentioned above, the WTO acknowledges that countries need flexibility in terms of time to implement the system's agreement. Taking that into consideration, the WTO provides special assistance and trade concessions for developing countries, including the transition period, to adjust the unfamiliar or more difficult WTO provisions.

D. Functions of the WTO

As mentioned above, there are four specific tasks of the WTO. Among the four tasks, the two critical tasks of the WTO are to provide a platform for its members to negotiate a trade agreement and to adjudicate a dispute between members.

I. Negotiation

Negotiation is an essential part of the WTO since the WTO itself is born from negotiations. There are several principles in the WTO negotiation. One of the key elements of the WTO negotiation structure is the single undertaking principle.²⁴² The WTO puts this principle as “nothing is agreed until everything is agreed.”²⁴³ Under a single undertaking approach, all members must agree to all aspects of the negotiations resulting in a single package of multilateral commitments that agreed simultaneously and inseparably.²⁴⁴ Thus, this prevents side agreements among some members or on some specific agenda.

The participation principle means that the negotiations are open to all WTO members and observer governments that negotiate or intending to negotiate membership. The negotiations have to be transparent and fully consider the principle of special and differential treatment for developing and least-developed countries.²⁴⁵

²⁴² Sonia E Rolland, *Redesigning the Negotiation Process at the WTO*, 13 J. INT'L ECON. L. 65 (2010).

²⁴³ WTO, HOW THE NEGOTIATIONS ARE ORGANIZED, https://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm (last visited Nov 28, 2018).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

As seen in Table 3.2, there have been nine rounds of trade negotiations under the auspices of the GATT and the WTO. After agreeing to negotiate on a range of subjects and the broad objectives, the latest negotiation round was launched in Doha, Qatar, on November 21, 2001. The negotiating round is also called semi-officially as the Doha Development Agenda because its fundamental objective is to improve the trading prospects of developing countries.²⁴⁶ Facing the Doha Round, the Trade Negotiations Committee (TNC) was established under the authority of the General Council.²⁴⁷ TNC then created subsidiary negotiating bodies to handle individual negotiating subjects such as agriculture, development, dispute settlement, environment, TRIPS, market access, rules negotiations, services, and trade facilitation.²⁴⁸ Negotiations on agriculture and services already started in 2000 and continued in the Doha Round.

The next step of negotiation is to agree on the work program. The work program contains frameworks and other agreements designed to focus the negotiations and raise them to a new level. Since it is complex, the negotiations have progressed in stages in which every stage is to narrow down differences through interim agreement. The task of the negotiations is to find common ground and, ultimately consensus from members.

After agreeing on the work program, including the framework, the next step is to agree on “modalities.”²⁴⁹ According to the WTO, modalities are “the ways or methods of doing something.”²⁵⁰ In the Doha Round, modalities are the blueprints for the final deal. This includes how to cut tariffs and reduce agricultural subsidies and support, together with flexibilities to deal

²⁴⁶ WTO, THE DOHA ROUND, https://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Nov 28, 2018).

²⁴⁷ WTO, THE TRADE NEGOTIATIONS COMMITTEE, https://www.wto.org/english/tratop_e/dda_e/tnc_e.htm (last visited Nov 28, 2018).

²⁴⁸ *Id.*

²⁴⁹ WTO, THE DOHA ROUND TEXTS - INTRODUCTION, https://www.wto.org/english/tratop_e/dda_e/texts_intro_e.htm (last visited Nov 28, 2018).

²⁵⁰ WTO, WHAT ARE “MODALITIES”?, https://www.wto.org/english/tratop_e/dda_e/modalities_e.htm (last visited Nov 28, 2018).

with some sensitivities.²⁵¹ Once the modalities are approved, members will apply the agreed formulas to tariffs on thousands of products and a range of support programs.²⁵² The result will be the “schedules of commitments” that consists of tens of thousands of pages of the final deal.²⁵³

The original aim of the Doha Round was to reach an agreement on almost all subjects of negotiation by 1 January 2005 except for Dispute Settlement Understanding (DSU) and registration system for geographical indications for wines and spirits.²⁵⁴ However, although there were approved modalities in special treatment in services for least-developed countries and modalities for the agricultural and non-agricultural market access, the Doha Round was failed to conclude. This is mainly because the single undertaking principle that requires all members to agree on all subjects in order for the negotiation round to be concluded entirely. After the passing the deadline, there were several attempts to restore the Doha Round, but it still failed

The Timeline
2001: Doha Development Agenda was launched
2003: Cancún ministerial mid-term review: no agreement
2004: “Framework” agreed
2005: Further agreement in Hong Kong Ministerial Conference
2008: The July 2008 package: attempt to break deadlock, some differences narrowed Revised draft modalities in agriculture and non-agricultural products.
2013: Round-the-clock consultations produce ‘Bali Package’

Table 3.3: The Timeline of the Doha Round

Source: WTO Website, https://www.wto.org/english/tratop_e/dda_e/dda_e.htm

²⁵¹ WTO, *supra* note 249.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ WTO, *supra* note 246.

II. *Litigation*

From 1948 to 1958, the GATT dispute settlement system was considered to be quite successful. According to Hudec, there are four factors contributing to success. First, since at that time, the GATT were relatively new, there was a consensus on what it meant and the interpretation.²⁵⁵ Second, the members of GATT was small, and they had similar backgrounds and interests.²⁵⁶ Third, many of the officials dealing with the GATT were personally involved with the GATT creation thus had a great stake in making GATT succeed.²⁵⁷ Fourth, after a careful examination, it was found that the GATT participants were concerned with the fragility of the GATT and tried to not put too much pressure to the GATT by the aggressive invocation of its dispute settlement system.²⁵⁸

However, as time passed, GATT membership increased, and the world economy expanded rapidly, the factors that supported the success of the dispute settlement during the 1950s diminished. Certain nations expressed their unsatisfactory experience with the GATT dispute settlement system.²⁵⁹ Eventually, the reputation of the GATT dispute settlement system declined. From 1959 through 1978, the GATT dispute settlement was only invoked once per year, with a majority of the complaints were brought by the U.S.²⁶⁰ It was criticized that the GATT dispute settlement system was no longer effective mainly because, under the GATT model, a ruling was only enforceable if it was agreed upon by the consensus of GATT members. This model caused major concerns around enforceability because the losing party could block the ruling, therefore making it unenforceable, so that no further action could be taken against the violator of the

²⁵⁵ ROBERT HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1990).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Davey, *supra* note 36.

agreement. Moreover, there was no timing for the GATT dispute settlement; thus, a case could go forever.

Consequently, prior to and during the Tokyo Round, the discussion about changing the dispute settlement system emerged. However, not all GATT members wanted the reform. Thus, the philosophical debate of whether GATT should adopt the adjudication or negotiation approach sparked. The two conflicting viewpoints on how the GATT dispute settlement system should operate were referred to the “legalistic” model, which emphasizes adjudication and “antilegalistic” model, which stresses the negotiation and consensus.²⁶¹ The U.S. was generally perceived as the supporter of the legalistic view. Members such as Japan and the EU were in the antilegalistic view arguing that GATT should only be used to the extent that it facilitates negotiated settlement of trade disputes.²⁶² In part, the different approach between the U.S, Japan, and the EU was because of the domestic traditions with regards to dispute settlement. The U.S. is a more litigious society than Japan, which prioritizes a high premium of consensus. Many analysts who have focused on the GATT dispute settlement system have also underlined the “political flexibility” and “apparent sustainability” as advantages of the GATT model.²⁶³

Although some members supported the old model, the eagerness to build a more legalized system has become more prevalent. The creation of the WTO as a replacement of GATT and its more legalistic dispute settlement system in 1995 is considered as the most notable achievement in the international trade policy field. Compared to other international institutions, the WTO, through its dispute settlement system, has established the core channel to impose international trade law that incorporates a high level of legalization.²⁶⁴ The legalized dispute settlement system

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Steinberg, *supra* note 36.

²⁶⁴ Davis & Sarah, *supra* note 37.

under the WTO provides an enforceable report by the Appellate Body, a panel of seven persons that can only be blocked by a consensus of WTO members, including the prevailing parties. Thus, with its greater legalization, arguably, the new dispute settlement system under WTO model provides “security and predictability”²⁶⁵ to the multilateral trading system and levels the playing field in order to equip members with equal rights.

From the time of its inception, the WTO dispute settlement mechanism functions very much like the court of international trade and has handled more than 500 cases at the time of writing. In order for a member to bring a case in the dispute settlement, the complainant needs to show that the respondent fails to carry out its obligations under the WTO agreements, and it results directly or indirectly in nullification or impairment of a benefit accruing to the complaint under the agreements.²⁶⁶ Moreover, unlike the GATT, the dispute settlement under WTO includes a timeline.

Although it acts like a court, the objective of the dispute settlement system is to encourage mutually acceptable solutions between parties that are consistent with WTO obligations. Retaliatory action should only be the last resort. The flow chart of the WTO dispute settlement system is displayed in Figure 3.2. There are three major phases of the WTO dispute settlement system. The first one is that parties must try to settle the dispute through consultations. The consultation is mandatory and consistent with the preferred objective of the Dispute Settlement Understanding (DSU) to bring members in dispute settle the case without resorting to litigation.²⁶⁷

²⁶⁵ WTO Dispute Settlement Understanding (DSU), Article 3:2 provides as followed: “*The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.*”

²⁶⁶ WTO, LEGAL BASIS FOR DISPUTE,

https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c4s2p1_e.htm (last visited Nov 24, 2018).

²⁶⁷ WTO Agreement, *supra* note 265, Art. 3:7.

If the consultation fails within 60 days after the date of receipt of the request of consultations,²⁶⁸ the second phase is the complaining party may demand that a panel of independent experts to be established to rule on the dispute. The request for the establishment of the panel must be made in writing indicating whether a consultation held, identify the specific measures at issue, and provide a brief summary of the legal basis of the complaint to present the problem clearly.²⁶⁹ The panel consists of three individuals unless disagreed, then the panel can be a maximum of five.²⁷⁰ The WTO Secretariat proposes nominations that meet requirements in terms of expertise and independence²⁷¹ for the establishment of the panel.²⁷² If there is no agreement on the panelist within 20 days, any party may request the Director-General to appoint the panel based on the Director-General authority.²⁷³ When the dispute is between a developing country Member and a developed member country, if the developing country member so requests, the panel should include at least one panelist from a developing country member.²⁷⁴ Moreover, a panelist cannot be from parties in dispute unless agreed by parties.²⁷⁵ Once it is formed, the panel should make an objective assessment of the matter between the disputed parties, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.²⁷⁶ Within 60 days, the panel should submit the final report and its recommendation to the Dispute Settlement Body (DSB).²⁷⁷ The panel also should regularly consult the parties giving them a chance to develop a mutually satisfactory solution.²⁷⁸

²⁶⁸ *Id.*, Art. 4:7.

²⁶⁹ *Id.*, Art. 6:2.

²⁷⁰ *Id.*, Art. 8:5.

²⁷¹ *Id.*, 2:1 and 8:2.

²⁷² *Id.*, Art. 8:6.

²⁷³ *Id.*, Art. 8:7.

²⁷⁴ *Id.*, Art. 8:10.

²⁷⁵ *Id.*, Art. 8:3.

²⁷⁶ *Id.*, Art. 11.

²⁷⁷ *Id.*, Art. 12:8

²⁷⁸ *Id.*

The third phase is applicable only when parties choose to appeal; thus, another review by the Appellate Body is needed. An appeal by the party is limited to the issues of law covered in the panel report and not about the facts of the case.²⁷⁹ Different from the panel that is composed for each dispute, the Appellate Body is permanent, consisting of seven members and appointed for four years. The Appellate Body hears appeals of the panel reports and required to issue its report within 60 to the most 90 days from the date of appeal.²⁸⁰ The Appellate Body may uphold, modify, or reverse the legal findings and conclusion of the panel report.²⁸¹ The report from the Appellate Body will be adopted by the DSB and parties unconditionally.²⁸²

The last stage is the implementation of the recommendation provided by the panel and the Appellate Body in the case of appeal. If a panel and the Appellate Body concludes that the measure in concerned is inconsistent with the covered agreement, it will recommend the member concerned to bring the measure into conformity with that agreement.²⁸³ Additionally, the panel or Appellate Body can also suggest how the member implements the recommendations.²⁸⁴

The DSB is then charged with monitoring the implementation of the recommendation. This also includes the possibility of a countermeasure when the losing party fails to implement the ruling. Within 30 days after the date of adoption of the panel and the Appellate Body report, the Member concerned needs to inform the DSB about its intention to comply with the recommendation. If immediate compliance is impractical, it can be done within “the reasonable period of time.”²⁸⁵ The reasonable period of time could be²⁸⁶: i) the period of time proposed by the

²⁷⁹ *Id.*, Art. 17:6.

²⁸⁰ *Id.*, Art. 17:5.

²⁸¹ *Id.*, Art. 17:13.

²⁸² *Id.*, Art. 17:14.

²⁸³ *Id.*, Art. 19:1.

²⁸⁴ *Id.*

²⁸⁵ *Id.*, Art. 21:3

²⁸⁶ *Id.*, Art. 21:3(a)-(c).

member concerned and approved by the DSB; ii) in the absence of approval by the DSB, the period of time needs to be mutually agreed by parties within 45 days after the adoption of the panel or the Appellate Body report; iii) a period of time determined through binding arbitration within 90 days after the date of adoption of recommendations and rulings.

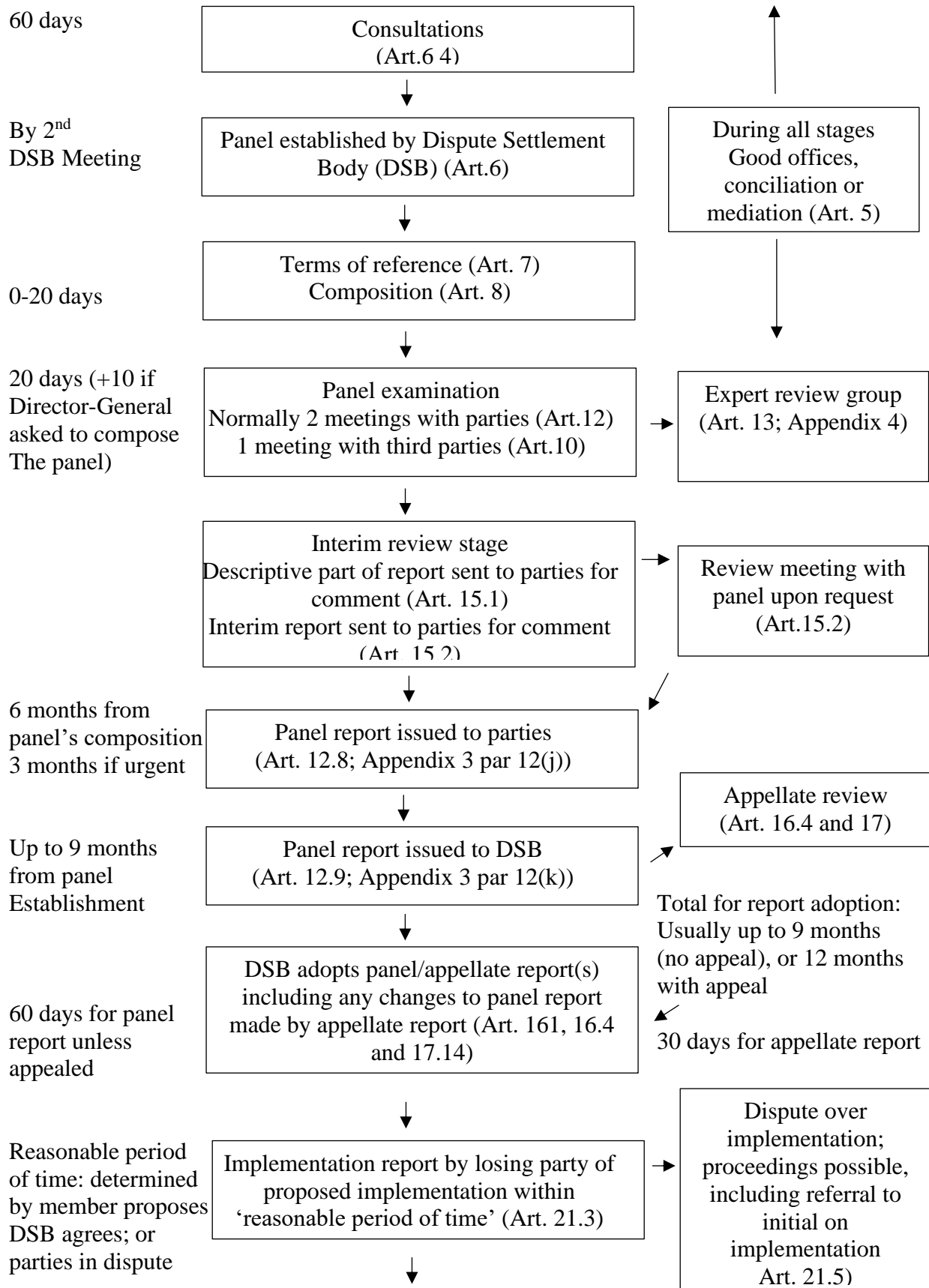
If the recommendation by the panel or the Appellate Body is not implemented within the reasonable period of time, the prevailing party is entitled to ask for compensation. If no satisfactory compensation is agreed within 20 days of the expiration of the reasonable period of time, the prevailing party can request DSB authorization to retaliate.²⁸⁷ The retaliation is in the form of suspensions concessions. In suspending a concession, the prevailing party should first seek to suspend concessions or other obligations with respect to the same sector where there has been a violation.²⁸⁸ If it is not practicable or effective to suspend concessions or other obligations in the same sector, the prevailing party may seek other sectors under the same agreement if practicable,²⁸⁹ otherwise it can seek from another covered agreement.²⁹⁰ As mentioned above, the retaliation is the last resort of every dispute in the WTO. The report by the panel and the Appellate Body, as supervised by the DSB, always recommends the Member concerned to strike down the law that is contrary to the agreement rather than go through compensation or retaliation.

²⁸⁷ *Id.*, Art. 22:2.

²⁸⁸ *Id.*, Art. 22:3(a).

²⁸⁹ *Id.*, Art. 22:3(b).

²⁹⁰ *Id.*



agree; or arbitrator

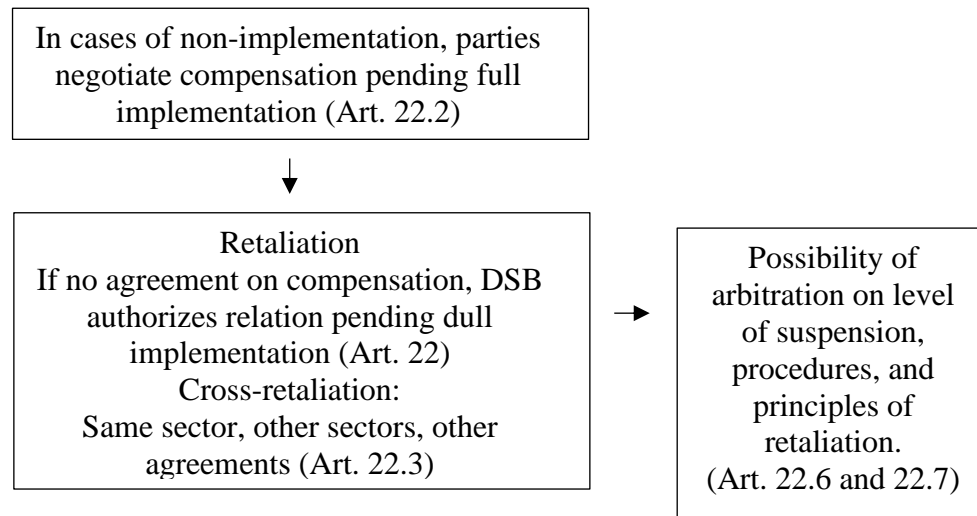


Figure 3.2: Flow Chart of WTO Dispute Settlement Process

Source: WTO Website

https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm

2. AGRICULTURE IN THE WTO: AGREEMENT ON AGRICULTURE

Although absent from international trade discussions for some time, as the importance of agriculture became more acknowledged and the interests of countries increasingly resulted in conflict, the need to bring agriculture trade into the international legal order became undeniable. After a lengthy debate on multilateral trade negotiation in the Uruguay Round, agricultural trade finally was brought up to the international trade law discipline through the Agreement on Agriculture.

A. Agriculture on The Uruguay Round

Debates on agriculture trade laws and policies related to world trade are not new. Some have argued that agriculture should be treated the same as other areas of world trade. On the other hand, others have stated that agriculture is a sector that cannot be treated the same as other trade areas because of the complex nature of its multifunctionality. Not only agriculture has trade

concerns, but also there are some non-trade concerns. Some of the important non-trade considerations are food security, rural development, and environmental protection.²⁹¹

Because of this contention, the agriculture sector was excluded from the first four negotiation rounds of the GATT. By the fifth round, which was the Dillon Round, member countries agreed on the oilseed tariff, though nothing beyond it.²⁹² During the next two rounds, the Kennedy Round and the Tokyo Round, the U.S. demanded that an agreement on agriculture be required for concessions in other sectors; however, because an agreement on agriculture could not be achieved, and for the sake of other important sectors, agriculture was eventually excluded in order to establish concessions in other areas.²⁹³

Prior to the Uruguay Round, agriculture was still granted a “special status” within the GATT, and domestic farm programs were regarded as sacred.²⁹⁴ The agricultural products were exempted from some GATT regulations. For example, GATT Article XI:2(a) to (c) exempts agricultural products from the prohibition of quantitative restrictions in the case that they are necessary to support government programs destined to control the production or marketing of a domestic product or to prevent shortages of foodstuffs. GATT Article XVI that prohibits export subsidies, also includes an exception for primary products.

At this time, the U.S. still maintained a measure that restricted some of the agricultural products. When the U.S. restricted imports of milk, the Netherlands brought a case to the GATT. The panel found that the U.S. was in violation of Article XI:2, but the U.S. declined to strike down the measure. In fact, the U.S. Congress mandated a continuation and even expansion of these

²⁹¹ Fiona Smith, “Multifunctionality” and “Non-Trade Concerns” in the Agriculture Negotiations, 3 J. INT’L ECON. L. 707 (2000).

²⁹² McCalla, *supra* note 41.

²⁹³ *Id.*

²⁹⁴ A. J. Rayner, K. A Ingersent & R. C. Hine, *Agriculture in the Uruguay Round: An Assessment*, 103 THE ECON. J. 1513 (1993).

measures. Many contracting parties saw the possibility of the U.S. terminating the GATT if the ruling was enforced, thus, the GATT contracting parties legalized the illegal U.S. measures by granting a waiver pursuant to the GATT Article XXV.²⁹⁵ As expected, this trend continued, and even the U.S. that was usually litigious did not immediately challenge the Common Agricultural Policy (CAP) of EU.²⁹⁶

However, after more agricultural disputes arising in the GATT, at the 1982 Ministerial Meeting, contracting parties of the GATT agreed to negotiate agricultural reform. Stated in the November 1983 Ministerial Declaration, contracting parties would negotiate “to bring agriculture more fully into the multilateral trade system.”²⁹⁷ The willingness of major countries to negotiate agricultural reform ensured that the agriculture sector had a high profile in the Uruguay Round.²⁹⁸

The Uruguay Round marks the first time that agriculture was comprehensively included in the negotiation agenda. As with previous experiences, deliberating on agriculture was complex for the WTO, and this became all more evident as the round progressed. Thus, from the beginning, there was already pessimism regarding the conclusion of the Uruguay Round. When the deadline for completion passed, the Uruguay Round appeared to be a failure. Over this period, the success or failure of the Uruguay Round appeared to depend on a settlement on agriculture. As anticipated, the delay was caused by major countries disagreeing over agricultural trade.²⁹⁹

The 1986 Ministerial Declaration on the Uruguay Round stated three objectives of the negotiation. The negotiation aimed to: i) improving market access through the reduction import barriers; ii) increasing disciplines on the use of all direct and indirect subsidies and other measures

²⁹⁵ MATSUSHITA ET AL., *supra* note 215.

²⁹⁶ *Id.*

²⁹⁷ GATT L/5424, MINISTERIAL DECLARATION ADOPTED ON 29 NOVEMBER 1982 (1982).

²⁹⁸ Rayner, Ingersent, and Hine, *supra* note 294.

²⁹⁹ Minju Kim & Hyo-young Lee, *supra* note 43.

affecting directly or indirectly agricultural trade; and iii) minimizing the adverse effects of sanitary phytosanitary regulations and barriers can have on trade in agriculture.³⁰⁰ The agricultural negotiation was dominated by the Quad, the most powerful consensus brokers, consisting of the U.S, Canada, EU, and Japan. In addition to the Quad, the Cairns Group, a coalition of some agricultural exporting countries, surprisingly also had a role in the negotiation. In 1986-1987, the initial proposals by each country and the Cairns Group were circulated. By 1990, agricultural offers were submitted by the Quad and the Cairns Group, as appeared in Table 3.4.

Policy Area	Country/Group of Countries				
	The U.S.	The Cairns Group	Canada	EU	Japan
<i>Internal support Commitments</i>	Reduction by no less than 75% for commodity-specific support and 30% for non-commodity specific support	Reduction by less than 75%	Reduction by 50%	Reduction by 30% for AMS commodities, 10% other commodities	Reduction by 30% in real terms
Implementation period	10 years from 1991-1992	10 years from 1991-1992	10 years from 1991-1992	10 years from 1986	10 years from 1986
Base year	1986-1988	1988	1987 (crops), 1988 (livestock)	1986 (after 'credit taken)	1986 and 1988
Border protection Modality	Tariffication	Tariffication	Tariffication	Tariffication with conditions	Tariffication not basic approach
Products to be tariffied	All products	All products	All products except those subject to	All products except table wine, dried	

³⁰⁰ GATT, MINISTERIAL DECLARATION ON THE URUGUAY ROUND (1986).

			nan-tariff measures explicitly allowed by the new or revised Article XI: 2	grapes, processed cherries and some fruits and vegetables	
Export competition Commitments					Elimination of export subsidies and export restrictions

Table 3.4: Agricultural offers 1990

Source: Zuhair Hassan, *Agreement on agriculture in the Uruguay Round of GATT: from Punta del Este to Marrakesh*

As seen above, despite some differences, there were also common grounds between the countries. The negotiation was particularly tough for Japan that is known for its extreme sensitivities over the agricultural sector. Before submitting the offer, in the initial proposal, Japan raised the issue of food security. Japan’s position was reasonable, considering its level of food self-sufficient is only 39%.³⁰¹ Thus, on the offer, Japan wanted to abolish the export restrictions. In addition to the low level of food self-sufficient, wheat and dairy products are sensitive products in Japan. Rice is even considered a sacrosanct product in Japanese politics.³⁰² Thus, Japan made an extremely difficult political decision to open the market for the agricultural products including rice.³⁰³

³⁰¹ Schoenbaum, *supra* note 30.

³⁰² Ministry of Foreign Affairs of Japan, JAPAN’S CONTRIBUTION IN THE URUGUAY ROUND NEGOTIATION, <https://www.mofa.go.jp/policy/economy/uruguay/mark.html> (last visited Nov 30, 2018).

³⁰³ Kazuhito Yamashita on his work “*Japanese Agricultural Trade Policy and Sustainable Development*” best elucidates the difficulty of the agriculture negotiation for Japan. While negotiating in the Uruguay Round, the Japanese Diet had twice passed resolutions that prohibited a single grain rice from entering the Japanese market. At 4 o’clock in the morning, just few hours before the Uruguay Round was concluded, the Japanese Prime Minister announced to the nation on the TV that the government had finally accepted opening up the domestic market to foreign rice under the tariff quota required by the special treatment of rice with regards to tariffication. In the same year, Japan had an extraordinarily poor harvest because of cold weather producing less than 26% of rice than in a normal year. The general perception was opening the Japanese rice market was inevitable. Without the poor harvest, there might have been a different outcome to the negotiations.

With the anticipated time frame became unfeasible, the countries conducted intensive consultations during the last three quarters of 1991.³⁰⁴ In November 1991, negotiators achieved significant progress in clarifying the technical issues and identifying political options.³⁰⁵ However, the U.S. and the EU remained different mainly about the volume of reductions on export subsidy. Most of the year 1992, the U.S. and EU were extensively negotiating, and in November 1992, the U.S. and the EU signed the Blair House Agreement that settled their differences concerning export competition and domestic support.³⁰⁶ It is said that the Blair House Agreement paved the way for the conclusion of agricultural negotiation. The Uruguay Round was finally completed after seven and a half years of negotiation, which was four years after the initial deadline. The WTO members agreed on bringing agriculture under WTO law through the Agreement on Agriculture.³⁰⁷

B. Agreement on Agriculture

Known as the three pillars, the focus of the Agreement on Agriculture (AoA) are domestic support, market access, and export restrictions. The AoA contains commitments from members to reduce the distortion on agriculture trade caused by high tariffs, domestic support, and export subsidies.

I. Market Access

As aforementioned, market access was the priority of the agricultural negotiation, and it is also the first issue addressed in the AoA. There are two goals with regard to market access. The first is to employ the tariffs-only principle in which members need to tariffy their agricultural products. The conventional wisdom is that tariffs are the WTO's trade-restrictive measures of

³⁰⁴ Zuhair A. Hassan, *Agreement on agriculture in the Uruguay Round of GATT: from Punta del Este to Marrakesh*, 15 AGRICULTURAL ECON. 29 (1996).

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ Rayner, Ingersent, and Hine, *supra* note 294.

choice due to its transparency. Article 4.2 of AoA, as follow, specifically prohibits the use of non-tariff barriers (NTBs) with some exceptions.

“Member shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary custom duties, except as otherwise provided for in Article 5 and Annex 5.”

The footnote to AoA Article 4.2. defines the NTBs as followed:

“These measures include quantitative import restrictions, variable imports levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary custom duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measure maintained under . . . non-agriculture-specific provisions . . . of the other Multilateral Trade Agreements in Annex IA to the WTO Agreement.”

One of the challenges of the tariffication is “dirty tariffication.”³⁰⁸ To calculate the tariff equivalent of a non-tariff-measure, members used the price-gap method; the price gap method is that the new tariff equals the difference between the domestic market price to the world market price.³⁰⁹ The pertinent base period was the years 1986-1988 that were characterized by a sharp price gap between the domestic price and the world market price.³¹⁰ Consequently, very high tariffs are very common.

This is why conversion to tariffs-only principle does not necessarily improve the market access if members still impose high tariffs. Thus, the second goal is to reduce the newly calculated tariff lines. According to the Modalities Agreement, the developed countries agreed to reduce their overall tariffs by 36%, and by at least 15% for any product category within the implementation period from 1995-2000. Developing countries, on the other hand, reduce the overall tariffs by 24%

³⁰⁸ MELAKU GEBOYE DESTA, LAW OF INTERNATIONAL TRADE IN AGRICULTURAL PRODUCTS, FROM GATT 1947 TO THE WTO AGREEMENT ON AGRICULTURE (2002).

³⁰⁹ *Id.*

³¹⁰ *Id.*

with a minimum of 10% within the same period of time. The least developed countries were not required to enter the reduction commitment.³¹¹

Removing quotas through tariffication could potentially create the danger that pre-existing market access for exports would be lost, especially when and if tariffication led to prohibitively high tariffs. Thus, to avoid this issue, the WTO members need to guarantee minimum market access based on the past market penetration through import-favoring tariffs quotas. Based on the Modalities Agreement, in the case that an imported product had less than 5% of market share in the past, then the quota had to be calculated so as to satisfy at least a 3% market of domestic consumption in the base period 1986-1988.³¹² Later, the market access had to be increased to at least 5% by the end of the implementation period in 2000.³¹³ If the imported product had 5% or more of market access historically, the percentage had to be preserved and increased over the implementation period.³¹⁴ Moreover, any expansion of access opportunities under the tariff quota system has to be provided on an MFN basis.³¹⁵

As stated in Article 4.2 above that there is a broad exception of the tariffication found in Annex 5 and Article 5 of the AoA. Annex 5 allows under certain conditions a special treatment of two categories of products. The first products are products being subject to the special treatment due to its non-trade concerns such as food security and environmental protection. The second agricultural products are “predominant staple in the traditional diet of a developing country

³¹¹ WTO, MODALITIES FOR THE ESTABLISHMENT OF SPECIFIC BINDING COMMITMENTS UNDER THE REFORM PROGRAMME (1995), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiV7v3xkIDfAhXGITQIHfrFBcUQFjAAegQIBhAC&url=https%3A%2F%2Fwww.wto.org%2Fenglish%2Ftratop_e%2Fagric_e%2F1993_ur_modalities_w24_e.pdf&usg=AOvVaw1MHY1yHxlnQAdb_ma-C5vH (last visited Dec 1, 2018).

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

Member.” Japan, Korea, and the Philippines reserved the special treatment for rice while Israel used the option for sheep meat and cheese.³¹⁶ Japan later dropped the special treatment for rice.³¹⁷

The exception in Article 5 of AoA is the Special Agriculture Safeguard (SSG) Provision that is available for all members of the WTO, though must meet some requirements first. In order for a government to utilize the Special Safeguard provisions, there are two requirements. First, the SSG can only be used on products that were tariffed.³¹⁸ Second, SSG can only be utilized if the government reserved the right to do so under their schedules of commitments on agriculture. The SSG, in general, allows a member to either: i) temporarily restrict imports of a product; ii) impose quota; or iii) increase in tariffs above the bound rate, if the country’s domestic industry is injured or threatened with injury as a result of a surge in imports.

There are two ways to decide whether a surge in imports exists. The first is based on the volume of imports. According to the SSG, the remedies above are available, provided the yearly volume of imports in any given product is more than the threshold level of 105-125% of the import volumes of the preceding three-year period.³¹⁹ The second alternative is based on the prices dropped. The SSGs may be used if a product’s import prices drop below a certain trigger price; the threshold is defined by the average price in the three years period 1986-1988.³²⁰ For example, undercutting the trigger prices by 40% may allow the member to impose an additional 10% duty surcharge while undercutting by 60% would justify a 20% surcharge.³²¹ Currently, there are thirty-

³¹⁶ MATSUSHITA ET AL., *supra* note 215.

³¹⁷ *Id.*

³¹⁸ WTO Agreement, *supra* note 40 Art.5:1.

³¹⁹ *Id.*, Art. 5:1(a).

³²⁰ *Id.*, Art. 5:1(b).

³²¹ Jai S. Mah, *Reflections on the Special Safeguard Provision in the Agreement on Agriculture of the WTO*, 33 J. WORLD TRADE 197 (1999).

nine WTO members that reserve the right to utilize SSG with Switzerland reserving for 961 products and Norway with 581 products.³²²

II. Domestic Support

Besides tariffication and further reducing the tariffs, another commitment contained in the AoA is to reduce domestic support in favor of domestic agricultural producers. Whereas the AoA does not define the term “domestic support,” it employs the technical language (subsidies) defined in the SCM Agreement. Thus, part IV of the AoA covers all financial contributions or income support measures by a member that confer a benefit to a specific recipient.³²³ The domestic support reduction commitments of each member are included in part IV of each country’s schedule.³²⁴

There are three types of subsidies: the amber box, the blue box, and the green box. The amber box covers the support measures that are trade-distorting, such as market price supports. The blue box captures the support measures that are only allowed if they are decoupled from production while the green box is permitted subsidy because it is viewed as no or minimal effect of trade-distorting.

The objective of the AoA is to reduce the subsidies in the amber box. The first step to reduce the trade-distorted domestic support is to measure the aggregate support itself. The WTO members agreed to a measurement formula called Aggregate Measurement of Support (AMS).

Article 1(a) of AoA defines AMS as:

“the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favor of agricultural producers in general.”

³²² WTO, SPECIAL AGRICULTURAL SAFEGUARD G/AG/NG/S/9/REV.1 (2002).

³²³ The term “subsidy” is used several times in the AoA. For example, Art.3.1 states that Part IV of each Member’s Schedule constitutes commitments “limiting subsidization.” Similarly, AoA Annex 3 lists support measures that include price support or direct payment “or any other subsidy.”

³²⁴ WTO Agreement, *supra* note 40, Art. 6:1.

There are two types of AMS. The first one is product specific that is calculated for every product receiving one of the three different types of domestic support: i) market price support; ii) non-exempt direct payment; and iii) other non-exempt measures.³²⁵ The second type is non-product specific. If the calculation of the AMS is impracticable, the member should use the Equivalent Measurement Support (EMS). The “total AMS,” defined as the sum of the product-specific AMS, non-product specific AMS, and the EMS,³²⁶ serves as a benchmark for maximum support at the end of the implementation period.³²⁷ Members agreed to reduce their total AMS by 20% by the end of the implementation period 2000. Developing countries committed to reduce their total AMS by 13.3% over nine years while least developed countries are not required to fulfill any reduction commitments.

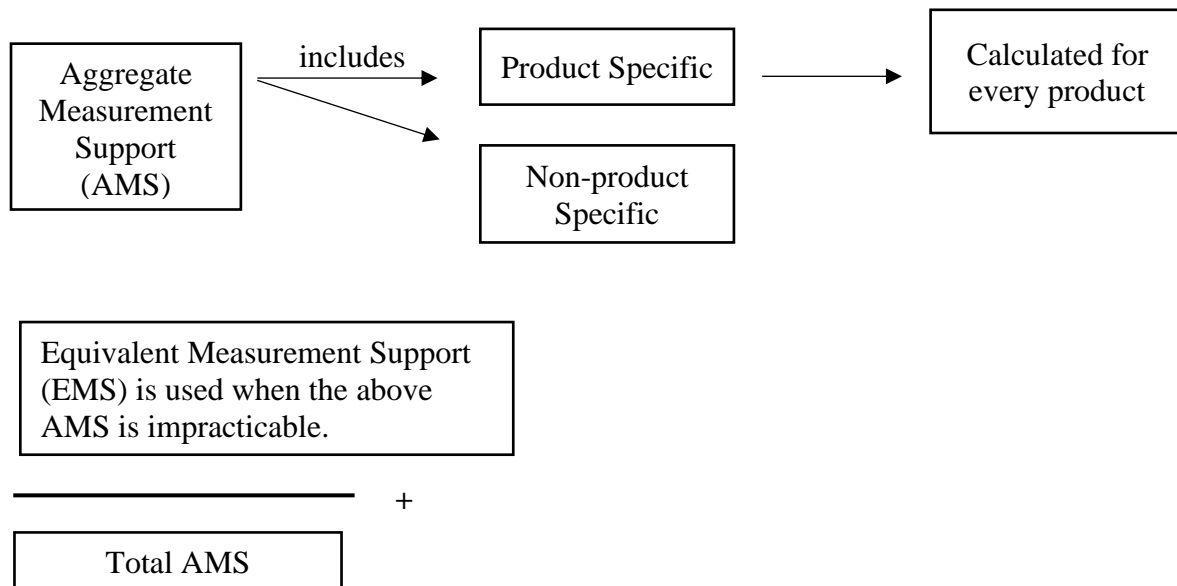


Figure 3.3: AMS Formula
Source: WTO Agreement on Agriculture

³²⁵ *Id.*, Annex 3.8.

³²⁶ *Id.*, Art. 1(h).

³²⁷ *Id.*, Annex 3.8.

Several measures are exempt from AMS calculations. The support measures need not be included in the calculation of the AMS if the product-specific does not exceed 5% of the overall value of the production of that agricultural production in the year concerned. The same with non-product specific, it will be exempted if the support does not exceed 5% of the total productions' value.³²⁸ Whereas for developed countries the *de minimis* level is 5%, the level for developing countries is 10%.³²⁹

In addition to exemption above, the blue box subsidies and the green box subsidies are excluded from AMS calculations. Similarly, investment subsidies and agricultural input subsidies of developing countries are not required to be counted in the AMS to encourage agricultural and rural development.³³⁰ Concerning the blue box support measures, Article 6.5 of AoA support measures that fall under the blue box are:

“[d]irect payments under production limiting programmes shall not be subject to the commitment to reduce domestic support if: (i) such payments are based on fixed area and yield; or ii) such payments are made on 85% or less of the base level of production; or iii) livestock payments are made on a fixed number of head.”

The reason being that blue box measures are not required to be reduced because, arguably, it requires farmers to limit production. Generally, as regulated by the AoA, direct payments under production limiting programs are excluded from the calculation of the current total AMS.³³¹

The green box is for supporting measures that have no or minimal trade-distorting effects. Annex 2 paragraph 1 of AoA specifically states that supporting measures can be qualified for the green box if:

³²⁸ *Id.*, Art. 6.4.

³²⁹ *Id.*, Art. 6:4(b).

³³⁰ *Id.*, Art. 6.2.

³³¹ *Id.*, Art. 6.5(b).

- (a) the support in question shall be provided through a publicly funded government programmes (including government revenue foregone) not involving transfers from consumers; and,*
- (b) the support in question shall not have the effect of providing price support to producers.*

In addition to the conditions above, Government Services Programmes with conditions are allowed under Annex 2 paragraph 2 of AoA. Government Services Programmes covered by this provision fall into two groups: government programs do not involve direct payments and involve direct payments. Examples of the programs that do not involve direct payments are certain general services³³², public stockholding for food security purposes,³³³ and domestic food aid.³³⁴ Direct payments that fall under the green box are decoupled income support, income insurance and income safety-net programs, payments for relief from natural disasters, structural adjustments assistance, payment under environmental programs, and payments under regional assistance programs.³³⁵

III. Export Competition

In addition to the two pillars of market access and domestic support, the last pillar of the AoA is the export competition i.e. export subsidies. There is a different approach between the use

³³² *Id*, Annex 2 para. 2. Policies under the general services involve expenditures (or revenue foregone) in relation to programs that provide services and benefits to agricultural and rural community. The programs include but are not restrict to the following list: i) research in connection with environmental programs and relating to a particular product; ii) pest and disease control; iii) training services; iv) extension and advisory services; v) inspection services; vi) marketing and promotion services, and vii) infrastructural services.

³³³ *Id*, Annex 2 para. 3. Some conditions on this program is that the public stockholding for food security purposes forms an integral part of a food security program identified in the national legislation. The volume and accumulation of the stocks need to correspond to predetermined targets related solely to food security. Moreover, the process of stock accumulation and disposal have to be financially transparent. The food purchases by the government must be made at current market prices and sales from food security stocks must be made at no less than the current domestic market price for the product and quality in questions.

³³⁴ *Id*, Annex 2 para. 4. Eligibility to receive the food aid must be subject to clearly defined criteria related to nutritional objectives. The aid must be in the form of direct provision of food to those in concerned or to allow eligible recipients to buy food either at market or at subsidized prices. Similar to the requirement of previous services, the financing and administration must be transparent.

³³⁵ *Id*, Annex 2 paras. 2-13.

of export subsidies in the general subsidy regime regulated by the SCM Agreement and in the AoA. The AoA allows certain export subsidies under some conditions. First, members have to list all export subsidies in their schedule separately for each agricultural product. Second, a member may only use export subsidies listed in AoA Article 9.1. Lastly, a member may not exceed the commitment they made with regard to both the quality and quantity of the scheduled subsidies.

The SCM that regulates the general subsidy regime, on the other hand, prohibits the use of all types of export subsidies.³³⁶ However, in the *US-Upland Cotton*, the Appellate Body confirmed that the SCM Agreement should be used for guidance in interpreting AoA provisions when appropriate.³³⁷ Thus, they are not mutually exclusive per se but rather both agreements display the remaining specialty of agricultural trade in the WTO system.³³⁸

Pursuant to article 1(e) of AoA, export subsidies are all subsidies contingent upon export performance, although there is no exact definition of “contingent upon export performance.”³³⁹ Article 9.1 of AoA lists six different kinds of export of subsidies that are allowed but subject to reduction:³⁴⁰

- a) *the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance;*
- b) *the sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than comparable price charged for the like product to buyers in the domestic market;*
- c) *payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the*

³³⁶ WTO SCM Agreement, Art. 3: “Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: (a) subsidies contingent, in law or in fact, whether solely or as one of several conditions, upon export performance.”

³³⁷ WTO Appellate Body Report *US-Upland Cotton*, para. 571.

³³⁸ DESTA, *supra* note 308.

³³⁹ WTO, *supra* note 40, Art. 1(e).

³⁴⁰ *Id.*, Art. 9.1.

agricultural product conferenced or on an agricultural product from which the exported product is derived;

- d) the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight;*
- e) internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favorable than for domestic shipments;*
- f) subsidies on agricultural products contingent on their incorporation in exported products.*

The wording of the provision makes it clear that the listed measures, without any need for further examination, are export subsidies.³⁴¹

As mentioned above, the members need to include the export subsidies commitments in the member's schedule. Article 9.2 of the AoA states that if a member indicates commitment levels by budgetary outlay, a member needs to indicate the maximum amount of such subsidies for each agricultural product or product group per year.³⁴² In the case of export quantity reduction commitments, a member needs to identify the maximum quantity of each agricultural product receiving a subsidy.³⁴³ Members also agreed to reduce the outlays and quantities by 36% and 21% respectively over a six-year period commencing in the year 1995.³⁴⁴ The base period was the year 1986 to 1990.³⁴⁵ Developing countries had the flexibility to implement the reduction commitments over a period of up to 10 years, whereas the least developed countries were exempt from the reduction commitments.³⁴⁶ In the WTO Ministerial Conference in Nairobi, developed members

³⁴¹ MATSUSHITA ET AL., *supra* note 215.

³⁴² WTO, *supra* note 40, Art. 9.2.

³⁴³ *Id.*

³⁴⁴ WTO, MODALITIES AGREEMENT MTN.GNG/MA/W/24 (1993).

³⁴⁵ *Id.*

³⁴⁶ *Id.*

must immediately eliminate the remaining scheduled export subsidy entitlements as of 2015 while developing countries must eliminate the export subsidy by the end of 2018.³⁴⁷

Besides the export subsidies, there is a brief statement with regard to export prohibitions in the AoA. Agricultural export restrictions are a policy area that remained “under-regulated” in the Uruguay Round.³⁴⁸ While most of the regulation is about the restriction on limiting agricultural imports, there is a minimal rule about export restrictions. In principle, GATT prohibits any quantitative restriction both for imports and exports. However, Article XI:2 of GATT permits:

- a) *Export prohibitions or restrictions temporarily applied to prevent relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;*
- b) *Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;. . .*

Article 12 of the AoA is in the same tone with GATT Article XI:2 that permits export restrictions.

Article 12 of the AoA states that:

1. *Where any Member institutes any new export prohibition or restriction on foodstuffs in accordance with paragraph 2(a) of Article XI of GATT 1994, the Member shall observe the following provisions:*
 - a) *the Member instituting the export prohibition or restriction shall give due consideration to the effects of such prohibition or restriction on import Members’ food security;*
 - b) *before any Member institutes an export prohibition or restrictions, it shall give notice in writing, as far in advance as practicable, to the Committee on Agriculture . . . , and shall consult upon request, with other member having a substantial interests as an importer with respect to any matter related to the measure in question. . .*
2. *The provisions of this Article shall not apply to any developing countries Member, unless the measure is taken by a developing country Member which is a net-food exporter of the specific foodstuff concerned*

³⁴⁷ WTO/WT/MIN(915)/45/WT/L/980, EXPORT COMPETITION: MINISTERIAL DECISION OF 19 DECEMBER 2015.

³⁴⁸ Giovanni Anania, *Agricultural Export Restrictions and the WTO: What Options Do Policy-Makers Have for Promoting Food Security?*, International Centre for Trade and Sustainable Development Working Paper, Geneva (2013).

However, there has been a notion of introducing more stringent WTO rules for export restrictions, especially after the severe food price spike of 2007-2008. In 2008, the rice market experienced volatility, unlike any seen in modern history.³⁴⁹ The crisis can be dated to an announcement made by India, the world's largest rice exporter, to ban the export of non-basmati rice crops.³⁵⁰ This decision shocked both rice-importing and rice-exporting nations. The Philippines, the world's largest rice importer, was sent into a panic. Thailand, another major rice exporter, put the world into another shock when it petitioned for the creation of an Organization of Rice Exporting Countries to regulated supplies and prices in a cartel-like system resembling Organization of the Petroleum Exporting Countries (OPEC).³⁵¹ Although the organization was not established, the announcement alone was enough to raise the market price even more. During the first four months of 2008, the price of a ton of rice on the world market went from \$300 to \$1,200.³⁵² In mid-May of 2008, the price started to decrease when Japan and the U.S. announced that Japan was allowed to re-export the American rice that held as a reserve in Japan to the Philippines.³⁵³ However, Japan never really released rice to the Philippines.³⁵⁴ In early June, the Philippines finally received the rice from the Viet Nam and no longer needed the rice held by Japan. Although the price started to drop, much damage remains. Governments and ordinary

³⁴⁹ Steven Menelly, *THE RICE CRISIS OF 2008: A LESSON IN MISMANAGEMENT* (2016), <http://hir.harvard.edu/article/?a=13124> (last visited Dec 9, 2018).

³⁵⁰ *Id.*

³⁵¹ Dan Charles, *HOW FEAR DROVE WORLD RICE MARKETS INSANE* (2011), <https://www.npr.org/sections/thesalt/2011/11/02/141771712/how-fear-drove-world-rice-markets-insane> (last visited Dec 2, 2018).

³⁵² *Id.*

³⁵³ Under the AoA market access, Japan needs to provide minimum market access to the U.S. rice. Thus, Japan allows the U.S. rice to enter the Japanese market. Since Japan did not really use the U.S. rice, Japan held it as a reserve. Under the WTO agreement, a country is not allowed to re-export a product unless the exporting country allows them to do so. After the discussion between the U.S. and Japan, the U.S. agreed to allow Japan to re-export the U.S. rice, and Japan also agreed to release the reserve. However, although the agreement reached, Japan never released its rice to the Philippines.

³⁵⁴ See: Tom Slayton, *The "Diplomatic Crop", or How the US Provided Critical Leadership in Ending the Rice Crisis*, in *THE RICE CRISIS: MARKETS, POLICIES AND FOOD SECURITY* 393 (2010).

consumers cannot be confident that the global food system will not face the crisis again, especially after the market psychology had completely changed.³⁵⁵

Since the rice crisis, the term “food security” has become an integral part of the WTO negotiations. Japan, especially that is very dependent on the importation of food products, wants that export restriction to be subjected to the same level of import restrictions, such as more substantial and transparent communication.

3. DOES AGREEMENT ON AGRICULTURE CREATE FAIR TRADING SYSTEM?

Notwithstanding the claim by the WTO that it is not only a free trade institution but also an organization that promotes development for less developed countries, many of the developing countries rejected the notion. Especially in the agriculture sector, developing members soon claimed there were only slight improvements in the agricultural trade for them.³⁵⁶ When the idea of a new negotiating round was raised, there was initial resistance by the Like-Minded Group of developing countries led by India and Indonesia. This is because there was a sense of grievance felt by developing countries about the conclusion of the previous Uruguay Round. The broad understanding of the Uruguay Round was that developing countries accepted disciplines in new areas such as services trade, intellectual property, and investment in return of market access concessions by developed countries in the areas of agriculture and clothing.³⁵⁷ Developing countries perceived that the developed countries had made use of significant trade-distorting domestic subsidies, had been big users of export subsidies, limit the market access to developing countries’ products by using the safeguard mechanism.³⁵⁸ Thus, the developing members agreed

³⁵⁵ *Id.*

³⁵⁶ MERLINDA INGCO, *AGRICULTURE, TRADE, AND THE WTO IN SOUTH ASIA* (2002).

³⁵⁷ Alan Matthews, *Doha Negotiations on Agriculture and Future of the WTO Multilateral Trade System*, 135th Seminar, August 28-30, Belgrade (2013).

³⁵⁸ *Id.*

to negotiate only if developed countries guaranteed that the negotiation would be a development round, and the needs and interests of developing countries, including food security and rural development, would be placed at the Doha Work Program. Throughout the Doha Round, developing members have frequently voiced its interests and submitted proposals, while also sharing its concerns that they were worried the U.S. and the EU would put aside developing members interests as happened in the Uruguay Round.

A. Developed Members Agricultural Support

One of the main contentions between developed and developing members in the agriculture sector is the use of domestic support and export subsidies. The main argument of this backlash is that the AoA exempts many of the traditional subsidies utilized by developed countries and thereby achieved minimal domestic subsidy reductions.³⁵⁹ As explained in the previous chapter, the AoA requires countries to reduce domestic subsidies based on an Aggregate Measure of Support (AMS). Compliance is measured through the calculation of the current total AMS, which included only those subsidies deemed to be most trade-distorting, the amber box subsidy. The AoA, however, excludes certain direct payments to the farmers under a production-limiting program, called the blue box subsidy, and certain *de minimis* subsidies from the calculation of the AMS. The AoA also excludes the subsidy reduction obligation certain measures deemed to have minimal or no trade-distorting effects, namely the green box subsidies.

Part of the reason why the blue box and green box category are included in the AoA is due to the Blair House Agreement between the EU and the U.S. that was concluded at the end of the Uruguay Round. What countries were not aware in the beginning of the conclusion of the AoA, the wording of the blue box are intended to embrace the deficiency payments in the U.S under the

³⁵⁹ Carmen Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUMB. J. ENVTL L. 433 (2012).

1990 Food, Agriculture and Conservation Trade Act and the arable area payments by the EU under the EU's compensation payment as part of 1992 "MacSharry reforms."³⁶⁰ This later raised controversy as it is insofar stated that the AoA was essentially an agreement between EU and the U.S despite its formal inclusion in the final Marrakesh agreement of 118 countries.³⁶¹ The U.S. and EU agricultural trade policies particularly garner international attention for several reasons. First, the U.S. and EU are countries with the highest agricultural subsidies in the world.³⁶² Second, both countries are major producers, consumers, exporters, and importers of many agricultural commodities; thus, the behavior of producers, consumers, and marketing firms can influence the world markets.³⁶³ Third, ever since the inception of GATT and later WTO, the U.S. and EU have played a major role in international trade negotiations.³⁶⁴

I. Support by the European Union

The Treaty of Rome, which established the European Economic Community in 1957, provides for a common market in agriculture among members states in order to increase farm productivity, ensure a fair standard living for farmers, stabilize agricultural markets, assure the availability of supplies, and maintain reasonable prices for consumers.³⁶⁵ To achieve these objectives, the EU launched its most important policies namely, the Common Agricultural Policy

³⁶⁰ One of the reasons why the Uruguay Round was concluded later than the original scheduled was because of the rising tension between the U.S. and the EU with regards to subsidies. From 1990-1992, most of the negotiation in the Uruguay Round was dominated by the conversation between the U.S. and the EU. In November 1992, the EU and the US concluded the Blair House Agreement that to be said paving the way to the conclusion of the Uruguay Round. Part of the agreement written in the Blair House was to have the blue box and the green box excluded from the trade-distorting subsidies.

³⁶¹ Jim Dixon, *Nature Conservation and Trade Distortion: Green Box and Blue Box Farming Subsidies in Europe*, 29 GOLDEN GATE U. L. REV. 415 (1999).

³⁶² Schoenbaum, *supra* note 30.

³⁶³ Daniel Sumner, *Implications of the US Farm Bill of 2002 for agricultural trade and trade negotiations*, 46 THE AUSTRALIAN J. AGRIC. AND RESOURCE ECON. 99 (2003).

³⁶⁴ WTO, THE WTO CAN GIVE THE WEAK A STRONGER VOICE, https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi07_e.htm (last visited Apr 6, 2019). Both the U.S. and EU are part of the Quad that is seen as the most powerful consensus brokers in the WTO.

³⁶⁵ Thomas Schoenbaum, *Agricultural Trade Wars: A Threat to the GATT and Global Free Trade*, 24 ST. MARY'S L. J. 1165 (1993).

(CAP) in 1962.³⁶⁶ From the day of its founding until now, the CAP has been widely criticized for stimulating surplus production and rewarding intensive agricultural at the expense of extensive or sustainable agriculture.³⁶⁷

When it was first introduced, the CAP heavily utilized a trade-distorting type of support, which was price support. For each commodity, the Council of Agricultural Ministers annually set a minimum price that farmers should receive for their products.³⁶⁸ To ensure that this price would be maintained, EC officials also set an intervention price, and when the free-market price for any commodity fell below the intervention price in any part of the community, member-state authorities were required to purchase stocks to support the price.³⁶⁹ In addition to that, under the CAP, huge commodity surpluses resulting from government intervention were sold on world markets through the use of export subsidies. The CAP also provided an export subsidy to private firms that sold agricultural products on world markets and because of that, the EU has become a major food exporter.³⁷⁰

Since then, the CAP had undergone several changes, especially in 1992, when the AoA was in negotiation in the WTO. Because in the talk of the AoA, there was an intense pressure to reduce the price support that is trade-distorting, the EU undertook the CAP reform, which also called the MacSharry Reform. The MacSharry Reform focused on cutting the support prices and introduced arable subsidy so it could meet the AoA requirements, especially the blue box, while still maintaining export subsidies. The basic elements of MacSharry are³⁷¹ i) that levels of price support would be substantially reduced, bringing them much closer to world market levels; ii)

³⁶⁶ EU Budget: The CAP After 2020, European Commission (2018).

³⁶⁷ Dixon, *supra* note 361.

³⁶⁸ Schoenbaum, *supra* note 365.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ Alan Swinbank, *CAP Reform, 1992*, 31 J. COMMON MKT. STUD. 360 (1993).

farmers would be compensated for their loss of revenue through a system of acreage payments; iii) the compensation would, however, be “modulated.” “Small” farmers would be compensated in full, but beyond a certain size, only partial compensation would be paid; and iv) compensation would be linked to a set-aside scheme. The MacSharry also includes a number of “accompanying measures” such as the Environmental Action Program and Community-financed Pre-retirement scheme.³⁷² Environmental Action Program is to give recognition of the dual role for farmers as producers and as stewards of the countryside and to encourage farming practices that are less intensive and more in tune with environmental constraints.³⁷³ The Community-financed Pre-retirement scheme enables farmers aged 55 years or more but not in receipt of a pension, to retire early.³⁷⁴

Another reform was taken from 2000 to 2003. Similar to the reform taken in 1992, one of the objectives of the reform was to “help prepare the Union for the next WTO Round.”³⁷⁵ These reforms have been predicated upon the need to win acceptance of the WTO community in the Doha Round negotiation. Under the 1992 CAP, the EU still provided price support for certain commodities such as cereal. In the 2003 CAP reform, the price support for all commodities was aimed to be completely abolished. This shows that the WTO discipline plays a pivotal role in shaping the approach by the EU on its support to its farmers.

In June 2003, as agreed in Luxembourg, the EU enacted Single Payment Scheme (SPS) in which the farm subsidy payments shifted towards the green box type of subsidies that provides decoupled income support to farmers.³⁷⁶ Part of the reason why the EU shifted its support from

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ European Union, EUROPEAN COMMISSION AGENDA 2000: FOR A STRONGER AND WIDER UNION.

³⁷⁶ Michael Cardwell & Christopher Rodgers, *Reforming the WTO Legal Order for Agricultural Trade: Issues for European Rural Policy in the Doha Round*, 55 THE INT’L AND COMP. L. Q. 805 (2006).

blue box to green box is to secure the SPS under WTO rules as there was a demand from WTO developing members to abolish the blue box subsidy, although the EU insisted on keeping it.

The SPS focused on two pillars: direct support for farmers/market measure and rural development.³⁷⁷ The SPS includes two components, the Single Farm Payment (SFP) and the Single Area Payment Scheme (SAPS). One of the major changes introduced by the 2003 CAP reform is the so-called “decoupling of a majority of direct payments from production.” Direct payments were provided on a hectare basis and have been transformant into a single payment, the SFP, linked to entitlements based on the value of historical subsidy receipts.³⁷⁸ The decoupled direct payment works as basic income support for producers. This, however, does not mean that the EU completely abolished direct payment linked to production as in 2009, 15% of the payment still linked to production.

Following the 2003 reform and the EU enlargement in 2004 and 2007, the direct payments in the new Member States were gradually introduced in the period 2004-2013 through the phasing-in mechanism. Thus, some member states still employ the SAPS, which is a uniform payment per hectare up to a national ceiling. Under the SAPS, farmers have no obligation to produce, but the land should be maintained in good agricultural and environmental condition. The EU also has been proactive in providing national aid schemes in times of crisis. The aid comes in the form of aid packages, tax exemptions, interest concessions on loans, reduced social security contributions, investment assistance or loans, and market support. In 2009 following the dairy crisis, market support measures including temporary export refunds for dairy products, public purchases in addition to regular intervention ceilings were activated.³⁷⁹

³⁷⁷ European Parliament’s Committee on Agriculture and Rural Development, THE SINGLE PAYMENT SCHEME AFTER 2013: NEW APPROACH - NEW TARGETS (2010).

³⁷⁸ *Id.*

³⁷⁹ *Id.*

In January 2015, the SPS was replaced by the Basic Payment Scheme (BPS). There was no significant difference between the SPS and the BPS as the goal of the BPS is to move towards a more uniform level of support between the Member States.³⁸⁰ This was to ensure a more equitable distribution of direct support between farmers. The Member States could choose from options provided:³⁸¹

- The basic model is the flat rate from 2015
- From which the member states may derogate by differentiating the values of payment entitles (PEs) on the basis of farmers' direct support for 2014 with different options:
 - If the Member still decides to reach a uniform value by the end of the period of convergence that is 2015-2019, it applies the so-called flat rate by 2019;
 - If the Member States decides to apply a longer transition, it applies a “partial convergence,” which takes several forms as framed by the EU legislation.

In addition to that, under the BPS, the greening payment, which is a support for farmers that use a sustainable method of farming as defined by the EU, will be paid a flat rate payment or as a percentage of the BPS of the individual farmer.

In June 2018, the EU presented legislative proposals on the CAP beyond 2020. For the 2021-2027 period, the EU proposes an ambitious total budget of €365 billion and an additional €10 billion to support specific research and innovation in food, agriculture, rural development, and the bioeconomy.³⁸² The CAP retains the direct support for farmers and rural development as its pillars.³⁸³ EU plans to increase the level of support per hectare for small and medium-sized farms and specific products sector undergoing difficulties will continue to benefit from additional

³⁸⁰ European Commission, DIRECT PAYMENTS: THE BASIC PAYMENTS SCHEME FROM 2015 (2015).

³⁸¹ *Id.*

³⁸² EU Budget, *supra* note 366.

³⁸³ *Id.*

support.³⁸⁴ The EU also aims to encourage new generations of farmers. Young farmers will get special attention as a minimum of 2% of the direct support payment will be set aside specifically to help young farmers that can include an increased “installation allowance” of up to €100,000.³⁸⁵

II. Support by the United States

While the EU has the CAP, the U.S. has a very similar legislative piece known as the Farm Bill. Similar to the CAP, the Farm Bill by the U.S. also undergoes a routine change every four to five years. The history of Farm Bill can be traced back to the Great Depression when the U.S. experiences a widespread hunger despite the overproduction of agricultural production and falling commodity prices.³⁸⁶ To overcome these issues, President Roosevelt signed the Agricultural Adjustment Act of 1933 (AAA) that established programs that allowed the federal government to purchase surplus crops from farmers.³⁸⁷ In the 1930s, the Farm Bill traditionally focused on a handful of staple commodities such as corn, soybeans, wheat, cotton, rice, dairy, and sugar. Farm Bills have grown in breadth in recent decades. It has expanded to cover not only several commodities but also horticulture products.³⁸⁸

Until now, the Farm Bill has undergone significant changes. Before 1996, the U.S. used a similar method to the EU price market support called deficiency payments. Under deficiency payment, the U.S. government provided compensation to the farmers or producers of a commodity for all or part of a difference between the government-guaranteed price and the market price of the commodity.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ Andrew Norkiewitz & Julia Nitsche, A VERY BRIEF HISTORY OF THE FARM BILL (2017), www.farmbill.org (last visited Mar 21, 2019).

³⁸⁷ *Id.*

³⁸⁸ Renée Johnson & Jim Monke, WHAT IS THE FARM BILL? (2018), www.crs.gov (last visited Mar 22, 2019).

A drastic change occurred in 1996 when the U.S. Congress proclaimed it was the time for the U.S. government to let the free market manage farm incomes. Since at that time, the AoA was enacted and prohibited the production-linked subsidy, through the Freedom to Farm Act, the U.S. government pulled out the price supports and introduced seven-year Production Flexibility Contracts (PFC). To comply with the WTO regulation, through PFC, the U.S. government instead provided annual payments to eligible farmers with eligible cropland, and payments were based upon historical yields and acreage, not current production.³⁸⁹

In 2002, the U.S. government replaced the PFC with the Direct and Counter-cyclical Payment Program (DCP). Direct payment is similar to the PFC in which fixed payments are made for eligible commodities. The 2002 Farm Bill set the payment rate for each commodity. The payment rate did not change and was not affected by the current production or market price effect.³⁹⁰ Besides the direct payment, the U.S. government revived a similar method with deficiency payments called Counter-cyclical payments. Counter-cyclical payments worked as payments for covered commodities whenever the effective price for the commodity is less than the target price.

The latest Farm Bill enacted is the 2018 Farm Bill consisting of twelve titles encompassing commodity price and income supports, farm credit, trade, agricultural conservation, research, rural development, energy, and foreign and domestic food programs among other programs. For the commodity programs, the U.S. government restructures the domestic support by eliminating the DCP program. Under the new farm bill, farmers may choose between two programs to respond to a decline in either price or revenue. The first one is Price Loss Coverage (PLC), which is a counter-

³⁸⁹ Economic Research Service, PRODUCTION FLEXIBILITY CONTRACT, <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/farm-policy-glossary.aspx#Paid%20Land%20Div> (last visited Mar 22, 2019).

³⁹⁰ Brandon Willis & Doug O'Brien, SUMMARY AND EVOLUTION OF U.S. FARM BILL COMMODITY TITLES, <https://nationalaglawcenter.org/farmbills/commodity/expanded-discussion/#direct-02> (last visited Mar 22, 2019).

cyclical price program that makes a farm payment when the farm price of a covered crop declines below its “reference price.”³⁹¹ The second program is Agricultural Risk Coverage (ARC), which is a revenue-based program to cover a portion of a farmer’s loss when crop revenue declines.³⁹²

Besides the supports above, the U.S government also provides additional support such as loans and crop insurance through the Federal Crop Insurance Act that protect the farmers from price volatility and unexpected disasters. The federal crop insurance program makes available subsidized crop insurance to producers who purchase a policy to protect against losses in yield, crop revenue, or whole farm revenue.³⁹³ There are basically two types of insurance: i) crop-yield insurance; and ii) crop-revenue insurance. While insurance against poor crop yields has been available for many years, the crop revenue is relatively new to protect farmers from low income even when yields are not.³⁹⁴

Crop-yield insurance consists of Crop-hail and Multiple Peril Crop Insurance (MPCI). Many farmers purchase Crop-hail coverage because hail has the unique ability to damage a significant part of a planted field while leaving the rest undamaged.³⁹⁵ MPCI, on the other hand, covers loss of crop yields from all types of natural causes, including drought, excessive moisture, freeze, and disease.³⁹⁶ For the crop revenue insurance, it is a form of insurance that protects a farmer’s revenue whenever low prices, low yields, or a combination of both causes revenue to fall below a guaranteed level selected by the farmers.³⁹⁷ In addition to insurance, USDA’s Farm

³⁹¹ Johnson and Monke, *supra* note 388.

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ Ag Decision Maker, CROP INSURANCE, <https://www.extension.iastate.edu/agdm/crops/html/a1-54.html> (last visited Mar 23, 2019).

³⁹⁵ Crop Insurance: How it Works, <https://cropinsuranceinamerica.org/about-crop-insurance/how-it-works/> (last visited Mar 23, 2019).

³⁹⁶ *Id.*

³⁹⁷ Economic Research Service, REVENUE INSURANCE, <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/farm-policy-glossary/#Capacity%20&%20Infras%20Prog> (last visited Mar 23, 2019).

Service Agency (FSA) also provides direct farm loans to family-size farmers and ranchers who cannot obtain commercial credit from conventional lenders.³⁹⁸

In terms of export subsidies, although based on Nairobi Ministerial Conference, the export subsidies are abolished, the U.S. government introduces Agricultural Trade Promotion Program (ATP). In early 2018, citing its concerns over national security and unfair trade practices, the Trump Administrations increased the tariffs on certain imported products in general and particularly on China's products entering the U.S. Several U.S. trading partners affected by this measure responded to retaliate by also increasing their tariffs targeting various U.S. products especially agricultural commodities.³⁹⁹ To help offset the adverse effects of the retaliatory tariffs, the U.S. government gives funds to provide cost-share assistance to eligible U.S. agricultural organizations to promote U.S. food and agricultural goods overseas and developed new markets.⁴⁰⁰ This funding is available to all sectors of agriculture and made available for trade promotion programs, including but limited to consumer advertising, public relations, point-of-sale demonstrations, participation in trade fairs, and exhibits, market research, and technical assistance.⁴⁰¹

B. Revisit the Blue Box and Green Box Subsidy

Following the inclusion of agriculture in the WTO discipline, members were aware that the enactment of AoA alone would not be a panacea for agricultural trade problems. As a matter of fact, developing members asserted that AoA did not really help their agricultural trade.⁴⁰² The

³⁹⁸ Economic Research Service, DIRECT LOAN, <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/farm-policy-glossary/> (last visited Mar 23, 2019).

³⁹⁹ J Jenny Hopkinson, *China's Retaliatory Tariffs on U.S. Agricultural Products*, Congressional Research Service Working Paper, Washington DC (2019).

⁴⁰⁰ Randy Schnepf et al., *Farm Policy: USDA'S Trade Aid Package*, Congressional Research Service Working Paper, Washington DC (2019).

⁴⁰¹ *Id.*

⁴⁰² NASH & INGO, *supra* note 2.

U.S. and EU particularly have been shifting their support out of the amber box, which is subject to reduction into the blue and the green box to avoid reductions.

Many of the developing members criticize the use of the blue box and the green box subsidy by the EU and the U.S. According to the U.S. and EU, the subsidy is allowed because it has no or minimal effects on trade distortion, however, others disagree. For example, the compensatory payment scheme that the EU categorized under the blue box because it is decoupled from production are challenged by some scholars.⁴⁰³

The distinguishing element of the blue box subsidies is payments based on fixed acreage, yields, or livestock numbers on no more than 85% of baseline production. Although there are acreage constraints, production may be distorted because farmers may increase production by using input more intensively.⁴⁰⁴ Farmers also have the urge to plant more area up to the ceiling than they otherwise would. While acreage payments are based on a fixed regional base area, individual farmers still have the incentive to increase acreage to maximize their share of the regional payments. The same goes for livestock headage payment and all payments that require farmers to continue remain in agriculture. Thus, the EU compensatory payments scheme appears to be at best only partially decoupled, and although regarded as trade-distorting-type policies, it is exempt from reductions under the AoA.

Besides the blue box subsidy, as explained above, there is also the green box subsidy that allows members to provide decoupled income support and crop insurance to its farmers without limitation. To some, the green box has been long considered to operate as an income insurance scheme for farmers in developed countries.⁴⁰⁵ Farmers receiving this support remain insulated

⁴⁰³ Harry De Gorter, Merlinda Ingco & Laura Ignacio, *Domestic Support: Economics and Policy Instruments*, in AGRICULTURE AND THE WTO: CREATING A TRADING SYSTEM FOR DEVELOPMENT (2004).

⁴⁰⁴ *Id.*

⁴⁰⁵ Devinder Sharma, *WTO and Agriculture: "Green Box" Subsidies Must Go*, 39 ECON. AND POL. WKLY. (2004).

from the volatility of the global markets. It does not matter whether the international price slumps or skyrockets, the farmers are protected by the state subsidies. It was reported that in the U.S., the big harvest of government checks usually happens in the fall with \$40,000 for just being a farmer, additional \$40,000 for emergencies like bad market conditions, another \$100,000 for not making any money on what is planted, and \$50,000 for taking other lands out production.⁴⁰⁶ It does not matter whether it is good or bad crops, high or low yields, by the end of the year, some farmers can receive up to \$280,000 even for having an unproductive year of planting.⁴⁰⁷

The green box subsidy is found to encompass some policies that are not fully decoupled.⁴⁰⁸ The AoA applies the term "decoupled" only in connection with direct payments to producers called "decoupled income support." These give the domestic support excluded from reduction commitments. The concern is whether the motive for the policy is to correct market failures or to redistribute income. If the reason was to redistribute income, the policy should be created to fulfill the criteria of decoupling. However, policies to correct market failures inevitably require a change in production.

Economists indeed have challenged the assumptions that decoupled subsidies do not affect production, thus, it not trade-distorting.⁴⁰⁹ According to some economists, access to direct and single farm payments creates a wealth effect that boosts production and further investment in productive facilities.⁴¹⁰ Farmers with access to secured income face fewer risks and can incur more

⁴⁰⁶ Timothy Egan, *FAILING FARMERS LEARN TO PROFIT FROM FEDERAL AID*, THE NEW YORK TIMES, December 24, 2000, <https://www.nytimes.com/2000/12/24/us/failing-farmers-learn-to-profit-from-federal-aid.html> (last visited Apr 5, 2019).

⁴⁰⁷ *Id.*

⁴⁰⁸ De Gorter, Ingco, and Ignacio, *supra* note 403.

⁴⁰⁹ See: David Hennessy, *Production effects of agricultural income support policies under uncertainty*, 80 AM. JOURNAL OF AGRICULTURAL ECONOMICS 46–57 (1998), Sumner, *supra* note 363, Amit Khandelwal, *Are U.S. Agricultural Subsidies Amber or Green?*, Columbia Business School Working Paper, Columbia University (2005).

⁴¹⁰ Grey, Clark, Shih and Associates, *Green Box Mythology: Decoupling Fraud*, Study Prepared for Dairy Farmers Canada, Ottawa (2006).

debt at preferential rates, and they are free to use this revenue stream as a base income and to supplement it with market revenue with little or no regard for the real cost of production.⁴¹¹

In the WTO, some members have been questioning the legality of the U.S. and EU “decoupling” program for several years. A coalition of some of the developing countries G20, for example, has asked for a review of decoupled support to ensure that any support provided meets the WTO requirements and that it is not going to be trade-distorting.⁴¹² G20 further argues that the “green” policies do not correctly perform their function and has been abused to merely follow the general orientation of the distorting policy.⁴¹³

C. Deadlock in the Doha Round

Pursuant to Article 20 of the AoA that gave the mandate to continue the reform with the aim of “establishing a fair and market-oriented trading system” one year before the end of the implementation period, the WTO continued the negotiations in early 2000.⁴¹⁴ From early 2000 to March 2001, forty-five proposals and three technical documents were submitted, and six negotiation meetings were held. The aim was to set the objectives and timetable in the next negotiation round in Doha. The WTO officially launched the Doha Round also calls the Doha Development Round, which was scheduled to conclude in 2005. In the Ministerial Declaration before the Doha Round, members committed themselves to negotiate on:

“substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the schedules of concessions and commitment and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to

⁴¹¹ *Id.*

⁴¹² WTO Document JOB (06)/145 Committee on Agriculture Special Session, G-20 COMMENTS ON THE CHAIR REFERENCE PAPER ON BLUE BOX (2006).

⁴¹³ *Id.*

⁴¹⁴ Article 20 of the AoA states that when recognizing the long-term objective of a substantial progressive reduction in support and protection, the continuation of the reform process is necessary.

*effectively take account of their development needs, including food security and rural development. We take note of the no-trade concerns reflected in the negotiating proposals submitted by members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture.*⁴¹⁵

As the previous negotiation, agriculture became the most critical and controversial sector in the Doha Round. Not only have the talks on this small part of world trade in goods received at least as much attention as the remaining 90% of merchandise trade, but agriculture also appeared to contribute to the difficulties in the negotiations, with disagreements over agriculture being the proximate cause of the failure of two critical Ministerial Meetings in 2008.⁴¹⁶

The different positions taken by individual WTO members in the Doha round reflect a number of factors, including their net trade position in agriculture, the importance of agriculture in their exports, the level of economic development, and their perception of the role of the WTO.⁴¹⁷ For the net exporters' members, they tend to be in favor of liberalization since this will improve their terms of trade. Other members that are net importers are concerned with the volatility of world food prices following liberalization. Country such as Japan may be concerned about the reliability of supplies from the net exporting countries.

Throughout the latest negotiation, a different pattern observed. It is well known that in the past negotiation rounds, the key to reach an agreement usually depended on the agreement between the U.S. and the major European economies, which typically then be adopted by other countries. However, this pattern broke down in the Doha Round.⁴¹⁸ While an agreement between the U.S. and Europe is still seen to be necessary, it is still far from sufficient for an agreement.⁴¹⁹ Indeed,

⁴¹⁵ WTO, DOHA MINISTERIAL DECLARATION, WT/MIN(01)/DEC/1, 20 NOVEMBER 2001. (2001).

⁴¹⁶ David Laborde & Will Martin, *Agricultural Trade: What Matters in the Doha Round?*, 4 ANN. REV. RESOURCE ECON. 265 (2012).

⁴¹⁷ *Id.*

⁴¹⁸ Timothy E. Josling, *An overview of the WTO agricultural negotiations*, 1 in AGRICULTURAL TRADE FOR DEVELOPING COUNTRIES (2007).

⁴¹⁹ *Id.*

the increased role of developing countries is a phenomenon that did not exist in the previous negotiation rounds. The involvement of the developing countries is shown by an increasing number of developing countries forming coalitions prior to the Doha Round. It is important to underline that these coalitions went beyond a position of merely blocking the conclusion of the Doha Round; instead, these coalitions came up with several alternative proposals supported by their own research.⁴²⁰ As a result, the WTO today is different from the “rich man’s club” dominated only by the Quad.⁴²¹ According to the WTO, there are currently fifteen groups in the agriculture negotiation that frequently vocalize their interests as one voice, distinctly different from the Uruguay Round.⁴²²

In the Doha Round, the key proposals were put forward by the U.S., EU, the Cairns Group of agricultural exporters, the G-20 group of developing countries, the G-10 of high-income net importers, and the G33 group of developing countries that concerned about excluding some special products from tariff cuts and about safeguard measures.⁴²³ The U.S. approach can be described as “drastic reform” while the EU is seen as a “gradual adaptation.”⁴²⁴ The U.S. was seeking for an elimination of the direct export subsidies, drastic reductions in tariffs, and domestic support. The U.S. asserted that the non-trade concerns are acknowledged, but they should not be an internal issue of the negotiations, rather, it should be addressed within the green box.⁴²⁵ EU, on the other hand, besides also advocating for reduction of the domestic support, tariffs, and export subsidies,

⁴²⁰ Amrita Narlikar & Diana Tussie, *The G20 at the Cancun Ministerial: Developing Countries and Their Evolving Coalitions in the WTO*, 27 *THE WORLD ECON.* 947 (2014).

⁴²¹ Amrita Narlikar, *New Powers in the Club: The Challenges of Global Trade Governance*, 86 *THE ROYAL INST. OF INT’L AFF.*, 717 (2010).

⁴²² Groups in the agriculture negotiation, https://www.wto.org/english/tratop_e/agric_e/negoti_groups_e.htm

⁴²³ Josling, *supra* note 418.

⁴²⁴ George Mermigas, *AGRICULTURAL NEGOTIATIONS IN THE FRAMEWORK OF THE DOHA ROUND* (2004), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjQ85yZh6jfAhUHGDQIHtTicCPsQFjAAegQIChAC&url=http%3A%2F%2Fwww.minagric.gr%2Fimages%2Fstories%2Fagropol%2FEn%2FAgro_pol%2FWTO1-EN--310804.pdf&usg=AOvVaw2XC3_CM_jRzWHvdPZk91Xm (last visited Dec 17, 2018).

⁴²⁵ *Id.*

recognizes the special and differential treatment for developing countries and the need to strike a balance between trade aspects and non-trade concerns.⁴²⁶ However, despite the advocacy on reducing the support by the EU and the U.S, the EU asserted that “[t]he EU are prepared to negotiate further reductions in the support provided that, in particular, the concept of the ‘blue’ and ‘green’ boxes will continue.”⁴²⁷

The Cairns group as the net agricultural exporters strongly focused on liberalizing markets, seeking the abolition of export subsidies, liberalization of market access barriers on the same basis as in no-agriculture, and major reductions in domestic support. However, the early stages of the renewed discussion on how to move the Doha Round forward have been a struggle for the Cairns Group, which is reflected in their conflict to frame a proposal endorsed by all of their members.⁴²⁸ For example, in 2015, when Canada presented an analysis of domestic support, only half of the Cairns Group⁴²⁹ supported this analysis.⁴³⁰ In another area of negotiation market access, the Cairns Group has not submitted a comprehensive proposal. Members of the Cairns Group, such as Brazil and Indonesia, have been silent on the Cairns Group’s position in the Doha Round. This is mainly because Brazil and Indonesia have changed their approach to a more defensive one and have formed their own coalition. Indeed, it seems that the Cairns Group has lost its influence in the Doha Round, mainly because most of the developing countries have joined other coalitions to take a more defensive position.⁴³¹

⁴²⁶ *Id.*

⁴²⁷ Cardwell and Rodgers, *supra* note 367.

⁴²⁸ Charles Akande, *What’s Wrong with the Cairns Group?*, 15 GENEVA WATCH, 1-2 (2015).

⁴²⁹ Members that endorse this report include Australia, Chile, Colombia, Costa Rica, Guatemala, Malaysia, Pakistan, Paraguay, Thailand, Uruguay, and Vietnam.

⁴³⁰ Akande, *supra* note 428.

⁴³¹ Peter Kleen, *So Alike and yet so Different: A comparison of the Uruguay Round and the Doha Round*, 2 JAN TUMLIR POLICY ESSAY, 1-22 (2008).

The G-10 group of net-importing developed countries sought much smaller cuts in protection than the exporting groups. The G-10 was more supportive of proposals for disciplines on export restrictions. The G-20 and the G-33 are more in the interests of developing countries. In general, they sought relatively more liberalization of industrial country policies, and especially domestic measures than was proposed both by the U.S. and the EU.⁴³² The G-33, a coalition of developing countries with large populations of smallholder farmers, led by Indonesia is known for its defensive position regarding agricultural trade liberalization. The G33 is formed to advance the defensive interests of import-sensitive poor farmers because the Cairns group and the G-20 were dominated by offensive objectives in the negotiations.⁴³³ Indonesia, as the coordinator, said that its main objective was to ensure the issue of food security, rural livelihood, and rural development becomes an integral part of the agriculture negotiation, the “engine” and central issue of the Doha Round.⁴³⁴ The G33 is also pressing for flexibility for developing countries to undertake limited market opening in agriculture because of these countries’ vulnerable positions in the agricultural market.

The Doha Ministerial set March 31, 2003, as the deadline for reaching an agreement on “modalities” that includes targets, formulas, timetables for achieving the mandated objectives. The WTO Ministerial Conference held in Cancun, Mexico 10-14 September 2003 was the last effort to conclude the Doha Round according to the target. Before the Cancun Ministerial, the U.S. and the EU reached an agreement on a broad framework for negotiating agricultural trade and submitted to the WTO as a joint proposal. However, most of the developing members consolidated in the G-20 and the G-33 rejected the joint proposal and made a counterproposal. The Cancun

⁴³² Laborde and Martin, *supra* note 416.

⁴³³ Robert Wolfe, *The special safeguard fiasco in the WTO: the perils of inadequate analysis and negotiation*, 8 WORLD TRADE REV. 517 (2009).

⁴³⁴ *Id.*

Ministerial eventually failed to reconcile the differences between the developed members and developing members in agricultural trade. The failure of Cancun Ministerial eliminated the prospect to conclude the Doha Round by its scheduled end date, January 1, 2005.

Despite the collapse of the Cancun Ministerial, most scholars perceive that the role developing countries played was “unfamiliar” and “innovative.”⁴³⁵ While on the Uruguay Round, the Blair House Agreement between the U.S. and the EU opened the way for a successful conclusion of that round, in the Doha Round, the U.S. and the EU joint proposal received opposition from a group of developing countries. Indeed, in May 2013, when Narlikar and Tussie conducted a series of interviews with delegates from developing countries, several of their interviewees repeatedly shared the concern of the EU and the U.S. “pulling another Blair House agreement on us.”⁴³⁶

The push from developing members did not stop in the Cancun Ministerial, however. Both in the formal and informal meetings after the Cancun up to now, the groups of developing countries continue to voice their concerns and submit proposals that support their position. Throughout the negotiation, there are two points that the G33 thinks will be essential in any future agreement. The first is public stockholding for food security purposes of minimizing the problem of rising food prices. The second is a special safeguard mechanism to counter the unfair practices of developed members.

Public stockholding is one solution that developing members in the WTO have been promoting as a way to tackle food security issues. Public stockholding is a policy that allows a government to purchase, stockpile, and distribute food when needed as part of a food security program that is identified in its national legislation. The problem with public stockholding for food

⁴³⁵ Narlikar and Tussie, *supra* note 420.

⁴³⁶ *Id.*

security purposes is solely on the purchasing side because stockpiling and distributing food, especially for the poor and malnourished, are allowed under the WTO agreement. Purchasing food with market prices does not raise an issue because it is considered fair. However, when the governments purchase food with “supported” or “administered” price, which is price set by the government itself, it provides support to the farmers and could distort trade. Price support like this counts as a trade-distorting subsidy that falls into the amber box subsidy and subjects to limits. The *de minimis* level for developed members is 5% while for developing members is 10%. If the AMS was below than *de minimis* level, it would not be subjected to reduction, nor it would be counted to the total AMS, thus, reducing the possibility of the members to breach their domestic support reduction commitments.

Public stockholding for food security purposes is complex because the AoA does not necessarily prohibit the governmental support in public stockholding for food security purposes as set out in paragraph 3, footnote 5, and footnote 5&6 of Annex 2. However, as mentioned above, due to its nature of price support, limits are still placed by accounting the difference between the support price with the market price in the AMS. Thus, developing members still need to maintain the price support to be below the *de minimis* level. Although the AMS including the support for food security is usually still below the *de minimis* level, some countries are afraid their total AMS could exceed the limits they have agreed on.

It is unsurprising that public stockholding has been a longstanding issue in the WTO agriculture negotiation. On the one hand, the WTO members agree that food security is a legitimate policy objective. On the other hand, it constitutes domestic support that could adversely affect the trade and the food security of other members, especially when it exceeds the agreed limit. The members have been debating about what could be the permanent solution.

The G33 proposes that public stockholding programs for food security purposes should not be counted as a trade-distorting subsidy; thus, it should be allowed without limit.⁴³⁷ By not counting the support price in the AMS, it treats the support price as almost like the green box subsidy which is allowed without limit. Indonesia, in July 2017 meeting, highlighted that the best solution of public stockholding must “satisfy” all the developing members dealing with the food security issue.⁴³⁸ Another reason worth the attention is that the trade-distorting subsidy is not calculated by how much the government actually spends but by the subtracted the government’s administered price with the price baseline from 1986-88.⁴³⁹ The inflation and rise of commodity prices have compelled the administered price to increase along with the amber box support calculation.

However, the proposals by the G33 are criticized by other members. The Cairns Group is afraid that this type of program could deliver “unintended consequences” to the international market and food security of other countries;⁴⁴⁰ for example, in the case when the government “unloads the stock” on the global market, the prices of similar products in other countries would be affected.⁴⁴¹ Moreover, according to the Cairns Group, the proposal goes against the goal of the agricultural reform that is to restrain subsidies.

At the Bali Ministerial Conference held in 2013, an improvement was made by at least the two principal decisions. First, members agree to negotiate on an agreement for a permanent

⁴³⁷ WTO: 2017 News Item, *NEW PROPOSALS IN AGRICULTURE TALKS FORM “TANGIBLE STEPS” FORWARD* (2017), https://www.wto.org/english/news_e/news17_e/agng_19jul17_e.htm (last visited Sep 27, 2017).

⁴³⁸ *Id.*

⁴³⁹ WTO: 2013 News Items, *CHAIR UPDATES ON ARM ISSUES PROPOSED FOR BALI MEETING: TALKS CONTINUE ON KEY DIFFERENCES* (2013), https://www.wto.org/english/news_e/news13_e/agng_23may13_e.htm (last visited Sep 29, 2017).

⁴⁴⁰ WTO: 2016 News Items, *FARM NEGOTIATORS WELCOME PROPOSALS TO CURB SUBSIDIES AND OPEN AGRICULTURAL MARKETS* (2016), https://www.wto.org/english/news_e/news16_e/agri_16nov16_e.htm (last visited Sep 26, 2017)

⁴⁴¹ WTO: 2017 News Item, *supra* note 437.

solution that will be applicable to all developing members by the next Ministerial Conference.⁴⁴² Second, until a permanent solution is obtained, the “peace clause” that explains members shall not challenge developing members policy that is inconsistent with its obligations under Articles 6.3 and 7.2(b) of the Agreement on Agriculture in pursuance of public stockholding programs for food security purposes, will still be in place.⁴⁴³ A developing member utilizing this Decision must meet several conditions. First is the program do not distort trade or adversely affect the food security of other members. Second, in order to fulfill the first condition, a member must meet the notification and transparency requirements as set out in paragraph 3 Ministerial Decisions of 7 December 2013. Those are:⁴⁴⁴

- A developing member have notified the Committee on Agriculture that the programs is exceeding or at risk of exceeding its AMS limits
- A developing member have satisfied and continue to satisfy its domestic support notification requirement under the AoA
- A developing member have presented and continue to present additional information for the public stockholding program for food security purposes annually
- A developing member needs to provide relevant statistical information

However, at the next Ministerial Conference in Nairobi, there was no significant development on these issues. The decision only went as far as reconfirming the Bali Ministerial Conference that is to “make all concerted efforts to agree and adopt a permanent solution on the

⁴⁴² WTO, MINISTERIAL CONFERENCE NINTH SESSION OF 7 DECEMBER 2013: WT/MIN(13)38-WT/L/913 PUBLIC STOCKHOLDING FOR FOOD SECURITY PURPOSES (2013).

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

issue of public stockholding for food security purposes.”⁴⁴⁵ Moving toward the Ministerial Conference in Buenos Aires, which is the deadline for finding a permanent solution, developing members have made clear that the “peace clause” would be still enforceable until a permanent solution is agreed, even if it exceeds the deadline of 2017.

In addition to the public stockholding for food security purposes, the G33 also has actively advocated for the need for a Special Safeguard Mechanism (SSM) exclusively for developing countries. The SSM would permit developing countries to raise tariffs on certain agricultural products in the case of import surges or price declines. For the developing members where its farmers are struggling with poverty and have the low risk-taking ability, import surges can result in serious consequences on the livelihood security of these farmers especially as things turned out, developed members continue their unreviewed subsidy policy.⁴⁴⁶

While the current Special Safeguard regime is also available for developed members, the G33 proposes that the SSM should only be available for developing countries since it would help the objectives of developing countries in terms of rural development and the need to counter the use of trading-distorting agricultural subsidies mainly utilized by developed members. This is also because in practice, the current safeguard mechanism is barely used by developing countries due to its additional constraints. First, the safeguard only applies to products that have been tariffed before. Many developing countries do not tariff its products and instead just set ceiling bindings. Second, the safeguard can only be used by members that reserved the right to invoke the safeguard

⁴⁴⁵ WTO, MINISTERIAL DECISION OF 19 DECEMBER 2015: WT/MIN(15)/44 — WT/L/979 PUBLIC STOCKHOLDING FOR FOOD SECURITY PURPOSES (2015), https://www.wto.org/english/thewto_e/minist_e/mc10_e/1979_e.htm (last visited Sep 23, 2017).

⁴⁴⁶ Parthapratime Pal & Deepika Wadhwa, *An Analysis of the Special Safeguard Mechanisms in the Doha Round of Negotiations: A Proposed Price-Trigger-Based Safeguard Mechanism*, Trade Working Papers 22235, East Asian Bureau of Economic Research (2006).

in its schedule commitments. As mentioned above, currently only 39 WTO members reserve the right to safeguard.

The SSM is one of the most contentious topics in the agriculture negotiation. The debate spans from reducing, constraining, and even eliminating the safeguard mechanism. The G33 and its allies support the SSM since it will enable them to protect poor farmers. Proponents of the SSM argue that they need the SSM because they do not have and cannot afford the policies that support farmers in developed countries where it protects them from the uncertainty in the markets.⁴⁴⁷ In countries where farmers are a large part of the population, the domestic support might not be affordable, and even if affordable at all, it would be evident and offensive to the rest of the population.⁴⁴⁸

Advocates of the SSM also believe that the SSM should be more accessible for developing in that it requires small triggers and higher tariff increases. The other perspective is that the SSM is used only as a “time-bound means to help liberalization.”⁴⁴⁹ They believe that the SSM should be more restricted and should be related to cutting tariffs from pre-Doha Round levels.⁴⁵⁰ This means that the SSM must not be triggered solely by normal price fluctuations or normal trade expansions with the limitation of a liberalization period.⁴⁵¹ Moreover, even in the case that safeguard is allowed, the tariff increase should not exceed pre-Doha Round commitments. The supporters of this view argue that the SSM should be more restricted to protect farmers as well because poor farmers must export their products to improve their well-being. Member like Russia even went further to argue that the safeguard should be abolished.

⁴⁴⁷ Wolfe, *supra* note 433.

⁴⁴⁸ *Id.*

⁴⁴⁹ WTO: 2017 News Item, AGRICULTURE NEGOTIATORS EXCHANGE VIEWS ON ISSUES FOR POTENTIAL OUTCOMES AT MC11 (2017), https://www.wto.org/english/news_e/news17_e/agng_01jun17_e.htm (last visited Sep 26, 2017).

⁴⁵⁰ WTO, AN UNOFFICIAL GUIDE TO AGRICULTURAL SAFEGUARDS: GATT, OLD AGRICULTURAL (SSG), AND NEW MECHANISM (SSM) (2008).

⁴⁵¹ *Id.*

Until now, the Doha Round is suspended indefinitely. Indonesia, as the chair of the G33, has made it clear that the best solution for public stockholding or SSM must "satisfy" all the developing members who are dealing with food security and the rural development issues. India even went insofar explicitly stated that if developed countries do not take into consideration developing countries' emergency interests, India would not agree to the rest of the negotiation.

Chapter 4

Major Agricultural Trade Cases Involving Indonesia

Giving Indonesia's agricultural trade law and policy as well as global agricultural trade law in the previous chapters, this section depicts the tension between Indonesia's agricultural trade law and policy with the international trade regime. The tension between the domestic regulations and international law turns to be a series of disputes regarding Indonesia's agricultural trade law in the WTO, which Indonesia is found to violate the WTO agreement. This chapter then reviews the cases and explains the analysis of the WTO panel and the Appellate Body regarding the challenged regulations in Indonesia's agricultural trade regime.

1. INDONESIA'S AGRICULTURAL CASES IN THE WTO

While it can be said that Indonesia plays an active role as the leader of the G33 in promoting the interests of developing members in agricultural negotiation, Indonesia itself is grappling with its agricultural trade law from international disputes. Recently Indonesia has to face some disputes brought by other WTO members concerning its agricultural trade regime.

As a member of the WTO and part of the WTO function as the adjudicator in international trade, Indonesia has involved in some cases in the WTO. Although not as active as other members such as the U.S., EU, Canada, or Brazil, Indonesia has utilized the WTO dispute settlement system. Indonesia has filed 14 complaints in the WTO Dispute Settlement Body and responded to 14 cases. Table 4.1 displays the specific cases in which Indonesia acts as complainant, while Table 4.2 shows the cases brought by other members against Indonesia.

Year	WTO Cases (Indonesia as Complainant)
1998	DS123 Argentina – Safeguard Measure on Imports of Footwear
2000	DS217 United States – Continued Dumping and Subsidy Offset Act of 2000

2004	DS312 Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia
2008	DS374 South Africa – Anti-Dumping Measures on Uncoated Woodfree Paper
2010	DS406 United States – Measures Affecting the Production and Sale of Clove Cigarettes
2012	DS442 European Union – Anti-Dumping Measures on imports of Certain Fatty Alcohols from Indonesia
2013	DS467 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging
2013	DS470 Pakistan – Anti-Dumping and Countervailing Duty Investigations on Certain paper Products from Indonesia
2014	DS480 European Union – Anti-Dumping Measures on Biodiesel from Indonesia
2015	DS491 United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia
2017	DS529 Australia – Anti-Dumping Measures on A4 Copy Paper

Table 4.1: Indonesia as Complainant in the WTO Cases

Source: WTO Website, https://www.wto.org/english/thewto_e/countries_e/indonesia_e.htm

According to the number of cases that Indonesia involved with, Indonesia has more cases in which it acts as a respondent than a complainant. Interestingly enough, starting in 2013, there was an increase with regard to the agricultural disputes involving Indonesia. Currently, half of the cases where Indonesia acts as a respondent is related to agriculture.

Year	WTO Cases (Indonesia as Respondent)
1996	DS54 Certain Measures Affecting the Automobile Industry filed by European Communities
1996	DS55 Certain Measures Affecting the Automobile Industry filed by Japan
1996	DS59 Certain Measures Affecting the Automobile Industry filed by United States
1996	DS64 Certain Measures Affecting the Automobile Industry filed by Japan
2013	DS455 Importation of horticultural products, animals and animal products filed by United States

2013	DS465 Importation of Horticultural Products, Animals and Animal Products filed by United States
2013	DS466 Importation of Horticultural Products, Animals and Animal Products filed by New Zealand
2014	DS477 Importation of Horticultural Products, Animals and Animal Products filed by New Zealand
2014	DS478 Importation of Horticultural Products, Animals and Animal Products filed by United States
2014	DS481 Recourse to article 22.2 of the DSU in the US — Clove cigarettes dispute filed by European Union
2014	DS484 Measures Concerning the Importation of Chicken Meat and Chicken Products filed by Brazil
2015	DS490 Safeguard on Certain Iron or Steel Products filed by Chinese Taipei
2015	DS496 Safeguard on Certain Iron or Steel Products filed by Viet Nam
2016	DS506 Measures Concerning the Importation of Bovine Meat filed by Brazil

Table 4.2: Indonesia as Respondent in WTO Cases

Source: WTO Website, https://www.wto.org/english/thewto_e/countries_e/indonesia_e.htm

From the seven agricultural cases involving Indonesia, there are two cases with one being a parallel case where the WTO panel and Appellate Body have submitted their reports. In all those cases, the WTO panel and the Appellate Body have ruled against Indonesia. Indonesia is found to be in violation of the related WTO agreements; thus, compliance from Indonesia is required. The details of the cases are discussed in the next section.

Case	Status of the Agricultural Cases against Indonesia
DS455	Panel established, but not yet composed on 24 April 2013
DS465	In consultations on 30 August 2013
DS466	In consultations on 30 August 2013
DS477	Report(s) adopted, with recommendation to bring measure(s) into conformity 22 November 2017

DS478	Authorization to retaliate requested (including 22.6 arbitration) on 15 August 2018
DS484	Report(s) adopted, with recommendation to bring measure(s) into conformity on 22 November 2017
DS506	In consultations on 4 April 2006

Table 4.3: Agricultural Cases against Indonesia in the WTO

Source: *WTO Website*, https://www.wto.org/english/thewto_e/countries_e/indonesia_e.htm

A. DS477 & DS478

On May 8, 2014, New Zealand and the U.S. as the co-complainants requested consultations with Indonesia. The U.S. specifically had consultations with Indonesia in Jakarta on June 19, 2014, but failed to resolve the dispute.⁴⁵² Due to the failure of the negotiation, in March 2015, the U.S. requested the establishment of a panel so that the WTO panel could officially adjudicate the cases.

I. Measures at Issue

Both New Zealand and the U.S. challenged eighteen separate regulations being imposed by Indonesia on the importation of horticultural products, animals, and animal products. Most of these measures constituted distinct elements or components of Indonesia’s import licensing regimes for both horticultural products and animal products.⁴⁵³

In the WTO panel report, the panel first discussed Indonesia’s Food Law, Farmers Law, Horticulture Law, and Animal Law as the general legal frameworks for the importation of horticultural products, animals, and animal products. These four national laws emphasize the role of government in controlling the food policy, protecting the farmers, and prioritizing the domestic products as opposed to foreign products.

⁴⁵² Request for the establishment of a panel by the United States (WT/DS478/9), INDONESIA - IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS, AND ANIMAL PRODUCTS: (2015).

⁴⁵³ Report of Panel WTO/DS477/DS478/R, INDONESIA - IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS (2016).

Indonesian Food Law stresses the importance of sovereignty and independence in food policymaking as well as the role of the government in managing food supply,⁴⁵⁴ distribution, and price stabilization.⁴⁵⁵ Food Law gives the government the authority to prioritize domestic food production and national food reserves as the primary sources of the food supply with importation to be considered only in the case of food shortages.

Indonesian Farmers Law echoes the fundamental principles of sufficiency and prioritization while assisting farmers to cope with numerous production and marketing challenges. Similar to the Food Law, Farmers Law explicitly prohibits the importation of agricultural commodities when domestic supply or government food reserves are deemed to be sufficient.⁴⁵⁶ “Import arrangements” must be planned by the government “according to the harvest season and/or domestic consumption requirement.”⁴⁵⁷ The law also establishes the designated entry points, import licensing producers for agricultural products, and stipulating criminal penalties for not conforming to the designated entry points and for importing agricultural commodities when domestic supply is sufficient.

Horticulture Law and Animal Law also enshrine the principle of sufficiency and prioritization of domestic products.⁴⁵⁸ Horticulture Law also governs food safety, quality, packing and labeling requirements, and criteria such as “availability of domestic horticultural products” and the “established production and consumption targets” as a condition in horticultural product importation.

⁴⁵⁴ Indonesian Food Law No. 12/2012, Art.1(2), and (3).

⁴⁵⁵ *Id.*, Art. 13.

⁴⁵⁶ Indonesian Farmers Law No. 19/2013, Art. 30.

⁴⁵⁷ *Id.*, Art. 15.

⁴⁵⁸ Art. 8(1) of the Horticulture Law and Art. 1(2) of the Animal Law. *See also* Art. 76(4) of Animal Law.

As explained above, New Zealand and the U.S. challenged a total of eighteen measures concerning Indonesia's import licensing regimes for horticultural products and animals and animal products as well as Indonesia's sufficiency of domestic production requirements that are listed in Table 4.4.

A. Import Licensing Regime for Horticultural Products	
Discrete Elements of the Regime	
Measure 1	Limited Application windows and validity periods
Measure 2	Periodic and fixed import terms
Measure 3	80% realization requirement
Measure 4	Harvest period requirement
Measure 5	Storage ownership and capacity requirements
Measure 6	Use, sale and distribution requirements for horticultural products
Measure 7	Reference prices for chili and fresh shallots for consumption
Measure 8	Six-month harvest requirement
Regime as a whole	
Measure 9	Import licensing regime for horticultural products as a whole
B. Import Licensing Regime for Animals and Animal Products	
Discrete Elements of the Regime	
Measure 10	Prohibition of importation of certain animals and animal products, except in emergency circumstances
Measure 11	Limited application windows and validity periods
Measure 12	Periodic and fixed import terms
Measure 13	80% realization requirement
Measure 14	Use, sale and distribution of imported bovine meat and offal requirements
Measure 15	Domestic purchase requirement
Measure 16	Beef reference price
Regime as a whole	
Measure 17	Import licensing regime for animals and animal products as a whole
C. Sufficiency Requirement	
Measure 18	Sufficiency of domestic production to fulfil domestic demand

Table 4.4: Measure at Issues at DS477 and DS478

Source: WTO panel report DS477 and DS478

The eighteen measures challenged by New Zealand and the US comprised of: (i) discrete elements of Indonesia's import licensing regime horticultural products (Measures 1 through 8);

(ii) Indonesia's import licensing regime for horticultural products as a whole (Measure 9); (iii) discrete elements of Indonesia's import licensing regime for animals and animal products (Measure 10 through 16); (iv) Indonesia's import licensing regime for animals and animal products as a whole (Measure 17); and (v) the requirement whereby importation of horticultural products, and animals and animal products depends upon Indonesia's determination of the sufficiency of domestic supply to satisfy domestic demand (Measure 18).⁴⁵⁹

Measure 1 consisted of a combination of the limited application windows and the six-month validity periods of the recommendation from the Indonesian Agriculture Ministry also called RIPH and the Import Approvals from the Ministry of Trade. As regulated by the Indonesian government, for the importation of horticultural products, importers may apply for a RIPH for the period from January to June over 15 working days starting in the early November of the previous year, and for the period from July to December over 15 working days starting in the early May of that year. Import Approval that is given by the Ministry of Trade may be made in December for the period from January to June, and in June for the period from July to December.⁴⁶⁰ Measure 2 was related to the requirement to import horticultural products only within the terms of the RIPH and Import Approvals. The terms included the quantity of the product imported, the specific type of products, the country origin of the products imported, the Indonesian designated port of entry. Terms in the RIPHs and the Import Approval could not be amended or revised during their validity period once it is issued.⁴⁶¹

Measure 3 required that registered importers of fresh agricultural products to import at least 80% of the quantity of each type of product specified on their import approvals for the six-month

⁴⁵⁹ Report of the Appellate Body WTO/DS477/AB/R - WT/DS478/AB/R, INDONESIA- IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS (2017).

⁴⁶⁰ Report of Panel WTO/DS477/DS478/R, *supra* note 453, para 2.33.

⁴⁶¹ *Id.*, para. 2.35.

validity period.⁴⁶² Measure 4 imposed another requirement that the importation of horticultural products could only take place within a certain time period.⁴⁶³ Measure 5 stated that importers must own their storage facilities with sufficient capacity to hold the full quantity of the imported products requested on their import application.⁴⁶⁴ Measure 6 was about the requirement that limited the use, sale, and distribution of the imported products.⁴⁶⁵ According to the regulations, an importer that obtained recognition as a Producer Importer of Horticultural Products (PI) could only import horticultural products as raw materials or auxiliary materials for its industrial production processes. They were prohibited from trading and/or transferring them. An importer that received recognition as a Registered Importer of Horticultural Products (RI) could import horticultural products for consumption provided that they are traded or transferred to a distributor and not directly to consumers or retailers.⁴⁶⁶ Measure 7 stated that importation was suspended when the domestic market price falls below the pre-established reference price. The reference price was defined as “the reference selling price at the retail level that is established by the Horticultural Product Price Monitoring Team.”⁴⁶⁷ Measure 8 required that in order for fresh horticultural products to be accepted in Indonesia, the products must have been harvested less than six months prior to importation.⁴⁶⁸ Measure 9 was about Indonesia’s import licensing regime for horticultural products as a whole, specifically when all the constitutive elements above are combined.⁴⁶⁹

Measure 10 to measure 17 was specifically about Indonesia’s import licensing regime for animals and animal products. Measure 10 prohibited the importation of bovine meat, offal, carcass

⁴⁶² *Id.*, para. 2.37.

⁴⁶³ *Id.*, para. 2.39.

⁴⁶⁴ *Id.*, para. 2.41.

⁴⁶⁵ *Id.*, para. 2.43.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*, para. 2.45.

⁴⁶⁸ *Id.*, para 2.48.

⁴⁶⁹ *Id.*, para 2.49.

and processed products that are not listed in the Indonesian Ministry of Trade regulation 46/2013, as amended, and Ministry of Agriculture regulation 139/2014, as amended; or non-bovine and processed products that are not listed in Appendices II of the regulation of the Ministry of Agriculture.⁴⁷⁰ Only limited animals and animal products can be eligible to obtain RIPH and Import Approvals. State-owned enterprises may be authorized to import unlisted carcasses, and/or secondary cut meats up to the amount decided by the Indonesian government to be required to address food availability, price volatility, inflation and/or natural disasters.⁴⁷¹ Measure 11 was similar to measure 1 that it was related to limited application windows and validity periods. Pursuant to the regulation, the use of a recommendation from the Ministry of Agriculture was conducted four times, which were December of the previous year, March, June, and September of the current year. Applications for Import Approvals of animals and animal products could only be submitted: i) for the first quarter (January to March), in the month of December (ii) for the second quarter April to June, in the month of March; iii) for the third quarter (July to September) in the month of June; and (iv) for the fourth quarter (October to December) in the month of September.⁴⁷² The Import Approval was then issued at the beginning of each relevant quarter and valid for three months.⁴⁷³

Measure 12 consisted of the requirement to only import animals and animal products within the terms of the RIPH and Import Approval. Changes to the elements specified in RIPH were prohibited once the RIPH has been issued. Measure 13 requires importers to import at least 80% of each type of product covered by their import approvals every year. Measure 14 limited the use, sale, and distribution of imported animals and animal products, including bovine meat and offal.

⁴⁷⁰ *Id.*, para 2.50.

⁴⁷¹ *Id.*, para 2.51.

⁴⁷² *Id.*, para 2.53.

⁴⁷³ *Id.*

Measure 15 states that importers must submit proof of local beef purchases duly verified by the provincial agency or municipality of origin. Accordingly, business operators, state-owned enterprises, or regional government-owned enterprises that import large ruminant meats must absorb local beef when applying for a Recommendation.⁴⁷⁴

Measure 16 suspended the import of certain animals and animal products when the market price of secondary cuts of beef is below the reference price.⁴⁷⁵ Imports resumed when the market price reaches again the reference price. Measure 17 was referring to the import licensing regime, especially for animals and animal products as a whole. Measure 18 was about the provisions in Indonesia's national law that states horticultural, animals, and the animal products was contingent upon the sufficiency of domestic supply for consumption and/or government food reserves.

New Zealand and the U.S. argued that all eighteen measures constituted quantitative restrictions that violated Article XI:1 of the GATT 1994. Article XI:1 reads:

“No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”

Besides the Article XI:1 of the GATT 1994, both complainants also argued that the eighteen measures violated Article 4.2 of the Agreement on Agriculture (AoA). Article 4.2. of the AoA states that:

Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 and Annex 5.

⁴⁷⁴ *Id.*, para 2.60.

⁴⁷⁵ *Id.*, para 2.63.

II. *The WTO Panel Report*

The U.S., through its written submission, argued that Indonesia imposed numerous prohibitions and restrictions on import through laws and regulations governing the import licensing of horticultural products, animals, and animal products. Additionally, Indonesia was accused of prohibiting the importation of all horticultural products and animals and animal products when the government deems domestic production of such products sufficient to satisfy domestic demand.⁴⁷⁶

On its request for the establishment of a panel, the U.S. claimed that Indonesia has: i) imposed prohibition or restrictions on import horticultural products, animals, and animal products; ii) imposed unjustified and trade-restrictive non-automatic import licensing requirements on imports of such products; (3) accorded less favorable treatment to imported products than to like products of national origin; (4) imposed unreasonable and discriminatory pre-shipment inspection requirements; and (5) has failed to notify and publish sufficient information concerning its import licensing measures.⁴⁷⁷

The U.S. also touched upon Indonesia's policy in the food sector that is to pursue the "self-sufficiency." The goal of this policy is to increase domestic reliance on domestic producers by "gradually reducing" and ultimately halting imports of agricultural products. According to the complainants, in the process to achieve this goal, Indonesia has deliberately and systematically restricted imports of agricultural products in order to protect domestic producers. Indonesia has done so by imposing a complicated, burdensome, and non-market-oriented import licensing requirement on horticultural products and animals and animal products.⁴⁷⁸

⁴⁷⁶ Annex C-3 WT/DS477/R/Add.1 - WT/DS478/R/Add.1, FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES (2016).

⁴⁷⁷ Request for the establishment of a panel by the United States (WT/DS478/9), *supra* note 452 para. 2.

⁴⁷⁸ Annex C-3, *supra* note 476.

Within the frame of the WTO agreement, both complainants asserted that Indonesia's import licensing regimes, operating individually and as whole regimes, and the provisions of Indonesia's law conditioning importation on the insufficiency of the domestic demand, are inconsistent with Article X:1 of the GATT 1994 and Article 4.2. of the AoA.⁴⁷⁹ The complainants argued that the WTO Appellate Body in the *China – Raw Materials* has confirmed that a “restriction” is “[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation” and as generally something that has a limiting effect.⁴⁸⁰ Thus, the term “restrictions” under Article XI:1 refers to measures “that are limiting, that is, those that limit the importation or exportation of products.”⁴⁸¹ More specifically, it was at the core of Indonesia's import regime was the legislation which expressly prohibits the importation of animals, animal products, horticultural product, and food in circumstances where domestic production is deemed sufficient to meet domestic demand.

Indonesia, on the other hand, requested the panel to reject the complainants' claims in their entirety. Indonesia claimed that this dispute touched upon one of the most sensitive issues faced by any WTO member that is food security and safety. In its written argument submitted to the WTO, Indonesia argued that Indonesia has the right to safeguard the health and safety of its food supply chain, and this responsibility relies heavily on the action of the government.⁴⁸² The challenged measures do so in a manner that takes into consideration the unique circumstances by Indonesia that are: i) a developing country; ii) thousands of miles from most of the major agricultural production centers and exporters of the world; iii) located on or near the equator; and

⁴⁷⁹ *Id.*, para. 50.

⁴⁸⁰ Annex C-1 WT/DS477/R/Add.1 - WT/DS478/R/Add.1, FIRST PART OF EXECUTIVE SUMMARY OF THE ARGUMENTS OF NEW ZEALAND (2016).

⁴⁸¹ *Id.*, para. 55.

⁴⁸² WTO (WT/DS477/AB/R - WT/DS478/AB/R), ADDENDUM - INDONESIA - IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS (2016).

iv) whose population is predominantly Muslim. Rather than restricting or limiting imports, the challenged measures sought to ensure a safe, reliable, and in some cases Halal-consistent supply of horticultural, animals, and animal products from the complainants and other WTO members.⁴⁸³

As a preliminary matter, Indonesia asserted that its import licensing regime is an automatic import licensing⁴⁸⁴ as opposed to discretionary; therefore, it falls outside of the scope of Article 4.2. of the AoA. A plain reading of the relevant statutes and regulations showed that the Indonesian government did not permit its agents to exercise discretion in the issuance of import licenses at any stage in the administrative process.⁴⁸⁵ The set of requirements was also clearly published and very straightforward. Indonesia's online application portal also streamlines the process, making it easy to meet all administrative requirements to obtain the appropriate import license for their products. According to Indonesia, both complainants have not provided any evidence that persons or entities that fulfill all the legal requirements to import products were denied import licenses under Indonesia's current import licensing regime. In fact, all complete applications submitted in the period of 2013-2015, both for RIPH from MoA and Import Approval from MoT were granted.⁴⁸⁶

Indonesia added that to the extent that the panel found that the challenged measures constituted a non-automatic import licensing regime, thus, fall within Article 4.2 of the AoA, the complainants have failed to establish that these measures constituted "quantitative restrictions,"

⁴⁸³ Annex C-5 WT/DS477/R/Add.1 - WT/DS478/R/Add.1, FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA (2016), para. 2.

⁴⁸⁴ According to the Agreement on Import Licensing, automatic import licensing is defined as an import licensing where the approval of the application is granted in all cases so long as the applicant fulfills the requirement. The government cannot refuse to issue the application process based on its discretionary authority. There should be no discrimination among those applying for automatic licenses. Any person fulfilling the legal requirement should be equally eligible to apply for and obtain import licenses.

⁴⁸⁵ Annex C-5 WT/DS477/R/Add.1 - WT/DS478/R/Add.1, *supra* note 483 para. 5.

⁴⁸⁶ Annex C-6 WT/DS477/R/Add.1 - WT/DS478/R/Add.1, SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA (2016), para. 17.

“minimum import prices,” or “similar border measures” as a matter of law.⁴⁸⁷ Indonesia repeatedly asserted that various aspects of Indonesia’s import licensing regime for horticultural products, animals, and animal products are not “prohibitions” or “restrictions” on imports within the meaning of Article XI:1 of the GATT and Article 4.2 of the AoA. While the complainants argued that they do not have to show any effect on trade at all, Indonesia, however, contended this point by arguing that a complainant must demonstrate that a measure has a limited effect on the quantity or amount of importation itself. The fact that Article XI:1 and Article 4.2 of the AoA do not require precise quantification of the trade effect does not mean a complaint is excused from demonstrating that the measure, as a matter of fact, has some effect on trade. The provisions, after all, according to Indonesia, are concerned with quantitative restriction and prohibition.

Agreeing with the EU’s third-party submission, Indonesia stated that the panel should carefully draw “the line between those measures which have a limiting effect on the quantity or amount of importation itself, and those measures which just have a negative impact on imports in any way.” This is consistent with the Appellate Body report in *Argentina – Import Measures* that “not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products.”

As an alternative argument, Indonesia argued that the regulations have fallen within the exception under Article XX of the GATT 1994. Specifically, Indonesia raised its defense under Article XX subparagraphs (a), (b), and (d). In Article XX(a), Members are granted broad discretion to pass a regulation that is seen as necessary to protect public morals. Article XX(b) allows Member to adopt a WTO non-conforming measure that is “necessary to protect human, animal or

⁴⁸⁷ *Id.*, para. 7.474.

plant life or health.” Lastly, the necessity contemplated under Article XX(d) may arise from the logistical, economic, or administrative constraints that make customs enforcement difficult to be enforced.

The panel commenced its analysis under Article XI:1 of the GATT 1994 instead of Article 4.2. AoA. The panel stated that Article XI:1 is the provision that “deals specifically with quantitative restrictions” and Article 4.2. of AoA has a “broader scope” and refers to measures other than quantitative restrictions.⁴⁸⁸ The panel further found that all eighteen measures are in violation of Article XI:1 and could not be justified under Article XX of GATT 1994. The panel exercised the judicial economy with regards to the claims under Article 4.2 of the AoA.

The panel made the following findings with respect to the complainants claims under Article XI:1 of the GATT 1994:

- a. Measures 1 through 7, 9, and 11 through 18 are inconsistent with Article XI:1 because, by virtue of their design, architecture, and revealing structure, they constitute a restriction having a limiting effect on importation;
- b. Measures 8 and 10 are inconsistent with Article XI:1 because, by virtue of their design, architecture, and revealing structure, they constitute a prohibition on importation; and

The panel addressed Indonesia’s defenses under Article XX of the GATT 1994 and found that:

- a. Indonesia had failed to demonstrate that Measure 1, 2, and 3 are justified under Article XX(d) of the GATT 1994;
- b. Indonesia had failed to demonstrate that Measure 4 is justified under Article XX(b) of the GATT 1994;

⁴⁸⁸ Report of Panel WTO/DS477/DS478/R, *supra* note 453.

- c. Indonesia had failed to demonstrate that Measures 5 and 6 are justified under Article XX(a), (b), and (d) of the GATT 1994;
- d. Indonesia had failed to demonstrate that Measure 7 is justified under Article XX(b) of the GATT 1994;
- e. Indonesia had failed to demonstrate that Measures 9 through 18 are justified under Article XX(a), (b), or (d) of the GATT 1994, where appropriate.

a) Limited Application Windows and Validity Periods for Horticultural Products

The U.S. argued that Indonesia's application window and validity requirements were "restrictions" within the meaning of Article XI:1 because the structure of these requirements caused a period of several weeks when products cannot be exported to Indonesia. Since it takes four to six weeks to ship products from the U.S. to Indonesia and the products must arrive in clear customs, exporters must stop shipping well before the semester's end to ensure their products could arrive by the last day. As a result, at the end of each semester, there was a period of several weeks when exporters cannot ship for the current period, although the RIPH and Import Approval were still valid because the goods cannot arrive on time. This impact was further exacerbated by importers' inability to start shipping immediately for the next semester because importers need to wait again for the Import Approvals issued by the MoT. Thus, the limited application windows and validity periods requirement were structured in such a way that imports are severely restricted at the start and at the end of the validity period due to the delay between Import Approvals being issued and the product being processed and shipped to Indonesia.⁴⁸⁹

Indonesia, on the other hand, argued that there was no period of time during which imports were restricted as a function of the lapse in validity periods. The application windows are typically

⁴⁸⁹ *Id.*, para 41.

one-month long, announced in advance, and because of Indonesia's online system, submitting an application is quick and easy. The validity periods also cover the entire calendar year. A temporary "slowdown" of imports for a limited amount of time alone is not enough to establish that a measure constitutes a quantitative restriction on imports. Indonesia asserted that the complainants had not shown any evidence that net import volumes have decreased as a result of the application windows or validity periods for import licenses.

Added to that, contrary to the claim, it appears that imports for several key products have increased as the percentage of the total market in recent years showing a growing market for imported food products in Indonesia. The market share of US-origin imports of oranges increased from 11% in 2012 to 15% in 2013, and 19% in 2014.⁴⁹⁰ Like oranges, US-origin lemons also increased from 10% in 2012 to 13% in 2013, and 22% in 2014.⁴⁹¹ For the processed horticultural products, the market share of US-origin frozen sliced potatoes increased from 33% in 2010 to 48% in 2013 and 2014.⁴⁹² Market share for US-origin grapefruit juice increased from 11% in 2012 to 56% in 2013, and an astonishing 85% in 2014.⁴⁹³

However, despite the argument presented by Indonesia, the panel agreed with the complainants that the measure resulted in no imports during the month of July. This is because the importer must make its last shipment (the shipment usually takes four weeks from the country of origin to Indonesia) by the beginning of June for the products to arrive on time to be admitted into Indonesia before the validity of the Import Approval expires. Since the Import Approval would be issued in July, the earliest the importer would be able to ship horticultural products under the validity period of July-December would be at the beginning of July because it cannot ship any

⁴⁹⁰ Annex C-5 WT/DS477/R/Add.1 - WT/DS478/R/Add.1, *supra* note 483, para. 13.

⁴⁹¹ *Id.*

⁴⁹² *Id.*

⁴⁹³ *Id.*

products before obtaining the new Import Approval which is needed in the pre-shipment verification. Thus, the panel ruled that this has caused a restriction having a limiting effect on importation within the meaning of Article XI:1. Citing the *Argentina – Import Measures* and *China – Raw Material*, the panel explained that the limitation on imports “need not be demonstrated by quantifying the effects of the measure at issue.” Thus, Indonesia’s regulation about limited application windows and validity periods are in violation of Article XI:1 of the GATT 1994.

b) Fixed License Terms

The complainants stated that according to the WTO jurisprudence, a measure is a “restriction” if it imposes “a limitation on the importation, a limiting condition on the importation, or has a limiting effect on the importation.” Thus, where a measure allowed only certain imports, that measure is a restriction. The complainants argued that the fixed license terms imposed by Indonesia are limiting the importation. During a semester, the only horticultural products permitted to be imported are those that conform to the products listed on importer’s RIPHs and Import Approvals. Since it is fixed terms, and not allowed to be amended, Indonesia’s restrictions removed the ability of importers to respond to market forces and external factors that occur during a validity period.⁴⁹⁴

As a defense, Indonesia noted that the terms are only static for one validity period of time. More importantly, the terms are self-selected by the importers, and they are free to change their terms of importation from one license application to the next. Indonesia rejected that the measure constituted a restriction because having to project trade volumes a few months out is hardly equivalent of a quantitative restriction or similar border measure, and incorrect estimates can be

⁴⁹⁴ *Id.*, para 42.

easily corrected before the start of a validity period with another application or in subsequent license application for the next validity period.

Similar to Measure 1, fixed licensed terms were also found to constitute a restriction due to its limiting effect on importation. The panel further stated that the design, architecture, and revealing structure of measure have the effect of an import quota. Measure 2 fixed the amount and type of products that can be imported for each validity period i.e., every six months. This means that for the six months period, there is a maximum quantity of products of a given type that can be imported that cannot be modified. Although Indonesia argued that the importers themselves set the amount of quota, the panel cited the *US – Cool* that “where private actors are induced or encouraged to take a certain decision because of the incentives created by a measure, those decisions are no ‘independent’ of that measure.” In this case, the system having an effect of quota can be perceived as the result of how Indonesia structured this measure.

c) 80% Realization

The other requirement imposed by Indonesia is that importers must fulfill at least 80% of the amount of import that is stated in the RIHP and Import Approval. First, importers are subjected to the 80% realization requirement as a condition to import, and in the case that they could not meet the requirement, the importers may be found to be ineligible to import in the future. This requirement created a powerful inducement to importers to lower the amounts for which they sought permission to import. To mitigate the risk of not fulfilling 80%, importers must lower the quantity it requested in the Import Approval application than the amount it would request otherwise. New Zealand stated that the 80% realization requirement also imposed a quantitative

restriction since importers need to conservatively estimate the quantities that they requested in their Import Approval and accordingly has a limiting effect on imports.⁴⁹⁵

Indonesia stated that the 80% realization requirement was imposed to serve as a safeguard to importers grossly overstating their anticipated imports. As a developing country, Indonesia has limited resources to devote to import administration. Thus, it is important for Indonesia to have a rough idea of expected trade volumes for each validity period and because Indonesia recognizes the need for flexibility in these estimates, Indonesia asked importers to achieve 80% of their anticipated imports for the relevant validity period. However, this realization requirement is already removed from Indonesia's regulation. Indonesia also found the arguments by the complainants are contradictory to each other. On the one hand, the complainants expressed that importers are unable to import as much as they want. On the other hand, the complainants stated that they are struggling to import 80% of their anticipated import volumes.

The panel ruled that the 80% realization requirement was found to be a restriction having a limiting effect on importation. Because the consequences of failing to comply with the requirement are severe and could result in importers being effectively prevented from doing business, the importers have a strong incentive to comply with the 80% realization requirement. Further, the limiting effect of the 80% realization requirement appeared to be "exacerbated" when combined with Measure 2. This results in importers conservatively estimating, or underestimating, the quantities requested in their import licenses to ensure they are able to satisfy the 80% realization requirement. Thus, Measure 3 acted in a similar way incentivizing importer to limit the amount that they request in the import approval applications, which, in turn, restricted the quantity of products they are allowed to import. The panel also rejected Indonesia's argument that both

⁴⁹⁵ *Id.*, para 43.

complainants have not presented any evidence that the realization requirement had an adverse impact on trade flows. As mentioned above, the jurisprudence within the WTO, there is no need to show the quantifying effects of limitation on imports.

d) Harvest Period

With regards to the harvest periods, the U.S. argued that the Indonesian MoA established periods of time during which it restricts or prohibits the importation of certain horticultural products to protect domestic products during their harvest periods. Because importers need to have RIHP issued by MoA to import horticultural products, restrictions through the RIHP for certain fruits during Indonesia's harvest period directly limited the types of quantities of imported products entering Indonesia. New Zealand added that the measure was protecting domestic Indonesian horticultural products by eliminating imported competition at certain times of the year.

Indonesia did not seem to contest that Measure 4 resulted in a temporary limitation on importation. Indonesia argued that imports were not banned but only regulated in terms of timing when to enter the territory of Indonesia. Indonesia did argue that this measure intended to prevent an oversupply of only certain fresh horticultural products that could have disastrous consequences. The panel decided that Measure 4 violated Article XI:1 GATT 1994 because, through this measure, Indonesia controlled the importation of certain horticultural products over the Indonesian harvest period for the same type of products by withholding or limiting RIPHS over those periods. The panel relied on the evidence presented by the complainants which is a letter dated 6 May 2015 from the Secretary to the Director-General of Horticultural addressed to the Secretary to the Director-General of Processing and Marketing of Agricultural Products that recommended the related institution to impose import ban of horticultural products that compete with domestic products to be harvested in the period in July to December.

e) Storage Ownership

The U.S. argued that Indonesia's requirement that importers must own its storage facilities to receive RIPH and the quantity specified in the Import Approval could not exceed the capacity of its storage facility was in violation of Article XI:1.⁴⁹⁶ This requirement limits the quantity of imported products because it operates as an artificial ceiling on the quantity importer can import during each semester. Without this restriction, an importer might be able to fill such facilities multiple times over each semester. However, due to such a requirement in place, the storage capacity dictates the quantity of product imported, not market conditions. Since importer was not allowed to lease or rent a storage capacity, this created prohibitive storage cost to the importer and adversely affected the competitive opportunities with domestic product.

Indonesia argued that the requirement did not place a limit on the amount of storage capacity an importer may acquire, just as it does not limit the amount of goods an importer may import during a particular validity. All of the limitations put forward by the complainants are, in fact, the choice by the importers and self-imposed. Indonesia asserted that the storage requirement is merely a food safety measure and not intended to limit trade.

The panel ruled that Measure 5 had a limiting effect on importation for the following three reasons. First, the storage ownership and capacity requirements, explicitly put a limit on the volume of imports of horticultural products by giving an importer the maximum amount they can store in its own storage during the six-month validity period of its Import Approval. Second, this Measure violated Article XI:1 GATT 1994 because it ignored the possibility of multiple turnovers of horticultural products taking place during a six-month period. This means that additional storage

⁴⁹⁶ The United States of America First Written Submission (DS477/DS478), FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA - INDONESIA IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS, AND ANIMAL PRODUCTS (2015), para. 187.

could be available as the products are sold, allowing the importers to renew the inventories with the new imports. However, this measure excluded such possibility because the storage capacity is measured when the importers apply for the relevant import documents. Further, even if the importer sells all the imported products before the six-month period or acquires more storage capacity, the importers would not be able to import the same period due to Measure 1 (application windows and validity periods) and Measure 2 (fixed and periodic import terms). The last reason is the increased costs. Since the importers are required to own and not lease or even borrow facilities, the importers need to spend more on owning storage. For these reasons, the panel concluded that Measure 5 was in violation of Article XI:1.

f) Use, Sale and Distribution

New Zealand and the U.S. claimed that Indonesia's restrictions on importation of horticultural products based on their use, sale, and transfer are restrictions within the meaning of Article XI:1. In the U.S.' view, Indonesia's regulations on use, sale, and distribution put a constraint on the ability of importers to market imported products, and by adding a distribution layer, it reduced the opportunity for imported products to reach Indonesian householders. The U.S. submitted that RI can only sell imported products to distributors and was prohibited from selling directly to consumers and retailers. Thus, the requirement added a level in the supply chain by forcing importers to rely on distributors and increases the costs associated with importer products. Meanwhile, PI can only import horticultural products as materials in their own industrial process and were explicitly prohibited from selling or transferring importer horticultural to another entity.⁴⁹⁷ If a PI does not use all the imported products, they were forced either to destroy the excess products or to incur the costs of storing them. This created waste and increased unnecessary

⁴⁹⁷ *Id.*, para. 193.

costs of using imported products. Thus, a PI must predict precisely the quantity of imported products that they would use in their product.

Indonesia did not contest the complainants' characterization of Measure 6; rather, it argued that the limitation of imports of horticultural products to certain end-users did not constitute a quantitative restriction.⁴⁹⁸ Indonesia further asserted that the differentiation between the RI and PI only for statistical purposes which allows keeping track of horticultural products needed for direct consumption and those used as a raw material for further processing.⁴⁹⁹

Nonetheless, the panel agreed with the complainants that Measure 6 was a restriction on importation within the meaning of Article XI:1. The measure reduced the competitive opportunities for imported products as it increased the costs of their marketing and affected the business plans of importers. More specifically, the measure limited the competitive opportunities of importers by forcing imported products to go through a distributor before they can reach the final consumer and consequently adding another layer in the distribution of chain of horticultural products.⁵⁰⁰

g) Reference price for Chili and Shallots

The complainants claimed that Indonesia's regulation stipulating importation of chili and shallots is postponed when the domestic market is below a reference price that has resulted in the restriction of New Zealand and the U.S. products from entering Indonesia. According to New Zealand, due to this regulation, no imports of chilies took place in February, March, and April of

⁴⁹⁸ Report of Panel WTO/DS477/DS478/R, *supra* note 453, para. 7.186.

⁴⁹⁹ *Id.*, para. 7.188.

⁵⁰⁰ *Id.*, para. 7.198.

2015.⁵⁰¹ In the U.S. view, the reference price also had a limiting effect on importation at all times because the threat of such a broad prohibition reduced the incentives for importation.⁵⁰²

Indonesia, however, argued that the reference price of chilies and fresh shallot was part of an integral plan of Indonesia's food safety and security plan that was carefully planned and determined by Indonesia's food security council. These goals and objectives were implemented through a multi-agency task force, including the Ministry of Agriculture's Agency for Food Security and the Ministry of Trade. The reference price system was specifically aimed to protect: i) against harmful overheat of perishable food items in equatorial heat; ii) the extreme volatility on the availability of a continuous supply of fresh chilies and shallots in Indonesia's food supply. Indonesia also underlined that the reference price system was not continuously in effect and only activated on a temporary basis as a response to an immediate crisis. Indonesia further explained that, given its location, Indonesia has always been an agricultural country where most of its citizens engage in farming for a living. In terms of chilies and shallots, almost every province in Indonesia has its own production of chilies and shallots. Thus, unrestraint import could result in the oversupply of the products. The reference price system used by Indonesia, among others, is one of the policy tools that protect Indonesia against extreme price volatility.

The panel concurred with the complainants that the reference price system constituted an absolute ban on the importation of chili and shallots products. The panel ruled that Indonesia's reference price system for chilies and shallots is similar to minimum price requirements that previous WTO and GATT panels have found to be inconsistent with Article XI:1. In *China – Price Band System*, the panel found that China's requirement on exporting enterprises to export at set or

⁵⁰¹ New Zealand Second Written Submission WT/DS477, INDONESIA - IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS (2016), para. 265.

⁵⁰² The United States of America First Written Submission (DS477/DS478), *supra* note 496, para. 199.

coordinated export prices or otherwise face penalties was a restriction under Article XI:1 because “by its very nature has a limiting or restricting effect on trade.”⁵⁰³ This measure also resulted in uncertainties and incentives for importers to limit the quantities they import. These uncertainties were caused by the lack of transparency as the reference price calculation methodology, and parameters are not published.⁵⁰⁴

h) Six Months Harvesting

Indonesia imposed a regulation that prohibits the importation of fresh horticultural products that have been harvested for more than six months. The U.S. was against this requirement, asserting that certain horticultural products are stored in controlled atmosphere conditions after harvest where they remain fresh for more than six months; thus, they can be shipped year-round to global markets.⁵⁰⁵ New Zealand added to the U.S. argument stating that the requirement constitutes an absolute prohibition on imports also because of the severe consequences when importer violates this requirement. In the case when an importer violates this requirement, it will not be granted a RIPH for one year.

Indonesian claimed that the requirement is to ensure food safety as having fresh horticultural products imported sooner allowed Indonesian health authorities to inspect them to ensure quality instead of importing such goods at a later date when “it is impossible to verify that proper storage procedures have been followed.”⁵⁰⁶

Despite Indonesia’s attempt to justify under Article XX(b), the panel asserted that Measure 8 is designed to prohibit the importation of horticultural products that have been harvested more

⁵⁰³ New Zealand First Written Submission WT/DS477, INDONESIA - IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS (2015), para. 263.

⁵⁰⁴ Report of Panel WTO/DS477/DS478/R, *supra* note 453, para. 7.222.

⁵⁰⁵ The United States of America First Written Submission (DS477/DS478), *supra* note 496, para. 151.

⁵⁰⁶ Report of Panel WTO/DS477/DS478/R, *supra* note 453, para. 7.233.

than six months prior to importation. To the panel, this is an absolute band that falls squarely into the definition of a “prohibition” under Article XI:1 of the GATT 1994. The panel argued that food safety arguments are not valid arguments.⁵⁰⁷

i) Import Licensing Regulation for Horticultural Products as a Whole

New Zealand claimed that in addition to each of the components of Indonesia’s import licensing regime for horticultural products operating independently being inconsistent with Article XI:1, these trade-restrictive requirements, viewed as a whole, are inconsistent with Article XI:1.⁵⁰⁸ Both of the complainants argued that Indonesia imposed numerous restrictions and prohibitions on the importation of horticultural products through its import licensing program. This resulted in importation was not undertaken according to commercial consideration but in relation to the requirements and conditions imposed by the combination of Indonesia’s import licensing regime. The combination of the various regulations has the effect of both directly limiting imports and creating disincentives for importers to import the type and amount of horticultural products that they will otherwise import based on their commercial considerations.

Indonesia rejected the complainants’ arguments stating since Indonesia’s import licensing is an automatic licensing pursuant to Article 2 of the Import Licensing Program, it is expressly permitted under Article 2.2(a) of the Import Licensing Agreement and therefore excluded from the scope of Article XI:1 of the GATT 1994. Indonesia added even if it is considered to fall within the scope of Article XI:1, not every condition or burden placed on importation or exportation will be inconsistent with Article XI:1 but only those that are limiting, that is, those that limit the importation of products are inconsistent with Article XI. In Indonesia’s view, the complainants failed to show sufficient pre and post-implementation import data to support the assertion that

⁵⁰⁷ *Id.*, para. 7.242.

⁵⁰⁸ New Zealand First Written Submission WT/DS477, *supra* note 503, para. 271.

its import licensing regime for horticultural products as a whole operated to restrict the quantity of imports.⁵⁰⁹

The panel first emphasized that automatic import licensing does not fall out *per se* from Article XI:1. Instead, the panel argued that the previous analysis of Measure 1 to Measure 8 has found to be in violation of Article XI:1. Although each of these measures was a prohibition or restriction under Article XII of the GATT 1994 in its own right, the panel observed that the restrictive effects of each measure are compounded once they are seen as part of a system because they are interrelated and do not work in isolation.⁵¹⁰

j) Prohibition on Imports of Certain Animals Products

The complainants argued that Indonesia imposed a “positive list” system to prohibit the importation of certain forms of meat, offal, and carcass. In particular, any bovine meat, offal, or carcass products that are not included in Appendix I of Indonesian MoA Regulation and Appendix I of MoT Regulation are ineligible to obtain a RIPH, and therefore Import approval which requires Recommendation. Unable to obtain Recommendation and Import Approval, importers are prohibited from importing products to Indonesia.

Indonesia denied the allegation by the complainants that it was imposing the “positive list” with respect to animals and animal products. Indonesia argued that it did not prohibit the importation of animals and animal products that do not appear in Appendix I or Appendix II of the MoT 46/2013 and Appendix I and II MoA 139/2014. Animals and animal products that are not listed are exempted from the requirements of the regulation and generally permitted to be imported to Indonesia unless expressly prohibited by another instrument or determination by an agency. Indonesia claimed that when animals or animal products are not allowed to be imported into

⁵⁰⁹ Report of Panel WTO/DS477/DS478/R, *supra* note 453, para. 7.263

⁵¹⁰ *Id.*, para 7.266.

Indonesia are solely for the protection of human, animal, or plant health or life under Article XX(b) GATT 1994.

The panel, however, underlined that Indonesia failed to identify the legal provisions that would specifically allow unlisted animals and animal products to be imported to Indonesia. Indonesia only replied that some products are not listed in the appendices because there is no demand for such products or because they are prohibited for food safety reasons.⁵¹¹ The panel then concluded Indonesia has failed to submit an effective rebuttal, thus, the complainants have presented a *prima facie* case that Indonesia used a “positive list” and prohibits the importation of animals and animals product violating Article XI:1.⁵¹²

k) Limited Application Window and Validity Periods for Animals and Animal Products

Similar to Measure 1, Measure 11 was also concerning limited application window and validity period. While Measure 1 regulated the application and validity period for the horticultural products, Measure 11 governed the application and validity period for animals and animal products. New Zealand argued that Measure 11 constituted a restriction within the meaning of Article XI:1 that is a limitation or limiting condition on importation or has a limiting effect on importation. The U.S. further added that the combination of the limited time windows within which importers can apply for, and receive import permits, and the short validity periods within which imports can enter Indonesia, results in a period of several weeks at the end of the validity period and the beginning of the next one where products cannot be exported to Indonesia. More specifically, due to the design and the structure of Indonesia’s license application windows and

⁵¹¹ *Id.*, para. 7.292.

⁵¹² The United States of America First Written Submission (DS477/DS478), *supra* note 496.

import validity periods, and the long shipping time from the U.S. to Indonesia, there is a period of five to six weeks during each import period when the U.S. exporters cannot ship to Indonesia.⁵¹³

The U.S. submitted that the Import Approvals are issued four times a year for a single three-month validity period, and it can be applied only during the month preceding the start of a period. Import Approval application can only be submitted after the importer has received a RIPH, which is issued only during the month before the start of a validity period. In reality, the U.S. contended that importers often have less than a month to apply for an Import Approval due to delay on the RIPH application window. Since Import approval number is needed to be written on the Certificate of Health that is issued in the products' country of origin, importers cannot begin placing orders and begin shipping until Import Approval has been issued for that period. Once the orders are placed, it takes U.S. products at least four to six weeks to be shipping, and therefore the earliest that U.S. animals and animal products could reach Indonesia is about one month after the start of a validity period.⁵¹⁴ Since also Indonesia required the products must arrive in Indonesia in clear customs, the U.S. exporters must stop accepting orders and shipping to Indonesia four to six weeks before the end of the period as it takes that long for shipping time.⁵¹⁵

Like Measure 1, Indonesia argued that the import licensing system for animals and animal products is an automatic import licensing system, and for that reason, it does not violate Article XI:1 of the GATT 1994.⁵¹⁶ Indonesia further argued that the validity periods of its import licenses for horticultural products, animals, and animal products cover the entire calendar year, and there was no period of time during which imports are restricted as a function of the lapse in the

⁵¹³ *Id.*, paras. 264-265.

⁵¹⁴ *Id.*, para. 268.

⁵¹⁵ *Id.*, para. 269-270.

⁵¹⁶ Report of Panel WTO/DS477/DS478/R, *supra* note 453, para. 7.307.

validity.⁵¹⁷ Indonesia also asserted that application window and validity periods are very common in administering imports in the WTO Members.⁵¹⁸

However, the panel rejected Indonesia's argument, and instead, agreed with both complainants that restriction occurred as a result of the limited application windows and validity period. This is due to the combination of the different elements or requirements that constitute Measure 11 namely: i) the timing of the application windows, which is very close to the expiration of the previous import documents; ii) the requirements that preclude importers from shipping products before having obtained the new Import Approval, that would otherwise allow importers to save time by shipping their products in advance while waiting for the new Import Approval, and iii) the shipping time from the country of origin, which creates a gap between the time where the new Import Approval is received and the time when the goods subject to such Import Approval arrive in Indonesia.⁵¹⁹ Citing the argument from New Zealand and the U.S, the panel agreed that due to the operation and interaction the different requirements under this measure as well as the shipping times from the complainants' territories to Indonesia, there are several periods where there are no imports of animals and animal products to Indonesia.⁵²⁰

l) Fixed License Terms for Animals and Animal Products

Similar to Measure 2, the RIPH and Import Approvals for animals and animal products are required to specify the type, quantity, country of origin, and port of entry. These are fixed terms and are unable to change once the RIPH and Import Approval are issued. New Zealand argued that these restrictions eliminate importers' flexibility to respond to changes in external factors that

⁵¹⁷ *Id.*, para. 163.

⁵¹⁸ *Id.*

⁵¹⁹ *Id.*

⁵²⁰ *Id.*, para. 7.324.

occur during Quarter, and therefore limit an importers' ability to alter its import quantities during that period.

Indonesia put forward the same argument as Measure 2 that the import terms are fully self-determined, and importers are free to change their terms of importation from once license application to the next, meaning that the terms only fixed for one validity period of time. Further, importers can easily change estimated shipment volumes and submit a new application for the current validity or wait for the next validity period to submit a new application.

The panel concluded that Measure 12 is similar to Measure 2 in the sense that the measure constitutes a quota because for that period of time, there is a maximum quantity and type of products that can be imported and unable to be changed.⁵²¹ The panel also rejected Indonesia's argument that the measure is self-determined. The panel asserted that in this case, the importers are induced or encouraged to take the decisions due to the incentives created by a measure. Therefore, it is not an independent decision of the importers.

m) 80% Realization Requirement for Animals and Animal Products

After being granted an Import Approval for bovine animals or animal products, an importer must import no less than 80% and no more than 100% of the quantity of each of the products specified in the Import Approval. This requirement, along with fixed license terms, magnified the limiting effect of the importation. Similar to Measure 3, New Zealand argued that the 80% realization requirement for animals and animal products resulted in importer reduced the quantities requested in their quarterly RIPH and Import Approvals. This is because importers are induced to conservatively estimate or underestimate the quantities requested in Import Approvals to ensure they fulfill an 80% realization requirement during the applicable period.⁵²² New Zealand further

⁵²¹ *Id.*, para. 7.346.

⁵²² New Zealand First Written Submission WT/DS477, *supra* note 503, para. 166.

argued that this caused the importers not to be able to follow a range of factors such as changes in domestic prices, world prices, supplier availability of supply, domestic demand, shipping availability.⁵²³ In addition to that, the U.S. also stated that in the animal context, when Measure 13 combined with Measures 16 (Beef reference price), importing in larger quantities during short periods of time to comply with the realization requirement even became riskier because it could cause the price to drop below the reference price and stop imports altogether.⁵²⁴

In its rebuttal, Indonesia asserted that the 80% realization requirement is needed as a safeguard against importers grossly overstating their anticipated imports and that if there is any change in the market, the importers can always change their requested volume in the next period. Indonesia also tried to give some flexibility to the importers by only requiring importers to fulfill 80% of its anticipated imports. According to Indonesia, the complainants also failed to show when the complainants have been unable to show when the importer failed to comply with 80% and lose its importer designation. Thus, there is no impact on trade flows.

Ruling on this matter, the panel agreed with both the complainants that the limiting effect of Measure 13 is exacerbated when combined with Measure 16 relating to the beef reference price. This is because the import of large quantities in a short period of time could cause the price to drop below the reference price, thus cut the import altogether. The panel then cited *India – Autos* in which it was found that measure that did not set an absolute numerical on imports but induced importers to limit their imports as a consequence of the obligation to satisfy an export commitment imposed by India counted as an import restriction. The 80% realization requirement acts in a similar way by incentivizing importers to limit the amount they request in their Import Approval application, which, in turn, restricts the quantity of products that they are allowed to import. As

⁵²³ *Id.*, para. 87.

⁵²⁴ Report of Panel WTO/DS477/DS478/R, *supra* note 453, para. 7.369.

previously stated, the panel rejected Indonesia's argument and reiterated that the limitation on imports "need not be demonstrated by quantifying the effects of the measure at issue."⁵²⁵

n) Use, Sale, and Distribution of Imported Animals and Animal Products

The Complaints argued that Indonesia imposed a prohibition on the importation of animals and animal products for particular uses, and for sale and distribution through certain outlets. For bovine meat, permitted offal and carcass may only be permitted to Indonesia for use by industry, hotels restaurant, catering, and/or other special needs. The effect of these measures is that bovine carcass, meat, and offal are not permitted to be imported into Indonesia for any form of domestic use or sold or distributed through consumer retail outlets. New Zealand underlined that these products are prohibited from being sold by importers to the modern market as well as a traditional retail outlet. The U.S. added that the prohibition to sell in traditional markets, where consumers purchase a substantive proportion of meat, is detrimental to their imported products.

Indonesia asserted that certain products are not permitted to be sold in the traditional Indonesian market because i) the extremely high risk of unsafe food handling; ii) the lack resources to monitor food safety practices in these markets; and iii) religious constraints on food consumption that impacts that vast majority of Indonesians.⁵²⁶ Traditional markets in Indonesia usually do not have proper cold storage facilities, and in such environments, products must be extremely fresh in order to be safe for human consumption. Indonesia also stated that the prohibition on the sale of non-fresh meat, such as defrosted or thawed, applies not only to imported products but also domestic meat.

The panel agreed with the complainants that the regulation resulted in some animals and animal products under the scope of related regulation cannot reach certain retail outlets where most

⁵²⁵ *Id.*, para. 7.327.

⁵²⁶ Annex C-5 WT/DS477/R/Add.1 - WT/DS478/R/Add.1, *supra* note 483, para. 20.

of the Indonesian consumers do at least half of their food shopping.⁵²⁷ To the panel, the design, architecture, revealing structure, Measure 14 restricted the competitive opportunities for imported products because it impedes sale in modern stores or traditional markets or directly to consumer, thus violating Article XI:1. The panel also cited *India – Quantitative Restrictions* where the panel found a similar measure namely India’s “actual user requirement” which provided that some products could only be imported by the “Actual user,” and thus did not allow the importation of products for resale by intermediaries, in violation of GATT agreement.⁵²⁸ The panel concluded that the Indian measure was “a restriction on imports because it precludes imports of products or resale by intermediaries, i.e. distribution to consumers who are unable to import directly for their own immediate use is restricted.”⁵²⁹

o) Domestic Purchase Requirement

Under the domestic purchase requirement, Indonesia required all persons who wish to import beef must purchase a specified amount of Indonesian beef.⁵³⁰ The quantity of the beef purchased is regulated quarterly. In July 2015, the amount was 3% of total beef purchases (for beef for all permitted purposes other than manufacturing) and 1.5% of total beef purchases (for beef imported for use in manufacturing purposes), both from designated abattoirs. The domestic purchase requirement must be included in the importer’s application for RIPH and required to be purchased three months before the month in which an application for the RIPH is made.⁵³¹ New Zealand explained it is difficult to fulfill the domestic purchase requirement because of the limited supply of beef that has been raised and slaughtered in Indonesia. The U.S. submitted that this

⁵²⁷ Report of Panel WTO/DS477/DS478/R, *supra* note 453, para. 7.396.

⁵²⁸ *Id.*, para. 7.397.

⁵²⁹ *Id.*

⁵³⁰ New Zealand First Written Submission WT/DS477, *supra* note 503, para. 179.

⁵³¹ *Id.*, para. 183.

requirement operates as a limitation or limiting condition on imports or has a limiting effect on imports in three ways. First, the domestic purchase requirement is designed to substitute imports with domestic products. Second, the domestic purchase requirement is a limiting condition on imports because it ties the permissible quantity of beef imports to the supply of local beef that is available for purchase towards the requirement. Third, the measure also adds unnecessary costs of importation that did not relate to any business purpose.

Indonesia, on the other hand, argued that domestic purchase requirement was adopted following a recommendation from the importers' association, therefore, it is not a measure that constitutes a restriction within the meaning of Article XI:1. Indonesia further stated that the domestic purchase requirement did not restrict or limit any amount of beef that can be imported to Indonesia. Indonesia provided data showing that there was plenty of domestic supply to meet the domestic purchase requirement. Indonesia also asserted that from January 2013 to March 2015, the domestic purchase requirement for beef pursuant to Article 5(1) of MoA 139/2014 has not been enforced and that RIPH application during that time has been rejected because the applicant has not met the domestic purchase requirement throughout 2015. Indonesia also responded that Measure 15 was not in force at the time of the establishment of the panel.

The panel, however, dismissed Indonesia's argument that Measure 15 is not in force because the Measure clearly stated that domestic purchase requirement went into force more than two months before the establishment of the panel. The panel observed that Measure 15 resembles a local content requirement discussed in *Argentina – Import Measures* in which it included a requirement to incorporate a minimum level of local content into goods produced in Argentina. In that case, the panel found that the “required increased of local content, either by purchasing from domestic producers or by developing local manufacture, [had] a direct limiting effect on

importation because the measure is designed to force the substitution of the imports.”⁵³² It was also underlined that this type of measure might cause costs unrelated to the business activity of the particular operator. Concurred with the panel on *Argentina – Import Measures*, the panel found that Measure 15 is in violation of Article XI:1.

p) Reference Price for Beef

Similar to the reference price used in chili and shallots, the Indonesian government also imposes reference prices for beef. The Indonesian government provides that import of bovine animals and animal products are suspended if the market price of beef secondary cuts in Indonesia falls below a specified “reference price.” According to New Zealand, the function of beef reference price is similar to “minimum import price,” as both the minimum import price and the beef reference price have the effect of establishing a minimum price below which imported beef cannot enter the market.⁵³³ New Zealand states that minimum import price has previously been found inconsistent with Article XI:1 of the GATT by some of GATT and WTO panels.⁵³⁴ In *China – Raw Materials*, particularly, the panel confirmed the inherent restrictiveness of a minimum export price.⁵³⁵ The U.S. added on that argument stating the effect of reference price is even more categorical than the minimum import or export prices found by previous panels to be “restrictions” because it prohibits *any* imports once the reference price has been reached, and prohibits of *all* beef products and not merely secondary cuts, if the price of secondary cuts below the reference price.⁵³⁶ Indonesian did not provide a substantial argument in relation to this measure besides a defense under Article XX(b) of the GATT 1994 and Article XI:2(c)(ii) of the GATT.

⁵³² WTO Panel Report, *Argentina – Import Measures*, para. 6.258.

⁵³³ New Zealand First Written Submission WT/DS477, *supra* note 503, para. 191.

⁵³⁴ *Id.*, para. 194. Particularly New Zealand referred to GATT Panel Report on *EEC – Minimum Import Prices, Japan – Semi-conductors*, and *China – Raw Materials*.

⁵³⁵ *Id.*

⁵³⁶ Report of Panel WTO/DS477/DS478/R, *supra* note 453, para. 7.433.

The panel concurred with all the arguments from the complainants that the structure of Measure 16 constitutes restrictions and prohibitions within the meaning of Article XI:1. The operation of the reference price system is rather simple: once the domestic price for secondary cuts of beef falls below the reference price established the MoT, imports of all bovine animals and animal products are suspended.⁵³⁷ Thus, once the reference price system is triggered, there is an absolute ban for the importation of these products, and no procedures exist to defer imports of previously approved quantities to the next validity period.⁵³⁸ The panel agreed with the complainants that Indonesia's reference price is similar to minimum import price mechanisms that previous panels and GATT panels such as *EEC – Minimum Import Prices*, *Japan – Semiconductors* and *China – Raw Materials*, have found to be inconsistent with Article XI:1 of the GATT.⁵³⁹ Further, even in the situation where the reference price has not been actually triggered, the panel decided that it could create uncertainty affecting investment plans.⁵⁴⁰

q) Import Licensing Regulation for Animals and Animal Products as a Whole

New Zealand argued that Indonesia's import licensing regime of animals and animal products as a whole has a limiting effect on import in three key mechanisms: i) prohibition on the importation of certain beef products; ii) market access limitations for animals and animal products; and iii) the limitation on importation by creating uncertainty and imposing practical thresholds on importation.⁵⁴¹ New Zealand stated that the import licensing regime is even more restrictive when seen as a whole. The U.S. agreed with New Zealand that when the requirements of the regime

⁵³⁷ *Id.*, para. 7.450.

⁵³⁸ *Id.*, para. 7.445.

⁵³⁹ *Id.*

⁵⁴⁰ *Id.*

⁵⁴¹ New Zealand First Written Submission WT/DS477, *supra* note 503, para. 201.

interact with and reinforce each other, the limitations or limiting effect of the regime as a whole on importation are even greater than the individual components.

Indonesia submitted two arguments on why its import licensing regime for animals and animal products as a whole is not a violation of Article XI:1 of the GATT 1994. First, as previously stated in the horticultural products, Indonesia contended that the import licensing regime for certain animals and animal products is an automatic licensing regime, thus excluded from Article XI:1 of the GATT 1994. The complainants also failed to show any evidence when an application of both Recommendation or Import Approval was rejected when all legal requirements are fulfilled. Second, Indonesia stated that the import licensing regime did not constitute a quantitative restriction. According to Indonesia, the complainants must show through clear and convincing evidence that the measure at issue has indeed a limiting effect on importation. Although Article XI:1 does not require precise quantification of the trade effects of a challenged measure, it did not mean a complainant is excluded from demonstrating that the measure has some effect on trade.

As previously found, Measure 10 to Measure 16 imposed several restrictions and prohibitions on imports that only limit the quantity of animals and animal products that can be imported into Indonesia, sometimes imposing an absolute ban, but also affected the competitive opportunities of imported products, increase the costs associated with importation, affect the investment plans of importers, cause uncertainty in the importation business, and create incentives among the importers to limit the amounts they effectively import.⁵⁴² Even though each of these measures is a prohibition or restriction under Article XI:1 of the GATT 1994, in its own right, the panel observed that the restrictive effects of each measure are compounded once they are seen as a part of the system due to their interrelation.⁵⁴³ From the standpoint of an importer wishing to

⁵⁴² Report of Panel WTO/DS477/DS478/R, *supra* note 453, para. 7.474.

⁵⁴³ *Id.*

import animals and animal products to Indonesia, the import licensing regime for animals and animal products is unfavorable to imports and importers, imposing strong disincentives for commercial operators to conduct importation an affecting the investment plans of importers.⁵⁴⁴ For these reasons, the panel found that Measure 17 is inconsistent with Article XI:1 of the GATT because, by virtue of its design, architecture, and revealing structure, it constituted a restriction having a limiting effect on importation.

r) Sufficiency of Domestic Production to Fulfill Domestic Demand

New Zealand argued that Indonesia's domestic sufficiency requirement that is set in the Animal Law, Horticultural Law, Food Law, and Farmers Law restricted imports of certain animals and animal products and horticultural products in a manner inconsistent with Article XI:1 of GATT 1994.⁵⁴⁵ This condition limited the competitive opportunities of imported products because they are only given market access on the condition, and to the extent that, domestic supply is deemed insufficient to satisfy Indonesian needs. Similar to New Zealand, the U.S. argued that Indonesia's domestic insufficiency requirement explicitly placed a limiting condition on imports by conditioning all importation of horticultural products and animals and animal products on the insufficiency of domestic products to meet Indonesian consumers' needs, thereby severely limiting the opportunities for importation.⁵⁴⁶

Indonesia, on the other hand, claimed that this measure did not have any impact on imports, and the complainants have not presented any evidence that this measure harmed their trade flows. Indonesia added that the language cited by the complainants is only a general statement of Indonesia's commitment to food security.

⁵⁴⁴ *Id.*, para. 7.476.

⁵⁴⁵ New Zealand First Written Submission WT/DS477, *supra* note 503, para. 286.

⁵⁴⁶ The United States of America First Written Submission (DS477/DS478), *supra* note 496, para. 366.

The panel noted that Article 36 of the Food Law establishes that imports of food “can only be done if the domestic [f]ood [p]roduction is insufficient and/or cannot be produced domestically.”⁵⁴⁷ The panel thus agreed with the complainants that by conditioning the importation of food and agricultural commodities upon a determination of the sufficiency of domestic production to fulfill domestic demand, Measure 18 constitutes a restriction on importation and thus in violation of Article XI:1.⁵⁴⁸ The panel clarified that WTO members are free to pursue food and farm development objectives. However, pursuing those objectives need to be done through WTO consistent measure. The sufficiency of domestic production to fulfill domestic demand should not be done by restricting importation. Indonesia’s prohibition stipulated at its national law that promotes self-sufficiency is not in line with Indonesia’s WTO obligations and undermines the basic principles of the multilateral trading system.⁵⁴⁹

III. *Indonesia’s Defenses under Article XX of the GATT 1994*

Following the panel’s findings that Measure 1 to Measure 18 are in violation of Article XI:1 of the GATT 1994, Indonesia raised its defenses under Article XX of the GATT 1994. Table 10 summarizes Indonesia’s defenses that are analyzed by the panel.

Measure No.	Description	Article XX Defense		
		(a)	(b)	(d)
1	Limited application windows and validity periods			X
2	Periodic and fixed import terms			X
3	80% realization requirements			X
4	Harvest period requirement		X	
5	Storage ownership and capacity requirements	X	X	X
6	Use, sale, and distribution requirements for horticultural products	X	X	X
7	Reference prices for chilies and fresh shallots for consumption		X	

⁵⁴⁷ Report of Panel WTO/DS477/DS478/R, *supra* note 453, para. 7.495.

⁵⁴⁸ *Id.*, para. 7.496.

⁵⁴⁹ *Id.*, para. 7.500.

8	Six-month harvest requirement		X	
9	Indonesia's import licensing regime for horticultural products as a whole	X	X	X
10	Prohibition of importation of certain beef and offal products except in emergency circumstances		X	
11	Limited application windows and validity periods			X
12	Periodic and fixed import terms			X
13	80% realization requirement			X
14	Use, sale, and distribution of imported bovine meat and offal requirements	X	X	X
15	Domestic purchase requirement for beef		X	
16	Beef reference price		X	
17	Import licensing regime for animals and animal products as a whole	X	X	X
18	Sufficiency of domestic production to fulfill domestic demand			

Table 4.5: Indonesia's Defenses under Article XX Admitted by the WTO Panel
Source: *The Panel Report, para. 7.3.4*

Article XX of the GATT 1994 regulates general exception within the WTO agreement.

Article XX(a), XX(b), and Article XX(d) that are raised explicitly by Indonesia are as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;*
- (b) necessary to protect human, animal or plant life or health;*
- ...*
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;*

In its ruling, the panel also rejected all of Indonesia's defenses under Article XX(a), XX(b), and (d). Under Article XX(a), Indonesia claimed that measures are needed to protect public moral which in this case related to Halal requirement. However, the panel were unable to find any identification of Halal among the objectives of the measures. Indonesia also failed to point specifically to any Halal provisions that would specifically apply to horticultural products.⁵⁵⁰ Indonesia's arguments under Article XX(b) were also rejected by the panel. The panel agreed with both complainants that there is nothing on the text of regulations that submitted by Indonesia refers to the protection of human, animal or plant life or health as the policy objective of the measure.⁵⁵¹ The panel then failed to see any of the legal instruments constituted relevant evidence that the measures were formulated to protect public health in the sense addressing Indonesia's concerns. The panel concluded that Indonesia had not demonstrated that there is a relationship between the measures and the protection of human, animal or plant life or health.

With regards to Article XX(d), the panel examined whether Indonesia had demonstrated that the measures were designed to secure compliance with Indonesia's WTO-consistent and regulations and, if so, whether it was necessary to secure such compliance. The panel asserted that the key step in the analysis of Article XX(d) is to establish whether, and, if so, how precisely Indonesia has identified the WTO-consistent laws and regulations.⁵⁵² Thus, the more precise Indonesia was able to identify the specific rules, obligations, requirements contained in the WTO consistent laws or regulations, the more likely the panel would be able to analyze how and why Measure 1 secured compliance with such laws or regulations.⁵⁵³ All Indonesia's defenses under Article XX(d) are rejected by the panel because Indonesia failed to identify any specific rules,

⁵⁵⁰ *Id.*, para. 7.658.

⁵⁵¹ *Id.*, para. 7.632.

⁵⁵² *Id.*, para. 7.571.

⁵⁵³ *Id.*, para. 7.572.

obligations, and requirements. Indonesia only insofar submitted legal instruments to the WTO,⁵⁵⁴ and based on the panel observation, all these laws and regulations deal with vast array of issues, some being very extensive with numerous article that consists more than 100 articles.⁵⁵⁵ Based on this reasoning, the panel rejected Indonesia's defense under Article XX(d).

B. DS484

Not long after New Zealand and the U.S. brought an agricultural case to the WTO about Indonesia's import licensing on horticultural, animals, and animal products, on 16 October 2014, Brazil requested consultations with Indonesia concerning certain measures imposed by Indonesia on the importation of chicken and chicken meats. Brazil stated that Indonesia had imposed general import prohibition on chickens and chicken meats that is inconsistent with Indonesia's WTO obligations under Article XI:1 of the GATT 1994 and Article 4.2. of the Agreement on Agriculture (AoA). The alleged general prohibition asserted by Brazil as follows:⁵⁵⁶

- a. Indonesian does not allow the importation of animal and animal products not listed in the appendices of the relevant regulation.
- b. Domestic food production and national food reserve are prioritized over food import, which is only authorized as an exception when domestic food supply in Indonesia is not considered "sufficient" by the government.

⁵⁵⁴ As responses to the Panel questions regarding the specific rules, obligations, and requirements, Indonesia provided five legal instruments to the WTO such as the Customs Law, Quarantine Law for Fish and Plant Law, Labelling Food Advertising Law, Verification or Technical Surveillance in Trading Sector Law, and Plant Quarantine for Entry of Fresh Fruits and Vegetable Law. Indonesia did not point out a specific article within the law as its defense.

⁵⁵⁵ Report of Panel WTO/DS477/DS478/R, *supra* note 453, para. 7.584.

⁵⁵⁶ Request for the Establishment of a Panel by Brazil WT/DS484/8, INDONESIA - MEASURES CONCERNING THE IMPORTATION OF CHICKEN MEATS AND CHICKEN PRODUCTS (2015).

- c. Imports of essential and strategic goods may be prohibited and/or restricted, and prices may be controlled by the Indonesian government. Thus, import and export operations may be postponed by the Minister of Trade during a force majeure event.
- d. The Indonesian government limited the importation of chicken and chicken products to certain intended uses.
- e. Indonesia imposed prohibitions and/or restrictions to importation through its Import Licensing Regime. Importers must obtain import licenses after several approvals and overlapping authorization stages covered by different regulations and authorities.
- f. Indonesia established an import prohibition through different regulations regarding halal slaughtering and labeling requirements for imported chicken meat and chicken products.

I. Positive List Requirement

The first measure concerned provisions in the relevant Ministry of Agriculture (MoA) and Ministry of Trade (MoT) regulations governing the importation of meat, which prescribe the type of carcass for which an importer may obtain an MoA Import Recommendation (RIPH) and MoT Import Approval. Chicken cuts and other chicken products cannot be subject either of RIPH and Import Approval because they are not listed in the relevant appendices of the respective regulations. Brazil, in its panel request, has described this measure as an import prohibition on certain products. In the course of the proceedings, Brazil referred to this measure as the “positive list requirement,” the term also used by Indonesia.⁵⁵⁷

Indonesia did not dispute the structure of the measures established a prohibition on the importation of chicken cuts. Instead, Indonesia raised its defense under Article XX(d) of GATT 1994. Indonesia argued that the positive list requirement is designed to secure compliance with the

⁵⁵⁷ Report of Panel WTO/DS484R, INDONESIA - MEASURES CONCERNING THE IMPORTATION OF CHICKEN MEAT AND CHICKEN PRODUCTS (2017), para. 7.103.

halal requirements laid down in Indonesian laws. Indonesia specifically referred to Article 58(1) of Animal Law 18/2009 that addresses Indonesian authorities' duty to "supervise, inspect, examine, standardize certify and register animal products" in order to "secure safe healthy, intact and rightful animal products."⁵⁵⁸ In the same law, Article 58(4) Indonesia points to the requirement for imported products to have a "rightful certificate." Indonesian Law 8/1999 Consumer Law also obligates companies to provide honest information about the condition and quality of products."⁵⁵⁹ Concerning specific halal requirements, Indonesia limits itself to a general reference to the "process of certification" in Law 33/2014. Indonesia further explained that the positive list requirement "served to ensure the traceability of imported chicken meat and chicken products to specific foreign establishments that obtained halal certificates."⁵⁶⁰

Addressing Indonesia's argument about whether the positive list requirement is justified under Article XX(d), the panel has a two-step analysis. First, the panel must review whether the positive list requirement is designed to secure compliance with the halal requirements, as argued by Indonesia. Second, it has to observe whether the positive list requirement is necessary to secure compliance with the relevant laws and regulations in Indonesia.

The panel cited the Appellate Body ruling in *Argentina – Financial Services* that the panel must apply "as an initial examination of the relationship between the inconsistent measure and the relevant laws or regulations," which requires a panel to "scrutinize the design of the measures sought to be justified."⁵⁶¹ Citing the ruling from the Appellate Body in the *Colombia – Textiles*, the panel stated that the Appellate Body has further clarified that the standard for ascertaining whether such a relationship exists is whether the assessment of the design of the measure reveals

⁵⁵⁸ *Id.*, para. 7.125.

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.*, para. 7.126.

⁵⁶¹ *Id.*, para. 7.127.

that the measure is not incapable of securing compliance with the relevant laws and regulations in Indonesia.⁵⁶² In this first step of the analysis, the panel concluded that there is a relationship between the positive list requirement with the laws submitted by Indonesia. In other words, the positive list requirement is designed to secure compliance with the halal requirements laid down in Indonesian law.

After concluding the relationship between the measure at issue and securing compliance with the halal requirements, the panel continued the analysis of whether the measure at issue is necessary to secure compliance with the relevant laws and regulations in Indonesia. The necessary test involves a process of “weighing and balancing” a series of factors including i) the importance objective; ii) the contribution of the measure to that objective; iii) the trade-restrictiveness of the measure; and iv) possible alternatives measure that is less trade-restrictive.

In weighing and balancing all factors together, the panel acknowledged the great importance that Indonesia attributes to halalness. However, the panel found that the import ban applied by Indonesia is very trade restrictive. The panel was also hesitant in concluding the contribution of this measure. Mindful of these factors, the panel found that there is a less trade-restrictive alternative measure than a ban implemented by Indonesia that would still fulfill the Indonesian objective. Brazil argued that conducting a certification in slaughterhouses in the exporting countries would meet Indonesia’s objective. Thus, the panel concluded the measure does not comply with the requirements of necessity test. The panel found that the positive list requirement constitutes a violation of Article XI of the GATT and Article 4.2. of AoA.

⁵⁶² *Id.*

II. *Intended Use Requirement*

Brazil brought the measure implemented by Indonesia that imported frozen chicken may only be sold to hotels, restaurants, caterings, and industries. Processed products may also be sold to modern markets. Violation of this intended use requirement will result in revocation of the recommendation, denial of the next recommendation application and proposal to the Indonesian Ministry of Trade to revoke the import approval. Brazil argued that the most important use of this measure is the exclusion of traditional markets as a place where imported products can be sold. Traditional markets are particularly important in Indonesia since this is where most of Indonesians buy their poultry needs. Brazil pointed out that Indonesia has restricted access to imported chicken meat and chicken products to the most important consumer markets in Indonesia, therefore, adversely affecting the competitive opportunities of the exported products.⁵⁶³ As the defense, Indonesia raised that exception under Article XX(b) and Article XX(d) arguing that the intended use requirement is to ensure that frozen chicken is not sold in markets without proper refrigeration that can harm the public health.⁵⁶⁴

To examine Indonesia's defense under Article XX(b), the panel proceeded with a two-steps analysis. First, it is whether the intended use requirement was to pursue a human health objective. The second is to observe whether it is necessary to achieve that objective. Indonesia specifically contended that there is a health risk of thawing frozen chicken, especially in tropical temperatures where Indonesia is located. Indonesia submitted several scientific publications in supporting the argument. The panel agreed with Indonesia that it had demonstrated the existence of a health risk arising from thawing frozen chicken at tropical temperatures. The panel also agreed with Indonesia

⁵⁶³ *Id.*, para. 7.198.

⁵⁶⁴ Annex B-2 WT/DS484/R/Add.1, INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA (2017), para. 80.

that there is a relationship between the intended use requirement and reducing the risk of human health. However, similar with Measure 1, although the panel found that the health risk existed and there was a relationship between the intended use requirement in reducing the risk of human health, the panel found that there is a less restrictive measure can be applied that still achieve Indonesia's objective rather than a prohibition of the traditional market access altogether. The less restrictive trade measure proposed by Brazil is a requirement for Brazil to have cold storage if they want to have access to traditional markets.⁵⁶⁵ Indonesia's defense under Article XX(d) was also rejected for the same reasoning due to a less-restrictive measure available for Indonesia.

III. Certain Aspects of Indonesia's Import Licensing Regime

In addition to the positive list and intended use requirements, Brazil claimed that certain other elements of Indonesia's import licensing regime were also WTO-inconsistent. Brazil specifically challenged the limited application windows and validity period as well as the fixed license terms. These elements, especially when combined resulted in a more restrictive effect in importation.

Brazil argued that because of the limitation on the application window and the validity of both RIPH and Import Approval, Brazil was prevented from exporting to Indonesia during the beginning of each validity period.⁵⁶⁶ This limiting effect was aggravated by the fact that both RIPH and Import Approval have fixed terms. Once these documents are issued, no changes or amendments are allowed; thus, all information related to the covered transaction has to be precisely defined in advance, and importers did not have the necessary flexibility to respond to changes in the market conditions.⁵⁶⁷

⁵⁶⁵ Report of Panel WTO/DS484R, *supra* note 557, para. 7.238.

⁵⁶⁶ Annex B-1 WT/DS484/R/Add.1, INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL (2017), para. 65.

⁵⁶⁷ *Id.*, para. 67.

Indonesia, on the other hand, rejected Brazil's claim arguing that the validity period covers the whole year, and therefore, Brazil should be able to export throughout the year. Concerning fixed terms, Indonesia argued that the terms were chosen by the importers and not imposed by Indonesia. Indonesia also raised the defense under Article XX(d). According to Indonesia, these measures were needed to secure compliance with laws regulating food safety, halal requirements, and consumer deceptive practices.⁵⁶⁸ The application windows, validity, and fixed license terms were intended to provide a sufficient number of quarantine and customs officials to a particular port of entry to supervise an importer's compliance with halal, food safety requirements, and consumer protection especially for Indonesia that lacks of resources in this matter.⁵⁶⁹

The panel agreed with Brazil that there was a period of no imports during the beginning of each validity period. This effect can be attributed to three separate causes: i) the timing of the application windows that is very close to the expiration of the previous import documents; ii) the requirements that prevented importers from shipping products before having the new Import Approval that would otherwise allowed importers to immediately shipped their products in advance while waiting for Import Approval; and iii) the shipping time from the country of origin which resulted on a gap between the time where the new Import Approval is received and the time when the good subject to such Import Approval arrives in Indonesia.

Responding to the defense raised by Indonesia, the panel, to some extent agreed with Indonesia that appropriate management of human resources at the time of importation is necessary for the proper enforcement of customs laws and regulations particularly on provisions on halal, public health, consumer protection, and food safety.⁵⁷⁰ The panel, however, argued that there are

⁵⁶⁸ Annex B-2 WT/DS484/R/Add.1, *supra* note 564, para. 112.

⁵⁶⁹ *Id.*, para. 114.

⁵⁷⁰ Report of Panel WTO/DS484R, *supra* note 557, para. 7.416.

less trade-restrictive measures available to Indonesia. For example, Indonesia could allocate human resources on the basis of the normal influx of imported cargo.⁵⁷¹ Realizing that this measure alone may not be enough, the first alternative measure could be combined with the monthly arrival plan that Indonesia would require from an importer. The forecast of the amount imports and ports of entry combined with the monthly import plan would provide necessary information to facilitate the allocation of human resources for government officials to be able to supervise an importer's compliance with Indonesia's halal, safety, and consumer protection requirement at the time of importation.⁵⁷² Thus, for these reasons, the limited application windows, validity period, and fixed license terms, Indonesia is found to be in violation of Article XI:I of the GATT 1994.

IV. Undue Delay in the Approval of the Veterinary Health

As part of sanitary and surveillance, a government will normally require a veterinary health certificate⁵⁷³ at the time of importation to accompany certain animal products. Following the customs, the Indonesian government requires a veterinary health certificate to accompany imported animal products. As part of this process, a member frequently evaluates the veterinary service of trading partner interested in exporting animal products and verifies certain sanitary requirements in the country of origin.

For this matter, Brazil argued that Indonesia had caused an undue delay with respect to the approval of a veterinary certificate for the importation of poultry from Brazil to Indonesia. In mid-2009, Brazil submitted to Indonesia a request for the approval of a veterinary health certificate for chicken products. Indonesia confirmed that it has not responded to this request. Brazil contended

⁵⁷¹ *Id.*, para. 7.424.

⁵⁷² *Id.*, para. 7.426.

⁵⁷³ A veterinary health certificate is an official document issued by recognized veterinarian in the country of origin, attesting certain health characteristics of the traded product and of its place of origin. The health characteristics include but not limited to the pest or disease status of the product of the animal which it is derived and of its place of origin and the type of veterinary inspection to which the animal was subject to.

that this violated the SPS agreement that requires any procedure to check and ensure the fulfillment of sanitary or phytosanitary measure is undertaken and completed without undue delay and in no less favorable than domestic products.⁵⁷⁴ Indonesia rejected Brazil's claim stating that it has not caused a delay in undertaking the relevant approval proceedings because the procedure has not yet commenced due to the incompleteness of the application, namely the relevant halal assurance questionnaire. Further, even if there were a delay, Indonesia claimed that it could not be deemed undue because it is the responsibility of Brazil to provide the halal assurance questionnaire mentioned above.⁵⁷⁵

The panel, however, sided with Brazil and ruled that Indonesia's declared inaction has led to a loss of time in the relevant SPS approval procedure constituting a delay.⁵⁷⁶ The panel did not consider that an SPS approval procedure starts only when all the relevant information is submitted. Rather, the procedure was triggered with the submission of an application, whether it has all the relevant requirements or not.⁵⁷⁷ On the next analysis or whether the delay is undue, the panel ruled that Indonesia has cause undue delay in the approval of veterinary health certificate that is inconsistent with Article 8 and Annex C(1)(a) of the SPS agreement. The panel reasoned that since the halal slaughtering requirements are not SPS related, which further confirmed by both parties, the inaction by Indonesia is considered unreasonable as provided under Annex C(1)(a).⁵⁷⁸

⁵⁷⁴ The SPS Agreement, Annex C(1)(a) states that: 1. Members shall ensure, with respect to any procedure to check and ensure the fulfillment of sanitary or phytosanitary measures, that: (a) such procedures are undertaken and completed without undue delay and in no less favorable manner for imported products than for like domestic products.

⁵⁷⁵ Report of Panel WTO/DS484R, *supra* note 557, para. 7.497.

⁵⁷⁶ *Id.*, para. 7.523.

⁵⁷⁷ *Id.*

⁵⁷⁸ In the Panel Report, *Russia – Pigs*, the Panel found that whenever a Member delays the relevant procedure because it has required information that is not SPS related, such delay would be undue under Annex C(1)(a).

V. *Halal Labeling Requirement*

Brazil argued that although Indonesia by law required both imported and domestic products to fulfill halal labeling requirements, Indonesian authorities do not conduct consistent surveillance concerning the implementation of halal labeling by domestic producers.⁵⁷⁹ According to Brazil, it is very common to find locally produced chicken meat and chicken products for sale without halal labels both in the traditional and modern markets. This resulted in a different treatment that was imposed on Brazilian products. Brazil claimed that without the halal label, their products would not be able to access the Indonesian marketplace even if the production process in Brazil strictly complies with the halal requirement.⁵⁸⁰ Moreover, Brazil also argued that the halal label requirement imposes additional costs on Brazilian exporters. Thus, not requiring that domestic like products to comply with the halal labeling requirement is discrimination toward imported products.

Indonesia denied Brazil's argument by stating that there are some exemptions on halal labeling requirements for a specific category of products, as stated in Government Regulation 69/1999. The relevant provision reads that:⁵⁸¹

Article 63

The provision on labels (i.e. halal label) and advertisement as mean in this government regulation shall not be effective for:

- a. food whose package is too small, so that it is impossible to contain all kinds of information as mean in this government regulation;*
- b. food directly sold and packaged before buyers in a small number;*
- c. food sold in a large amounts (bulk)*

The reason why some of the local chicken products, especially fresh chicken sold in traditional markets do not subject to label requirement because it is directly sold and packaged before buys

⁵⁷⁹ Annex B-1 WT/DS484/R/Add.1, *supra* note 566, para. 111.

⁵⁸⁰ *Id.*

⁵⁸¹ The Indonesian Government Regulation 69/1999, Article 63 (emphasis added).

in a small number. The claim from Brazil that their frozen chicken cannot be exempted merely because it does not fall under the exemption requirement stated above.

On this matter, the panel agreed with Indonesia that the imported chicken products are packaged and labeled before they reach the traditional market, and also because it is frozen, it must be in cold storage when sold in traditional markets; thus, the exemption cannot be applied. With regards to the cost of labeling, the panel argued that it already incurred before the products arrived in Indonesia, thus it is not something that Indonesia's government discriminate towards domestic products. Finally, in the panel view, the exemption would apply if and when imported frozen chicken products, for example, chicken cuts, are sold and individually packed in front of the buyer.⁵⁸²

VI. *Transportation Requirement*

Brazil claimed that the direct transportation requirement imposed by Indonesia is a quantitative restriction and in violation of Article XI:1 and Article 4.2. of AoA. Brazil stated that in the relevant regulation, Indonesia required the transportation of imported products to be "direct" to Indonesia, and if it stopped in a third country port before it arrived at the Indonesian port, the products would not be allowed to be imported.⁵⁸³ This is rejected by Indonesia, asserting that Indonesia allows for imported products to transit through ports located in countries other than those in the country of origin and the country of destination. In response to Indonesia's explanation, Brazil argued that the "murky language" in Article 19(a) of the Ministry of Agriculture Regulation 32/2016 created legal uncertainty that amounts to a quantitative restriction.⁵⁸⁴ The language of the measure at issue is as followed:

⁵⁸² Report of Panel WTO/DS484R, *supra* note 557, para. 7.578.

⁵⁸³ Annex B-1 WT/DS484/R/Add.1, *supra* note 566, para. 73.

⁵⁸⁴ *Id.*, para. 78.

Article 19

The requirements of transportation/shipment of carcass, meat, offal and/or their processed products as referred to in Article 6 letter d are as follows:

- a. Conducted directly from the Country of Origin to the port of entry within the territory of the Republic of Indonesia*
- b. ...*
- c. Importation by way of transit is conducted in accordance with and regulations regarding animal quarantine;*

The panel proceeded to its analysis with the examination of whether the direct transportation requirement means what Brazil alleged it is to mean that is a non-stop shipment requirement. If that is the case, the panel would continue with the analyses on whether it is inconsistent with Article XI:1 or Article 4.2 of the AoA. If, however, the panel found that the transportation requirement means as what Indonesia argued that it allows for transit, the panel would continue to the second issue by Brazil that is the direct transportation is inconsistent with Article XI:1 of the GATT and Article 4.2. of AoA due to its “murky language.”⁵⁸⁵

The panel found that the direct transportation requirement does not prohibit imported products from being imported to Indonesia after transiting through ports in the third countries. Although when it is read alone Article 19(a) could be understood that transportation must be non-stop from Brazil, the text of paragraph (c) is explicit in referring to “importation by way of transit.” This provision clearly indicated that the importation of foods is allowed as long as it is conducted in accordance with the Law of Animal, Fish and Plant Quarantine and regulation of Animal Quarantine.⁵⁸⁶ The panel also incorporated the RIPH template that contained a field in transit. This would suggest that an importer may indicate the port or ports of a transit of the imported products.

⁵⁸⁵ Report of Panel WTO/DS484R, *supra* note 557, para. 7.587.

⁵⁸⁶ *Id.*, para. 7.593.

Indonesia also specifically submitted evidence showing that the import of animals that transit through third countries, in a manner consistent with quarantine laws and regulations before getting to Indonesia, is allowed.

Continue to the next analysis if the “murky language” created uncertainties that constituted trade restriction, the panel disagreed with Brazil. Brazil referred to findings of the panels in *Colombia – Ports of Entry* and *Argentina – Import Measures* that ruled a measure constitutes a quantitative restriction when it creates uncertainties and affects investment plan, restricts market access for import, makes importation prohibitively costly, creates uncertainty as to an importer’s ability to import, and more generally has an implication on the competitive situation of an importers. However, in the two cases that Brazil referred to, none of these cases addressed the issue of legal uncertainty potentially created through “murky language.” Moreover, Brazil did not submit any evidence that would demonstrate such uncertainty exists or is experienced by its exporters.

VII. General Prohibition

Brazil contended that Indonesia imposed a general prohibition of importation. This was rejected by Indonesia arguing that there is nothing in the measure written as to Indonesia imposed a general prohibition of importation. Brazil, however, contended that the alleged unwritten measure could be inferred from the written individual measures insofar as their combined operation and the effect of a total ban on imports would be proof of that existence. In this case, the individual measures were: i) positive list requirement; ii) food self-sufficiency requirement in which food import is authorized only when domestic food supply is not considered “sufficient” by the government; iii) imports of essential and strategic goods may be prohibited or restricted and prices may be controlled by the Indonesian government; iv) intended use requirement; v) undue

delay in examining and approving the health certificate; vi) restriction import licensing regime (i.e. limited application windows, validity period, and fixed terms). Brazil also argued that all the individual elements pursue the same single objective by specifically pointing to the provisions on self-sufficiency in Indonesian law. Brazil also asserted that self-sufficiency is an important component of the general prohibition because “it consists of a mandatory requirement that has to be applied by Indonesian authorities before imports are authorized.”⁵⁸⁷ Brazil tried to support the argument by showing that there was an absence of any imports of chicken meat and chicken product into Indonesia since 2009.⁵⁸⁸

First, the panel rejected the absence of any imports of chicken meat and chicken product Indonesia as to be sufficient in showing there was a general prohibition on importation. The panel specifically cited the panel report on *Colombia – Ports of Entry* and the Appellate Body Report on *EC – Bananas III* that trade effects are neither necessary nor sufficient to prove a violation.⁵⁸⁹ Brazil needed to show that it is not the effect alone, but there is a causal link between the challenged measure and the observed or potential effect.

Second, analyzing the six different elements, the panel noted that the four individual measures that challenged separately are all part of the legal instruments that generally govern the conditions for animal importation of animal products, including chicken meat and chicken products into Indonesia. The fact that they are part of the same import regime means that they work together and relate to each other. However, the two additional individual measures, namely the self-sufficiency clause and essential goods clause, are contained in the different legal

⁵⁸⁷ *Id.*, para. 7.652.

⁵⁸⁸ *Id.*, para. 7.658.

⁵⁸⁹ *Id.*, para. 7.659.

instruments that are in the higher normative level.⁵⁹⁰ The four individual measures indeed refer to the national law in its preamble; thus, the panel concluded that there is a relationship between all of these individual measures. However, a relationship based merely on the co-existence in the same legal instrument or a connection between different legal instruments is not enough to conclude that the different measures operate as a single measure.⁵⁹¹ To consider the several individual measures as a single distinct measure, they must be inter-dependent with respect to the overall impact assessed. The panel did not find such interdependence among the different measures identified by Brazil for at least the following two reasons:⁵⁹²

- a. First, even the four individual measures are part of the same import regime, they were not dependent on each other. Each one of the four measures could be terminated without affecting the operation of the other measures. It also remains unclear for the panel whether and if so, how the self-sufficiency clause and essential good clause are related to and impact the operation of the other four individual measures.
- b. Second, contradictory to Brazil's claim, the panel did not see the general prohibition as a consequence of the individual measures operating together. For example, the "undue delay" measure by itself results in chicken meat and chicken products from Brazil not being permitted into Indonesia. This measure is not dependent on or reinforced by any other measure. Brazil's point of view inferred that it does not matter how many individual measures there are, what they are about and whether they relate to each other, the alleged unwritten measure still exists.

⁵⁹⁰ The four individual measures are in the form of ministerial regulations while the self-sufficiency clause and essential good clause are contained in the national laws. As explained in the chapter of 2, the national law is in the higher hierarchy than a ministerial regulation. s

⁵⁹¹ Report of Panel WTO/DS484R, *supra* note 557, para. 7.768.

⁵⁹² *Id.*, paras. 7.669-7.671

Lastly, the panel analyzed the argument from Brazil that there is an overriding objective that binds together the constitutive elements, namely the food self-sufficiency objective. Brazil submitted evidence that explained the food self-sufficiency as the “glue” that holds together the individual measures.⁵⁹³ The panel stated that for the policy objective to be the “glue,” it must be the rationale for the adoption of the identified individual measures and continue to be the reason for the adoption of any further trade-restrictive until that policy objective is abolished.

In assessing the documents submitted by Brazil, the panel decided that Brazil did not sufficiently demonstrate that there is a link between the policy objective of self-sufficiency and the alleged specific trade-restrictive measures taken. First, the panel analyzed the OECD reports submitted by Brazil. The OECD report mentioned self-sufficiency as a priority in Indonesia’s agricultural policy. In other parts of the report, OECD described non-tariff measures taken by Indonesia as “stringent,” “used to control imports” and “implemented in a non-transparent manner.”⁵⁹⁴ The panel reasoned that the OECD report is an outside perspective and therefore, acted as secondary information. Moreover, references made by OECD are not sufficient to prove the role of an overriding policy objective as Brazil described it in respect of alleged unwritten measures. Showing that a Member pursuing self-sufficiency alone is not enough to prove that policy has been implemented through an unwritten measure that consists of adopting the trade-restrictive measure as self-sufficiency is not WTO-inconsistent.

Another evidence was a letter from the Director-General of livestock at the Ministry of Agriculture to the Brazilian Ambassador to Indonesia in which Indonesia declined Brazil’s proposal for a sanitary certificate for poultry on the grounds that the Indonesian poultry industry

⁵⁹³ *Id.*, para. 7.674.

⁵⁹⁴ *Id.*, para. 7.678.

is self-sufficient.⁵⁹⁵ However, Brazil also submitted a statement by Indonesia that expressed the exact opposite that exports of chicken products would be possible despite the domestic industry's efforts to become self-sufficient. Thus, whether the letter is proof of self-sufficiency as the reason for the existence of the individual measure is doubtful. There is also no evidentiary value for the continued existence of the alleged unwritten measure.

Brazil also submitted press articles from 2012, 2015, and 2016. The panel proceeded with caution as press articles may not necessarily report facts in the most objective manner but rather reflect opinions or the author's own interpretation of facts.⁵⁹⁶ Based on the analysis of the panel, none of the press articles made a link between the trade-restrictive measures with the importation of chicken. For these reasons, the panel concluded that based on all the documents submitted by Brazil, Brazil did not sufficiently demonstrate that there is a link between a policy objective of self-sufficiency and the alleged specific trade-restrictive measures taken.⁵⁹⁷

⁵⁹⁵ *Id.*, para. 7.681.

⁵⁹⁶ *Id.*, para. 7.682.

⁵⁹⁷ *Id.*, para. 7.683.

Chapter 5

The Future of Agricultural Trade in the WTO: Development and Reform

This chapter presents critiques of the structure of the WTO as an institution generally and the WTO Agreement on Agriculture (AoA) specifically. The structure of the WTO and the existing AoA have been utilized in terms that favor developed countries at the expense of developing countries. It is now perceived that the way the WTO works, and the current AoA needs to be changed to be more developmental centered that will also fulfill one of the principles of the WTO that is to encourage development. Learning from this experience, the developing members were more aware of their stakes in the final outcome of the current negotiation and rejected the position to become “bystanders.” Unlike the Uruguay Round when most of the developing members played an inactive role, developing countries now have the urge to fight back in the Doha Round.

1. THE WTO AGREEMENT ON AGRICULTURE IN THE PERSPECTIVE OF DEVELOPING COUNTRIES

International trade is essential to the development of a nation, as it is viewed as “the best hope for growth and poverty alleviation.”⁵⁹⁸ For most developing countries, agriculture is the source of livelihood for a majority of the population and vital to the national economy in which small-scale and subsistence farming are predominant. Trade in the agriculture sector is particularly crucial for their development due to its significant contribution to the GDP, employment, exports, and foreign exchange earnings.⁵⁹⁹ For example, in Indonesia, despite the declining percentage, agriculture still accounts for a substantial employment share as well as a significant source of GDP.

⁵⁹⁸ WTO News - DDA June/July 2006 Modalities: Summary 24 July, TALKS SUSPENDED. “TODAY THERE ARE ONLY LOSERS.” (2006), https://www.wto.org/english/news_e/news06_e/mod06_summary_24july_e.htm (last visited Dec 13, 2017).

⁵⁹⁹ NASH AND INGCO, *supra* note 2.

In 2016, Indonesian agriculture contributed to 13.95% of the GDP,⁶⁰⁰ which is still the highest among Southeast Asia five central economies and accounted for 34% of the employment share.⁶⁰¹

Further analysis showed that poverty is prevalent in rural areas in which most of the population depends on agriculture. Globally, around 75% of poor people live in rural areas in which they are dependent on agriculture.⁶⁰² Indonesia shows the same experience. Data also shows that in Indonesia, about 11% of the population still live below the nationally defined poverty line.⁶⁰³ In 2002, 57.69% of the poor in Indonesia were employed by the agricultural sector.⁶⁰⁴ In 2008, the share was still more than 50%.⁶⁰⁵ In 2010, over 60% of those earning less than \$1.25 per day lived and worked in an agriculture setting.⁶⁰⁶ In Indonesia, three of five Indonesians still live in rural areas with farming as their primary employment.⁶⁰⁷ Inevitably, poverty leads to undernourishment. According to the World Food Programme (WFP), Indonesia and India are home to one-quarter of all the undernourished people.⁶⁰⁸

Besides the economic importance, what is often overlooked when analyzing Indonesia's agriculture law and policy is its historical and cultural ideology. While food self-sufficient just gained increased attention in some countries in the wake of the 2007-08 international food crisis,⁶⁰⁹ Indonesia's self-sufficiency is an ideology that already embedded ever since the independence of Indonesia. History shows that despite the different administrations, self-sufficiency, not only in

⁶⁰⁰ OECD, *supra* note 4.

⁶⁰¹ *Id.*

⁶⁰² NASH AND INGCO, *supra* note 2.

⁶⁰³ OECD, *supra* note 4.

⁶⁰⁴ Surhayadi & Hadiwidjaja, *supra* note 10.

⁶⁰⁵ *Id.*

⁶⁰⁶ Quincieu, *supra* note 12.

⁶⁰⁷ World Bank, *supra* note 13.

⁶⁰⁸ World Food Programme, *supra* note 14.

⁶⁰⁹ Jennifer Clap on her work "Food self-sufficiency: Making sense of it, and when it makes sense" states that following the 2007-08 food price crisis, countries as diverse as Senegal, India, the Philippines, Qatar, Bolivia, and Russia have all expressed interest in improving their levels of food self-sufficiency.

agriculture but also all basic goods such as clothing, is firmly adopted by all of the Indonesian Presidents. At the Agriculture Ministry five-year plan conference of 1954, Chairman R. Soetjio provided two reasons for seeking self-sufficiency in agriculture. First, the unfavorable expansion of international politics after the end of World War II made many Indonesians fear dependent on other nations for vital goods, the flow of which might threaten during a war.⁶¹⁰ Second, the large amount of foreign currency needed to import agriculture products, especially rice, was a severe burden on Indonesia, which at that time was still rebuilding from war and years of colonialization.⁶¹¹

On the other hand, Indonesia's idea of self-sufficiency was not well received by the U.S. Suzanne Moon explains that the U.S. officials saw Indonesia as a populous, resource-rich, and strategically located island nation that could be either a strong ally or a disastrous enemy in Southeast Asia. Like India, Indonesia had adopted policy nonalignment that the U.S. feared might eventually lead to a takeover by Communist powers. Audrey and George Kahin have argued that the U.S. Policymakers worried that Indonesia would follow the example of Communist China.⁶¹²

Despite the debate of whether self-sufficiency is a justified ideology, Indonesia's effort to be self-reliant is proven to help Indonesia in the recent Global Financial Crisis (GFC) of 2008. It is widely believed that one of the reasons why Indonesia survived the GFC was its huge domestic market.⁶¹³ In terms of the food prices, only a few countries were notably successful in keeping domestic price rises very low or relatively stable. They are China, India, and Indonesia in rice and

⁶¹⁰ Suzanne M. Moon, *Takeoff or Self-Sufficiency? Ideologies of Development in Indonesia, 1957-1961*, 39 *TECH. AND CULTURE* 187 (1998).

⁶¹¹ *Id.*

⁶¹² *Id.*

⁶¹³ Basri and Patunru, *supra note* 90.

sugar.⁶¹⁴ Indeed, the data show that many countries that are well supported by their domestic economic performed better during GFC than countries that are extremely dependent on exports.⁶¹⁵ Even the Vice President Boediono, who is widely known as a technocrat and a supporter of the market economy, states that: “the crisis underscores the importance of securing some ‘structure’ for the economy amid globalization. The concept of the national economy remains relevant.”⁶¹⁶ While this statement does not necessarily imply that Boediono has changed his approach or become more inward-looking, instead, it reflects the support for a balance between export-oriented and inward-looking strategies.

Meanwhile, more frustration of the treatment of the agriculture sector is shown by developing countries in the WTO that is very much pushing for freer trade. Way before the establishment of GATT/WTO and the disputes involving Indonesia, the agriculture sector has always been politically sensitive in trade. What it is crucial to consider is that the historical records of the Uruguay Round reveal that the inclusion of the agriculture sector was part of the trade-off between developed and developing members. Developing countries agreed to accept new discipline under the WTO agreements proposed by developed members such as intellectual property and investment due to the promise from developed members to provide more open market access for the agricultural products.

However, soon after the conclusion of the Uruguay Round and its new agreements, developing members have been protesting that while they bear more legal obligations under the intellectual property and investment, they have not enjoyed much of benefit from the agriculture

⁶¹⁴ David Dawe & Cristian Morales-Opazo, *How Much Did Developing Country Domestic Staple Food Prices Increase During the World Food Crisis? How Much Have They Declined?*, ESA Working Paper No.09-09, The Food and Agriculture Organization, Rome (2009).

⁶¹⁵ Basri and Patunru, *supra* note 90.

⁶¹⁶ *Id.*

agreement in the WTO. Contrary to the expectation, developing members have been accusing its developed trading partners of unfair practices in the agricultural trade. For the Indonesian government, particularly, it is more than just informal statements in the media or the WTO forum. The Indonesian government, for example, has made its stance “official” by stating on its 2016 Agricultural Report that some of its domestic policy is adopted in order to protect its farmers from the unfair practices from other countries. Thus, to the local constituents, the recent rulings against Indonesia raise a question as to why must Indonesia pay a “price” from protecting its farmers from the unchallengeable unfair practices done by other members?

The interviews conducted with officials from the Indonesian Ministry of Agriculture and Ministry of Trade raise the concern of unfair treatment of developing countries in the WTO. The Indonesian Ministry of Trade clearly expresses that the global agricultural trade is not fair, and that unfairness is institutionalized in the Agreement on Agriculture.⁶¹⁷ For example, members like the EU and the U.S. have huge AMS, as for members like Indonesia that do not have AMS, is automatically applied the 10% de minimis.⁶¹⁸ Moreover, developed members have been known to utilize, if not abuse, the blue box and the green subsidy. Developing members, on the other hand, are facing more of structural constraints that prevent them from supporting their domestic farmers the way developed members do. Let alone providing billions of direct incomes to farmers, developing members still struggle to support farmers with basic capitals such as adequate infrastructures, fertilizers, and seeds.

Similar to the Ministry of Trade, the Indonesian Ministry of Agriculture also expresses its disappointment with the ruling calling it “unfair” and left Indonesia feeling is being attacked by

⁶¹⁷ Interview with the Indonesian Ministry of Trade, Director of APEC Negotiations and International Organizations, and Deputy Director for Agricultural Product, September 20, 2019.

⁶¹⁸ *Id.*

the WTO. The Ministry of Agriculture emphasizes explicitly that the ruling that pushes for the more open market has been difficult since they also have the responsibility to take care of more than 30 million low-income farmers in improving their welfares. The Indonesian Ministry of Agriculture gives the point on how it could be difficult for them: exporting chickens and chicken products, where Indonesia already has more than enough are economically inefficient and also with foreign products that are much lower in production costs, Indonesian farmers are “doomed” if the foreign product enters the domestic market. Some of the past regulations were enacted to tackle this issue. For example, the harvest period requirement was to avoid import surges while the harvest period that can injure domestic farmers. Although later added that as a member of the WTO, it considers the rulings, the Indonesian Ministry of Agriculture states Indonesia retains the right to ensure that the products imported are still under control because unrestraint import will disadvantage the domestic farmers. In that sense, Indonesia asks for countries not to have much interference on Indonesia’s policy.

Reflecting from the WTO interpretation and the subsequent rulings, Indonesia, however, has to accept that it is difficult to challenge the WTO dispute settlement body interpretation. If there were two points confirmed from these disputes is that the WTO jurisprudence provides two critical points: i) WTO does not take into consideration at all any of its member policy concern, or ii) WTO accepts a member’s policy concern but then provide a small, or if any, policy space for the member to pursue its objective. The first approach can be seen in *Indonesia – Horticultural Products*, where the WTO panel and Appellate Body fully rejected Indonesia’s argument regarding its lack of human resources, halal, and oversupply of horticultural products. The second approach is shown in *Indonesia – Chicken Meat*. As aforementioned, unlike *Indonesia – Horticultural Products*, where the panel entirely rejected the concern, the panel and Appellate Body in

the *Indonesia – Chicken Meat* found that self-sufficiency is a legitimate objective. However, in pursuing the self-sufficiency goal, it must employ a WTO-consistent regulation, something that is arguably hard. These two approaches imply that it is almost impossible for the WTO to let a country retain its WTO non-compliance regulation even though it is necessary to achieve a legitimate policy objective.

Understanding the difficulty in complying with the WTO regulations while simultaneously pursuing its national objective with the challenge of unfair practices, developing countries have been very active in promoting changes in the current WTO Agreement on Agriculture. Developing countries have been more engaged in the discussion and have formed coalitions and alliances. Indeed, while in the Uruguay Round developing countries' coalition were discouraged and seen as a threat to the trading system,⁶¹⁹ there was an increasing number of developing countries forming coalitions prior to the Doha Round. It is also important to underline that these coalitions went beyond a position of simply blocking the conclusion of the Doha Round; instead, these coalitions came up with several alternative proposals supported by their own research.⁶²⁰ As mentioned in Chapter 3, in the ongoing multilateral trade negotiation, Indonesia is the coordinator of the G33, which is the largest coalition focusing on agricultural reform. The G33 has been fighting the inclusion of rural development as well as the public stockholding for food security purposes in the new WTO agreement.

⁶¹⁹ Mayur Patel, *New Faces in the Green Room: Developing Country Coalitions Decision-Making in the WTO*, PEIO Conference Paper (2007).

⁶²⁰ Amrita Narlikar & Diana Tussie, *supra* note 420.

2. REALIZING DEVELOPMENTAL PRINCIPLE IN THE WTO: AGRICULTURAL TRADE REFORM

On the one hand, the WTO emphasizes its role is not as an aid agency.⁶²¹ On the other hand, at the very beginning of its inception, the WTO also rejected the idea that its sole purpose as an organization is only to support freer trade. Based on its principles of the trading system, the WTO expresses that it is an organization that encourages development and economic reform.⁶²² This development principle translates to the flexibility given by the WTO in the form of more time to implement the WTO agreement and allows for special assistance and trade concessions for developing countries.⁶²³

However, despite the claim that WTO encourages development, most of the WTO developing members did not feel like so, especially in the agriculture sector, which is the interest of most of them. While the Agreement on Agriculture (AoA) aimed or at least was claimed to address the distortions in this sector by promoting liberalization in three areas, market access, domestic support, and export subsidies, the global agricultural trade remains highly distorted. Initially, the AoA intended to convert the quantitative restrictions to tariffs and further reduced the tariffs. It also asked members to reduce both domestic support and export subsidies, yet enormous agricultural subsidies combined with highly protectionist trade structures still exist among OECD countries and have a significant impact on developing countries.⁶²⁴

The AoA that once hailed as a victory for farmers around the world claiming that farmers would benefit from more trade and greater access to markets has turned to be practices that hit

⁶²¹ WTO, THE WTO CAN HELP COUNTRIES DEVELOP, https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi06_e.htm (last visited Apr 2, 2019).

⁶²² WTO, PRINCIPLES OF TRADING SYSTEM, *supra* note 241.

⁶²³ *Id.*

⁶²⁴ Jennifer Clapp, *WTO Agriculture Negotiations: Implications for the Global South*, 27 THIRD WORLD Q. 563 (2006).

farmers in poor countries the hardest as they are often pushed off the farm by dumped agricultural commodities. Instead of victory, the AoA has been deemed as a failure by developing members as in practice, it did not really change the trading system, rather to some extent, it only worsened the system.⁶²⁵ Perhaps realizing that sooner or later this issue would emerge, the AoA includes a provision to renegotiate the Agreement starting in 2000.⁶²⁶ From launching the new multilateral trade negotiation to the negotiation itself, developing members have been demanding the realization of a developmental principle in the new AoA.

A. Effort for a Developmental Round: Battle in Seattle & Doha

Approaching the end of the implementation period, the WTO members gathered in Seattle over the course of three days meeting beginning on Tuesday, 30 November 1999, with a hope to launch a new millennial round of trade negotiations. The Seattle Ministerial Conference also marked the very first ever WTO Ministerial in the U.S. soil. Unfortunately, the week in Seattle turned to be a dramatic week that will remain not only in the history of trade negotiation and any international organization in the world but also the history of the relationship between developed and developing countries.

In the Seattle Ministerial Conference, the riot not only happened outside of where the meeting⁶²⁷ was held but also inside the meeting room. Outside of the meeting venue, dividing

⁶²⁵ Kevin Watkins, *Agriculture and food security in the GATT Uruguay round*, 18 R. AFR. POL. ECON. 38–50 (1991).

⁶²⁶ Article 20 of the Agreement on Agriculture: *Recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period, taking into account:*

- a) *the experience to that date from implementing the reduction commitment*
- b) *the effects of the reduction commitments on world trade in agriculture;*
- c) *non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the preamble to this Agreement; and*
- d) *what further commitments are necessary to achieve the above-mentioned long-term objectives.*

⁶²⁷ The 1999 Seattle Ministerial Conference was surrounded by massive and controversial street protests outside hotels and the Washington State Convention and Trade Center. The protests also sometimes referred to 1999 Seattle WTO protests and also the Battle of Seattle involved no fewer than 50,000 protesters. This event has been made into

social movements and citizens' groups came from all over the world to Seattle expressing their concerns about further trade liberalization. Local organizers, along with the FBI and the Seattle Police Department, were carefully planning security arrangements for the official venue. Special forces from the FBI, the CIA, and other federal agencies were on the scene to keep protestors from the ministerial conference.⁶²⁸

The situation inside the meeting room was not much different. The Seattle Ministerial Conference was actually troubled before it began, and although some already saw the chances of failure at Seattle were high, no one expected the spectacular failure that actually took place. In the previous negotiations, the larger trading countries typically would have an agreement on a core set of issues and tried to convince the rest of the members to adopt their agenda. However, the Seattle Ministerial Conference began without any consensus between the Quad, which are the EU, the U.S., Canada, and Japan. Their consultations in Geneva before the Seattle Ministerial Conference did not result in any agreement on the agenda of the negotiations.

On the other hand, after the implementation of the agreements reached in the Uruguay Round, developing countries entered the negotiation determined about their positions. In May 1998, during the pre-Seattle process, developing countries came together in what is called the like-minded group (LMG). They exchanged approaches on the current issues, shared information, and prepared common papers despite their political differences. They were against how the negotiation process had been handled⁶²⁹ and how their demands for resolving problems of WTO agreements

a movie such as *Battle in Seattle* by Stuart Townsend and *30 Framers a Second: The WTO in Seattle 2000* by Rustin Thompson.

⁶²⁸ Michel Chossudovsky, *Seattle and Beyond: Disarming New World Order*, 35 *ECON. AND POL. WKLY* 100 (2000).

⁶²⁹ The collapse of the Seattle Ministerial Conference was, to a great extent, due to last-minute letters of protest by the African Countries and some Latin American countries. They were against what has come to know as the "green room process" where the vast of majority developing members were excluded from meetings discussing major issues on the agenda, and only developed members, and a few developing members were invited to participate and have their opinions heard.

implementations, including changing some of the rules had been dismissed by the major trading partners who only pushed their own agenda.⁶³⁰

The reaction by developing countries was not surprising at all. Soon after the Uruguay Round concluded, developing countries felt that their interests were not being fully recognized. They believed that the Uruguay Round and other agreements in the WTO are “asymmetric, imbalanced, and iniquitous” to the developing countries.⁶³¹ The expected benefits of accepting the WTO agreement had not accrued to the developing countries, as a matter of fact, the WTO system and its rules and obligations have increased the marginalization of countries and people in the South. Based on the interviews with some WTO delegates and Secretariat staff members, Jawara and Kwa reports on their research that:⁶³²

“Developed countries are benefitting from the WTO, as are a handful of (mostly upper) middle-income countries. The rest, including the great majority of developing countries, are not. It is as simple as that.”

This position is not a mere complaint, but it is confirmed by other empirical findings that found the WTO membership is associated with a large and significant increase in trade volumes for developed countries; however, the impact of membership for developing members on trade volumes is weak or non-existent.⁶³³

Throughout the Seattle Ministerial Conference, developing members explicitly asked for a development to be a dimension of all the issues being discussed instead of being a stand-alone issue. Developed countries, however, were reluctant to accept the idea arguing that the

⁶³⁰ Sheila Mathrani, *Revolt of Developing Countries at Seattle*, 34 ECON. AND POL. WKLY 3568 (1999).

⁶³¹ Clapp, *supra* note 624.

⁶³² FATAOUMATA JAWARA & AILEEN KWA, BEHIND THE SCENES AT THE WTO: THE REAL WORLD OF INTERNATIONAL TRADE NEGOTIATIONS: LESSONS OF CANCUN (2004).

⁶³³ See: Theo Eicher & Christian Henn, *In search of WTO trade effects: Preferential trade agreements promote trade strongly, but unevenly*, 83 J. INT’L ECON. 137 (2011). Pao-Li Chang & Myoung-jae Lee, *The WTO trade effect*, 85 J. OF INT’L ECON. 53 (2011). Arvind Subramanian & Shang-Jin Wei, *The WTO Promotes Trade, Strongly but Unevenly*, 72 J. INT’L ECON. 151 (2007).

development issue had already been included and addressed, and there was a more urgent need on other matters that is to further liberalize other sectors including investment and competition. The U.S. ambassador to the WTO at that time, Rita Hayes, argued that the existing agreements “are finely balanced.”⁶³⁴

Developing members, however, were firm on their demand. A large number of developing members and particularly some of the major ones from Asia and Africa, such as India, Pakistan, Indonesia, Malaysia, and Egypt, opposed extending the WTO discipline to new areas such as investment and competition policy. They have been stressing that their problems in the implementation of the Uruguay Round should be resolved first before even starting a new negotiation on a wide range of new subjects. Unless redressing the imbalances was at the top of the agenda, the developing countries would reject another round of trade negotiation. As it turned out, Seattle was a watershed. Although, in the end, some progress was made in some of the less controversial areas, the differences were considerable.

Failure at Seattle was a serious setback to the global trading system. Some thought that if the 142 member countries of the WTO failed again at the next ministerial conference in Doha, the WTO as an institution might become irrelevant. There was a danger that regionalism or even bilateralism might replace the multilateralism. After December 1999, an immediate impact of the failure was that the WTO members, especially the Quad, to some extent, finally accepted that it requires a discussion of the developmental issue in the WTO; otherwise, the negotiation would never continue.⁶³⁵ The developing members, at the same time, continue their efforts to revive the promise of the WTO that it will encourage developmental goals.

⁶³⁴ Mathrani, *supra* note 630.

⁶³⁵ Dilip K. Das, *The Global Trading System: From Seattle to Doha*, 57 INT’L J. 605 (2002).

Meeting two years after the failure in Seattle, the dynamic of negotiations changed in Doha. Proclamations by major trading economies in several instances showed that not all of the WTO member supported the launch of a new trade round, although the EU supported the idea of a "comprehensive" trade round. Despite the differences, on 14 November 2001 in Doha, the WTO members made a deal to a new of multilateral trade negotiations, its agenda, and its timetable, including the insertion of developmental goals in the next round. In comparison to the Seattle Ministerial Conference, this was a valuable accomplishment.

Officially launched as a "development" round, the Doha Round was supposed to give special consideration to the needs and concerns of developing members. This was regarded as a new idea for the WTO, as the previous round had revolved primarily on industrialized countries' issues.⁶³⁶ The ministerial declaration adopted in Doha explicitly acknowledged the vulnerability of developing and the least developed countries. Further, it committed the global trading system to address the marginalization of the least developed countries in international trade and to improve their effective participation. Declaration from the WTO Ministerial Conference in Doha, states in part:

"We commit ourselves to comprehensive negotiations aimed at: substantial improvement in market access; reductions of, with a view to phasing out, all form of export subsidies, and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations . . ."

However, just when some thought the road after the launch of the Doha would be easier, it was not. The Doha Round is currently under indefinite suspension, with one of the reasons is the major disappointment from many developing countries about the agricultural reform. A negotiation in agricultural trade is particularly always contentious in the GATT/WTO history. If

⁶³⁶ Clapp, *supra* note 624.

anything, it was ignored during the first five rounds of multilateral trade negotiations because agriculture was considered too contentious and politically sensitive to be approached. Once it was on the negotiation table, it became evident that countries have opposite mindsets and contradictory sets of agriculture policies. Not only there are longstanding major disagreements within industrialized countries such as the EU, Japan, and the U.S, but also there is disagreement between these powerful countries with the developing countries. Within the developed members, for example, the EU and the U.S. dispute over subsidies continued. Both parties have “dirty hands” on agricultural subsidies, and the conversation turned into exchange accusations. Developing members, on the other hand, asserted that there is a failure in implementing the special and differential treatment for developing countries and least developed countries and brought the issue of high subsidies used by the EU and the U.S.

Just as in the Seattle Ministerial Conference, developing countries are demanding for the developmental value to be realized in the Doha Round. Not only the previous AoA is arguably unequal, but also with the future environmental challenge such as climate change that threatens the developing countries, a change needs to be achieved in the next round. For these legitimate reasons, the developing countries are not afraid to play their roles in the Doha Round instead of being bystanders as happened in the previous rounds. However, despite the expressed priority for developing members, developed countries were still unwilling to offer serious concessions.

B. Applying the Developmental Principle in the Agriculture Sector

Amidst the debate about the implementation of the current WTO agreements followed by failure in the multiple efforts of negotiations, it is then asked how to address the developmental issues raised by the developing members in the WTO generally and in the agricultural sector specifically? Learning how the WTO negotiation was conducted in the past and the outcomes of

the negotiation, it seems self-evident that a fairer agreement is required to address the issues brought up by the developing members. Then, the question becomes: what does constitute a fair agreement?

To create a fair agreement, this research attempts to focus on at least two parts. The first one is through the lens of the decision-making process. As mentioned in Chapter 2, the decision-making in the WTO could be categorized in two ways. The first one is through the negotiated law-making, and the second one is the judicial law-making. The earlier process touches upon how the agreement should be negotiated, mainly focusing on the fair procedures. While it is hoped that the outcomes of a fair procedure are more likely to be fair, it is also possible that an open and transparent bargaining process results in unfair outcomes, especially when the parties to the bargaining have different strengths. While the focus of this section is more on the negotiated law-making, considering the deadlock of the negotiated law-making, the judicial law-making is also discussed. The later part of this section focuses on the substantive issues, which are the content of the agreement on agriculture. In the Doha Round, although it is implicit, Article 2 of the Doha Ministerial Declaration contains the principle of fairness, which aims for the new agreement to be more “balanced rules” and “well-targeted.”⁶³⁷

⁶³⁷ Article 2 of Doha Ministerial Declaration: “*International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration. Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play.*”

I. *Decision-Making Process: Negotiation and Litigation*

a) *Negotiation*

Unlike other international institutions, the WTO is perceived as an organization that embraces democracy in its decision making. Amrita Narlikar, a prominent scholar in international relations, focusing on the WTO, provides at least four tenets of the negotiated decision-making process in the WTO. First, the WTO is a one-member-one-vote organization.⁶³⁸ This is different from other international organizations such as the United Nations (UN), the International Monetary Fund (IMF), and the World Bank. In UN deliberations, for example, if a matter is related to critical political or security issues, it is subject to the veto power of the Security Council.⁶³⁹ Among the WTO's 'Bretton Woods' sister institutions, decision making in the IMF and the World Bank are based on weighted voting. The IMF perseveres an executive board,⁶⁴⁰ and the World Bank has a board of executive directors with decision making in both cases decided by a system of weighted voting by countries. The weights are determined by a country's GDP, current account transactions, and official reserves.⁶⁴¹ The WTO, on the other hand, as stated in Article IX:1 of the Agreement Establishing the WTO, provides that each member has one vote irrespective of trade shares or general economic size, thus, allowing equal status to all members. Decisions then will be taken by a majority of votes cast unless otherwise provided for in the agreement. This is significantly different from IMF, for example, where main decisions require 85% of the majority and giving the U.S. essentially a veto power due to its voting share of 17.56%.⁶⁴²

⁶³⁸ Amrita Narlikar, *The politics of participation: Decision making processes and developing countries in the world trade organization*, 364 THE ROUND TABLE 171 (2002).

⁶³⁹ The veto power in the UN Security Council refers to the power of the five permanent members of the UN Security Council, which are China, France, Russia, the United Kingdom, and the United States. These countries have the right to veto any substantive resolution. In 1945, the U.S. refused to join the UN unless it was given veto power.

⁶⁴⁰ International Monetary Fund, ABOUT THE IMF, <https://www.imf.org/en/About> (last visited Apr 17, 2019).

⁶⁴¹ The World Bank, WHO WE ARE, <http://www.worldbank.org/> (last visited Apr 17, 2019).

⁶⁴² Narlikar, *supra* note 638.

The second feature is consensus-based.⁶⁴³ While voting is formally the WTO's key decision-making method, in practice, voting never occurs in the WTO,⁶⁴⁴ and adoption of decisions by consensus is the longstanding practice. This is due to the reference of Article IX of the Agreement Establishing the WTO that indicates "the WTO shall continue the practice of decision making by consensus followed under GATT 1947." Under the WTO, the consensus is fulfilled "if no Member presents at the meeting when the decision is formally taken, formally objects to the proposed decision." In the consensus-based, the condition is that only the opinion of those who are present will count which is different from the requirement of voting where the majority is required relative to all the members in the WTO.⁶⁴⁵

The third feature is that the WTO is a member-driven nature organization.⁶⁴⁶ In the IMF or the World Bank, the Secretariat works directly with the government in preparing, monitoring, and enforcing conditionalities with the approval of the Executive Board, which is rarely withheld. In the WTO, it is the members themselves who make the decisions and enforce them through Dispute Settlement Body (DSB) while Secretariat, if only needed, can provide technical and administrative support. The fourth feature is formed as a result of the other tenets. Due to the equal representation of its members and minimal powers to Secretariat, it leads the WTO to rely on an elaborate network of the informal process, such as the controversial "Green Room" process, that can beat consensus into shape. The role of this informal process is even recognized in the WTO website.

For developing countries, these features of the decision-making process in the WTO imposes some fundamental problems. Specific features such as the informal meetings, in this case,

⁶⁴³ *Id.*

⁶⁴⁴ Kent Jones, *The WTO Green Room, Coalitions, and the Problem of Representation*, in *THE DOHA BLUES: INSTITUTIONAL CRISIS AND REFORM IN THE WTO* (2011).

⁶⁴⁵ BERNARD HOEKMAN & MICHEL KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND* (2nd Ed. 2001).

⁶⁴⁶ Narlikar, *supra* note 638.

the Green Room process, could be seen as the most problematic one while the consensus-based decision also poses a significant issue. These problems are exacerbated by the mandate of the WTO, which goes far deeper than any other organization. Compared to the IMF and the World Bank, where they lose their enforcement powers once its debts repaid, as explained in Chapter 3, the WTO members must follow its international trade rules in perpetuity with substantial consequences such as cross-retaliation when members do not comply with the laws.

As mentioned above, the infamous Green Room process is perhaps the most controversial one in which it raises the issue of lack of transparency. The Green Room meeting is an invitation-only basis wherein some events, the Secretariat often treated the list of the invitee as confidential to avoid a flood of requests for participation from the excluded countries.⁶⁴⁷ The meeting is only among a limited number of countries dominated by the Northern WTO members. Typically, countries with significant advanced economies, nowadays, are the U.S., the EU, Japan, Canada, negotiate among themselves to come up with a common position. Afterward, these countries select a few, usually only the influential developing countries, to negotiate within another round of informal meetings with the goal of winning them over often by putting pressure on them to break ranks with other developing countries.⁶⁴⁸ Since it is a relatively small meeting, most of the WTO members are not informed nor invited to these meetings and often not knowing what is being negotiated. The formal minutes from these meetings are not taken, and deliberations are officially off the record.⁶⁴⁹

⁶⁴⁷ Rege Vinod, 'WTO PROCEDURES FOR DECISION MAKING: EXPERIENCE OF THEIR OPERATION AND SUGGESTIONS FOR IMPROVEMENT', Background Paper, Commonwealth Secretariat (2000).

⁶⁴⁸ JOSEPH STIGLITZ, MAKING GLOBALIZATION WORK (2007).

⁶⁴⁹ Thomas Bernhardt, *North-South Imbalances in the International Trade Regime: Why the WTO Does Not Benefit Developing Countries as Much as it Could*, 12 CONSCIENCE: THE J. OF SUSTAINABLE DEV. 123 (2014).

The Green Room process is not new as many initial trade negotiations, both under GATT and the WTO, have used this process. Historically, in origin years of the GATT, the U.S. alone dominated the negotiation and decision making. It relied principally on the U.S. initiatives and bilateral consultations with other GATT members.⁶⁵⁰ Thus, the Green Room sessions, at that time, were not needed. However, as the GATT membership expanded, the complexity of issues increased, and more importantly, the European Common Market gained importance in the world trade, the negotiation shifted. The earliest recorded Green Room meetings took place in the Tokyo Round and were initially named Director General's meeting room.⁶⁵¹ In the Tokyo Round, the Green Room meetings tended to be small with less than eight members represented, but it has expanded to include 25 to 30 or more countries in the Uruguay Round. While the interests of the developed country are always well represented, it is not the case with the developing members.

In the Uruguay Round, the domination of developed members even became very significant that the terms the Quad referring to the four countries controlling the negotiation, which are the U.S., EU, Japan, and Canada, developed. Agriculture particularly was destined to be the center of the topic in the Uruguay Round. It was also the sector that mostly to be blamed for the crisis and was largely responsible for causing the round to last for over seven years. Despite the importance of agriculture to developing countries, there is little to no account of the role of developing members in the agricultural negotiation.⁶⁵² Instead, the historical accounts show the talks were dominated by the U.S. and the EU and to some extent, Japan and Canada.

⁶⁵⁰ Kent Jones, *Green room politics and the WTO's crisis of representation*, 9 PROGRESS IN DEV. STUD. 249 (2009).

⁶⁵¹ *Id.*

⁶⁵² To some extent, other members such as Japan, Canada, and the Cairns Group coalition also involved in the negotiation. These countries also tabled their proposals, although later, the Agreement on Agriculture is essentially only between the U.S., and the EU, and even Japan accepted the deal reluctantly.

From the beginning of the agricultural negotiation, the idea was to secure a bilateral deal between the U.S. and the EU, then to work the details of an agreement that would apply to all members. Numerous bilateral meetings were held, and proposals of the agreement circulated only between them. The U.S. and EU met in Heysel but failed to produce success because the EU could not accept the constraint of export subsidies. The EU saw that as too much attack on their Common Agricultural Policy (CAP). However, for both the U.S. and the EU, the Heysel meeting made it clear that the Uruguay Round could not be successfully concluded without an agricultural trade agreement.

Following the unsuccessful attempt at Heysel, primarily due to the political conditions in the U.S, both countries tried to settle their differences. The Bush Administration at that time was eager to obtain an agreement in an election year because of the possibility of no extension from Congress of the soon-to-expire Fast Track Authority. The EU also was concerned that the U.S. presidential election could add a new uncertainty to the negotiation. In February 1991, while it was previously blocked, the EU finally allowed discussion on export subsidies to proceed. Much of the year was used to draft the treaty text. In December 1991, the details of potential agricultural trade agreement were formed into the “Draft Final Act” by Director General GATT at that time, Arthur Dunkel. Technical discussions started again in Geneva between the US, the EU, Japan, Australia, and Canada.

In 1992, at the G-7 meeting in July, the British Prime Minister at that time, John Major arranged private meetings between President Bush and European leaders and worked to initiate the outline of a compromise. The U.S. and the EU continued their discussions in Chicago until the day of the U.S. election. After a promising meeting at Chicago, both parties met again in the Blair House, a building across White House used for visiting government officials, for the finalization.

Although the negotiation was still intense, both countries could enter into their first agreement on November 20, 1992. This agreement, however, went for another change, referred to as Blair House Accord II, in December 1993. Some of the actors of the negotiation had changed by then. Commissioner for Agriculture in the EU was replaced as well as the U.S. due to the newly elected President Clinton. The talks were mostly about the demand for allowing the export subsidies by the EU; a compromise eventually was reached at the end of 1993. This very agreement achieved in the Blair House, which essentially negotiated only between the U.S and the EU, is the foundation, if not a literal copy of the AoA that applies to all WTO members until now.

After the Uruguay Round, there is a lingering sense of unfairness among the developing members about the outcome of the negotiation. They view the Uruguay Round as a result of “informal meetings” manipulations by rich countries to impose their interests, such as intellectual property to the poor countries but protecting agriculture, which is of their interests. The WTO dispute settlement understanding that provides a member can bring a claim to the WTO, and the decision is enforceable has further increased the stakes of the next negotiations.

The disappointment of how the negotiation carried out increased in the early years after the Uruguay Round, but it is not until the Seattle meeting where this finally exploded. In Seattle, many countries have already complained openly at meetings and in the corridors about the Green Room process. When some developing country delegates tried to get into the Green Rooms without an invitation, things got worse as it was reported that they were physically thrown out from the room. Comments by countries excluded from the meeting rooms found their way to the popular press.

“... the 'green room discussions,' the next level of debate, this time mostly between the rich countries, were excluding the poor. At least one African delegate was physically barred from attending.”⁶⁵³

⁶⁵³ John Vidal, *Real battle for Seattle*, THE OBSERVER, December 4, 1999, <https://www.theguardian.com/world/1999/dec/05/wto.globalisation> (last visited Apr 19, 2019).

*“The WTO’s reputation for secrecy and elitism - criticized by outside protests - was even roundly endorsed within its own rank when many countries’ delegates were excluded from the final round of talks held behind closed doors at the convention center as leading nation tried desperately, but ultimately in vain, to hammer out a talks-saving pact.”*⁶⁵⁴

Following this incident, eleven developing members of the WTO sent a formal letter to the WTO Chair, calling the end of the Green Room process.⁶⁵⁵ They asserted that this is a central issue to the goal of integrating all Members meaningfully in the work of the WTO. When nothing was changed in Seattle, the WTO paid a heavy price for the weakness in its decision-making process.

In the aftermath of Seattle debacle, some attempts have been made towards addressing the issues. Some, however, saw that the new formats are as problematic as the old one. Since the Green Room diplomacy now has a bad connotation, the WTO changed it with “small group meetings.”⁶⁵⁶ Countries that particularly involved or interested in an issue would be invited. In principle, no country wants to join would be refused as what happened before. However, informal meetings frequently are set from one informal session to another, and by missing one, a country would not be on a list to know about the next meeting. Moreover, although it is said that the informal meeting and the list of invitees are now announced, there was a complaint from a Caribbean country delegation about the lack of information regarding the meeting. Shefali Sharma in the *WTO Decision Making: A Broken Process* reports this issue:⁶⁵⁷

“I was present at a consultation conducted by Ambassador Bryn who was handling Implementation Issues. Ambassador Akram of Pakistan complained about the lack

⁶⁵⁴ Joanna Walters, *What went wrong at the summit*, THE OBSERVER,

<https://www.theguardian.com/world/1999/dec/05/wto.globalisation1> (last visited Apr 19, 2019).

⁶⁵⁵ Khor Marin, LETTER SENT BY 11 COUNTRIES TO WTO CHAIR CRITICIZING GREEN ROOM PROCESS, <https://www.globalpolicy.org/component/content/article/209/43577.html> (last visited Apr 18, 2019). Khor Marin, *Letter Sent by 11 Countries to WTO Chair Criticizing Green Room Process*,

<https://www.globalpolicy.org/component/content/article/209/43577.html> (last visited Apr 18, 2019).

⁶⁵⁶ Shefali Sharma, *WTO Decision Making: A Broken Process*, WTO Cancun Series Paper No. 4 (2003).

⁶⁵⁷ *Id.*

of progress, and when he began to press the issue, the U.S. Ambassador responded in frustration, 'Akram, we will discuss this in the session tomorrow morning!' But no one in the room knew about this HOD. I asked the Chair after the meeting, what time, and where, and he said he did not know. He told me to ask his secretary. But the secretary did not know. She asked to check the board, but it is said nothing on the board. Finally, I asked Mario, and he knew the time and place. This meeting was obviously fixed with a few delegations."

While it may be true that the tentative schedule for formal meetings for the year is put up on the WTO's bulletin board, the informal meetings are still called for much shorter notice, thus, countries do not have adequate time for planning, preparation, and resource allocation.⁶⁵⁸

To improve transparency, the WTO starts to publicize the minutes of informal meetings while it also repeatedly emphasized that the small group meetings are used only for consensus-building. However, although the small group meetings are used only for consensus-building instead of decision-making, many members being excluded find it difficult to intervene in the final stages of the discussion. Moreover, while the effort to publicize the minutes of the meeting is laudable, it is not enough. The minutes do not contain any technical details and political compromises, which is needed to enable effective participation in final decision-making. Even further, some countries alleged that the minutes are biased and further distort information provision.⁶⁵⁹

Another concern is the use of consensus decision-making instead of voting. As aforementioned, consensus decision-making means that no member that presents in the meeting formally objects to the decision. On its face, with the consensus decision making, any member in the WTO, no matter rich or poor, has implicit veto power. This is believed to be grounded on the "notion of sovereign equality" of states that negate status and provides equal representation of each

⁶⁵⁸ Narlikar, *supra* note 638.

⁶⁵⁹ This is based on interview with delegates from several developing countries by Amrita Narlikar.

country.⁶⁶⁰ However, the decision-making by consensus does not necessarily guarantee in enhancing democracy and the rule of law.⁶⁶¹ Some critiques even further pushed the argument that the GATT/WTO decision-making rules based on the sovereign equality of states are organized hypocrisy in the procedural context.⁶⁶² Sovereign equality is used merely to serve as an external display to the public in legitimatizing the WTO outcomes. While in launching the trade rounds, powerful countries are usually willing not to use their powers, in the two important stages that shape the outcome of negotiation such as informal agenda-setting and closing the trade round, Steinberg argues that the process has historically conducted in the shadow of the coercive power of the EU and the U.S.⁶⁶³

It is important to note that consensus decision-making is made through an open discussion. Many developing countries have asserted that they often fear the consequences of expressing their objections, such as retaliation in Geneva or in some other negotiation to bilateral pressures directed to capitals, thus, delegation chooses to remain silent.⁶⁶⁴ This is not a new issue in the WTO or in international organizations overall. Some studies from law and political science scholars have provided a specific historical account of the U.S. use of “carrots and stick” to support the adoption of particular UN resolutions. Political scientists have specifically discussed the influence of the U.S. foreign aid on UN voting patterns. This work suggests that it is possible for powerful states to respect the procedural rule and also use various practices to escape the constraints on the power that lies within the consensus decision-making rules. Further, the assumption in consensus

⁶⁶⁰ Wenwei Guan, *Consensus Yet Not Consented: A Critique of the WTO Decision-Making by Consensus*, 17 J. OF INT’L ECON. L. 77–104 (2014).

⁶⁶¹ *Id.*

⁶⁶² Richard Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 339 (2002). Steinberg further elaborated that organized hypocrisy by sociologists and political scientists is defined as patterns of behavior or action that are decoupled from rules, norms, scripts, or rituals that are maintained only for an external image.

⁶⁶³ *Id.*

⁶⁶⁴ Narlikar, *supra* note 638.

decision-making is the presence in the meeting. However, not all members actually have a permanent presence in Geneva, and even countries with representation, they usually have a smaller delegation compared to developed nations.⁶⁶⁵ With the small number of representatives, some developing countries struggle to keep up with meetings and often miss some meetings.⁶⁶⁶

In principle, an international organization is directly accountable not to the citizenry but rather to national governments, particularly to agencies within these governments. International organizations, including the WTO, are lack the democratic legitimacy that derives from the electoral process; thus, it must obtain its legitimacy from how they conduct their business. If the process of functioning is transparent and accountable, not only the outcome is most likely fair, but the legitimacy of WTO as an organization also increases substantially. As quoted by Rubens Ricupero, Joseph Stiglitz pointed out that:⁶⁶⁷

“if policies are forged on the basis of widespread international discussions, a process of global consensus building, then their legitimacy is enhanced. If by, contrast, policies seem to reflect the power of a few large countries, then the legitimacy is reduced. If the policies seem to reflect special interests, legitimacy is reduced.”

For the WTO particularly, its level of legitimacy is at high stake and the center of everlasting government public debates since its inception for at least two reasons. First, the WTO gets involved in the critical global discussion relating to finance, climate change, or poverty eradication.⁶⁶⁸

⁶⁶⁵ Narlikar further found that at least 24 countries do not have a permanent presence in Geneva. Even for those who have diplomatic representation, the size of their delegation is relatively small, with average size 7.38 for developed countries vs. 3.51 for developing countries.

⁶⁶⁶ Ha-Joon Chang on his book *Bad Samaritans* also mentions the difficulty faced by developing members to keep up with numerous meetings in the WTO. He specifically gave an example of his former student who works as a representative for one of developing members in the WTO. It is stated that his team only consists of three representatives, thus, under this circumstance, it is difficult to attend all meetings and often, they either miss the important discussions because they join in the middle of meeting or they have to miss the meeting overall.

⁶⁶⁷ Rubens Ricupero, *Rebuilding Confidence in the Multilateral Trading System: Closing the Legitimacy Gap*, WTO Paper (2001).

⁶⁶⁸ Panagiotis Delimatsis, *Transparency in the WTO's Decision-Making*, 27 LEIDEN J. OF INT'L L. 701–726 (2014).

Second, the WTO possesses its powerful dispute settlement system with an enforcement mechanism leading to compliance from governments in most cases, which is very rare for an international organization.⁶⁶⁹ In the absence of such legitimacy, as what happened, Seattle is the obvious consequence.

In the light of legitimacy, those who support informal meetings like the Green Room argue that such a meeting is necessary due to the considerable big size of the WTO members. With the 164 members involved and the nature of consensus, conducting a large meeting might be seen as time-consuming, inefficient, cumbersome, and ultimately impossible. Members such as Canada, the EU, and Japan have suggested a change in the WTO structures that would incorporate a new committee with limited membership comparable to other International Financial Institutions and the UN Security Council.⁶⁷⁰ Most of these proposals resemble the World Bank and the IMF, where members with the highest shares in world trade would serve as permanent members while the remaining members would be appointed according to regional criteria. Some also have proposed a similar structure where the WTO will form a limited membership committee that only has consensus-building and no decision-making powers.

However, as one group of developing countries pointed out that the inception of a committee would only formalize the elimination of a large number of members from the process of consultation.⁶⁷¹ They emphasize that decision-making needs to be member-driven rather than board-led, especially in an organization such as the WTO that is different from the World Bank or the IMF. For example, the coverage of the WTO has expanded greatly in recent years. The WTO began to write rules for policies applied inside the border, such as technical barriers, services,

⁶⁶⁹ *Id.*

⁶⁷⁰ Narlikar, *supra* note 638.

⁶⁷¹ Narlikar, *supra* note 421.

intellectual property rights, investment, and competition rules. Moreover, agreements made under the WTO are legally binding, and there is a severe consequence if members do not comply with the rules.

It could be argued that if the group size of the WTO membership is seen as a barrier to an active and evolving discussion, several small meetings, round-robin style, will be required. While it is true in this way efficiency may suffer, arbitrary exclusion in the discussion, however, is not an option. For members that do not get chances to join small group meetings, they have been requesting that there is a need for clearer criteria on how the small group meetings are arranged. Such criteria must be fully transparent, equitable, and legitimate in the eyes of all WTO members.⁶⁷²

Some scholars have provided their thoughts to fulfill these criteria. First, at the beginning of each year, Chairman working together with the Councils of Goods, Services, and TRIPs, with the assistance of Secretariat prepares the planned-meetings along with the list of members that would be invited.⁶⁷³ The list would be announced, and any member that considers it has vital interests can join the meeting. With advanced technology nowadays, a video screening of the meetings also could be an option. It is also important to inform the other members about the development of the meetings. Circulation of reports or an open-ended meeting is then necessary to inform the rest of the delegations.

Another important feature of conducting the meeting is that the mandate needs to be clearly defined and limited. It is essential to keep the notion that small group meetings are only intended as a forum to consult, discuss, and debate. The result of the meetings will be referred to the

⁶⁷² Richard Blackhurst & David Hardtridge, *Improving the Capacity of WTO Institutions to Fulfil their Mandate*, in REFORMING THE WORLD TRADE SYSTEM (2005).

⁶⁷³ See: Vinod, *supra* note 647. AMRITA NARLIKAR, DEADLOCKS IN MULTILATERAL NEGOTIATIONS: CAUSES AND SOLUTIONS (2010).

membership for its approval. In this way, in the case that any member is unable to attend the meeting, they will not jeopardize their interests. However, as it is pointed out, most GATT and the WTO decisions have been based on trade-offs and cross-issue linkages.⁶⁷⁴ Limited small group meetings can pose a difficulty when the discussion involves cross-issue linkages. The small group meetings then have to pay attention to parallel negotiations that are special importance of members. A plenary meeting could be arranged to discuss all the relevant small groups. If later on, the plenaries become too many, the original small meetings should be reconsidered, and expanded mandate meetings could be used instead.

The improved participation proposed by developing members emphasizes on greater transparency rather than exercising executive boards or changing the member-driven character of the WTO. However, to increase transparency that most proposals refer to more small group meetings, and open-ended-meetings would come with a cost. This would ultimately increase the number of meetings that delegations from some countries already struggle with. This is when other options might be considered. First is to eventually set a less ambitious negotiation agenda. On the one hand, the negotiators are pleased that the Uruguay Round, what some call as the most ambitious trade negotiation ever,⁶⁷⁵ was successfully concluded. On the other hand, the outcome of the Uruguay Round has been quite problematic. Part of the obstacle is the imbalance of the human resources of the Members. In the 2003 Cancun Ministerial Meeting, for example, the size of the official the U.S. and the EU was reportedly 800 for each.⁶⁷⁶ Japan was not sure about the size of its delegations but estimated it between 300 or maybe mor, while some countries had around

⁶⁷⁴ Narlikar, *supra* note 54.

⁶⁷⁵ David Greenaway & André Sapir, *New Issues in the Uruguay Round: Services, TRIMs and TRIPs*, 36 EUROPEAN ECON. REV. 509 (1992).

⁶⁷⁶ Amrita Narlikar & Rorden Wilkinson, *Collapse at the WTO: A Cancun Post-Mortem*, 25 THIRD WORLD Q. 447 (2004).

30 to only three officials.⁶⁷⁷ One of the solutions to address this problem is incorporated into the second point that is to provide technical assistance and capacity building to the WTO Members.

Technical assistance and capacity building by the WTO Secretariat can be seen as a way to help developing countries in handling not only as part of the WTO negotiation but also to enhance their trading options in the global economy as the long-term goal. Although the capacity building and technical assistance may sound uncontroversial, the form and content of such assistance must be planned carefully. One of the fundamental questions, as quoted by Shaffer, is that should the capacity-building help the developing members to widen their economic policy choices? Or should it be limited to helping them deal with the burden of commitments they have taken “for the benefit of their more developed partners”?⁶⁷⁸

One of the least uncontroversial assistance by the WTO could be in the form of administrative ones such as managing the meetings. As mentioned before, some of the complaints from the WTO members are the difficulty of finding information about the WTO meetings, which sometimes cause them to miss the meetings and to feel as they are intentionally left out from the discussion. Thus, the primary task of the WTO Secretariat in this matter is to keep Members informed about any of the meetings and its report. The WTO Secretariat would work closely with each Member in notifying and regularly updating any scheduled meeting. In the case that Member is unable to attend a meeting, the WTO Secretariat could help in distributing the reports of the meeting.

When assistance and capacity-building are aimed to be more than just the administrative ones, the discussion becomes more complicated. Under the circumstances where the WTO

⁶⁷⁷ *Id.*

⁶⁷⁸ Gregory Shaffer, *Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?*, in REFORMING THE WORLD TRADE SYSTEM (2005).

assistance and capacity-building work merely to help members to implement the existing obligation, especially in the sector that has been argued as imbalance such as agriculture and TRIPs, the capacity building would be counterproductive.⁶⁷⁹ Thus, what has been accepted generally is that the primary aim of the WTO capacity building should be the ones to empower developing members to better define their trade objectives, to integrate their objectives in development plans, and advance it in the international trade negotiations, monitoring, and enforcement and shaping the internal regulatory policies.

While helping members to implement the WTO obligation could be seen as counterproductive, in the case when the WTO limits the assistance by explaining the existing obligations to developing countries, it is, at the very least, already preparing the developing members to have a critical view of these obligations and how to engage with the rules in the light of their national interests.

Admittedly, the work from the WTO alone would be difficult to achieve this goal, either due to the limited resources in the WTO or the existed skepticism of the WTO role in development. With the launch of the Doha Round, the funding for the trade-related technical assistance and capacity-building increased. In 2002, Members pledged over 21.5 million Swiss francs and increased to 30 million Swiss francs.⁶⁸⁰ Nonetheless, some are afraid that the WTO capacity-building programs would be lack of impartiality to engage with developing members and only serve the donor countries' interests. The fear is that the programs would focus on a presentation about rules and how developing countries should implement the obligations due to a restrictive interpretation of the WTO's rule-orientated mandate instead of discussing whether the WTO rules

⁶⁷⁹ *Id.*

⁶⁸⁰ WTO Press 279, GOVERNMENTS PLEDGE CHF 30 MILLION TO DOHA DEVELOPMENT AGENDA GLOBAL TRUST FUND (2002), https://www.wto.org/english/news_e/pres02_e/pr279_e.htm (last visited May 9, 2019).

works or not in the development context or how the WTO rules are interpreted to promote the development objectives. This position is, to some extent, confirmed by the WTO itself. The WTO Secretariat also has been repeatedly stated that the WTO is not a development agency nor an aid agency though one of its principles is to promote development.

Alternatively, referring the capacity-building and the assistance to the relevant development institutions in a coordinated matter is needed. In the past, other organizations such as United Nations Conference on Trade and Development (UNCTAD) and International Trade Centre (ITC) have worked together with the WTO to provide technical assistance to Least Developed and other African Countries.⁶⁸¹ Despite the criticism of this program, developing countries can also independently seek guidance from other related trade organizations. Even in the case that developing members do not want to rely on these organizations, assistance from Non-Governmental Organizations (NGOs) are also provided.

Nonetheless, the most sustainable technical assistance and capacity-building would be the ones that penetrate from its own institutions and societies. Indeed, trade-related capacity-building will be more effective if it considers the local constituent, such as, private sectors, academics, and other civil groups as part of the bottom-up process.⁶⁸² If the goals from developing countries are to have an international trading system that helps their economic development and to take benefit of the WTO rules, they will need to work closely with other local actors to enhance the resources at their disposal. For example, the U.S. and the EU have been long known for its close cooperation with private resources to advance their agendas. Brazil's private sector went as far as to finance

⁶⁸¹ UNCTAD/PRESS/IN/2006/013, *JITAP WORKSHOP FOCUSES ON HELPING AFRICAN COUNTRIES WITH WTO NEGOTIATIONS* (2006), <https://unctad.org/en/pages/PressReleaseArchive.aspx?ReferenceDocId=7162> (last visited May 9, 2019).

⁶⁸² Shaffer, *supra* note 678.

the costly WTO legal challenges against U.S. cotton and EU sugar subsidies.⁶⁸³ Some civic society organizations also have been the ones that shape the debates over TRIPs agreement and agricultural subsidies. Thus, developing countries will also need to have their own strategies that involve broader networks of actors.

b) Litigation

Besides negotiation, another method of decision-making in the WTO is the judicial law-making through the work of the WTO dispute settlement body. It is important to underline that the dispute settlement mechanism deviates significantly from the negotiation in which the decision is created by WTO panel and Appellate Body through a legal interpretation that is “in accordance with customary rules of interpretation of public international law.”⁶⁸⁴ In other words, the WTO dispute settlement mechanism functions very much like a court of international trade. There is compulsory jurisdiction, disputes are settled largely by applying rules of law, decisions are binding upon parties, and the sanction may be imposed if decisions are not observed.⁶⁸⁵ With the increased difficulty in decision-making through negotiation, members often shift to the WTO dispute settlement body in an attempt to challenge and to further amend the WTO agreements. However, just as the negotiation process has been seen problematic, the WTO Dispute Settlement Body also has been the target of criticism from legal scholars and developing members.

The experience of the interpretation by the WTO panel and Appellate Body for the past two decades shows that the adjudicating bodies have exercised considerable freedom while doing their interpreting function. Article 3.2 and 19.2 of the WTO Dispute Settlement Understanding

⁶⁸³ GREGORY SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* (2003).

⁶⁸⁴ WTO DSU Agreement, Art. 3.2.

⁶⁸⁵ Thomas Schoenbaum, *WTO Dispute Settlement: Praise and Suggestions for Reform*, 47 INT’L & COMP. L. Q. 647 (1998).

(DSU) stating the "recommendation and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreement" could be seen as an ambiguous provision which the practical relevance is somewhat limited. The freedom exercised by the adjudicating bodies is further increased by the highly ambiguous language used in the agreements which open the way to several possible interpretations allowing the adjudicating bodies to decide as to their choice.

Moreover, even though the Appellate Body expresses that its report has no precedential value, in practice, there is a strong tendency to follow the earlier interpretation developed in particular by the Appellate Body, thus, constituting *de facto* precedent value. The practical automaticity of adoption of this interpretation by the adjudicating bodies has resulted in "a body of WTO jurisprudence binding on subsequent panels, deviation from which is onerous."⁶⁸⁶ The combined effects of the factors of flexibility in interpretation and automaticity in adoption have turned the WTO panel and Appellate Body to become the most influential organs of the WTO. However, more scholars have pointed out that the WTO panel and Appellate Body have exceeded its responsibility by creating new rules and procedures. This also transforms into the developed-developing countries divide due to the existed perception in the WTO that the judicial law-making seems "to affect adversely developing countries more than their developed counterparts."⁶⁸⁷

In contrast with the conventional wisdom that a binding third-party arbitration should favor smaller and less powerful states, it appears that this belief does not apply to the WTO dispute settlement mechanism. Some of the developing countries' experiences, including the recent cases of Indonesia, tend to confirm the notion that WTO adjudicating bodies may be favoring leading

⁶⁸⁶ Rajesh R Babu, *Decision making in the WTO: From Negotiated Law-making to Judicial Law-making*, in INTERNATIONAL ECONOMIC LAW AND GOVERNANCE (2016).

⁶⁸⁷ *Id.*

industrial countries at the expense of interests of developing countries.⁶⁸⁸ Professor Hudec validates this view on his study GATT 1947 dispute settlement system by concluding that the panel was more responsive to the interests of a stronger, which he adds that it is more natural in a young legal system.⁶⁸⁹ Confirming the perception that the special and differential treatment provisions for developing members have been watered down to the point that it only provides the developing members a longer time to implement the agreement. This judicial apathy has caused to tilt the balance of rights and obligations against developing countries.⁶⁹⁰

The case of *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (India – Quantitative Restrictions)* is one of the early examples of how the Appellate Body is considered to use its interpretation leeway against the interests of developing member. In July 1997, the U.S. requested consultations with India regarding quantitative restrictions imposed by India on the importation of more than 2,700 agricultural, textile, and industrial products tariff lines. The U.S. complained that India's obligations were inconsistent with Articles XI:1 and XVIII:11 of GATT 1994, Article 4.2. of the Agreement on Agriculture, and Article 3 of the Agreement on Import Licensing Procedures. This is also the same complaint filed by the U.S. in the recent *Indonesia – Horticultural Products, Animals, and Animal Products*. India raised the balance-of-payments (BOP) justification under Article XVIII: B of the GATT.

Before the disputes arose, India had been consulting under Article XVIII: B in the BOP Committee regularly since 1957 and had been carried out the economic reform program.⁶⁹¹ During the consultation with BOP in November 1994, the BOP encouraged India to continue

⁶⁸⁸ Chad Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders*, 19 THE WORLD BANK ECONOMIC REVIEW (2005).

⁶⁸⁹ ROBERT HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF MODERN GATT LEGAL SYSTEM (1993).

⁶⁹⁰ Babu, *supra* note 686.

⁶⁹¹ Report of Panel WT/DS90R, INDIA – QUANTITATIVE RESTRICTION ON IMPORTS OF AGRICULTURAL, TEXTILE AND INDUSTRIAL PRODUCTS (1999).

implementing its import liberalization program. On its notification, India reported to the BOP Committee of its quantitative restrictions and proposed that it needed a nine-year-period to eliminate the quantitative restrictions. When India met again with the BOP Committee in 1997, although all Members appreciated India's effort and commitment to eliminate the import restrictions over a period of time and praised India on its comprehensiveness, transparency, and timeliness of the plan, the Members were divided over the length of India's time schedule. Some agreed that India should adopt a cautious approach acknowledging that although "India's external position appeared to be stabled, the overall balance of payments remained structurally weak."⁶⁹² This was confirmed at the time consultation where India faced account deficit as a result of the rapid growth of imports and the decline of exports. Taking into consideration the negative impact on the stability of India's reserves due to the widening trade deficit during 1995/96, India's approach to adopt a caution pace to liberalize its trade should have been justified. Especially for India that has a large population and wide income disparities, the structural reform should be completed in a manner that was "socially and politically sustainable."⁶⁹³ In sum, the timing and sequence of the phase-out of the quantitative restrictions "should be left to the judgment of the Indian government."

India further asserted that the WTO should give substantial leeway to India to determine whether the balance-of-payments measures were justified in order to maintain goodwill among the WTO members. Indeed, a previous significant liberalization of India's trade regime, as well as the future commitment to liberalize the remained, would seem to support the view that India did not intend to evade WTO discipline but rather asked for more autonomy in determining how best to

⁶⁹² WTO, WT/BOP/R/11, COMMITTEE ON BALANCE-OF-PAYMENTS RESTRICTIONS: REPORT ON THE CONSULTATION WITH INDIA (1996).

⁶⁹³ *Id.*

comply with such discipline. This is supported by the fact that starting in 1992, India had made significant changes to its trade policy. In 1992, the Indian government announced a 5-year import-export policy to achieve a stable regime that would be available to the industry and trade, enabling them to plan their economic activities in a longer perspective. To increase transparency, in 1995, the import policy treatment of various items on the tariff line basis was in accordance with HSN Custom Tariff Classification. Linking of the import control classification with the HSN Classification reduced ambiguous and provided a transparent framework to exporters and importers. During 1994-1995, the Indian government increased a significant number of freely importable items. Out of 11,587 tariff lines at the 8-digit level under HS classification, 6,463 lines were in the freely importable list, while 1,487 lines were in the freely tradable Special Import License list.⁶⁹⁴ India also reminded the Committee that before the Uruguay Round, only 3% of India's tariff was GATT bound while post the Uruguay Round, it increased to 62%. The peak rate of tariff reduced from 400% to 50%.⁶⁹⁵ Thus, based on these previous reforms, India hoped that the WTO would appreciate the already implemented trade liberalization and asked for the WTO support and understanding for India's desire to proceed on the trade liberalization autonomously and sustainably, "keeping in the view the many complexities involved in managing a continental-size developing economy like ours."⁶⁹⁶

However, other members, including the U.S. and Canada, rejected India's proposed timeline even after India offered to revise the phase-out plan from nine years to seven years. They argued that the BOP restrictions could be phased out in a shorter period than what asked by India. Without any conclusion about the proper length of time, this issue eventually went to the WTO

⁶⁹⁴ *Id.*

⁶⁹⁵ *Id.*

⁶⁹⁶ Annex 1 WT/BOP/R/11, STATEMENT BY THE REPRESENTATIVE OF INDIA.

panel, which later India appealed to the Appellate Body. In the report, the WTO panel consulted to the IMF that asserted India's quantitative restrictions could no longer be justified under the balance-of-payments grounds due to India's adequate monetary reserves.

After the ruling of the *India – Quantitative Restrictions*, support to the WTO dispute settlement mechanism declined noticeably.⁶⁹⁷ Some of the prominent trade scholars criticized the ruling. Rajesh Babu argues that the Appellate Body in the *India – Quantitative Restrictions* has based their findings against India's primarily on the opinion of the IMF and refused to take into account the developmental concerns of developing countries.⁶⁹⁸ Robert Hudec adds to that "had the Appellate Body considered the developmental policy informed by a conception of equity that includes the notion that development policy is a matter in the first instance for the participation of those who are affected, it would have analyzed the legal issues quite differently."⁶⁹⁹

Chantal Thomas raises two particular concerns of this ruling: the substantive and the institutional. Substantively, India's argument for caution deserves some consideration on this ground. Although the WTO panel dismissed India's concern as irrelevant, the Asian Financial Crisis that occurred immediately after the establishment of the panel, at least partially, supported India's concern of full trade and monetary liberalization.⁷⁰⁰ Institutionally, the WTO was supposed to give the autonomy asked by India by taking into consideration the significant liberalization that

⁶⁹⁷ Cosette Creamer & Zuzanna Godzimirska, *(De)legitimation at the WTO Dispute Settlement Mechanism*, 49 VAND. J. OF TRANSNAT'L L. 275 (2016). Creamer and Godzimirska further note that the WTO Dispute Settlement Mechanism received widespread support from the Members in its initial years, particularly in 1996, when the first reports were adopted. Reason for this support partially because of the "general optimism" about the new system. Another possible cause, as suggested by Robert Hudec and quoted by Creamer and Godzimirska, the support could simply be attributable to a "collective cease-fire against all public criticism of Appellate Body decisions during its start-up years."

⁶⁹⁸ Babu, *supra* note 686.

⁶⁹⁹ Robert Howse, *Pursuing Sustainable Development Strategies: The Case of the Balance of Payment Rules in the WTO*, UNCTAD Sustainable Debt Conference (2005).

⁷⁰⁰ Chantal Thomas, *Balance-of-Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order*, 15 AM. U. INT'L L. REV. 1249 (2000).

India had done before.⁷⁰¹ Arguably, the WTO granted this such autonomy to the U.S. on its controversial Section 301 that authorizes the U.S. to impose unilateral trade sanctions on WTO members. The Appellate Body utilized its interpretation power in the *U.S. – Section 301* to save the U.S. legislation. Regardless of the finding that the U.S. law was inconsistent, the panel determined to accept the verbal assurance of the U.S that they shall refrain from doing unilateral determinations of violations. However, in *the India - Pharmaceutical Patent*, the adjudicating bodies did not give such trust and deference to India's assurance. India assured with absolute certainty that it could, when patents are due in accordance with Article 10.8(b) and (c) of TRIPs, decide to grant such patents based on the applications currently submitted. Nevertheless, the Appellate Body found the assurance from India as unreliable. In short, the power of interpretation of the WTO judicial bodies has been used arbitrarily that most often to the detriment of developing countries.

Fast forward to the recent days, neither the institutional nor the judicial process has addressed their concern. The WTO panel and Appellate Body still neglect the policy concern raised by a developing country surrounding a particular trade regulation. As a result, the current international trade regime has pushed the domestic policies to be compatible with the WTO rather than the WTO being sufficiently flexible to policies. In the agriculture sector, particularly, the domestic policies should not be made to entirely subservient to the WTO trade rules for at least two reasons: i) the AoA itself is unbalanced; and ii) agriculture plays an important role for developing countries in its development process. In short, the WTO should not overly limit the ability of the governments to implement agriculture and developmental policies.

⁷⁰¹ *Id.*

Morrissey supports this position for two reasons: first, in agriculture, it cannot be assumed that the world price is a fair and a competitive market even under the circumstance it excludes cases where developed country policies distort the world market.⁷⁰² Second, farmers in developing countries are facing structural constraints that limit their ability to compete with imports.⁷⁰³ On top of that, the developing countries have limited resources, thus, their efforts should be directed to eliminating the structural constraints.

Byers also argues that to become a vibrant and productive sector, agriculture requires a period of sustained institutional reform and investment to commercialize, and the government has a crucial role to play in leading this transformation.⁷⁰⁴ During this time, trade barriers may be justified to protect domestic producers from "unfair" global competition, and exemption from full compliance with WTO rules is probably needed. Moreover, in agriculture, a desire for food self-sufficiency is often the driving force behind major episodes of agricultural transformation such as in Japan, the Republic of Korea, and Taiwan,⁷⁰⁵ and even the EU, so it is not inappropriate to consider such strategy for developing countries.

In other words, a properly motivated development strategy should not be secondary to multilateral trade rules. Nonetheless, it is reasonable to ask governments to make a case for such protection and in doing so, to demonstrate the senses in which import competition is unfair and what specific strategies they have in place to support domestic producers.

Some have suggested creating a check-balance on WTO adjudicating bodies. In a domestic court, when it "makes law," it is subject to review, oversight, and modification by the legislature.

⁷⁰² Oliver Morrissey, *What types of WTO-compatible trade policies are appropriate for different stages of development?*, in *WTO RULES FOR AGRICULTURE COMPATIBLE WITH DEVELOPMENT* (2007).

⁷⁰³ *Id.*

⁷⁰⁴ Terry Byers, *Agriculture and development: the dominant orthodoxy and an alternative view*, in *RETHINKING DEVELOPMENT ECONOMICS* (2003).

⁷⁰⁵ Magnus Jirström, *The State and Green Revolutions in East Asia*, in *THE AFRICAN FOOD CRISIS: LESSONS FROM THE ASIAN GREEN REVOLUTION* (First Edition ed. 2005).

However, this check-balance system is either lacking or ineffective in the WTO. Indeed, as stated by Ehlermann and Ehring, once the panels or Appellate Body create the WTO jurisprudence, it is difficult to correct it through "legislative action" by the Members.⁷⁰⁶ The Sutherland Report of 2005, for example, suggests having selected particular findings of panels or the Appellate Body to be analyzed by a special expert group of the Dispute Settlement Body.⁷⁰⁷ Others have proposed to ensure transparency and accountability in the functioning system, such as public hearing, especially when important interpretations that have implications on broader concerns are being made. The WTO Appellate Body has so far authorized public appeal hearings such as those in the *US – Continued Suspensions (Hormones)* and *Canada – Suspensions (Hormones)* held in August 2005 as the exception but not the rule.⁷⁰⁸ Nonetheless, the most important way to fix this problem must come from within the panel and Appellate Body. Richard Steinberg proposes that the Appellate Body could give more significant consideration to object and purpose, context, and preparatory materials to help determine whether an ambiguity or gap was deliberately left vague to permit a range of action and to help interpret it when it was not.⁷⁰⁹ It also should treat WTO agreements not as if they have an exclusively liberalizing purpose but as contracts that embody both liberal and illiberal purposes.⁷¹⁰

This trend has severe implications not only for the future of the WTO as an institution but also for the rights and obligations of the developing countries. Let us not forget that the Asian and African States had the deep-rooted distrust and doubt about the impartiality of the judges in the

⁷⁰⁶ Claus-Dieter Ehlermann & Lothar Ehring, *Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?*, 8 J. OF INT'L ECON. L. 51 (2005).

⁷⁰⁷ Armin von Bogdandy & Markus Wagner, *The Development of the WTO – Remarks on the Sutherland Report*, 2 INT'L ORG. L. REV. 167 (2005).

⁷⁰⁸ Alberto Alvarez-Jimenez, *Public Hearings at the WTO Appellate Body: The Next Step*, 59 THE INT'L AND COMP. L. Q. 1079 (2010).

⁷⁰⁹ Steinberg, *supra* note 36.

⁷¹⁰ *Id.*

International Court of Justice (ICJ), resulting in them to refuse to bring cases to ICJ.⁷¹¹ Professor Anand points out that there was a feeling among developing members that “the present system of international law, developed as it was historically among the Western European countries, must now be interpreted and modified with due regard to their economic and social conditions and the present changed the structure of international society.”⁷¹² While the developing members in the WTO have not yet gone as far as rejecting the whole dispute settlement system, the sign of their refusal of the system is shown through their cautious approach in committing to new obligations during the Doha Round. Unless the WTO Dispute Settlement Body thinks carefully about the situation and conducts a reality check, this trend would undermine the WTO dispute settlement system and the WTO as a whole.

II. Substantive Issue

As previously mentioned, with the flawed decision-making process, especially in the negotiation stage, the outcome, which in this case is the content of the agreement itself, is most likely going to be unfair. This is evident in the content of the current Agreement on Agriculture (AoA) as the historical accounts reveal that it is largely, if not entirely, a product of the U.S. and the EU.

The current AoA was the opposite of what the negotiators initially agreed in the Punta del Este Declaration. In the initial meeting, negotiators agreed on the "urgent need to bring more discipline and predictability to world agricultural trade" and set the objective of achieving "greater liberalization of trade in agriculture" by "bringing all measures affecting import access and export

⁷¹¹ R. P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 14 THE INT'L AND COMP. L. Q. 788 (1965).

⁷¹² *Id.*

competition under strengthened and more effective GATT rules and disciplines."⁷¹³ Later after the AoA was concluded, the preamble of the agreement states that the long-term objective is to establish "a fair market-oriented agricultural trading system and . . . a reform process providing for a substantial progressive reduction in agricultural support and protection."⁷¹⁴ Notwithstanding the stated objectives, the AoA, in reality, retains both domestic and export subsidies, which primarily utilized by the U.S. and the EU, and indeed, from the beginning, the negotiation on AoA was much about how to retain such supports.

In the Doha Developmental Round (DDR), "No repeat of the Uruguay Round" was a phrase often heard. The agriculture has once again become the center of the stage. Thus, the economic and political significance of the agricultural negotiations set the pace of the overall negotiations. As widely known, the DDR was an impasse primarily due to developing members' rejection of the developed members' offer to accept liberalization in new disciplines such as investment, competition, transparency in government procurement, and trade facilitation, in return to reducing their agricultural supports. Developing members such as Indonesia and India express resolution on the agriculture sector is their primary interest, and the DDR as a whole will not be concluded unless and until the concerns in the agriculture sector are addressed.

In the DDR, despite the questionable role of trade liberalization in advancing development, some developed members, above all the EU, push liberalization in new disciplines by arguing that liberalization will be useful for developing countries and suitable for their developments. In this sense, what could be inferred is that developing countries will help themselves by liberalizing in

⁷¹³ GATT, *General Agreement on Tariffs and Trade (GATT): Punta Del Este Declaration* (1986), http://www.sice.oas.org/trade/punta_e.asp (last visited Jul 19, 2019).

⁷¹⁴ WTO AoA, Preamble.

the WTO, irrespective of the actions of developed countries. Hence, on this basis, developing countries should accept almost any offer that is set on the table.

However, this reasoning contains flawed logic. If trade liberalization alone would be good for development, developing countries do not need any trade agreement and could just open their market unilaterally. What is usually left out from the discussion is that the matters of development are not so easy, and the task is much more complex than the simple prescriptions of the Washington Consensus, which blithely exhorts developing countries to liberalize the markets rapidly and indiscriminately. It is true that in the right circumstances, policies that reduce tariffs and other barriers to the movement of goods and services can facilitate trade between nations and deliver welfare gains. However, it is also crucial to point out that while increased trading opportunities are good for developing countries, liberalization must be managed carefully. This view is supported by some development economists who believe that the problems in developing countries were “structural and required radical government intervention to overcome.”⁷¹⁵

Part of the book written by the recipient of the Nobel Memorial Prize in Economic Sciences, Joseph Stiglitz and Andrew Charlton gave an excellent case study on when trade can be good or not good for development. Both of the authors draw lessons from “East Asian Miracle” and the Latin American countries. East Asia is used as an example of a successful story. At the heart of its success, there were well-functioning firms and markets, but the government played an important role. The government worked as catalysts that helped markets by providing the essential physical, institutional infrastructure, by remedying market failures and by promoting savings and technology. The government clearly did not believe in the free and unfettered market. While East Asia’s success was based on a combination of factors, contrary to the belief of the notion of free

⁷¹⁵ STIGLITZ AND CHARLTON, *supra* note 23.

trade, active government intervention was, in fact, a critical factor in their economic growth. Their trade policy mainly did not follow conventional free trade prescriptions. The governments of many Asian countries undertook the two-track policy, which protects industries that are not ready to compete internationally while promoting export-ready industries.⁷¹⁶ Their policies, in some cases, were broader than or even violated the prescription of the free-market by the Washington Consensus.

Latin American countries provides another lesson for the economic developmentalists. Many of the Latin American countries adopted the import substitution policies in which they should import only essential capital goods. Scarce foreign exchange would result on demand for locally produced goods because other imports were restricted, and it could protect the industries to compete from firms of Europe and the U.S. Economic growth in Latin American countries which had averaged 6% in the 1970s fell to almost zero in the 1980s and the continent entered the so-called “lost-decade.”⁷¹⁷ As expected, the supporters of the neo-liberalism such as the IMF and World Bank blamed the lost-decade to the import substitution policy adopted by the governments. They argued that the import substitution required a great intervention by the government that it became insufficient and uncompetitive and required too much government spending ultimately leading to runaway inflation.

However, an alternative view of the neo-liberalism argued that the lost-decade had less to do with the import substitution and more to do with exogenous factors independent of domestic policies such as debt policies⁷¹⁸ combined with unfortunate global circumstances. Stiglitz and

⁷¹⁶ Joseph Stiglitz, *SOME LESSONS FROM THE EAST ASIAN MIRACLE*, 11 THE WORLD BANK RESEARCH OBSERVER 151 (1996).

⁷¹⁷ STIGLITZ AND CHARLTON, *supra* note 23.

⁷¹⁸ These counties borrowed a significant amount of money during the seventies to avoid the global recession, which followed upon the oil price shock. However, at the end of the 1970s, the region’s foreign debt exploded, and debt service payments reached \$33 billion per year. When the U.S. Federal Reserve raised interest rates, many countries were pushed to the edge.

Charlton argued that if the underlying problem were really the import substitution, presumably, the unwinding of that strategy would have taken place differently in different countries. However, not one single Latin American country experienced much growth during the 1980s regardless of their policy differences. This then suggests it was Latin America's open capital market rather than its relatively closed trade policy, which led to the loss-decade. In the 1970s, Latin American countries operated the most open capital markets in the developed world, shown by their high share of global FDI flows. In terms of financial liberalization, Latin America was far more open than South East Asia, where controls over foreign capital flows were strict. Latin America's reliance on foreign capital flows and foreign direct investment are what made it particularly vulnerable to global economic shocks. Admittedly, the import substitution policy is also far from perfect and corruption. However, what these two cases show is that the process of successful liberalization is more complex than the neo-liberal Washington Consensus would suggest. It could be said that until now, there is no successful developing country that has pursued a purely free-market approach to develop. The literature has been successful in demonstrating the importance of some variables for economic development, such as education, institutions, health, and geography. Trade liberalization and economic growth, however, is much more controversial and inconclusive. Thus, the implementation of trade liberalization needs to be sensitive to national circumstances.

Ha-Joon Chang, another prominent developmental economist, argues that the economic history of countries that preach the notion of free trade themselves, namely the U.S. and the EU, deviates from the free trade principle in their early years. Ha-Joon Chang further notes that none of the other countries among today's wealthy nations were ever as protectionist as Britain or the U.S., with the exception of Spain in the 1930s.⁷¹⁹ He even goes as far as to express that the history

⁷¹⁹ Ha-Joon Chang, *The double life of Daniel Defoe: How did the rich countries become rich?*, in *BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* 267 (2008). This section of his book

of globalization, along with the idea of free trade, “has been rewritten today in order to fit the current neo-liberal orthodoxy.”⁷²⁰

As expected from the earlier narration, despite their advocacy of free trade, developed countries themselves only liberalize the sector in which they have the interests to do so. While they agree to reduce their tariffs and to eliminate subsidies for the goods in which they have a comparative advantage, they are more reluctant to open up their market and to eliminate their own subsidies in other areas where the developing countries have the advantage.

For example, in terms of agricultural export subsidies, the Heysel meeting between the EU and the US collapsed because the EU could not accept the proposal for specific constraints on export subsidies. Later on, as it was agreed in the Blair House and stated in the AoA, export subsidies were allowed. Although the AoA imposed a ban on a new type of export subsidies, the long-existing subsidies were allowed to continue subject to reductions. In the manufacturing sector, however, it adopts the exact opposite approach. Article 3.1 of the Subsidies and Countervailing Measures Agreement (SCM) provides that it prohibits any type of export subsidies:

Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

a) subsidies contingent, in law or fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I

Concerning the domestic support, the AoA classifies such support into three different boxes according to the level of distortion. The three boxes are i) the amber box that is trade-distorting, thus, a limitation is required, ii) the blue box that is decoupled from production, thus, no limitation required and iii) the green box that has minimal or no trade-distorting effect, thus no limitation is

discusses what he calls the true history of globalization and free trade. He explains in detail the protectionist trade policy adopted by the U.S. and British in their early years.

⁷²⁰ *Id.*

required. Since there is no limitation on both the blue and the green box, those can be used freely and cannot be challenged under the WTO. As mentioned in the previous section, the blue box was specifically added as a result of the Blair House Agreement. Blue box subsidy, as stated in Article 6 paragraph 5 (a) is:

- a) *Direct payments under production-limiting programmes shall not be subject to the commitment to reduce domestic support if:*
 - i. *such payments are based on fixed area and yields; or*
 - ii. *such payments are made on 85 percent or less of the base level of production; or*
 - iii. *livestock payments are made on a fixed number of head*

This has become a longstanding controversy as the AoA enables the EU and the U.S. to maintain their domestic support that developing members do not have access to. Under this exemption, neither the U.S deficiency payment nor the compensation payments in the EU Common Agricultural Policy (CAP) need to be reduced. The U.S. and the EU successfully escaped the reduction commitment on major aspects of their domestic policy. Another important result of the Blair House is domestic support commitment is not a product specific but sector-wide, thus allowing some heavily subsidized sectors to avoid disciplines of the reduction constraint.

Although some assert that the record is mixed regarding the extent to which the domestic supports have been cut, it is obvious that the use of the blue box and the green box by the U.S. and the EU is the highest in the world. The agricultural subsidies in OECD countries increased from \$271.2 billion in 1986-1988 to \$330.6 billion in 1998-2000.⁷²¹ This does not really come as surprise since around 60% of the OECD subsidies were exempt from cuts, and the “function” of the box-shifting became evident.⁷²² Research by the Institute for Agriculture and Trade Policy

⁷²¹ Clapp, *supra* note 624.

⁷²² OECD, THE URUGUAY ROUND AGREEMENT ON AGRICULTURE: AN EVALUATION OF ITS IMPLEMENTATION IN OECD COUNTRIES (2001).

further claims that the U.S. is one of the world's largest sources of dumped agricultural commodities.⁷²³ In 2003, it was found that U.S. agriculture exports sold anywhere between 10% to 47% below the cost of production.⁷²⁴

The argument raised by the EU and the U.S. is that since the blue box and the green box is “non-trade distorting,” it is still in accordance with the AoA rules. However, whether the blue box and the green box are, in fact, non-trade-distorting still contentious, thus, one cannot say that the AoA has resulted in a fundamental change of agriculture. This lack of profound change delivered by the AoA has caused some disappointment not least among developing countries evident in the DDR.

When the developed members were confronted with their high agricultural subsidies in the DDR, they were unwilling to offer serious concessions citing the reason for the legality of their supports. Contrarily, in order to stop their agricultural subsidies and recommit their special treatment for developing members, the developed members ask developing countries to open, once again, markets where they have the interests. The EU has implicitly stated that in order to enable them to deliver on the commitments in the AoA, it would need to be “compensated” by massive market opening in developing countries through investment/ The condition of the agriculture reform by the EU is also to keep the blue box and green box subsidy as they have been implementing. Similar to the EU, the U.S. wanted capital market liberalization as part of an investment agreement even though the evidence was that capital market liberalization did not promote growth but did lead to more instability.

⁷²³ Sophia Murphy, Ben Lilliston & Mary Beth Lake, WTO AGREEMENT ON AGRICULTURE: A DECADE OF DUMPING, Institute for Agriculture & Trade Policy (2005).

⁷²⁴ *Id.*

In the 2003 Cancun Ministerial Conference, where it was scheduled to move the DDR forward, developing members firmly rejected to continue the negotiation. A representative from Kenya descended an escalator in Cancún's convention center and declared that Kenya had abandoned the negotiations. A few hours later, the Mexican Finance Minister and chair of the meeting stated that the debate is not useful anymore. The G33 led by Indonesia and India voiced a similar stance arguing the way agreement is formulated does not allow for the rural livelihood and food security concerns of developing countries to be addressed.⁷²⁵ The G33 specifically demanded the right to protect their small-scale and resource-poor farmers.⁷²⁶ As an overall reaction, the DDR was said not to deserve its epithet.

Thus, one must rethink the whole idea behind the DDR and pay closer attention to the concern of developing countries in the agriculture sector that has been constantly left out from a serious discussion in the WTO. The proposal by the EU and the U.S. for developing countries to accept liberalization in new sectors as a tradeoff for the conclusion in the agriculture has no ground, and with the developing members' determinations, there is no doubt that a revised agreement on agriculture is an essential condition for the whole trade negotiation move forward.

In the light of developing members' concerns, both export and domestic subsidies are among the focus of the revisions. Progress has been made in the export subsidies. In the 2015 Nairobi Ministerial Meeting, all members have agreed to abolish the export subsidies. Therefore, the export subsidies mostly excluded from the current negotiation. However, stringent supervision on the application is needed, especially countries like the U.S. still use it in disguise of export promotion.

⁷²⁵ Jayati Ghosh, *India faces criticism for blocking global trade deal, but is it justified?*, August 22, 2014, <https://www.theguardian.com/global-development/poverty-matters/2014/aug/22/india-criticism-blocking-global-trade-deal> (last visited Apr 15, 2019).

⁷²⁶ *Id.*

Domestic support, on the other hand, has a more structural problem, thus requires radical change. Part of the reform needed on this matter is to eliminate or to restrain the use of the blue box and the de minimis categories. As suggested by Thomas Schoenbaum, the blue box and de minimis are “simply unnecessary loopholes that serve no important policy function.”⁷²⁷ As also explained in Chapter 3, the notion if the blue box is decoupled from a production still questionable. The green box, on the other hand, should be retained but needs a more precise definition as the current definition, which is “payments that have no or minimal trade-distorting effect,” is too broad. A more precise definition could avoid the abuse of the green box subsidies, as shown, on how some countries assign payments to an exempt box that actually belongs to the amber box.

Greater discipline is particularly needed with regards to the subcategory in the green box of decoupled income support payments to farmers. As previously mentioned, the reasoning behind the inclusion of the decoupled income support in the green box is that, in principle, these payments do not depend nor affect the current prices or production. Thus, the judgment on the level of decoupled income support is entirely left to the decision of the government. The discussion of whether this payment should be included in the green box subsidies has been subject to the debate.

The debate stems from the question of whether decoupled income support, especially at high levels, has more than a minimal trade distorting or production and thus should be constrained. Some studies, as gathered by Order, Blandford, and Josling, have found some mechanisms through which decoupled income support might stimulate production:⁷²⁸

- wealth effect making producers less risk-averse;

⁷²⁷ Schoenbaum, *supra* note 30.

⁷²⁸ DAVID ORDERN, DAVID BLANDFORD & TIMOTHY E. JOSLING, WTO DISCIPLINES ON AGRICULTURAL SUPPORT: SEEKING A FAIR BASIS FOR TRADE (2011).

- easing of credit constraints, so additional purchased inputs are utilized; impacts on labor allocation decisions so more labor is devoted to farming production;
- coverage of fixed costs so that the number of farms or levels of profit-maximizing output are increased;
- anticipation of future rebasing of payment eligibility criteria that reward the expansion of current production.

Additionally, there is a study by Gardner, Hardie, and Parks that use the advanced statistical techniques examining the effects of the U.S. support programs since 1987, which was the time those programs became increasingly separated from production decisions and included the U.S. direct payments as decoupled income support. They find that the U.S. decoupled income support has induced 45 to 90 million more acres into agricultural production than would otherwise have been the case.⁷²⁹ With the shreds of evidence and the remaining uncertainty about to what extent decoupled income supports affect productions, there is a need to put nominal limits of this type of support.

On the other hand, the nontrade concerns such as rural development and food security brought by developing members, including Indonesia, are a more complex one. The developing countries' coalitions such as the G33 and the G20 have specifically proposed the realization of the Special and Differential Treatment (SDT) citing the current SDT has watered down to the point that it is useless. If there was any "special treatment" for developing countries, it is not more than an extended period of time given to developing members to implement the agreement. Hence, in the DDR, there was an effort to reinstate the SDT for developing countries. Article 44 of the Doha Declaration specifically provides "that provisions for special and differential treatment are an

⁷²⁹ Bruce Gardner, Ian Hardie & Peter J. Parks, *United States Farm Commodity Programs and Land Use*, 92 AM. J. OF AGRIC. ECON. 803 (2010).

integral part of the WTO Agreements.” Further, it asserts that SDT will be reviewed in the DDR “with a view to strengthening them and making them more precise, effective, and operational.”

There are members that support and reject the reinstatement of SDT. Proponents of the SDT argue that considering the special circumstances of developing countries, it deserves to be given enough policy space to foster development even if these policies would have some negative externalities for other countries.⁷³⁰ Alan Matthews summarizes at least six arguments on why the SDT is justified:⁷³¹

- The trade liberalization damages food security argument - Critics believe that the liberalization of agriculture has benefited only the larger, more export-oriented farmers, has led to the concentration of farms and has marginalized small farmers and created unemployment and poverty.
- The different role of agriculture argument – For developing countries, agriculture has many roles. Not only to provide basic needs, but agriculture is also a source of employment, GDP, and foreign exchange.
- The weakness of agriculture argument - Weak market orientation and the lack of infrastructure, among other things in developing countries, make it difficult for them to compete. Thus, agricultural production needs significant support.
- The food security argument – At the heart of this argument is that the belief that staple food self-sufficiency is a necessary condition for food security.
- The vulnerability argument – Developing countries and especially low-income farmers are more vulnerable to the adjustment pressures by open trade policies. While the price

⁷³⁰ STIGLITZ AND CHARLTON, *supra* note 23.

⁷³¹ Alan Matthews, *Shallow versus Special and Differential Treatment (SDT) and the issue of differentiation in the WTO among groups of developing countries*, in WTO RULES FOR AGRICULTURE COMPATIBLE WITH DEVELOPMENT (2007).

variability arises from domestic causes, the world market also can be the source of instability.

- The asymmetry of support argument – This could be the most powerful rhetorical argument supporting the SDT. Historically, the developed countries have supported their farmers. The AoA further institutionalized this such support. Developing countries, on the other hand, did not provide such support or were not able to.

Others, however, argue that SDT violates the principle of reciprocity, and it will only lead to some protectionist trade policies which are inefficient for industrial development.⁷³² This is linked to the neo-liberal view that believes most of the WTO rules that promote trade liberalization are good rules, thus, it should be followed by all countries. The EU has been specifically asking whether greater flexibility in the form of SDT would actually contribute to the desired goals of increased food security and rural development.⁷³³ The EU further notes that “All SDT proposals should be evaluated against the following basic criterion: will this aid the economic development of developing countries and their fuller integration of developing countries into the trading system, as opposed to creating what has been described as permanent exclusion or second-tier Membership of the system?”⁷³⁴

Despite the debates, after the failure in Cancún, developing countries stepped up their demands for SDT to become a prerequisite for progress in the round. Provided the lesson of the Uruguay Round, cautious developing countries see SDT as an “insurance policy” that provides them the flexibility to opt-out from the agreement, which proved to be too onerous for them. The

⁷³² STIGLITZ AND CHARLTON, *supra* note 23.

⁷³³ Matthews, *supra* note 731.

⁷³⁴ *Id.*

G33 coalition consisting of 42 developing countries led by Indonesia are united behind the SDT, believing that liberalization should not further aggravate the rural poverty and food insecurity.

The specific features that the G33 proposes as components of the SDT are Special Products (SP) and Special Safeguard Mechanism (SSM). SP and SSM are seen as a fundamental component of the needed flexibilities in the current negotiation to address developing members' food security and rural development concerns. Indonesia, on behalf of the G33, further expresses that to be an effective instrument, SDT provisions in the revised AoA must have the following parameters:⁷³⁵

i) developing countries must be able to decide themselves a percentage of tariff lines to be considered as SP, ii) SP must be a stand-alone provision; iii) there must be no tariff reduction commitment for all SP; iv) there must be no new TRQ commitment on all SP, iv) products considered as SP must also have access to SSM.

The G33 firmly reemphasizes that as an integral part of SDT, SP, and SSM must have a higher degree of clarity and specificity in the eventual framework to be agreed upon. As this is supposed to be a Development Round of Trade Negotiation, the G33, therefore, believes that language on all SDT, including on SP and SSM must be appropriately enhanced and for which no compensation can be requested from developing countries.

The G33 has also proposed to include procurement of food products from farmers at minimum support price (MSP) and their distribution at subsidized rates to poor. The G33 promotes that the subsidy of these programs should not be included in the category of trade-distorting subsidies that disrupt markets and prices of food items. The current AoA allows the public stockholding programs intended for food security purposes from amber box rules. However, it states that in a program in which food stocks or food security purposes are acquired and released

⁷³⁵ The G33, *Press Statement of the G33: G33 Re-emphasizes the Importance of SP and SSM* (2004), <https://www.twn.my/title2/twninfo155.htm> (last visited Jul 19, 2019).

at “administered” prices, any difference between the acquisition prices and the external reference prices must be accounted for the AMS or in other words, subject to reduction. This has raised concerns from some developing members that their support would be above the AMS limit and vulnerable to challenge in the WTO.

Although the debate over the public stockholding issue was intense in the Bali Ministerial Meeting, it appears that the problem is not as severe, and the differences need not be irreconcilable as they have predicted to be.⁷³⁶ The study by International Centre for Trade and Sustainable Development (ICTSD) shows that even in the absence of finding permanent solution in this matter, there are options for developing countries to continue providing supports to their farmers including the option to convert the public stockholding programs to green box measures by removing the administered prices altogether and replace it with unlimited amounts of input subsidies for as long as there are extended to low-income or resource-poor farmers.⁷³⁷ However, what it is important to underline is that the effort for developing countries to seek for a permanent solution to the public stockholding issues should be viewed “in the light of calls of many developing countries to rectify many exists imbalances in the domestic support allowances accorded to developed members.”⁷³⁸

While the issues of SP and public stockholding for food security are easier to find the common grounds and to negotiate, the SSM, however, is still the contentious one. The DDR collapsed in 2006-07, mainly over the issue of whether developing countries should be granted the SSM. This impasse signals that developing countries learning from the Uruguay Round experience

⁷³⁶ Raul Montemayor, *Public Stockholding for Food Security Purposes: Scenarios and Options for a Permanent Solution*, International Centre for Trade and Sustainable Development Issue Paper No. 51, Geneva (2014).

⁷³⁷ Another possible solutions are i) the use of US dollars in notifying prices and monetary values in AMS calculations and to equate “eligible” production only to the proportion of local output that is actually marketed by producers” ii) to exempt developing countries from *de minimis* caps if their actual procurement does not exceed a given percentage of local production; iii) rebasing references prices to a more recent period or adjusting them for inflation through the of producer price indices.

⁷³⁸ Montemayor, *supra* note 167.

would insist on the passing of the SDT, including the SSM. SSM is being visualized in the DDR as a mechanism through which a WTO member country can temporarily impose a tariff rate that is higher than the bound tariff rate on the import of a particular product. The idea behind the SSM is that it should allow a country to use temporary protective measures to insulate its domestic agricultural products from the short-term fluctuations of international prices and also from sudden import surges. There are several reasons why SSM is especially crucial for developing countries. First, developing countries are uniquely vulnerable to dumped imports from developed countries. Unlike developed countries that have a small farming population, in many developing countries, a high proportion of the population lives on the land engaged in the agriculture sector in which most of them are living below the poverty line. Hence, the developing countries are more in need of SSM compared to the developed members. Second, the fact that the domestic subsidies in developed members remain high and will be likely to be so under a new agreement means that developing countries will remain to be vulnerable to “dumped” agricultural imports from developed countries. Besides the economic threat that this could impose, dumped imports may threaten food security in developing countries by forcing small agricultural products out of business. While some argue this will not be likely to happen, there are plenty of past events that show otherwise. Swaziland produced sugar at less than half of the cost of the EU, but the dumping of subsidies EU sugar products forced Swaziland companies out of business, leading to the loss of some 16,000 jobs.⁷³⁹ Another example is when thousands of small dairy farmers in the Dominican Republic were forced out of business due to the dumping of EU dairy products.⁷⁴⁰

⁷³⁹ Schoenbaum, *supra* note 30.

⁷⁴⁰ MANITRA A. RAKOTOARISOA, RAMESH P. SHARMA & DAVID HALLAM, AGRICULTURAL IMPORT SURGES IN DEVELOPING COUNTRIES: ANALYTICAL FRAMEWORK AND INSIGHTS FROM CASE STUDIES (2011).

Although the WTO members have made progress that is to agree on the ongoing multilateral trade negotiation to be a “developmental round,” meaning it would seriously address issues by taking into consideration the developmental concern, the road ahead is still long. As expressed by Rubens Ricupero, the fifth Secretary-General of the United Nations Conference on Trade and Development in the Seattle Ministerial Meeting, calling a multilateral negotiation a developmental round will not make it one, rather, there is a need to convert this rhetoric into concrete action.⁷⁴¹

Some also may argue that the agricultural problems in developing countries are caused by internal constraints such as poor infrastructures or lack management tools to mitigate agricultural production risks or to respond to the disaster, and limited financial ability to support the farmers. It may also be pointed out that developing countries could do more for themselves, and that some of their problems are only marginally related to constraints on external market access. However, it is no excuse for an international trade regime to make life more difficult for farmers in developing countries. It is true that the rest of the world cannot solve the problems facing developing countries, and their success depends mainly on their own efforts, but it should not turn the playing field against them, which has shown it has been doing.

The struggle of developing countries, including Indonesia, in the agricultural trade, raises an important question: on the one hand, countries cannot break all the rules and expect to be taken seriously unless perhaps North Korea. On the other hand, by breaking the rules, countries implicitly stating that these rules are not actually fair. In the long run, these rules have to be reformed, but this will take time. Policymakers in developing countries, therefore, have to make a choice: do countries try to be good citizens despite thinking these rules are unfair and see big

⁷⁴¹ Ricupero, *supra* note 667.

countries ignoring them all the time? Or do we break the rules? While it is easy to say never break the rules because we all break the rules, what would happen? However, for real-world policymakers, they could face a reality of poor farmers who cannot feed themselves, and if they could break the rules, they might be able to provide for poor farmers.

Chapter 6

Restructuring Indonesia's Agricultural Trade Law

1. THE AFTERMATH OF THE WTO DISPUTES: DOMESTIC BACKLASH

Recall in Chapter 4, Indonesia denied the claim by the U.S, New Zealand in *Indonesia – Horticultural Products, Animals, and Animal Products* and Brazil in *Indonesia – Chicken Meats and Chicken Products*. In the broader sense, Indonesia expressed that these disputes touched upon one of the most sensitive issues faced by any WTO member that is food security and safety. In its written argument submitted to the WTO, Indonesia argued that Indonesia has the right to safeguard the health and safety of its food supply chain, and this responsibility relies heavily on the action of the government. The challenged measures do so in a manner that takes into consideration the unique circumstances by Indonesia that are: i) a developing country; ii) thousands of miles from most of the major agricultural production enters and exporters of the world; iii) located on or near the equator; and iv) whose population is predominantly Muslim. In the narrower sense, Indonesia claimed that the regulations did not constitute “quantitative restrictions,” “minimum import prices,” or “similar border measures” as a matter of law.

There are several points made by Indonesia: first, Indonesia denied the argument that it implements a discretionary import licensing as opposed to an automatic import licensing. Indonesia underlined that there was no discretion given to its administrative agent in the issuance of import licensing in any stage of the process. The set of requirements for the import licensing was straightforward and clearly published along with the availability of the online application to streamline the process. Based on the data from 2013 -2015, Indonesia emphasized that there is no evidence that Indonesia rejected any complete application.

Second, Indonesia argued that its regulation did not limit the importation of the products. Citing the Appellate Body Report in *Argentina – Import Measures*, Indonesia stated that not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products. To support this assertion, Indonesia submitted data that for some of the U.S. products, it experienced an increased share of the market. This, according to Indonesia, would be contrary to the logic of quantitative restriction and prohibition.

Last and perhaps the most important is Indonesia's argument that some measures intended to prevent an oversupply of only certain fresh horticultural products that could have disastrous consequences. Indonesia further explained that, given its location, Indonesia has always been an agricultural country where most of its citizens engage in farming for a living. For example, in terms of chilies and shallots, almost every province in Indonesia has its own production of chilies and shallots. Thus, unrestrained import could result in the oversupply of the products. The reference price system used by Indonesia, among others, is one of the policy tools that protect Indonesia against extreme price volatility. Indonesia is also the center of other fresh horticultural products like mangos, durians, potatoes, carrots, bananas, papayas, pineapples, and melons, which are produced throughout every province in Indonesia. Indonesia argued that in a certain period, a particular agricultural product is abundant in Indonesia, and an oversupply of the product can drive the prices down that will harm small Indonesian farmers that are already living below the poverty line.

Notwithstanding Indonesia's contentions, the WTO panel proceeded with its interpretation, deciding all of the eighteen Indonesia regulations violate the WTO agreement by putting in place regulations that have the effect of quantitative restrictions. Later in the appeal process, the

Appellate Body confirmed the finding. The WTO panel and Appellate Body specifically explained the limiting effects of the measures could be demonstrated through design, architecture, and revealing structure of the measure at issue considered in its relevant context.

It must be admitted, however, that some of Indonesia's alternative defenses, especially the ones raised under Article XX of the GATT 1994, are ill-prepared. It is likely that part of it because Indonesia is aware of the narrow textual interpretation of the WTO so that it attempted to provide legal arguments that fit the text of agreement while, in fact, its policy and regulation are based on much broader policy concern. With the WTO jurisprudence that often, if not always, utilize a narrow interpretation that relies heavily and solely on the text, it is hard for Indonesia or even other members to have its policy concern accepted by the WTO panel and Appellate Body.

The outcome of *Indonesia – Chicken Meats and Chicken Products* is similar to *Indonesia – Horticultural Products, Animals, and Animal Products*, although arguably, the approach of the WTO panel and Appellate Body are “softer” in this case. One of the critical rulings from this case is that the WTO panel acknowledges the principle of food self-sufficiency, a highly controversial idea,⁷⁴² as a legitimate policy objective. The Panel further stressed that as a legitimate policy objective, members could freely pursue the food self-sufficiency as long as not violating the WTO agreements, including not using the quantitative restrictions or reference prices used by Indonesia. Question then arises if it was possible to pursue the self-sufficiency goal resorting exclusively to WTO-compliance policies.

Following the rulings by the WTO, as explained in Chapter 3, the WTO panel and Appellate Body will recommend the member concerned to bring the measure into conformity with

⁷⁴² Jennifer Clapp, in her work “*Food self-sufficiency: making sense of It, and when it makes sense,*” mentions that the policy of food self-sufficiency has been widely critiqued as being misguided. She gave an example of in 2009, the *Financial Times* notes that the aim of food self-sufficiency would be disastrous globally.

that agreement. The Dispute Settlement Body (DSB) is obligated to monitor the implementation of the recommendation. In the case that immediate implementation is impractical, it can ask for a reasonable period of time to implement the WTO panel and Appellate Body ruling. If it is not implemented within the period of reasonable time, the prevailing member is entitled to ask for compensation. If no compensation is agreed, the prevailing party can request retaliation in the form of suspension concessions.

In implementing the recommendation by the WTO panel and Appellate Body, the Indonesian government is at a crossroads. On the one hand, the Indonesian government is aware of the severe consequences of not complying with WTO ruling; thus, it is left with no choice but to change the regulations as recommended. Indonesian government asserts that it has changed some of the concerned regulations. However, the U.S. that is not satisfied with Indonesia's implementation in *Indonesia – Horticultural Products, Animals, and Animals Products*, on August 15, 2018, officially requested US\$ 350 million to the WTO to retaliate against Indonesia.⁷⁴³ The Indonesian government has repeatedly expressed in the national media that it did not expect such a request from the U.S, especially following the bilateral meetings in Washington just months before the request. These series of events spark controversy in the national media.⁷⁴⁴

On the other hand, the response of the Indonesian government to comply with the WTO rulings receive an extensive backlash from local constituents. When Indonesia lost in the panel stage, some of the domestic actors already expressed their concern. National Horticulture Council stated that the defeat of the Indonesian government has the potential to increase the import of the

⁷⁴³ According to the WTO Website, the U.S. filed a request to retaliate against Indonesia on 15 August, 2018. The request is currently under review. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds478_e.htm

⁷⁴⁴ When Indonesia loses WTO appeal, THE JAKARTA POST, August 9, 2018, <https://www.thejakartapost.com/academia/2018/08/09/when-indonesia-loses-wto-appeal.html> (last visited Jun 19, 2019). RI kalah di WTO terkait pembatasan impor pertanian (*Indonesia lost at the WTO regarding restrictions on agricultural imports*), KONTAN, December 23, 2016, <https://nasional.kontan.co.id/news/ri-kalah-di-wto-terkait-pembatasan-impor-pertanian> (last visited Jun 19, 2019).

horticultural products.⁷⁴⁵ Thus, in the appeal process, the government must work harder by involving all the necessary stakeholders. Later, when Indonesia also lost in the appeal process, the backlash intensified to the point that the Indonesian government is asked to reconsider its membership in the WTO.⁷⁴⁶

Indonesia for Global Justice expresses its concern that the adjustment of Indonesian agricultural trade law and policy to the WTO ruling will be in "conflict with Indonesia's food sovereignty and deprive farmers welfare."⁷⁴⁷ Some further assert that the WTO is often used as a political instrument of developed countries to dominate emerging markets. As a result, international law related to economy and trade has wrapped up the interests of developed countries, without being able to be opposed by developing countries.⁷⁴⁸ The mechanism of trade disputes in the WTO is seen as a mean that forces Indonesia to submit to the international rules of regulation and the interests of other countries, although it conflicts with the constitution.

The extreme reaction comes from Indonesia Farmers Union that asks the Indonesian government to reconsider its commitment to the WTO. They argue that Indonesia's commitment to the WTO would certainly further eliminate Indonesia's sovereignty to pass national legislation in favor of the people and national interests.⁷⁴⁹ Thus, it is appropriate for the people of Indonesia and the House of Representatives to urge the Government of Indonesia to review Indonesia's membership in the WTO. The Indonesian Farmers Union ultimately asked the Indonesian

⁷⁴⁵ *Id.*

⁷⁴⁶ M Dani Pratama Huzaini, *Kalah di Kasus Pembatasan Impor Hortikultura, Indonesia Terancam Sanksi (Losing in the Case of Horticultural Import Restrictions, Indonesia is Threatened with Sanctions)*, HUKUM ONLINE, November 23, 2017, <https://www.hukumonline.com/berita/baca/lt5a169be7ae350/kalah-di-kasus-pembatasan-impor-hortikultura--indonesia-terancam-sanksi> (last visited May 24, 2019).

⁷⁴⁷ *Id.*

⁷⁴⁸ WTO Ancam Ketahanan Pangan Indonesia? (WTO Threatens Indonesian Food Security?), PINTERPOLITIK, December 5, 2017, <https://pinterpolitik.com/wto-ancam-ketahanan-pangan-indonesia/> (last visited Jun 19, 2019).

⁷⁴⁹ Sanksi Dagang AS Ancam Kedaulatan Pangan Indonesia (*US Trade Sanctions Threaten Indonesian Food Sovereignty*), KUMPARAN, August 9, 2018, <https://kumparan.com/@kumparanbisnis/sanksi-dagang-as-ancam-kedaulatan-pangan-indonesia-1533799067124996044> (last visited Jun 19, 2019).

government to reconsider Indonesia's membership in the WTO following the ruling that will hurt Indonesian farmers that are already living in the poverty line.⁷⁵⁰

2. REVISIONS ON THE REGULATIONS FOLLOWING THE WTO RULINGS: WHAT COULD BE AND COULD NOT BE DONE

The creation of the WTO as a replacement of GATT and its more legalistic dispute settlement system in 1995 is considered as the most notable achievement in the international trade policy field. Compared to other international institutions, the WTO, through its dispute settlement system, has established the core channel to impose international trade law that incorporates a high level of legalization.⁷⁵¹ The legalized dispute settlement system under the WTO provides an enforceable report by the Appellate Body, a panel of seven persons that can only be blocked by a consensus of WTO members, including the prevailing parties.

In Indonesia's agricultural cases, the legally enforceable reports by the WTO Appellate Body then must be followed by Indonesia within a reasonable period of time in order to avoid any ramifications of non-compliance under WTO. Thus, after the ruling in *Indonesia – Horticultural Products, Animals, and Animal Products* and *Indonesia – Chicken Meats and Chicken Products*, both the Indonesian Ministry of Trade and the Ministry of Agriculture revised the disputed measures significantly and immediately to be in line with the ruling. Indeed, in many instances, Indonesia expresses its intention to fully comply with the rulings due to its respect to the global rules-based multilateral trading system.⁷⁵²

⁷⁵⁰ WTO Menghancurkan Nasib Petani Dan Nelayan Indonesia (WTO Destroys the Fate of Indonesian Farmers and Fishermen), SERIKAT PETANI INDONESIA, December 12, 2017, <https://spi.or.id/wto-menghancurkan-nasib-petani-dan-nelayan-indonesia/> (last visited Jun 19, 2019).

⁷⁵¹ Davis & Sarah, *supra* note 37.

⁷⁵² Interviews with the Indonesian Ministry of Trade Director of APEC Negotiations and International Organizations, Deputy Director for Agricultural Products, Legal Advisor, and the Indonesian Ministry of Agriculture Head of Inter-Governmental Organizations Section, September 20, 2019.

From the eighteen regulations that WTO panel and Appellate Body found to violate the WTO agreements, the Indonesian government has revised the seventeen technical regulations through the amendments of the Minister of Trade (MoT) Regulation and the Minister of Agriculture (MoA) Regulation. Table 6.1. summarizes the revisions of the challenged measures done by the Ministry of Trade and the Ministry of Agriculture.

A. Import Licensing Regime for Horticultural Products		
Discrete Elements of the Regime		
Measure 1	Limited Application windows and validity periods	Revised through Article 10 and Article 26A MoA 24/2018
Measure 2	Periodic and fixed import terms	Related to the revision of Measure 1
Measure 3	80% realization requirement	Revised through Article 9 MoT 64/2018
Measure 4	Harvest period requirement	Revised through Article 5 MoA 38/2017
Measure 5	Storage ownership and capacity requirements	Revised through Article 6 MoT 64/2018 & Article 18 MoA 38/2017
Measure 6	Use, sale and distribution requirements for horticultural products	Revised through Article 12 MoT 64/2018
Measure 7	Reference prices for chili and fresh shallots for consumption	Revised through Article 32 MoA 24/2018
Measure 8	Six-month harvest requirement	Deleted in the MoA 24/2018
Regime as a whole		
Measure 9	Import licensing regime for horticultural products as a whole	Related to revisions above
B. Import Licensing Regime for Animals and Animal Products		
Discrete Elements of the Regime		
Measure 10	Prohibition of importation of certain animals and animal products, except in emergency circumstances	Deleted in MoT 59/2016 & Revised through Article 7A MoA 23/2018
Measure 11	Limited application windows and validity periods	Revised through Article 12 MoT 59/2016 & Article 21 34/2016
Measure 12	Periodic and fixed import terms	Related to the revisions of Measure 11
Measure 13	80% realization requirement	Revised through Article 21 MoT 59/2016 & deleted in MoA 23/2018
Measure 14	Use, sale and distribution of imported bovine meat and offal requirements	Revised through Article 31 MoA 32/2016
Measure 15	Domestic purchase requirement	Deleted in MoA 34/2016
Measure 16	Beef reference price	Deleted in MoT 59/2016
Regime as a whole		
Measure 17	Import licensing regime for animals and animal products as a whole	Related to revisions above

C. Sufficiency Requirement		
Measure 18	Sufficiency of domestic production to fulfil domestic demand	Requires approval of Congress to be revised

Table 6.1: Revisions on the Concerned Measures

Source: MoT and MoA Regulations as Gathered by Writer

In *Indonesia – Horticultural Products, Animals, and Animal Products*, the WTO panel, and Appellate Body require Indonesia to relax its import regime both on horticultural products and animals and animal products. There are two MoA regulations that govern a separate import recommendation for horticultural products and animals and animal products and other two MoT regulations that manage a separate import approval. This section reviews the regulations separately based on the type of products.

Concerning the horticultural products, the Ministry of Agriculture has revised the regulation on Import Recommendation on Horticultural Products (RIPH) by issuing the latest MoA Regulation Number 24 of 2018 as the amendment of the disputed MoA Regulation Number 86 of 2013. Prior to the latest MoA Regulation Number 24 of 2018, the Ministry of Agriculture had already changed the regulation two times through the MoA Regulation Number 16 of 2017 and the MoA Regulation Number 38 of 2017. The details of changes, including the specific articles, are provided in Table 6.2.

MoA Provision on Import Recommendation of Horticultural Products	
Previous Regulation	Amendment
<p>Article 13 MoA 86/2013 (1) RIPH is issued 2 (two) times in one year which are valid for the period of January to June and July to December.</p> <p>Article 10 MoA 38/2017 (1) RIPH is issued 2 (two) times in 1 (one) calendar year for 1 (one) Business Actor.</p>	<p>Article 10 MoA 24/2018 (1) Business actors can submit a RIPH application at any time.</p> <p>(2) The application for RIPH as referred to in paragraph (1) is carried out within a working day.</p> <p>Article 26A MoA 24/2018 RIPH as referred to in Article 26 paragraph (2) letter a, is valid for 1 (one) calendar year.</p>

<p>Article 10 MoA 38/2017 (2) Issuance of RIPH on subsequent RIPH applications is carried out after the Business Actor: a. fulfill the imports terms b. submits reports on the realization of imports</p>	<p>Article 10 MoA 38/2017 (2) Deleted and no longer mentioned in the rest of the regulation.</p>
<p>Article 5 MoA 86/2013 (1) Imports of horticultural products are carried out outside the period before the harvest, harvest, and after harvest in a certain period of time. (2) The specified period as referred to in paragraph (1) is determined by the Director General. (3) The Director General in stipulating a certain period of time as referred to in paragraph (2) is based on a proposal from a working group formed by the Director General</p>	<p>Article 5 MoA 38/2017 RIPH as referred to in Article 4 paragraph (1) must: a. consider domestic horticultural production b. encourage domestic production c. consider the implementation of government programs; and d. consider national needs</p> <p>Related to Article 5 is Article 9 MoA 38/2017</p> <p>Article 9 (1) Horticultural production considerations as referred to in Article 5 letter (a) are determined by the Director General.</p>
<p>Article 8 MoA 86/2013 (2) In addition to fulfilling the administrative requirements as referred to in paragraph (1)(a), the issuance of RIPH for fresh products for consumption must be completed by following technical requirements: c. submission of the statement of having horticultural product storage and distribution facilities that are in accordance with the character and type of product; d. submission of the statement of the suitability of storage warehouse capacity</p>	<p>Through Article 18 MoA 38/2017, the administration requirements for RIPH does not include horticultural storage and facilities anymore.</p>
<p>Article 5 MoA 86/2013 (4) The issuance of RIPH for fresh horticultural products for consumption in the form of chili and shallot is based on reference price decided by the Minister of Trade.</p> <p>Article 11 MoA 38/2017 In the case of implementing a government program as referred to in Article 5(c)*, the issuance of RIPH for certain types of Horticulture Products is exempted from the provisions referred to in Article 10.</p>	<p>Article 32 MoA 24/2018 (1) Business actors that carry out the import of fresh garlic products as referred to in Article 7 must carry out the development of domestic garlic planting.</p> <p>Article 11 MoA 24/2018 Deleted</p>

*Article 5(c) refers to shallots and chilis.	
Article 8 1(a) MoA 86 2013 & Article 18(g) MoA 38 2017 1) Administrative requirements for Business Actors and SOEs as referred to in Article 17 include: g) Statement not to include fresh Horticulture Products exceeding 6 (six) months	Article 18 MoA 24/2018 (1)(g) deleted
Article 37 MoA 38/2017 (1) Business actors who violate the provisions referred to in Article 18 paragraph (1) letter g, are subject to sanctions not given RIPH for 3 (three) consecutive years.	Article 37 MoA 24/2018 (1) deleted

*Table 6.2: Amendment on Horticultural Product Import Recommendations (RIPH)
Sources: The MoA Regulations as Gathered by Writer.*

The amendments done by the Ministry of Agriculture has significantly altered the issuance of RIPH. The RIPH, which was initially issued two times per year, thus, making it only valid from January to June and July to December, it now can be applied at any time and valid for one calendar year. The previous requirement had also caused a company to struggle to change its import terms since it had to wait until the next semester to submit another application. However, through this change, although a company is still required to submit any revision to its import terms, it does not have to wait until the next semester to change its import terms. The change on import terms can be submitted at any time, and the Ministry of Agriculture will issue the revised RIPH no later than two working days as from the date of receipt of complete and correct applications. Also, previously, an importer was required to import at least 80% of the quantity of each type of product specified in the import approvals. Failing to do so may result in the rejection of the RIPH and import approval. The amended regulation eliminated such requirements.

Perhaps one of the most controversial changes is regarding the harvest period requirement. Under the MoA Regulation Number 86 of 2013, the importation of horticulture products is carried out outside the period before the harvest, harvest, and after harvest. In the amended regulation,

there is no harvest period requirement anymore, although the importation of the horticulture products must still consider some factors such as domestic production, implementation of government programs, and national needs. The storage ownership and capacity requirements were eliminated from the MoA Regulation and now are solely regulated by the Ministry of Trade.

Moreover, in the previous regulation, the importation of fresh shallots and chili were based on the reference price, meaning that the importation is suspended when the domestic price falls below the reference price. After the amendment, the importation of those products is now freely allowed only with an additional requirement of domestic garlic planting development. The MoA also eliminated the regulation that requires the fresh horticulture products to be harvested six months before importation.

In addition to the MoA Regulation, the Ministry of Trade also enacts the MoT Regulation Number 64 of 2018 concerning Provisions on the Importation of Horticultural Products to replace the MoT Regulation Number 16 of 2013. Before the MoT Regulation Number 64 of 2018, the MoT Regulation already underwent three changes through the MoT Regulation Number 95 of 2017, the MoT Regulation Number 30 of 2017, and the MoT Regulation Number 71 of 2015. The detailed revisions of the MoT Regulation concerning Import Approval are summarized in Table 6.3.

MoT Provision the Importation of Horticultural Products	
Previous Regulation	Amendment
Article 9 MoT 30/2017 (2) The issuance of Import Approval for Business Actors must pay attention to: b) the previous realization of imports of horticultural products.	Article 9 MoT 64/2018 (2)(b) deleted
Article 8 of MoT 16/2013 (1) Business Actors must submit the Import Approval application electronically to the Minister by attaching:	Article 6 MoT 64/2018 b) proof of <i>possession</i> of registered cold storage in accordance with the provisions of the legislation;

(e) proof of <i>ownership</i> of storage in accordance with the provisions of the legislation, as well as in accordance with the characteristics of the product;	
<p>Article 12 of MoT 30/2017 (1) Companies owning API-U that have been approved to import: a) can only trade and/or transferring the imported horticultural products to distributors; and b) prohibited from directly trading and/or transferring the imported horticultural products to consumers or retailer.</p> <p>(2) The company that owns API-P that have been approved to import: a) can only import horticultural products to be used as a raw material for production or auxiliary material for industrial production needs that the API-P has; and b) prohibited from trading and/or transferring the imported horticultural products to other parties.</p>	<p>Article 12 MoT 64/2018 (1)(a) and (b) deleted</p> <p>(2)(a) The company that owns API-P that has received the Import Approval: can only import horticultural products to be used as raw material for production or auxiliary material for industrial production needs that the API-P has. (b) deleted</p>

*Table 6.3: Amendment on Provisions on the Import of Horticultural Products
Sources: MoT Regulations as Gathered by Writer*

The MoT regulation mainly covers the issuance of import approvals. After an importer receives RIPH from the Ministry of Agriculture, it must apply for the import approval issued by the Ministry of Trade. The validity of import approval is in accordance with the validity period of RIPH, which is one year. The past MoT regulation that required that the issuance of import approval must consider the realization of the previous import is now eliminated. Regarding the storage ownership and capacity requirement, the amended article now only requires the "proof of possession of cold storage" as opposed to the previous requirement of the "proof of ownership of storage." In this case, an importer does not have to own storage and can choose to lease storage that is more accessible and affordable. Lastly, the Ministry of Trade also relaxes its use, sale, and distribution requirements. Previously, API-U companies can only trade or transfer the horticultural products to distributors and not directly to consumers and retailers. API-P, on the other hand, can only import the products as raw materials or auxiliary materials for its industrial production

processes and is thus prohibited from trading and/or transferring them. The revised MoT Regulation now permits the API-U companies to trade or transfer the products to both distributors or consumers and retailers. However, the requirement for API-P, in which the products can only be used as raw materials or auxiliary materials for its industrial production processes remains.

Compared to the horticultural products, the process of adjusting the regulations of the importation of animals and animal products to be in line with the WTO ruling is more complex. This can be observed from the numbers of amendments done by both related Ministries. After the MoA Regulation Number 139 of 2014 on the Import of Carcasses, Meats, and/or Processed Products into the Territory of the Republic of Indonesia, the Ministry of Agriculture revised the regulation for four times including the MoA Regulation Number 2 of 2015, the MoA Regulation Number 58 of 2015, the MoA Regulation Number 34 of 2016, and the latest one the MoA Regulation Number 23 of 2018. Similar to the horticultural products, the amendments on the importation of animals and animal products result in a notable change in the current regime. The details of the changes are provided in Table 6.4. below.

MoA Provisions on Import of Carcasses, Meats, and/or Processed Products into the Territory of the Republic of Indonesia	
Previous Regulation	Amendment
<p>Article 7 MoA 139/2014 In addition to the requirements referred to in Article 4, Article 5, and Article 6, the import of carcasses, meats, and/or processed products must meet the following requirements: a. types of carcass, meat and / or processed products;</p> <p>Article 8 MoA 139/2014 Requirement regarding the bovine-meat that can be imported is listed in Appendix I which are an integral part of this Ministerial Regulation, and</p>	<p>Article 7A MoA 23/2018 The types of carcasses, meats, offal, and/or processed products which are of bovine meats or non-bovine which are not listed in Appendix I and Appendix II as referred to in Article 7 can be given Recommendations insofar as they meet the requirements for safety, health, and halal.</p>

carcasses and/or non bovine-meat, as well as processed meat products that can be imported is listed in Appendix II which is an integral part of the Regulation This Minister.	
Article 23 MoA 139/2014 Application for Import Recommendations by Business Actors, State-Owned Enterprises, and Regionally-Owned Enterprises must be submitted on December 1-31 of the previous year, March 1-31, June 1-30, and September 1-30 of the current year.	Article 21 MoA 34/2016 Application for Import Recommendations by Business Actors, State-Owned Enterprises, and Regionally-Owned Enterprises, Social Institutions, and Foreign Country Representatives/International Institutions may be submitted on working days.
Article 25 MoA 34/2016 The issuance of Import Recommendations as referred to in Article 24 paragraph (5) for the importation of carcasses, meats, and/or processed products, considers the realization of previous income and distribution plans of the importation.	Article 25 MoA 23/2018 Deleted
Article 32 MoA 139/2014 (1) The purpose of use as referred to in Article 30(j) regarding bovine meats as referred to in Article 8 is for hotels, restaurants, catering, industry, and other special needs. (2) The purpose of use as referred to in Article 30(j) regarding carcass, non-bovine meats, as well as processed meat products as referred to in Article 8 is for hotels, restaurants, catering, industries, other special needs, and <i>modern markets</i> .	Article 31 MoA 34/2016 (1) The purpose of use as referred to in Article 28 letter j with regards to carcasses, meats, offal, and/or processed products requiring cold chain handling as referred to in Article 8, is for hotels, restaurants, catering, industry, <i>markets</i> , and other special needs that have cold chain facilities.
Article 5 MoA 139/2014 Business actors, State-Owned Enterprises, or Regionally-Owned Enterprises as referred to in Article 4 that import large ruminant meat must absorb local beef from slaughterhouses that already have a Veterinary Control Number.	Article 5 MoA 34/2016 Deleted

Table 6.4: Amendment on Provisions on Import of Carcasses, Meats, and/or Processed Products into the Territory of the Republic of Indonesia
Sources: MoA Regulations as Gathered by Writer

One of the most notable revisions in the importation of animals and animal products regulation is about the type of animals and animal products that can be given the import recommendation. The MoA regulation used to prohibit the importation of bovine meat, offal,

carcass, and processed products that are not listed in Appendix I or non-bovine and processed products that are not listed in Appendix II. It is now revised with a particular regulation stating that the types of carcasses, meats, offal, and/or processed products which are of bovine meats or non-bovine that are not listed in Appendix I and Appendix II can still be given import recommendation insofar as they meet the requirements for safety, healthy, whole, and halal.

Another important change is the application and validity periods of the recommendation. Previously, the import recommendation must be submitted on the specific time provided by the Ministry of Agriculture, which were: December of the previous year, March, June, and September. The Ministry of Agriculture later revised this requirement, stating that the application can be submitted at any time. Due to this new regulation, an importer can also change the import terms immediately without waiting for the next application period, thus, giving more flexibility to change the type or the amount of the importation. Furthermore, the realization of the previous import will no longer affect the issuance of recommendation.

Another change is regarding the use, sale, and distribution of imported bovine meat and offal. The former regulation required that bovine meat could only be imported for hotel, restaurant, catering, industrial, and other special needs. Thus, it could not be sold in any market. Similarly, non-bovine, carcass, meats, and offal can only be used for the above purpose and sold in modern markets. The new regulation provides that carcass, bovine and non-bovine meat, offal, and other processed meats can be used for hotel, restaurant, catering, industrial and other special needs, as well as sold in markets with cold storage. Since the article does not say whether it is only modern market or traditional market, it can be interpreted that the animals and animal products above can also be sold in traditional markets where most of Indonesian buy its animals and animals products needs as long as it fulfills the cold storage requirement due to food safety reason. In addition to

some changes above, there is a removal of one requirement, namely the domestic purchase measure that required the importers of large ruminant meats to absorb local beef.

Regarding the import approval for animals and animal products, the Ministry of Trade revised the regulation on Export and Import of Animals and Animal Products for seven times since the MoT Regulation Number 46 of 2013. The revision includes the MoT Regulation Number 57 of 2013, the MoT Regulation Number 17 of 2014, the MoT Regulation Number 5 of 2016, MoT Regulation Number 59 of 2016, the MoT Regulation Number 13 of 2017, the MoT Regulation Number of 20/2018, and the latest MoT Regulation Number 65 of 2018.

MoT Provision on Export and Import of Animals and Animal Products	
Previous Regulation	Amendment
<p>Article 2 MoT 46/2013 (2) Animal species and animal products that can be imported are listed in Appendix I and Appendix II which are an integral part of the Ministerial Regulation.</p>	<p>Article 2 MoT 59/2016 (2) Deleted</p>
<p>Article 12 MoT 46/2013 (1) Application for Approval of Import of Animals and Animal Products as listed in Appendix I for: a) The first quarter of the January - March period can only be submitted in December. b) The second quarter of the April - June period can only be submitted in March. c) The third quarter of July - September period is only submitted in June The fourth quarter of the period from October to December can only be submitted in September (2) Import Approvals are issued at the beginning of each quarter</p>	<p>Article 12 MoT 59/2016 Application for Import Approval as referred to in Article 11 may be submitted at any time.</p>
<p>Article 13 MoT 46/2013 Business actors that import animals and animal products that have obtained Import Approval as intended in Article 11 paragraph (3)(a) must realize the import of animals and animal products with a</p>	<p>Article 21 MoT 59/2016 (1) Companies that have obtained Import Approvals must submit reports on the implementation of imports of animals and/or animal products realized or not realized.</p>

minimum of 80% of the accumulation of Import Approval for 1 (one) year	
Article 14 MoT 46/2013 (1) In the case of the price of beef in the secondary cut type on the market below the reference price, the importation of animals and animal products as listed in Appendix I of this Minister's regulation is delayed until the price reaches the reference price again.	Article 14 MoT 59/2016 (1) deleted

*Table 6.5: Amendment on Export and Import of Animals and Animal Products
Sources: MoT Regulations as Gathered by Writer.*

Similar to the MoA Regulation, there are two significant changes in the MoT Regulation. The first one is the removal of Appendix I and Appendix II that listed the only type of animals and animal products that could be imported to Indonesia. An importer now only refers to the Appendixes attached to the MoA Regulation. Another important change is the issuance of import approval by the Ministry of Trade. Following the change on the import recommendation, the import approval that initially issued at the beginning of each quarter now can be applied and issued at any time.

There are two requirements removed through the revised MoT Regulation. The MoT used to require an importer to fulfill at least 80% of the specified accumulation amount of import, as stated on their import recommendation for one year. This requirement is eliminated, although an importer is still required to submit the report on their import implementation for the fulfilled amount and not fulfilled. The second removal is the beef reference price requirement. Similar to horticultural products, the reference price is when the domestic market price of secondary beef cuts falls below the pre-established reference price, the importation would be suspended. Through the revision, the reference price no longer affects the importation of secondary beef cut.

In *Indonesia – Chicken Meats and Chicken Products*, although Brazil brought some of the similar issues with the U.S. and New Zealand under *Indonesia – Horticultural Products, Animals,*

and *Animal Products*, it also raised some new matters such as the halal labeling requirement. From the total of seven measures brought to the WTO panel, four regulations were found to violate the WTO agreements while the other three were in compliance with the WTO agreements.

Importation on Chicken Meats and Chicken Products		
Measure 1	Positive list requirement	Deleted in MoT 59/2016 & Revised through Article 7A MoA 23/2018
Measure 2	Intended use requirement	Revised through Article 31 MoA 32/2016
Measure 3	Certain aspects of Indonesia's Import Licensing Regime: <ul style="list-style-type: none"> • Limited application windows and validity periods • Periodic and fixed import terms 	Revised through Article 12 MoT 59/2016 & Article 21 34/2016
Measure 4	Undue delay in the approval of the veterinary health	Under examination
Measure 5	Halal Labeling Requirements	Not found to be in violation of the WTO Agreement
Measure 6	Transportation requirement	Not found to be in violation of the WTO Agreement
Measure 7	General Prohibition	Not found to be in violation due to lack of evidences

Table 6.6: Revisions on the Concerned Measures in Indonesia Chicken Meats and Chicken Products

Source: The WTO Panel Report and MoA and MoT Regulations

The first three regulations found to violate the WTO agreements are also the same concerned measures in the case of *Indonesia – Horticultural Products, Animals, and Animal Products*. For the first measure, the claim by Brazil that it cannot import chicken meats and chicken products due to those products not listed in Appendix I and Appendix II of the MoT and MoA Regulations has already revised by the Indonesian government. Through the amendment of the MoT and the MoA Regulations, the products that are not included in the Appendixes can still be imported as long as it meets the health, safety, and halal requirement.

The intended use requirement raised by Brazil is the same measure with "use, sale, and distribution" requirement in *Indonesia – Horticultural Products, Animals, and Animal Products*,

which also has been revised by the Indonesian government as explained above. Measure 3 concerning the limited application windows and validity periods and periodic and fixed import terms have been amended through the MoA and the MoT Regulations that stipulates the application of import recommendation and import approval can be submitted at any time instead of each quarter as previously regulated. Thus, any changes in the import terms also can be adjusted at any time without waiting for the next period of application.

Perhaps the most controversial measure, in this case, is about the undue delay in the approval of veterinary health. Indonesia argued that it has not yet issued the veterinary health due to the absence of relevant halal assurance questionnaire. Until the time of this writing, the Indonesian government is reportedly still not issuing veterinary health due to the same reason. The rest of the measures, namely halal labeling and transportation requirements, are not found to violate the WTO agreements. The allegation of the general prohibition done by Indonesia is also not proven to be true. Thus, for these measures, no further action by the Indonesian government is required.

Besides revising the regulations, the Indonesian government has also used a diplomatic approach to both complainants in *Indonesia – Horticultural Products, Animals, and Animal Products*. In March 2018, President Jokowi visited New Zealand in which part of the meeting with New Zealand Prime Minister was to address the importation of beef. As a result of the close discussion, Indonesia was able to reach a sequencing agreement with New Zealand.⁷⁵³ A different end is, however, found with the U.S.; although it is said that the U.S. is quite satisfied with the changes done by Indonesia, it is waiting for more revisions, especially on the national laws. On August 15, 2018, the U.S. officially requested US\$ 350 million, a number that Indonesia strongly

⁷⁵³ Interview with the Indonesian Ministry of Trade Legal Advisor, September 10, 2019.

disagrees with, to the WTO to retaliate against Indonesia under the proceeding of Article 22 of the DSU.⁷⁵⁴ The Indonesian was said to be quite surprised by the U.S. decision, especially following the bilateral meetings in Washington just months before the request. From 2018 the Indonesian government has sent its team consisting of the Minister of Trade, the Minister of Agriculture, and the Minister of Foreign Affairs to discuss the implementation of the WTO ruling to the U.S. When asked why there could be such an opposite reaction between two complainants on the same case, first, Indonesia emphasizes that there is no different treatment between the U.S. and New Zealand on the implementation of the ruling.⁷⁵⁵ Second, Indonesia, if not the world, has been witnessing an unprecedented move by the U.S.; a more aggressive approach has been utilized by the U.S. on the global trading system and other topics such as climate change.⁷⁵⁶

Despite Indonesian's aim to fully comply with the ruling, the national laws that are also subject to revision under this case are almost impossible to revise. This is because amending national laws is not only about the legal process but also takes the "political process." The Ministry of Trade and the Ministry of Agriculture have proposed the national laws' changes, but it also depends on the Indonesian parliament to decide. Indonesia then points out that the U.S. was also facing the very same problem before. In the *United States - Measures Affecting the Production and Sale and Clove Cigarettes*, the U.S. was found to violate the TBT Agreement and required to change Section 907(a)(1)(A) of the Federal Food, Drug, and Cosmetic Act but was not able to do so.

⁷⁵⁴ According to the WTO Website, the U.S. filed a request to retaliate against Indonesia on 15 August 2018. The request is currently under review. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds478_e.htm

⁷⁵⁵ Interview with the Indonesian Ministry of Agriculture Director General of Foreign Trade Staffs, September 13, 2019.

⁷⁵⁶ Interview with the Indonesian Ministry of Trade Director of APEC and International Negotiations and Deputy Director for Agricultural Product, September 20, 2019.

Responding to the retaliation inquiry by the U.S, Indonesia affirms its commitment to fully comply with the ruling. Indeed, Indonesia states that it is not an easy decision and process for them to revise all the technical requirements. The Ministry of Trade, for example, explains the struggle in communicating the importance of complying with the WTO rulings with the Ministry of Agriculture.⁷⁵⁷ Reasonably, the Ministry of Agriculture initially rejected the change of the regulations because of its potential negative impacts on the domestic farmers that they must protect. In an interview with the Ministry of Agriculture, it confirms the difficult decision they have to make in allowing the revisions.⁷⁵⁸ Although later adding that, as a member of the WTO, it acknowledged the ruling, the Indonesian Ministry of Agriculture asked for less interference in Indonesia's policy, and stated further that Indonesia retains the right to ensure that the importation of agricultural products is still under government control, because otherwise unrestrained imports will disadvantage domestic farmers.

At the time of the writing, the process under the Article 22 of the DSU is currently halted because Indonesia and the U.S. have been engaging in the bilateral negotiation in Jakarta, Washington, and Geneva while domestically Indonesia also continues its effort to amend the domestic regulations to be in full compliance with the WTO rulings. The Ministry of Trade states that this case is important because it is not isolated only on agricultural products, but it is also intertwined with other trade sectors under the Generalized System of Preferences (GSP) negotiation with the U.S. When further asked what the options Indonesia has regarding the negotiation with the U.S., there are two options mentioned i) quoting the DS406, parties continue the process of arbitration and request panel of the arbitration to reveal its numbers and with its

⁷⁵⁷ Interview with the Indonesian Ministry of Trade Legal Advisor, September 10, 2019.

⁷⁵⁸ Interview with the Indonesian Ministry of Agriculture, Head of Inter-Governmental Organizations, September 20, 2019.

number, the parties need to abide; and ii) there is an option applicant did not execute any decision of the panel as existed in *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*.

3. INCREASING PRODUCTIVITY AND COMPETITIVENES OF THE AGRICULTURE SECTOR

The history of the WTO rulings, including the recent ones on Indonesia's cases along with the current state of WTO negotiation, suggest at least three critical points. First, from the perspective of the recent rulings, it is worth to reemphasize that the WTO is an organization that bases most of its focus on trade liberalization to the point that regulation could violate the WTO agreement just by the structure of the regulation without the need to quantify the adverse trade effects of the regulation itself. Despite the claim that the WTO encourages development, it seems that the principle of freer trade triumphs other principles. The WTO, with its exceptional features such as the dispute settlement system, can easily push its members to adopt the same principle, which in this case is freer trade, and one of the consequences of freer trade is the possibility of an import surge, as explained in the previous chapter.

Second, the WTO rarely, if ever, considers policy concerns from its members when adjudicating a case. Besides the early case of *India – Quantitative Restrictions* that demonstrates this point, it is also evident in how the WTO rejected some of the policy concern raised by Indonesia in *Indonesia – Horticultural Products, Animals, and Animal Products*. In *Indonesia – Chicken Meats and Chicken Products*, the WTO panel highlighted that the policy of food self-sufficiency is legitimate under the WTO that, as such, does not lead to a violation of WTO law. However, in fulfilling that policy, the WTO underlines that Indonesia must use the trade

regulations that comply with the WTO rules. This leads to a question of whether, in practice, it is feasible to implement a self-sufficiency target resorting only to WTO-compliant policies.

Third, the WTO negotiation in the agriculture sector is on a challenging road. Although developing countries have repeatedly voiced their concerns both inside and outside of the WTO forum, there is a lack of development in the negotiation. The public stockholding for food security purposes was almost concluded in the Buenos Aires Ministerial Meeting, where the comprised text has been prepared and agreed by the members, including the EU, but later rejected by the U.S.⁷⁵⁹ While the door for the conclusion is not entirely closed, it may take more time for all members to finally agree.

These three critical points provide Indonesia with a conclusion that is: unless Indonesia wants to ignore the international trade regime completely, in which Indonesia mentions it has no intention to do so,⁷⁶⁰ it has to restructure its agricultural trade law and policy to comply with the WTO agreements that very much push for a more open market. Indeed, Indonesia already restructured most of its regulations to provide more market access to foreign agricultural products as ruled by the WTO. In the middle of the pressure of freer trade, Indonesia then must strengthen its effort in developing its agriculture sector in order to become more productive and competitive, hence, helping more impoverished farmers to compete in a more open market. Although the Indonesian government could use the safeguard measures to encounter possible import surges as a consequence of a more open market, the Indonesian government cannot entirely rely on the safeguard measure because it is not sustainable and may not protect the agriculture sector

⁷⁵⁹ Interview with the Indonesian Ministry of Trade, Director of APEC Negotiations and International Organizations, September 20, 2019.

⁷⁶⁰ Interview with the Indonesian Ministry of Trade, Director of APEC Negotiations and International Organizations, states that Indonesia still believes in the global rules-based multilateral trading system, respects the WTO rulings, and committed to strengthen the global trading system.

indefinitely. For these reasons, the need for safeguard measures against import surge should be viewed and used as they are intended to achieve as temporary and necessary measures to prevent the sudden disruption of domestic production and the disastrous impacts on domestic farmers and workers. The safeguards cannot be considered to counter trade flows indefinitely.

The strengthen self-effort by the Indonesian government is also supported by the idea that although developed countries are a crucial part of the development of developing countries because so much of world trade is affected by their policies and because they are the most powerful actors within the WTO, developed countries are neither the whole problem nor the complete solution. Their trade policies are essential, but⁶ their reform is a complement to, not a substitute for, reform within developing countries. Thus, in the long run, putting more effort into developing the agriculture sector to be more productive and competitive will be beneficial for Indonesia itself. This section then tries to examine what Indonesia could do to improve its agriculture sector.

A. Government Support and Environment

The conventional wisdom is that government intervention, in this case government support, is essential to develop the agriculture sector. Within the WTO frame, there is no necessarily “red box” of subsidy or subsidy that is completely prohibited. Instead, there is an amber box type of subsidy, which is a subsidy that is allowed but still limited, and the blue box and the green box subsidy are allowed without any limitation. The green box subsidy is specifically permitted due to its desirable social objectives and has less of an effect than other support on a country’s competitors. The green box excludes expenditures that improve infrastructure in rural areas from constraints but draws the line at “the subsidized provision of on-farm facilities” and “subsidies to inputs or operating costs, or preferential user charges.”⁷⁶¹ Similarly, the green box permits

⁷⁶¹ WTO Agreement on Agriculture, Annex 2, para. 2.

subsidies that are aimed at research and extension and other forms of dispersal of technical information but is less generous with marketing support. Excluded from the green box are public marketing services that can “be used by sellers to reduce their selling price,” a phrase that could be very much open to interpretation.⁷⁶²

Despite the positive impact of the green box subsidy in which it can be used to help farmers to compete until they reach better conditions as those farmers in developed countries, data shows that the amount spent by developing countries on green box measures is still small in relation to their agricultural GDP.⁷⁶³ Indeed, although the developing countries dominate the WTO membership accounting to three-quarters of the members, they account only for a minor share of global agricultural domestic support.⁷⁶⁴ Thus, in terms of the green box subsidy, developing countries have much room to increase their support and should do so from which their agricultural sectors stand to gain the most if used properly.

One of the areas in which the Indonesian government could utilize the green box subsidy is to improve the infrastructure in the rural areas. One of the critical problems Indonesia currently facing is the irrigation system. Although development for irrigation in Indonesia continues, challenges such as the need to increase production due to population growth, low irrigation efficiency, and most of all the climate change are increasing too. The Indonesian government then should utilize the unrestraint green box subsidy to continue the development of the increasingly troubled irrigation in Indonesia as well as mitigating the impact of climate change.

⁷⁶² Timothy E. Josling, *Strengthening the Global Trade System: Rethinking the Rules for Agricultural Subsidies*, International Centre for Trade and Development, Geneva (2015).

⁷⁶³ André Nassar et al., *Agricultural subsidies in the WTO green box: opportunities and challenges for developing countries*, in *AGRICULTURAL SUBSIDIES IN THE WTO GREEN BOX* (2009).

⁷⁶⁴ Mario Jales, *Domestic support to agriculture in developing countries*, in *WTO RULES FOR AGRICULTURE COMPATIBLE WITH DEVELOPMENT* (2007).

The policy of irrigation development in Indonesia is designed to attain both food security and farmers' welfare. Some of the efforts done by the government in the irrigation development are through rehabilitation, upgrading, and improvement of Operation and Maintenance (O&M). The development of a new irrigation scheme is aimed to compensate for the increasing food demand and the rice field conversion. The approach towards modernization irrigation is based on the five pillars, which are water availability, infrastructure, management, institutions, and human resources, also has begun to be implemented.

However, these goals are becoming harder to meet due to the scarcity of water. Agricultural water use in Indonesia is expected to face severe water scarcity from the combined effects of climate change.⁷⁶⁵ This is not only true for Indonesia, but also for most developing countries, where there is lagging water infrastructure development and rapidly increasing populations.⁷⁶⁶ In several regions, water scarcity has become a limiting factor for economic development. Thus, any effort to improve food security and farmers' welfare is hugely dependent upon irrigation development.

The current problem facing Indonesia is also very complicated for several reasons. First, the use of water resources is getting competitive due to the increasing water demand by households, industry, and other economic sectors. Second, while the use is on the rise, the water availability is getting more limited due to the failure to reduce the degradation of water resources. Since the 1997 Economic Crisis, the rate of water degradation resources has been worsening due to the expansion of deforestation in the catchment area caused by the growing incidence of rural poverty. Third, Decentralization Laws have altered natural resource management. There is a positive and negative effect of the implementation of decentralization with regards to water resource development and its implication for food security and poverty reduction. It is positive if

⁷⁶⁵ Sumaryanto, *supra* note 168.

⁷⁶⁶ OECD, OECD ENVIRONMENTAL OUTLOOK TO 2030 (2018).

the policy formulation takes into consideration the interdependency principles, and the implementation of the policy is effective. However, decentralization has a negative impact if the goal of development is to maximize regional economic growth without taking into account the interdependency principles for the sake of efficiency, equity, and sustainability.

Fourth and perhaps the most important thing to consider is that the future incidence of climate change can only be conjectured, but it will have an impact on agriculture generally, and specifically small farmers living in marginal areas who have to cope with the least knowledge and resources. Experience has shown that programs can be adapted to help mainly through technological innovations such as improved water management. Future research and technology transfer then will have to focus increasingly on helping small farmers cope with climate change.

Climate change is perceived as a “wicked problem.”⁷⁶⁷ In contrast with “tame problem” that may be readily identified as either solved or not solved, in the case of climate change, there is a little agreement on an appropriate definition of the problem much less the solution.⁷⁶⁸ The complexity of climate change also lies in the requirement of broad engagement with other disciplines and with society at large to achieve a successful assessment of the climate change impacts and alternative mitigation strategies. This has made climate change one of the most complex challenges of the young century.

The climate change issue is particularly important for developing countries that still struggle with poverty, including Indonesia. Researches have shown that climate change, agriculture, and poverty are closely related. First, agriculture is arguably the most important sector

⁷⁶⁷ Thomas Hertel & Stephani Rosch, *Climate Change, Agriculture, and Poverty*, 32 APPLIED ECON. PERSP. AND POL. 355 (2010).

⁷⁶⁸ Sandra S. Batie, *Wicked Problems and Applied Economics*, 90 AM. J. OF AGRIC. ECON. 1176 (2008).

of the economy that is highly depended on climate.⁷⁶⁹ Any change in temperature, rainfall, solar radiation, wind patterns could have important effects either positive or negative on plant and animal productivity.⁷⁷⁰ Global warming could also lead to a rise in sea level that could inundate coastal areas and affect groundwater quality.

Second, agriculture is important for developing countries as it still remains as their significant source of employment, GDP, export, and foreign exchange earnings.⁷⁷¹ Simultaneously, in developing countries, the majority of the poor live in rural areas where agriculture is the predominant form of economic activity. Thus, their livelihoods are inseparable from farming activity. In fact, agricultural GDP growth is 2.2 times as effective at reducing poverty compared to growth in non-agricultural GDP.⁷⁷² With a quarter of the population of developing countries still lives on less than \$1.25 a day, limited human and financial resources, and weak institutions, developing countries are really vulnerable from the impact of climate change.

The average temperature on earth has already warmed by close to 1°C.⁷⁷³ In the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), a consensus document produced by over 2,000 scientists representing every country in the United Nations states that “warming of the climate system is unequivocal.”⁷⁷⁴ More than a decade after the Kyoto

⁷⁶⁹ John M. Antle, *Climate Change and Agriculture: Economic Impacts*, 23 CHOICE AMERICAN AGRICULTURAL ECONOMICS ASSOCIATION, (2008).

⁷⁷⁰ John M. Antle, *Climate Change and Agriculture in Developing Countries*, 77 AM. J. OF AGRIC. ECON. 741 (1995).

⁷⁷¹ NASH & MERLINDA INGO, *supra* note 2.

⁷⁷² Luc Christiaensen, Demery Lionel & Jesper Kuhl, *The Role of Agriculture in Poverty Reduction: An Empirical Perspective*, 4013 Policy Research Working Paper, World Bank, Washington DC (2006).

⁷⁷³ WORLD BANK, WORLD DEVELOPMENT REPORT 2010: DEVELOPMENT AND CLIMATE CHANGE (2010), <https://www.google.com/search?client=firefox-b-1&q=world+development+report+2010%3A+development+and+climate+change> (last visited Jan 3, 2019).

⁷⁷⁴ IPCC, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE FOURTH ASSESSMENT REPORT: CLIMATE CHANGE 2007: SYNTHESIS REPORT (2007). IPCC, *Intergovernmental Panel on Climate Change Fourth Assessment Report: Climate Change 2007: Synthesis Report* (2007), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=2ahUKEWjnIKIINPFAhVIMXwKHQEyBBwQFjADegQIBBAC&url=http%3A%2F%2Fwww.un-documents.net%2Fipcc-ar4%2Fsyr.pdf&usq=AOvVaw3XKYBRFWb23NHbY0Cu93WC> (last visited Jan 3, 2019).

Protocol set limits on international carbon emissions, greenhouse gases in the atmosphere are not decreasing; at worse, they are increasing at an accelerating rate.⁷⁷⁵ The effects of climate change can be seen in the form of higher average air and ocean temperatures, widespread melting of snow and ice, and rising sea levels. Global precipitation has increased, and even Australia, Central Asia, the Mediterranean Basin, the Sahel, the western United States, and many other regions have seen more and more intense drought.⁷⁷⁶ Heavy rainfall and flood also have become more common, and form of storms and tropical cyclones have increased.⁷⁷⁷

While climate change threatens all, developing countries are particularly affected the most. Sea levels could rise by one meter this century, threatening more than 60 million people and \$200 billion in assets in developing countries alone.⁷⁷⁸ The report by the World Bank also states that one billion people lack clean drink water due to the rise of sea level.⁷⁷⁹ Agricultural productivity would likely decline throughout the world, particularly in tropics, even with changes in farming practice. Reduction of agricultural productivity could hinder the effort to support rural growth as multiple research has shown the importance of agricultural productivity growth to rural development. According to Mellor, increasing agricultural production would lead to increased incomes for poor farmers who then eventually increase demand for the goods and services produces by the non-farming rural poor.⁷⁸⁰ Thus, higher agricultural output stimulates employment in the rural and urban non-farm sectors through both forward and backward linkage. This series of impact decreases urban poverty by slowing migration to urban areas and lowering food prices.⁷⁸¹

⁷⁷⁵ *Id.*

⁷⁷⁶ WORLD BANK, *supra* note 773.

⁷⁷⁷ *Id.*

⁷⁷⁸ IPCC, *supra* note 774.

⁷⁷⁹ WORLD BANK, *supra* note 773.

⁷⁸⁰ J. MELLOR, *Faster, More Equitable Growth - The Relation Between Growth in Agriculture and Poverty Reduction Agricultural Policy Development Project*, Agricultural Policy Development Project Research Report No. 4, Cambridge (1999).

⁷⁸¹ *Id.*

Therefore, agricultural growth benefits not only the rural benefit but also the urban poor. As summarized in Table 6.7., the full general equilibrium effects exist through the farm, rural non-farm, and national economies.⁷⁸²

Farm Economy
Higher incomes from farm output
On-farm employment
Rural Economy
More jobs upstream and downstream in agriculture & food value chains
Employment in expanding rural non-farm sectors
Increased and employment allow better nutrition, health & increased investment in education leading indirectly to higher labor productivity
Generates more local tax revenue & demand for better infrastructure, contributing to second round effects promoting the rural economy
Linkages in production chain generate trust & information, build social capital and facilitate non-farm investments
National Economy
Reduced prices of food & raw materials raise real wages of the urban poor, reduces wage costs of non-farm sectors
Generations of savings & taxes from farming allows investment in non-farm sector, creating jobs, and incomes in other sectors
Earning foreign exchange allows import of capital goods & essential inputs for non-farm productions
Release of farm labor allows production in other sectors.

Table 6.7: General Equilibrium Effects of Agricultural Growth
Source: Irz et.al, Agricultural Productivity and Poverty Alleviation

However, the World Bank Report states that by century's end, climate change could lead to warming of 5°C more compared with preindustrial times and a vastly different world from today.⁷⁸³ There would be more extreme climate events, stressed ecosystems, extinction of species, and inundation of whole island nations. Even with the best efforts, it is unlikely to stabilize temperatures at anything less than 2°C above preindustrial temperatures, warming that will require substantial adaptation. Moreover, even in the circumstances that warming would be at anything less than 2°C above preindustrial temperatures, it still could result in a 4% to 5% permanent

⁷⁸² Xavier Irz et al., *Agricultural Productivity Growth and Poverty Alleviation*, 19 DEV. POL. REV. 449 (2001).

⁷⁸³ WORLD BANK, *supra* note 773.

reduction in annual income per capita in Africa and South Asia as opposed to minimal losses in high income countries and a global average GDP loss of about 1%.⁷⁸⁴ Indeed, these losses would be driven by impacts in agriculture, a sector important to the economies of developing countries. It is estimated that developing countries will bear 75%-80% of the costs of the damages.⁷⁸⁵ Figure 6.1. specifically shows the percentage of agricultural yields reduction in 2050. South Asia would suffer from 18% of agricultural yields reduction, followed by Sub-Saharan Africa by 15%, and East Asia and Pacific by 12%.

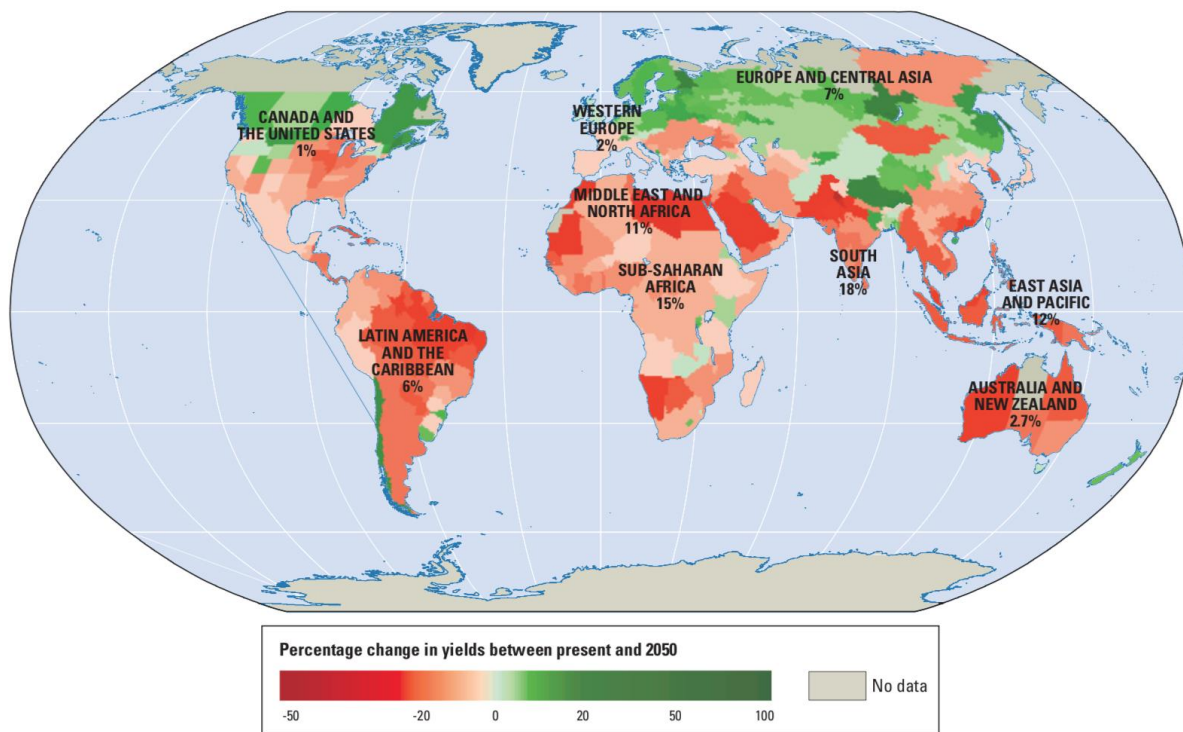


Figure 6.1: The Percentage on Agricultural Yields Reduction in 2050
Source: Muller and other 2009; World Bank 2008; World Development Report 2010.

⁷⁸⁴ *Id.*

⁷⁸⁵ *Id.*

To be more specific, the most vulnerable regions of the world are undoubtedly in the tropics, particularly the semi-arid regions where higher temperatures and reduction in rainfall and increases in rainfall variability could have substantial negative impacts, and in coastal areas that are likely to be flooded due to sea level rises. The impact will be more severe in isolated regions where the cost of transportations is high, incomes are extremely low, and most rural households are highly dependent on agriculture for their livelihoods and food.⁷⁸⁶ These adverse impacts are predicted to be seen in parts of Sub-Saharan Africa, and other isolated areas in southwestern and south Asia. Low-lying areas in South Asia, such as Indonesia, and other poor coastal regions, are also likely to suffer from serious impact. As an archipelago of almost 17,000 islands with a coastline of more than 81,000 kilometers and a population of 110 million living in coastal areas, research by Antle specifically reports Indonesia as one of the most vulnerable countries facing climate change. Indonesia could be impacted the most due to the vulnerability of sea-level rise and limited ability to adapt by moving to higher ground or making investments to protect vulnerable areas. Indonesia also has significant amounts of agricultural land on or near coastlines that could be threatened by inundation and intrusion of saltwater into freshwater if sea levels rise.⁷⁸⁷ This would increase the risk of malnutrition and hunger in Indonesia.⁷⁸⁸

Research by Naylor et al. has specifically analyzed the impact of climate on Indonesian rice farming since 1983. Indonesia has two rice harvests; the main harvest is in December and January and a smaller one in late spring. Since summers are usually dry, the stocks of rice often decrease, and prices rise in the fall, which Indonesians call the “hungry season.” Planting for the

⁷⁸⁶ M.L Parry et al., *Effects of climate change on global food production under SRES emissions and socio-economic scenarios*, 14 GLOBAL ENVIRONMENTAL CHANGE 53–67 (2004).

⁷⁸⁷ Antle, *supra* note 769.

⁷⁸⁸ Parry et al., *supra* note 786.

main harvest usually begins in October, with the coming of the monsoon rains.⁷⁸⁹ The study shows that Indonesia's agricultural production is strongly influenced by annual and interannual variations in precipitation caused by the Austral-Asia monsoon and El Niño-Southern Oscillation (ENSO) dynamics.⁷⁹⁰ During a warm El-Niño, the arrival of monsoon rains is delayed, thus, prolonging the hungry season and disrupting the planting of the main December-January crop. Using the output from 20 global climate models tailored to the complex local topography of the Indonesian archipelago, the authors found that the probability of experiencing a harmful delay in monsoon rains could more than double in some of Indonesia's most important rice-growing regions. Moreover, most of the models predict that the rains would come later in Indonesia, and it would be an almost rainless dry season in some areas.⁷⁹¹ A significant decrease in rainfall, especially during the dry season, causes serious damage to crop. In extreme drought years, the drought-affected area increases significantly. For example, for rice, the total affected area could go up to 900,000 ha, while for maize, soybeans, and peanuts, it could go up to 86,000, 38,000, and 23,000 ha, respectively.⁷⁹² The Indonesian Ministry of Agriculture, through its 2019 Strategic Policy Concept For Food Security and Nutrition, has indeed set climate change as the number one challenge to attain food security.

Indeed, drought has turned to be a yearly event. One of the most severe droughts happened in 2015 to 2016. In 2015, 16 provinces, 102 districts, and 712 sub-districts were hit by drought.⁷⁹³

⁷⁸⁹ Stanford News Service, *Climate change a threat to Indonesian agriculture, study says*, 2007, <https://news.stanford.edu/pr/2007/pr-indonesia-050207.html> (last visited Jan 6, 2019).

⁷⁹⁰ Rosamond L. Naylor et al., *Assessing Risks of Climate Variability and Climate Change for Indonesian Rice Agriculture*, 104 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 7752–7757 (2007).

⁷⁹¹ Stanford News Service, *supra* note 789.

⁷⁹² Rizaldi Boer & Arjunapermal R. Subbiah, *Agricultural Drought in Indonesia*, in MONITORING AND PREDICTING AGRICULTURAL DROUGHT: A GLOBAL STUDY (1st Ed. 2005).

⁷⁹³ DOMPET DHUFAFA DISASTER MANAGEMENT CENTER, *DROUGHT IN INDONESIA 2015* (2015), <https://reliefweb.int/report/indonesia/indonesia-drought-indonesia-2015-situation-report-period-31-august-2015> (last visited Jan 7, 2019).

Data from the Ministry of Agriculture showed that Java Island as Indonesia's main rice-growing island was the most affected compared to other islands.⁷⁹⁴ The drought that continued to 2016 affected the Indonesian coffee production that dropped 10% on that year.⁷⁹⁵ Indonesian farmers reaped 570,000 metric tons down from a record 636,300 tons a year earlier, the steepest decline since 2011-2012.⁷⁹⁶

In the same year, the World Food Programme (WFP) interviewed 2,400 households in eight districts hit by drought in Indonesia. The key findings of the report as followed.⁷⁹⁷

- From the eight districts surveyed, 40% of primary rice growers lost more than 50% of their crop in the last harvest.
- Two-thirds of agricultural households stated that they had delayed or not yet planted crops due to drought.
- Three out of five households suffered from loss of income. 31% of the households suffered a severe impact that defined by losing more than 30% in primary income. The most impacted areas were Kupang and Timor Tengah Selatan districts, where 48% and 40% of households reported a severe impact on income.
- Almost half of the households engaged in food crop production and those relied on agricultural wages reported a 30% or more reduction income.
- Due to less income, one in five households reduced expenditure on food. Others relied on a second income source or reduced non-food expenditure.

⁷⁹⁴ *Id.*

⁷⁹⁵ Yoga Rusmana & Eko Listiyorini, *Indonesia Coffee Crop May Tumble Most in 5 Years on Drought*, BLOOMBERG BUSINESS, May 9, 2016, <https://www.bloomberg.com/news/articles/2016-05-09/indonesia-coffee-crop-may-tumble-most-in-five-years-on-drought>.

⁷⁹⁶ *Id.*

⁷⁹⁷ Anthea Webb & Amit Wadhwa, *The Impact of Drought on Households in Four Provinces in Eastern Indonesia*, WORLD FOOD PROGRAMME INDONESIA (2016).

- Sumba Tengah and Kupang, 30%, and 27% were classified as having reduced the number, frequency, or quality of meals.

In 2017, lingering drought in parts of Java and West Nusa Tenggara province resulted in a shortage of clean water affecting was affecting rice fields.⁷⁹⁸ In Central Java alone, 1,235 villages in 266 districts faced water shortages and affecting around 1.4 million people.⁷⁹⁹ In 2018, some parts of Indonesia experienced drought, although it was not as severe as in previous years. In West Java, the main rice-grower areas, 1,775 hectares, suffered from failed harvest due to drought.

As mentioned above, since water management is increasingly affected by climate change, the Indonesian government then also must pay attention to climate change mitigation action. This is particularly important for Indonesia considering that for the past two decades, Indonesia's greenhouse gas emissions have increased from almost all sectors such as land use defined as, land use, land-use change, and forestry, including peat fires, energy, agriculture, industry, and waste. While currently, the land-use sector dominates the GHG emissions in Indonesia, the projection shows that the share of the energy sector would increase to over 50% of total emissions by 2026-2027.⁸⁰⁰ Since climate change would also fundamentally affect the agriculture sector, the Indonesian government eventually must step up its effort in mitigating climate change effects.

Indonesia's effort in mitigating the impact of climate change can be traced to June 5, 1992, when Indonesia signed the United Nations Framework Convention on Climate Change (UNFCCC). On August 1, 1994, President Suharto signed the Act of Ratification of UNFCCC

⁷⁹⁸ Wahyudi Soeriaatmadja, *1.4m hit as severe drought ravages crops in Indonesia*, STRAITS TIMES, August 31, 2017, <https://www.straitstimes.com/asia/se-asia/14m-hit-as-severe-drought-ravages-crops-in-indonesia> (last visited Jan 7, 2019).

⁷⁹⁹ Ganug Nugroho Adi, *Thousands of Central Java villages threatened by drought*, THE JAKARTA POST, August 11, 2017, <https://www.thejakartapost.com/news/2017/08/11/thousands-of-central-java-villages-threatened-by-drought.html> (last visited Jan 8, 2019).

⁸⁰⁰ Arief Wijaya et al., *How Can Indonesia Achieve Its Climate Change Mitigation Goal? An Analysis of Potential Emissions Reductions from Energy and Land-Use Policies*, World Resources Institute Research Paper (2017).

Number 6 1994. Through its first communication on climate change, the government initiated to do the followings in the agriculture sector:⁸⁰¹

- Improving technology and information transfer to the farmer in order to speed adaptation and innovation and adoption;
- Strengthening research, development, and dissemination of sustainable agriculture practices;
- Supporting research and technology that will ensure that the agricultural sector can deal successfully with the various challenges of the future;
- Promote improved agricultural practices that emit the least amount of greenhouse gases;
- Staple food diversification by the promotion of non-rice food sources;
- Improve water management in rice production;
- Regionalization of agricultural research and development.

While there were limited real actions during the administration of Suharto, the environmental policy became more prominent in the later years of President Susilo Yudhoyono's leadership as Indonesia reconfirmed its commitment to address climate change. In 2008, under Presidential Decree Number 46, the Year 2000, Indonesia formed the National Council on Climate Change to oversee climate mitigation and adaptation policies. At the 2009 G20 conference, President Yudhoyono expressed its effort to reduce Indonesia's carbon emissions by 26% by 2020 and could rise to 41% with international assistance.⁸⁰² In 2011, the Indonesian government enacted the Presidential Regulation Number 61 the Year 2011 on the National Action Plan for Greenhouse

⁸⁰¹ Indonesia, INDONESIA: THE FIRST NATIONAL COMMUNICATION ON CLIMATE CHANGE (1994).

⁸⁰² Mervyn Piesse, *Indonesian Climate Change Policies: Striking a Balance between Poverty Alleviation and Emissions Reduction*, GLOBAL FOOD AND WATER CRISES RESEARCH PROGRAMME, September 18, 2019, <http://www.futuredirections.org.au/publication/indonesian-climate-change-policies-striking-a-balance-between-poverty-alleviation-and-emissions-reduction/> (last visited Jul 1, 2019).

Gas Emissions Reductions. The Presidential Regulation provides the basis for the implementation of various mitigation actions in the forestry, agriculture, energy, transport, industry, and waste sectors. In 2015, Indonesia joined a global wave of countries that submitted their post-2020 climate pledges to the UNFCCC, known as intended nationally determined contributions (INDCs). Since then, it has signed and ratified the Paris Agreement, and later formally submitted its first nationally determined contribution (NDC) in 2016, reemphasizing its commitment to a low-carbon, climate-resilient future. However, a 2017 study by the World Resources Institutes (WRI) shows that if Indonesia follows the existing policies aimed at reducing emissions, Indonesia would only reduce its emissions by 19% in 2030 which is behind its initial target.⁸⁰³

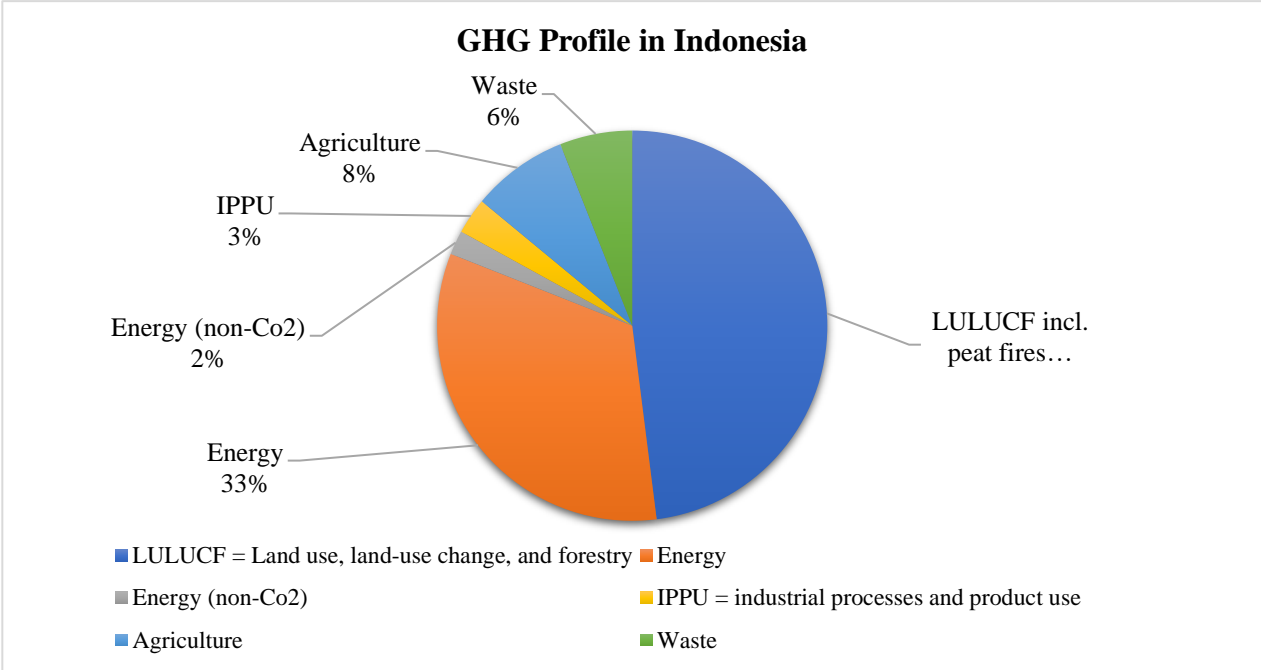


Figure 6.2.: GHG Profile in Indonesia
 Source: Indonesia’ First Biennial Update Report under the UNFCCC 2015

In Indonesia, much of the focus for climate change mitigation has been on land use and clean and renewable energy due to its significant contribution to Indonesia’s emissions, as shown

⁸⁰³ Wijaya et al., *supra* note 800.

in the GHG Profile above. Part of the reason why LULUCF contributes the most is that the majority of fires in Indonesia occurs within tropical peatlands, which the country has an abundance. Indonesia is home to 36% of the world's tropical peatlands, more than any other country. These areas have some of the largest quantities of carbon on earth, accumulated over thousands of years from decaying dead plants. When they are drained and burned, the carbon gets released into the atmosphere, which leads to immense spikes in GHG. In addition to that, for years, unsustainable forest management practices and the conversion of forestland for commercial uses have reduced the forest cover in Indonesia.

Being the largest contributor to GHG emissions, there is a need for ambitious mitigation actions in LULUCF, starting with strengthening and extending the forest moratorium policy, peatland restoration, land and forest rehabilitation, and social forestry programs. The study by WRI further finds that while both land-use and energy sectors represent significant mitigation potential, the forest moratorium is the single most effective policy measure in achieving emissions reductions.⁸⁰⁴

In the energy sector, much of the focus is to develop renewable energy to achieve the lowest cost path to emissions reduction and avoid locking in fossil fuel power generation equipment. Promoting renewable energy will require multiple policy directions, which among others, are a carbon tax on fossil-fuel power plants, replacing new development of coal power plants with clean and renewable energy sources such as wind or solar, and providing subsidies and better feed-in tariffs for promoting renewable energy sources. Renewable energy also has the potential to bring thousands of green jobs to the market. However, Indonesia must be careful in providing feed-in

⁸⁰⁴ *Id.*

tariffs as the WTO ruling on the case of *Canada – Feed-in Tariffs* did not provide a clear answer on whether subsidy in the form of the feed-in tariff is permitted under international trade regime.

In the agriculture sector, ‘direct agricultural emission’ is defined as those emissions typically found in agricultural GHG inventories. Generally, these inventories only include nitrous oxide (N₂O) and methane (CH₄) emissions, which are potent greenhouse gases. N₂O has a global warming potential 296 times that of carbon dioxide (CO₂), and CH₄ has a global warming potential 23 times that of CO₂. Sources of global direct agricultural emissions with related percentages are listed in the following table.

Sources of emissions	%
Enteric fermentation Ruminants (e.g. cattle, sheep, goats, water buffalo) emit CH ₄ directly as byproduct of digestion	43%
Manure deposited on grazing lands Manure and urine that falls on grazing lands causes N ₂ O emissions	16%
Synthetic fertilizers N ₂ O emissions from soils resulting from larger amounts of nitrogen fertilizer added to crops	15%
Rice production Most production system result in CH ₄ emissions from anaerobic decomposition on flooded fields. This fraction represents CH ₄ emissions from rice only. N ₂ O emissions from fertilizer are counted in ‘synthetic fertilizers’	11%
Stored manure Livestock manure and urine cause both CH ₄ emissions through increased decomposition in wet storage systems, as well as N ₂ O emissions in dry storage systems	7%
Crop residues Crop residues that remain on agricultural lands are a source of N ₂ O	3%
Manure deposited on croplands Manure is another source of nitrogen fertilizer for crops resulting in N ₂ O emissions	2%
Cultivation of organic soils N ₂ O emitted from drained organic soils	2%

Table 6.8: Sources of Direct Agricultural Emissions
Source: FAOSTAT 2010

Geographically, Asia, which holds 60% of the world’s population and 30% of its land area, accounts for 45% of global agricultural GHG emissions while it also has the most diversified

sources of agricultural emissions, mainly because it is the dominant producer of rice.⁸⁰⁵ Four countries, China, the U.S., India, and Brazil, account for over 40% of direct agricultural emissions.⁸⁰⁶ If the EU were accounted as a single country, it would rank as the world's third-largest emitter and would account for 10% of direct global emissions.⁸⁰⁷

China, the largest GHG emitter in the world, produces a significant percentage of agriculture emissions. China's agriculture emissions alone contribute to 1.6% of global emissions.⁸⁰⁸ Believed to have the largest overuse fertilizer in the world, one of the substantial potential emissions reductions in China is through the improvement of the fertilizer application. Simple measures can significantly reduce GHG emissions from fertilizer application in China without harming yields. In fact, in many cases, reduced fertilizer application would help yields and long-term soil fertility. In addition, securing significant industrial inefficiencies in China's fertilizer production would yield very significant GHG reductions.

Another focus in reducing the direct agricultural emissions is to decrease the rice emissions in Southeast Asia. Although this opportunity is spread across a region instead of a single country, rice farming has both high emissions and mitigation potential due to the amount of rice grown in flooded fields. This is because when fields are flooded, the decomposition of material depletes oxygen in the soil and water, causing anaerobic conditions that generate CH₄. The water management system of rice cultivation is, therefore, one of the most critical factors affecting and causing GHG emissions, while other factors such as soil type, tillage management, residues, and fertilizer also play a role. Also, rice uses about 40% of the world's irrigation water, and 30% of

⁸⁰⁵ Amy Dickie et al., *Strategies for Mitigating Climate Change in Agriculture: Abridged Report* (2014), www.agriculturalmitigation.org (last visited Jul 11, 2019).

⁸⁰⁶ *Id.*

⁸⁰⁷ *Id.*

⁸⁰⁸ Johannes Friedrich, Mengpin Ge & Andrew Pickens, *This Interactive Chart Explains World's Top 10 Emitters, and How They've Changed* (2017), <https://www.wri.org/blog/2017/04/interactive-chart-explains-worlds-top-10-emitters-and-how-theyve-changed> (last visited Jul 11, 2019).

the world's developed freshwater resources.⁸⁰⁹ Thus, adding irrigation to better control water, which allows for double cropping, is seen as an effective intervention to reduce rice emissions that is also complementary to productivity gains.

In Indonesia, the agriculture sector contributes “only” 8% of the GHG emissions. As one of the top rice producers in the world and in line with the effort to reduce direct agricultural emissions, through the National Council on Climate Change blueprint, the government prioritizes the repair and maintenance irrigation networks that not only would help the agriculture sector overall but also help to reduce the GHG emissions. The targets for the irrigation sector are i) improvement of irrigation networks covering an area of 1.34 million hectares and ii) maintenance of irrigation networks around 2.32 million hectares in twenty-four provinces in Indonesia.⁸¹⁰ Another focus has been on the optimization and application of plant cultivation technology, as well as the utilization of organic fertilizers and bio-pesticides.

The latest presidential election, however, resulted in some uneasiness. With Indonesia is falling behind its target, there is no further discussion on how to tackle this issue and to provide real progress. In the latest presidential election debate, there was a prior guarantee that climate change would be a topic of debate.⁸¹¹ Later on, the theme “energy, the environment, infrastructure, food, and natural resources” was set, but the discussion of climate change was completely missing.⁸¹² This is found to be ironic for several reasons. First, the theme of the debate was on the

⁸⁰⁹ International Rice Research Institute (IRRI), (2013), https://www.irri.org/index.php?option=com_k2&view=item&id=9151&Itemid=100480&lang=en (last visited Jul 11, 2019).

⁸¹⁰ Presidential Regulation No. 61 the Year 2011 on the National Action Plan for Greenhouse Gas Emissions Reductions, Annex 1.

⁸¹¹ Basten Gokkon & Indra Nugraha, *Environmental issues to be a focus of Indonesian presidential debates: official*, MONGABAY, August 21, 2018, <https://news.mongabay.com/2018/08/environmental-issues-to-be-a-focus-of-indonesian-presidential-debates/> (last visited Jul 1, 2019).

⁸¹² Tempo, *Presidential Debate Fail to Mention Climate Change Impacts: Walhi*, February 19, 2019, <https://en.tempo.co/read/1177126/presidential-debate-fail-to-mention-climate-change-impacts-walhi>.

environment, energy, infrastructure, food, and natural resources, which all are closely related to climate change. Second, climate change is one of the greatest challenges of our time. Third, Indonesia itself is one of the largest emitters of greenhouse gases in the world. While there are some initiatives on the pipeline to improve Indonesia's climate plans, the recent presidential election debate has added uncertainties over the government's commitment to tackling climate change. For both candidates, it seems that national integrity and security issues eclipse everything else, including climate change.

B. Fixing the “Subsidy Sham”

Besides maximizing the use of green box subsidy in supporting its farmers, there still needs to be done regarding the current implementation of other types of subsidy such as fertilizer. Fertilizer subsidy is a common policy in most of the Asian countries. In Asia, input subsidies have tended to be part of a package of output promotion policies as distinct from sub-Saharan Africa where seed and fertilizer subsidies have more frequently been standalone policies.⁸¹³ Indonesia represents the Asian experience. Irrigation, seed, fuel, credit, agricultural research, and marketing infrastructure all receive some form of public subsidy.⁸¹⁴

The implementation of fertilizer subsidy in Indonesia itself is motivated by the effort to increase productivity and also the fact that most of the Indonesian farmers are small farmers with minimal capital. With the fertilizer subsidy, it is hoped that farmers could increase their productivity; hence, their profit per unit area will be higher. The subsidy incentives are also expected to encourage farmers to do more advanced production technology innovations so that productivity could increase even more.

⁸¹³ Rashid Shahidur et al., *Modern Input Promotion in sub-Saharan Africa: Insights from Asian Green Revolution*, 44 AGRIC. ECON. 705 (2013).

⁸¹⁴ Peter Warr & Arief Anshory Yusuf, *Fertilizer subsidies and food self-sufficiency in Indonesia*, 45 AGRIC. ECON. 571–588 (2014).

Some studies support this notion. For example, an analysis of Syafaat et al. shows a decrease in fertilizer prices result in increased productivity.⁸¹⁵ This result is consistent with the analysis of Simatupang et al., which shows at the national level, the decline in fertilizer prices will increase rice productivity, especially for the price of Urea and TSP fertilizer.⁸¹⁶ The study by Herwaman using the 2SLS econometric analysis finds that without subsidized fertilizer, it is almost impossible for Indonesia to be food self-sufficient.⁸¹⁷ Another study by Kasiyati shows that subsidized fertilizer has an impact on increasing farmers' income in Central Java by 0.64%.⁸¹⁸ As stated by Susilowati on her work, the Indonesian Central Statistics Agency (BPS) also shows that there is still a significant number of farmers who rely on subsidized fertilizer. In 2013, BPS data showed that 41.7% of farmers used subsidized fertilizer, and around 42.1% of farmers used the combination of both subsidized and non-subsidized fertilizer.⁸¹⁹ Only 13.55% of farmers, who are usually smallholder farmers with a quite extensive land, use non-subsidized fertilizers, while 2.57% of farmers do not use fertilizer at all.⁸²⁰ From this data, the dependence of farmers on subsidized fertilizer is evident.

This has motivated the Indonesian government to keep providing subsidized fertilizer to its farmers. Indeed, subsidized fertilizer is one of Indonesia's most significant farm support

⁸¹⁵ Nizwar Syafa'at et al., *Kaji Ulang Sistem Subsidi dan Distribusi Pupuk (Review of Fertilizer Subsidy and Distribution Systems)* (2007).

⁸¹⁶ P Simatupang, Supriyati & Susilowati, *Analisis Elastisitas Harga pupuk Terhadap Produktivitas Padi (Analysis on Fertilizer Price Elasticity on Rice Productivity)*, Indonesian Ministry of Agriculture Research Center, Bogor (2014).

⁸¹⁷ Iwan Hermawan, *Analisis Dampak Kebijakan Subsidi Pupuk Urea and TSP Terhadap Padi dan Capaian SWASEMBADA Pangan di Indonesia (Analysis of the Impact of Urea and TSP Fertilizer Subsidy Policy on Rice Production and Food Self-Sufficiency in Indonesia)*, 5 JURNAL EKONOMI & KEBIJAKAN PUBLIK 63 (2014).

⁸¹⁸ Sri Kasiyati & Purbayu Budi Santosa, *Analisis Dampak Subsidi Harga Pupuk Terhadap Output Sektor Produksi dan Tingkat Pendapatan Rumah Tangga di Jawa Tengah (Analysis of the Impact of Fertilizer Price Subsidies on the Production Sector Output and Household Income Level in Central Java)*, 6 JURNAL ORGANISASI DAN MANAJEMEN 28 (2010).

⁸¹⁹ Sri Hery Susilowati, *Urgensi dan Opsi Perubahan Kebijakan Subsidi Pupuk (Urgent Policy Changes in Fertilizer Subsidy)*, 14 ANALISIS KEBIJAKAN PERTANIAN 163–185 (2016).

⁸²⁰ *Id.*

programs. Over the past 12 years, the volume of subsidized fertilizer almost doubled from 5.04 million tons in 2005 to 9.55 million tons in 2016, with the value of fertilizer subsidies in the same period had increased substantially, from 2.66 trillion rupiahs to 3.06 trillion rupiahs.⁸²¹ Likewise, the share of fertilizer subsidies to total government subsidies also increased from 7.75% in 2005 to 16.67% in 2016.⁸²² In Indonesia, the subsidized fertilizers are produced by state-owned firms in volumes that are decided by the Indonesian Congress based on data from farm groups. The subsidized fertilizer is sent to 2,485 distributors and 274 farm cooperatives who, with the help of government officials, then determine how much is to be distributed to the 44,000 retailers.

While there are some positive impacts of fertilizer subsidy, it is also important to note some of its negative consequences. Fertilizer subsidy policy, among others, is believed to encourage excessive use of fertilizers by farmers. Fertilizer used in appropriate quantities has a positive and significant impact on rice yields; however, a study also shows that overused of fertilizer has an adverse impact on yields and the environment.⁸²³ When fertilizer is overused, the fertilizer run-off contaminates the surface and groundwater quality and creates GHG emissions in the form of N₂O. The data on fertilizer consumption show that farmers indeed use more urea than recommended by the Ministry of Agriculture. While the optimal levels of urea required per hectare vary according to soil quality across Indonesia, the Ministry of Agriculture recommends using 200-250 kg/ha of urea.⁸²⁴ Although the over-apply fertilizer in Indonesia is not as severe as in China, data show that some farmers used more than the suggested amount of fertilizer, ranging from 268kg/ha to 343kg/ha of urea.⁸²⁵

⁸²¹ *Id.*

⁸²² *Id.*

⁸²³ Osorio et al., *supra* note 141.

⁸²⁴ Ministry of Agriculture Decree Number 1/Kpts/SR.130/I/2006

⁸²⁵ Osorio et al., *supra* note 141.

Another problem often emerges in the fertilizer subsidy policy is in the distribution chain as a media outlet has been reported the existence of “the subsidy sham.”⁸²⁶ The subsidized fertilizers have been reported to reach Indonesian plantations instead of small farmers. In 2015, it was reported that there were 40 complaints officially processed by law enforcement.⁸²⁷ Besides getting to the wrong hand, the distributors and retailers of the subsidized fertilizer sometimes hold on to their stock, and when there is scarcity, they sell it at higher prices that most small farmers cannot afford.

State-owned fertilizer company, PT Pupuk, has tried to solve the distribution problems by making subsidized products in the color of pink so that they are easy to identify. However, experts say retailers can easily wash or mix the products to make them the normal white. The Indonesian government, on the other hand, has stated that it works hard to prevent subsidized fertilizer from going into the wrong hands. The government admits that it simply cannot work alone to prevent this from happening again and ask stronger coordination from local authorities, including farmers.

With the series of issues of the existed policy, causing the fertilizer subsidy to be less effective, inefficient, and inequitable, there is a need to find a solution to tackle this issue. First, it is necessary to impose a stringent sanction on all types of distribution violations, including but not limited to counterfeiting subsidized fertilizers, the sale of subsidized fertilizers outside the allotment such as to the plantation and industrial companies or smuggling outside the region. Currently, the form of sanction is not more than an administrative sanction for producers, distributors, and retailers, in the form of written warnings up to the temporary suspension of

⁸²⁶ Randy Fabi & Christina Munthe, *Subsidy sham: Fertilizers reach Indonesia plantations, not small farmers*, REUTERS, February 14, 2016, <https://www.reuters.com/article/us-indonesia-fertilizers/subsidy-sham-fertilizers-reach-indonesia-plantations-not-small-farmers-idUSKCN0VN127>.

⁸²⁷ *Id.*

contracts. These sanctions are seen as not providing a deterrent effect for violators so that more stringent sanctions need to be established that could be in the form of criminal sanctions.

As for the distribution issue, from 2016 to 2018, the Indonesian government had worked to find a new method in distributing its subsidized fertilizer. Starting in 2019, the government begins to use direct fertilizer subsidies relying on a computer database. The government provides an electronic card for farmers calls farmers' cards, and only farmers who have farmers' cards that can get access to subsidized fertilizer.⁸²⁸ The Ministry of Agriculture compiles data on farmers receiving fertilizer subsidies and recapitulates farmer data per farmer group with the number of fertilizers needed.⁸²⁹ The Ministry of Agriculture later issues payment to the bank partner.⁸³⁰ For farmers, they need to bring the farmers card, which also works as a payment card to the retailer. A direct subsidy policy to farmers has been seen as a better option than the current distribution mechanism through distributors because the supervision will be easier. However, there are also some pre-condition that the government must ensure to be in place in order for the reform method to be efficient. Some of the pre-conditions are i) the farmer database must be accurate; ii) adequate supervision of farmers' data collection, the distribution of farmers, and the use so as not to be misused for other purposes; 3) the designated bank must be easily accessible in all regions including the remote areas.

Ultimately, reduction of the fertilizer subsidies could be considered as another alternative. There are at least two reasons that can justify this choice. First, in the light of limited fiscal resources, fertilizer subsidies are becoming an increased burden on the state budget (APBN).

⁸²⁸ Alek Kurniawan, *Kementan: Kartu Tani Jadi Syarat Petani Dapatkan Pupuk Bersubsidi (Ministry of Agriculture: Farmer Cards Become Requirements for Farmers to Get Subsidized Fertilizers)*, KOMPAS.COM, February 24, 2019, <https://ekonomi.kompas.com/read/2019/02/24/131253726/kementan-kartu-tani-jadi-syarat-petani-dapatkan-pupuk-bersubsidi> (last visited Jul 6, 2019).

⁸²⁹ Badan Kebijakan Fiskal (Fiscal Policy Agency), *Rencana penerapan subsidi langsung tahun 2016 (Plans for implementing direct subsidies in 2016)* (2016).

⁸³⁰ *Id.*

Second, even under the method of direct fertilizer subsidy, there is still a possibility of various negative excesses of the subsidized fertilizer, one of which is the harmful effect on the environment. As previously mentioned, an overused of fertilizer, practice that has been done by Indonesian farmers, could result in GHG emissions. However, it is important to note that if government decides to reduce the fertilizer subsidies, it must be combined with assistance in the form of cash transfer to allow credit-constrained farmers to buy an optimal volume of inputs.

With a well-targeted system of cash transfers, farmers would be in a better position to determine the level and combination of inputs best suited to their needs, and to some extent, it is another way to increase farmers' welfare in the form of income support. This step must also be followed by the transfer of knowledge to the farmers so that they could use free capital wisely and effectively. Meanwhile, the government could reallocate the support by investing in other agriculture public goods that matter more to the overall agriculture sector, such as irrigation, extension services, and research and development (R&D). R&D in Indonesia especially has been long known as an underfunded sector in agriculture. Indonesia's budget on R&D is one of the lowest in the ASEAN. Thus, there has been an urge by the Indonesian Congress to the Ministry of Agriculture to start increasing the fund for R&D.

R&D is particularly important to develop a more efficient fertilizer application method. This process is knowledge intensive as it needs a number of technologies and tools that can enable and improve optimal fertilizer efficiency. As suggested by California Environmental Associates, some of the technology and tools that can be developed include but not limited to i) plant breeding and genetic modifications to increase the uptake of nitrogen by the crop so that less fertilizer is needed to achieve the same yields; ii) better accounting and use of organic fertilizer so that agricultural systems are less reliant on external inputs and less likely to underestimate nitrogen

inputs; iii) regular soil testing to develop appropriate nutrient management plans; iv) decision support tools for better managing input management in terms of timing, rate, and type.⁸³¹

C. Coordination between Related Ministries

Another room for improvement in Indonesia's agricultural trade sector is to strengthen the coordination between related ministries. What is relatively unknown about coordination in Indonesia's government is the conflict between related governmental institutions, especially between the Ministry of Trade, the Ministry of Finance, and the Ministry of Agriculture. It is indeed said that both of the Ministry of Trade and Ministry of Agriculture is in the process of building trust, implying that there was no previous trust between the two ministries.⁸³² This, however, does not only exist in Indonesia as it was also reported occurring in India following the *India – Quantitative Restriction*. Following the WTO ruling in which India was asked to remove its quantitative restrictions immediately, the Finance Ministry asked for all restrictions lifted within a year, whereas the Indian Agricultural Ministry opposed to any lifting of quantitative restrictions.⁸³³ Since most of the import restrictions left to be removed were on agricultural goods, the voice of the powerful agrarian poor in India's politics was heard clearly on this issue, and India's coalition government could not ignore their concern over cheaper foreign agricultural imports.⁸³⁴

Just like any other country, one of the critical aspects of the structure of agricultural trade policy and the law is the relationship between agricultural ministry and trade officials. Trade and Finance Ministry usually takes prime responsibility for the overall conduct of talks as well as

⁸³¹ Dickie et al., *supra* note 805.

⁸³² Interview with the Indonesian Ministry of Trade Staff at Director General of Foreign Trade, September 13, 2019.

⁸³³ International Centre for Trade and Sustainable Development, *Quantitative Restrictions Cause Trouble for India*, 1997, <https://www.ictsd.org/bridges-news/bridges/news/quantitative-restrictions-cause-trouble-for-india> (last visited May 16, 2019).

⁸³⁴ *Id.*

compliance in the WTO. However, it is usually the agricultural ministry that makes proposals and is frequently in the position to veto any proposal that is deemed politically impossible.

The disagreement between the Indonesian Ministry of Trade and the Ministry of Agriculture is not new, although the previous debates were relatively under the radar. For example, in October 2015, there was a different opinion between the Minister of Agriculture and Minister of Trade about rice importation. The Minister of Agriculture stated that under his administration, Indonesia did not need to import rice.⁸³⁵ Contrarily, the Minister of Trade later said the government was still negotiating on plans to import rice from Vietnam and Thailand.

In 2016, the Minister of Agriculture expressed that it would not import shallots. This statement was based on the data that the Minister of Agriculture held in which Indonesia's shallots production was 241 thousand tons while the domestic need was 175 thousand tons; hence, the import was not needed.⁸³⁶ However, the Minister of Agriculture later withdrew his statement by announcing the importation of 2,500 tons of shallots on the grounds of stabilizing the prices of Ramadhan.⁸³⁷

The recent case concerning the importation of rice, however, could be the climax of the previous conflicts. The internal debates and changed arguments between the Indonesian Ministry of Trade with the Ministry of Agriculture and BULOG, which is a government-owned company that deals with food distribution and price control, became public.⁸³⁸ The controversy started when BULOG and Ministry of Agriculture insisted that the rice stock was sufficient despite the Trade Ministry's recommendation to import another 2 million tons of rice in 2018. The Coordinating

⁸³⁵ Julkhaidar Romadhon, *Negara "Darurat" Lembaga Pangan (State "in Emergency" for Food Agency)*, INDONESIAANA, February 11, 2018, <https://www.indonesiana.id/read/122639/negara-darurat-lembaga-pangan> (last visited Jul 3, 2019).

⁸³⁶ *Id.*

⁸³⁷ *Id.*

⁸³⁸ Karina Tehusijarana, *Bulog, Trade Ministry spar over rice imports*, THE JAKARTA POST, <https://www.thejakartapost.com/news/2018/09/20/bulog-trade-ministry-spar-over-rice-imports.html>.

Minister for Economy and the Minister of Trade blamed the Ministry of Agriculture of its inaccurate rice production projection data stating that if the production projection data by the Ministry of Agriculture was accurate, there would be no decision to import.⁸³⁹

The debate on the inaccuracy of the data by the Ministry of Agriculture is not new. In 2017, the Ministry of Agriculture data released that there was going to be a surplus⁸⁴⁰ of rice reaching to 13.81 million tons. However, according to the Ministry of Trade and the Ministry of Economic, in the market, the price of the rice was still high and even higher than the highest retail price, and the surplus claims also did not affect the absorption of BULOG's rice.⁸⁴¹ At that time, the maximum absorption of BULOG's rice was only 590 thousand tons while the safe limit of BULOG's stock should be at 2 million tons.⁸⁴² Indeed, in the same year, the USDA found that Indonesia's rice production was, in fact, 28% lower than the estimation made by the Ministry of Agriculture.⁸⁴³

It must be acknowledged that all this time, the data on rice production in Indonesia was obtained by the so-called "eyesight" method.⁸⁴⁴ Agriculture Service Officers from each region will come to the rice fields then record the planting area and harvest area in the rice field plots. Undoubtedly, this method has a weakness as compared to the USDA that uses the satellite imagery to calculate the harvested area and supply surveys owned by traders and the government. Also, the

⁸³⁹ Polemik Impor Beras, Menko Darmin Salahkan Data Kementan (Rice Import Polemic, Coordinating Minister Darmin Blames Ministry of Agriculture Data), CNN INDONESIA, September 19, 2018, <https://www.cnnindonesia.com/ekonomi/20180919224053-92-331586/polemik-impor-beras-menko-darmin-salahkan-data-kementan?> (last visited Jul 2, 2019).

⁸⁴⁰ The surplus is calculated from the amount of production minus the total needs or national rice consumption based on the population multiplied by the level of consumption per capita.

⁸⁴¹ CNN Team, *Darmin Sebut BPS Jadi Pemegang Kendali Data Produksi Beras (Darmin Called BPS to be the Data Control Holder for Rice Production)*, CNN INDONESIA, September 20, 2018, <https://www.cnnindonesia.com/ekonomi/20180920133742-92-331724/darmin-sebut-bps-jadi-pemegang-kendali-data-produksi-beras> (last visited Jul 3, 2019).

⁸⁴² *Id.*

⁸⁴³ Safyra Primadhyta, *Dari Mata Turun ke Mulut, Data Beras Bikin Ribut (From the Eyes Down to the Mouth, Rice Data Makes Chaos)*, CNN INDONESIA, September 20, 2018, <https://www.cnnindonesia.com/ekonomi/20180920124221-92-331703/dari-mata-turun-ke-mulut-data-beras-bikin-ribut?> (last visited Jul 3, 2019).

⁸⁴⁴ *Id.*

USDA considers price movements. Some, however, consider it is a natural response from the Ministry of Agriculture to claim there is a surplus of national rice production. After all, the Ministry of Agriculture has an interest in creating rice self-sufficiency. Following the debate, the Coordinator Minister of Economy explicitly said that he doubted the national rice production data by the Ministry of Agriculture, thus, starting in 2019, the Central Statistics Agency (BPS) would be the only institution that holds the control of data.⁸⁴⁵ The shift of data control to an independent agency is made to avoid another confusion data on rice production.

While part of the problem is because of the inaccuracy of the data, the frequent disagreements also raise the concern of lack of coordination between the related Ministries. One of the ways to minimize the disagreement between ministries is by establishing a new and independent institution that will coordinate and synchronize the interests of all. Indeed, the idea to establish such an institution has been mandated by Food Law No. 18 of 2012.⁸⁴⁶ The independent institution will function as a single food policymaker in which it must consider the confusion of national food data, which among others, is caused by sectoral egos. This condition is evident when the government determines the number of important food ingredients such as rice, soybeans, meat, and salt. The differences in data issued by the Ministry of Agriculture, the Ministry of Trade, and the Central Bureau of Statistics, trigger the debates that later result in indecisiveness.

Besides affecting the government's decision on the importation, the lack of coordination also could impact the formulation of agricultural trade policy and law. The effective formulation of agricultural trade policy and law requires close discussion and trust between related ministries. For example, the Ministry of Agriculture first lays out the specific objectives it tries to achieve.

⁸⁴⁵ CNN Team, *supra* note 841.

⁸⁴⁶ Article 126 of Food Law Number 18/2012 states that: *to achieve food sovereignty, food self-reliance, and national food security, a government institution that handles the food sector that is under and responsible to the President will be formed.*

The Ministry of Agriculture, together with the Ministry of Trade, which is in the charge to comply with the WTO rules, develop a set of regulations that could be utilized to support the domestic interests. More specifically, the Ministry of Trade and the Ministry of Agriculture could discuss some of the legal tools provided by the WTO such as increased tariffs insofar it is still in the bound tariffs rate, the use of Sanitary and Phytosanitary Measures (SPS), exceptions provided in Article XX of the WTO agreement. To some extent, the lack of coordination could also impact the government response to import surges. In order to provide a timely and appropriate response to import surges and cushion any adverse impact of increased and cheap importation, an effective trade surveillance system must be established by the government. Indeed, the importance of effective trade surveillance cannot be overemphasized. Effective trade surveillance by governments requires effective coordination among concerned agencies, regular consultation with stakeholders, good database, and strong analytical capability of people and institutions involved. It is the only means by which both government and private industries can provide a timely and appropriate response to import surges and properly respond to any adverse impact of importation. Developing countries must set up trade monitoring and build market and trade capacity for more effective and better policymaking and information sharing between government officials and private sectors.

Chapter 7

Conclusions & Recommendations

On the one hand, the agriculture sector is central to developing countries, including Indonesia. Economically, it significantly contributes to GDP, employment, exports, and foreign exchange earnings. Through the same lens, Indonesia still grapples with poverty that is prevalent in rural areas where most of the population depends on agriculture. Beyond the economic viewpoint, agriculture in some countries is also closely related to its cultural and historical philosophy. Culturally, Indonesia recognizes itself as an agrarian country due to its abundant agricultural commodities. Historically, as a country that is previously colonized, since Indonesia's independence, it strives to be self-sufficient in critical domestic needs, including agriculture. These experiences have shaped Indonesian agricultural policy to emphasize food self-sufficiency and rural development. On the other hand, Indonesia, as a member of the World Trade Organization (WTO), has the commitments to set its agricultural trade policy and law to be in line with the WTO Agreements.

In Chapter 2, I have described the history of Indonesia's agricultural trade law and policy. It is discovered that while Indonesia's general trade policy has endured some significant changes, the center of Indonesia's agricultural policy remains the same. It is indeed confirmed that despite the changes of governments, the agricultural policy always concentrates on the rural development and improvement of farmers' welfares, and the trade policy and law are established to achieve these goals. I have also provided the current agricultural trade policy tools and its legal framework both at the domestic and international levels. On the domestic level, the Indonesian government has been employing price support, subsidies in seeds and fertilizer, credit schemes, and infrastructure to achieve its national objectives. Indonesia's price support through BULOG and

subsidies in seeds and fertilizer are the focus of Indonesia's policy and law. At the international level, while the tariff and export licensing are pretty straightforward, the import licensing is a more complicated process as it requires both recommendation and import approval from related ministries.

In Chapter 3, I have introduced the general structure of the WTO along with its principles and the specific WTO Agreement on Agriculture. As an international organization, the purpose of the WTO is to provide a non-discriminatory, freer, and more predictable trade regime. Closely related to the developing countries, the WTO also claims to provide fair competition and encourage development. The WTO maintains its functions as a platform to negotiate an agreement and as an adjudicator in trade disputes between the members to achieve the goals mentioned above. The functions of the WTO explain its vital role as the only organization that regulates the international trade regime. Further, having the authority to interpret the agreement and to enforce it, the WTO members are legally obligated to follow the WTO Agreements.

The WTO also passed a specific agreement on the agriculture sector. The Agreement on Agriculture (AoA) has the so-called "three pillars," which are market access, domestic support, and export subsidies. This agreement contains commitments from members to reduce the distortion on agriculture trade caused by high tariffs, domestic support, and export subsidies. Later in this chapter, I have argued that despite the goal to reduce distortions, the developed members, namely the U.S. and the EU, indeed, still retain a very high amount of distorting subsidy to its agriculture sector.

In Chapter 4, I have laid out the tension between Indonesia's domestic laws provided in Chapter 2 with the international trade regime explained in Chapter 3. The tension is evident in the recent WTO rulings on the disputes brought by the U.S., New Zealand, and Brazil. In these cases,

Indonesia first declared that it did not prohibit the importation of agricultural products by arguing that it never rejected any complete import application, and as for some of the U.S. products, the share of the market increased. Perhaps the most critical argument given by Indonesia is that some regulations intended to prevent an oversupply of some fresh horticultural products that could have harmful consequences. Despite the concerns, however, it is ruled that most of Indonesia's regulations on the importation of horticultural products, animals, and animal products infringe the WTO rules; thus, compliance with the WTO rules is required. While in one of the cases the WTO panel decided that Indonesia's self-sufficiency policy is legitimate, Indonesia must provide WTO-compliance regulations to achieve this goal, something which is arguably very difficult, or even impossible to do.

Based on the discussion of the previous chapters, in Chapter 5, I have argued that the structure of the WTO generally and the WTO Agreement on Agriculture specifically have been used to benefit the developed members at the cost of developing countries' interests. The decision-making process in the WTO, namely the negotiation and litigation have made it difficult for developing countries to fight for its interests in the agricultural trade. The concerns of developing members have been long left out of the table, which is clearly shown on the failure of the Seattle Ministerial Meeting up to the launch of Doha Round.

In the negotiation, there is a lack of transparency and inclusion of the developing countries. The informal process of negotiation calls the Green Room is a glaring example of this issue. Consensus decision-making that is made through an open discussion also has resulted in developing members often fear retaliation in Geneva or some other negotiation to bilateral pressures directed to capitals when expressing their objections. The flaw of this negotiation process is evident in the content of the AoA. Notwithstanding the importance of agriculture to the

developing countries, the AoA is essentially a bilateral product of the U.S. and the EU. In the domestic support, the inclusion of the blue box subsidy and the green box subsidy are because of the agreement of these two dominant players. These two types of subsidies allow developed members to continue their domestic support. For the export subsidies, while it is allowed with limitation under the AoA, it is completely prohibited in other sectors as regulated in the Subsidies and Countervailing Measures. This is a very contradictory approach to the WTO Agreements that show the double standard used by developed members in the WTO.

In the litigation, the way the WTO interprets an agreement has been known as very narrow that it excludes the policy concern surrounding developing countries when adjudicating their cases. The case of India - Quantitative Restriction is one of the early examples of how the WTO rejects the concern of India to open its market immediately in the midst of India's reserve struggles due to the widening trade deficit during 1995/96. Even after India was willing to open its market sooner than it was initially planned, the WTO still rejected India's position. The recent cases of Indonesia also show how the WTO refuses Indonesia's fear of oversupply agricultural products in Indonesia that can harm the domestic farmers. In the struggle of its domestic farmers that do not receive support as farmers in developed countries, Indonesia is still forced to open its agricultural market in the cost of domestic farmers that already live below the poverty line. This has made Indonesia is committed to fight for its interests in the current negotiation through the coalition of the G33.

This chapter, thus, proposes some changes in the structure of the WTO and the AoA in order to be more developmental centered, fulfilling one of the principles of the WTO, which is to encourage development. In the negotiation, developing members have proposed a more inclusion of their role in the discussion. One of the ways to achieve this is to have more small group meetings with more precise criteria on how it is arranged. Although, through this method, efficiency may

suffer, arbitrary exclusion in the discussion is not an option. When the meetings become too many to manage, eventually, a less ambitious negotiation agenda must be set. Providing technical assistance and capacity building could help WTO members not only for preparing them for the negotiation but for the long run, it could be used to empower them to define their trade objectives better, to integrate their objectives in development plans, and advance it in the international trade negotiations, monitoring, and enforcement and shaping the internal regulatory policies.

In the litigation side, the creation of a check-balance on WTO adjudicating bodies is needed. While others have proposed to have a special expert group that can evaluate the ruling of the WTO, especially when important interpretation that implications on broader concerns are being made or to have the WTO to open its hearing to the public, more importantly, the reform must come from within the WTO itself. The WTO panel and Appellate must give more consideration to the context of the WTO agreements, and as Steinberg explains, they should see the WTO agreements not as if they have an exclusively liberalizing purpose but as contracts that embody both liberal and illiberal purposes.

For the context of the AoA, some proposed changes include the elimination of the blue box subsidy that serves no important policy function and the redefinition of the green box subsidy. A more precise definition of the green box subsidy could avoid the abuse of the green box subsidies, as shown on how some countries assign payments to an exempt box that actually belongs to the amber box. Further, developing countries, including Indonesia as the coordinator of the G33 has been raising its demand on the integration of rural development, special products, public stockholding, and special safeguard mechanism. Learning from the previous experiences and with the possibility that developed members would continue its significant subsidies despite the changes

in the AoA, it is argued that the developing members deserve some "insurance policy" to protect them from unfair treatment.

Lastly, on this chapter, I have also argued that while some may assert that the agricultural problems in developing countries are due to internal constraints such as poor infrastructures or lack management tools to mitigate agricultural production risks or to respond to the disaster, and limited financial ability to support the farmers, it is no excuse for an international trade regime to make life more difficult for farmers in developing countries.

Besides changes in the WTO, in Chapter 6, I have also proposed some domestic changes that Indonesia could do to develop its agriculture sector. This proposal stems from the following points. First, it is worth reemphasizing that the WTO sets its freer trade principle above other things despite its claim that it encourages development, and with its exceptional authority, the WTO can easily push its members to open its market. Second, it is supported by the WTO jurisprudence that shows that it does not take into consideration the policy concern when adjudicating a case. Third, while the reform on the WTO is obviously needed, it will take time to do so because this will also depend on the development of geopolitics. Thus, unless Indonesia wants to ignore the international trade regime completely, which Indonesia has stated that it does not have the intention to do so, it has to restructure its regulations on the importation of agricultural products. Indeed, aware of this challenging position, the Indonesian government has chosen to significantly amend the challenged measures to comply with the WTO rulings that are to provide more market access. In the middle of the pressure of freer trade, Indonesia then must strengthen its effort in developing its agriculture sector in order to become more productive and competitive, hence, helping more impoverished farmers to compete.

What Indonesia could do is to utilize the tools provided by the WTO, like the green box subsidy that includes infrastructure. One of the critical problems Indonesia currently facing is the irrigation system. Although development for irrigation in Indonesia continues, challenges such as the need to increase production due to population growth, low irrigation efficiency, and most of all the climate change are increasing too. Thus, maximizing water management is crucial in helping the agriculture sector. Further, a significant number of researches have shown that the agriculture sector in developing countries would be affected the most by climate change. This will eventually hinder Indonesia's effort in achieving food self-sufficiency and improving farmers' welfares. Being the fifth largest greenhouse gas emitter, Indonesia must put its effort into reducing its greenhouse gas emissions. Although the agriculture sector is not the primary contributor to Indonesia's emissions, the land-use that is closely related to the production of palm oil should be the main focus of Indonesia's effort. Moreover, the government's support for the research and development that are long known as underfunded is also needed to help farmers to cope with the impact of climate change.

Besides focusing on the environment, the current program of Indonesia's subsidy is also still problematic as it is reported the subsidized fertilizers have gone to the plantation instead of the small farmers. Thus, the Indonesian government still has its homework on ensuring the subsidized fertilizer will not go to the wrong hand. Lastly, more active coordination between related ministries, in this case, the Ministry of Agriculture and the Ministry of Trade, is required to help Indonesia to achieve its national objectives. Some of the clashes that became public display the lack of coordination between the ministries, especially when it comes to the sectoral ego. While the Ministry of Agriculture is tasked to protect millions of farmers and achieve food self-sufficiency, one of the responsibilities of the Ministry of Trade is ensuring compliance of the

domestic trade regulations with the international norms. A close and continuous discussion between these ministries is critical in shaping synergy regulations. A far-reaching goal in the agriculture sector is set, then both Ministries discuss the possible policy that can be used to achieve the goal. Indeed, as acknowledged by the Indonesian Ministry of Trade, this case has provided a valuable lesson about the necessary coordination between the Ministries that Indonesia has been lacking.

Bibliography

Books

Alan Matthews, *Shallow versus Special and Differential Treatment (SDT) and the issue of differentiation in the WTO among groups of developing countries*, in WTO RULES FOR AGRICULTURE COMPATIBLE WITH DEVELOPMENT (2007).

ALICIA SCHRIKKER & JEROEN TOUWEN, PROMISES AND PREDICAMENTS: TRADE AND ENTREPRENEURSHIP IN COLONIAL AND INDEPENDENT INDONESIAN IN THE 19TH AND 20TH CENTURIES (2015).

AMRITA NARLIKAR, DEADLOCKS IN MULTILATERAL NEGOTIATIONS: CAUSES AND SOLUTIONS (2010).

André Nassar et al., *Agricultural subsidies in the WTO green box: opportunities and challenges for developing countries*, in AGRICULTURAL SUBSIDIES IN THE WTO GREEN BOX (2009).

BERNARD HOEKMAN & MICHEL KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO (1995).

BERNARD HOEKMAN & MICHEL KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND (2nd Ed. 2001).

DAVID ORDERN, DAVID BLANDFORD & TIMOTHY E. JOSLING, WTO DISCIPLINES ON AGRICULTURAL SUPPORT: SEEKING A FAIR BASIS FOR TRADE (2011).

ELIZABETH F. COLLINS, INDONESIA BETRAYED: HOW DEVELOPMENT FAILS (2007).

FATAOUMATA JAWARA & AILEEN KWA, BEHIND THE SCENES AT THE WTO: THE REAL WORLD OF INTERNATIONAL TRADE NEGOTIATIONS: LESSONS OF CANCUN (2004).

GREGORY SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003).

Gregory Shaffer, *Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?*, in REFORMING THE WORLD TRADE SYSTEM (2005).

HA-JOON CHANG, BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM, (1st Ed. 2007).

Harry De Gorter, Merlinda Ingco & Laura Ignacio, *Domestic Support: Economics and Policy Instruments*, in AGRICULTURE AND THE WTO: CREATING A TRADING SYSTEM FOR DEVELOPMENT (2004).

HIROYOSHI KANO, *INDONESIAN EXPORTS, PEASANT AGRICULTURE, AND THE WORLD ECONOMY, 1850-2000: ECONOMIC STRUCTURES IN A SOUTHEAST ASIAN STATE* (2009).

Ivan Roberts, Benjamin Buetre & Frank Jotzo, *Agricultural Trade Reform in the WTO: Special Treatment for Developing Countries*, Two in REFORMING AGRICULTURAL TRADE FOR DEVELOPING COUNTRIES.

JOHN NASH & MERLINDA INGCO, *AGRICULTURE AND THE WTO: CREATING A TRADING SYSTEM FOR DEVELOPMENT* (1st Ed. 2004).

JOSEPH STIGLITZ, *MAKING GLOBALIZATION WORK* (2007).

JOSEPH STIGLITZ & ANDREW CHARLTON, *FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT* (2007).

Kent Jones, *The WTO Green Room, Coalitions, and the Problem of Representation*, in THE DOHA BLUES: INSTITUTIONAL CRISIS AND REFORM IN THE WTO (2011).

Magnus Jirström, *The State and Green Revolutions in East Asia*, in THE AFRICAN FOOD CRISIS: LESSONS FROM THE ASIAN GREEN REVOLUTION (1st Ed. 2005).

MANITRA A. RAKOTOARISOA, RAMESH P. SHARMA & DAVID HALLAM, *AGRICULTURAL IMPORT SURGES IN DEVELOPING COUNTRIES: ANALYTICAL FRAMEWORK AND INSIGHTS FROM CASE STUDIES* (2011).

MARI PANGESTU, *ECONOMIC REFORM, DEREGULATION, AND PRIVATIZATION: THE INDONESIAN EXPERIENCE* (1996).

MARI PANGESTU, *INDONESIAN TRADE POLICY: A PERSPECTIVE* (1989).

Mario Jales, *Domestic support to agriculture in developing countries*, in WTO RULES FOR AGRICULTURE COMPATIBLE WITH DEVELOPMENT (2007).

MERLINDA INGCO, *AGRICULTURE, TRADE, AND THE WTO IN SOUTH ASIA* (2002).

MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION LAW, PRACTICE, AND POLICY* (3rd Ed. 2015).

Oliver Morrissey, *What types of WTO-compatible trade policies are appropriate for different stages of development?*, in WTO RULES FOR AGRICULTURE COMPATIBLE WITH DEVELOPMENT (2007).

Rajesh R Babu, *Decision making in the WTO: From Negotiated Law-making to Judicial Law-making*, in INTERNATIONAL ECONOMIC LAW AND GOVERNANCE (2016).

Raul Montemayor, *Public Stockholding for Food Security Purposes: Scenarios and Options for a Permanent Solution*, International Centre for Trade and Sustainable Development Issue Paper No. 51, Geneva (2014).

RETNOWATI ABDULGANI-KNAPP, SUHARTO: THE LIFE AND LEGACY OF INDONESIA'S SECOND PRESIDENT (1st Ed. 2007).

Richard Blackhurst & David Hardtridge, *Improving the Capacity of WTO Institutions to Fulfil their Mandate*, in REFORMING THE WORLD TRADE SYSTEM (2005).

Rizaldi Boer & Arjunapermal R. Subbiah, *Agricultural Drought in Indonesia*, in MONITORING AND PREDICTING AGRICULTURAL DROUGHT: A GLOBAL STUDY (1st Ed. 2005).

ROBERT HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF MODERN GATT LEGAL SYSTEM (1993).

ROBERT HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (1990).

SIMON BUTT & TIM LINDSEY, THE CONSTITUTION OF INDONESIA: A CONTEXTUAL ANALYSIS (2012).

Terry Byers, *Agriculture and development: the dominant orthodoxy and an alternative view*, in RETHINKING DEVELOPMENT ECONOMICS (2003).

Timothy E. Josling, *An overview of the WTO agricultural negotiations*, 1 in AGRICULTURAL TRADE FOR DEVELOPING COUNTRIES (2007).

Tom Slayton, *The "Diplomatic Crop", or How the US Provided Critical Leadership in Ending the Rice Crisis*, in THE RICE CRISIS: MARKETS, POLICIES AND FOOD SECURITY 393 (2010).

Indonesian Law/Regulations/Report

Badan Kebijakan Fiskal (Fiscal Policy Agency), *Rencana penerapan subsidi langsung tahun 2016 (Plans for implementing direct subsidies in 2016)* (2016).

Central Bureau of Statistics (BPS), STATISTICAL YEARBOOK OF INDONESIA 2018 (2018).

Indonesian Government Regulation 69/1999

Indonesia, INDONESIA: THE FIRST NATIONAL COMMUNICATION ON CLIMATE CHANGE (1994).

Indonesian Law 7/2014 on Trade

Indonesian Law 12/2011 on the Formulation of Laws and Regulations.

Indonesian Law 12/2012 on Food.

Indonesian Law 13/2010 on Horticulture Product.

Indonesian Law 19/2013 on Protection and Empowerment of Farmers.

Ministry of Agriculture Decree Number 47/2017.

Ministry of Agriculture Decree Number 1/Kpts/SR.130/I/2006

Ministry of Agriculture of Indonesia, *Indonesian Agricultural Strategic Plan 2005-09* (2006).

Ministry of Agriculture of Indonesia, *Indonesian Agricultural Strategic Plan 2015-19* (2015).

Ministry of Agriculture of Indonesia, THE VISION AND MISSION OF THE MINISTRY OF AGRICULTURE, <http://www.pertanian.go.id/home/?show=page&act=view&id=5> (last visited Oct 8, 2018).

Presidential Regulation Number 12/2011 on Direct Superior Aid and Fertilizer.

Presidential Regulation 48/2016 on BULOG in the Context of National Food Security.

Presidential Regulation No. 61 the Year 2011 on the National Action Plan for Greenhouse Gas Emissions Reductions, Annex 1.

Regulation of the Ministry of Agriculture Number 16/2018.

Regulation of The Ministry of Agriculture Number 38/PERMENTAN/HR.060/11/2017.

Regulation of the Ministry of Agriculture Number 46/Permentan/OT.140/10/2006.

Regulation of the Ministry of Agriculture Number 47/Permentan/Sr.310/12/2017 on Allocation and Highest Retail Price of Subsidized Fertilizer for the Agricultural Sector in the 2018 Fiscal Year.

Regulation of the Minister of Finance Number 12/PMK.010/2017 on Determination of Products with Export Tariff

Regulation of the Ministry of Finance Number 117/PMK 06/2006 on Credit on Bio-Energy Development and Plantation Revitalization Credit.

Regulation of the Minister of Finance Number 150/PMK.011/2009 on Decision on Import Tariff of Sugar.

Regulation of the Minister of Finance Number 240/KMK.010/2006 on Removal of Import Duty on Raw Sugar by Refined Sugar Industry.

Regulation of Minister of Trade Number 1/2018 on Export and Import of Rice.

Regulation of the Minister of Trade Number 117/M-DAG/PER/12/2015 on Import of Sugar

Regulation of the Ministry of Trade Number 15/M-DAG/PER/4/2013 on Procurement and Distribution of Subsidized Fertilizer for the Agricultural Sector.

Regulation of the Ministry of Trade Number 30/2017.

Regulation of the Minister of Trade Number 41/M-DAG/PER/9/2009

Internet

Adinda Normala, *This Year's Rice Imports to be Largest Since 2011.*, JAKARTA GLOBE, August 28, 2018, <https://jakartaglobe.id/business/years-rice-imports-largest-since-2011/> (last visited Oct 30, 2018).

Ag Decision Maker, CROP INSURANCE, <https://www.extension.iastate.edu/agdm/crops/html/a1-54.html> (last visited Mar 23, 2019).

Andrew Norkiewitz & Julia Nitsche, *A VERY BRIEF HISTORY OF THE FARM BILL* (2017), www.farmbill.org (last visited Mar 21, 2019).

Amy Dickie et al., *Strategies for Mitigating Climate Change in Agriculture: Abridged Report* (2014), www.agriculturalmitigation.org (last visited Jul 11, 2019).

Brandon Willis & Doug O'Brien, *SUMMARY AND EVOLUTION OF U.S. FARM BILL COMMODITY TITLES*, <https://nationalaglawcenter.org/farmbills/commodity/expanded-discussion/#direct-02> (last visited Mar 22, 2019).

Clyde Russell, *China's rubber appetite fails to boost prices amid over-supply*, REUTERS, September 19, 2017, <https://www.reuters.com/article/us-column-russell-rubber-asia/chinas-rubber-appetite-fails-to-boost-prices-amid-over-supply-russell-idUSKCN1BU1AW> (last visited Oct 30, 2018).

Crop Insurance: How it Works, <https://cropinsuranceinamerica.org/about-crop-insurance/how-it-works/> (last visited Mar 23, 2019).

Dan Charles, *HOW FEAR DROVE WORLD RICE MARKETS INSANE* (2011), <https://www.npr.org/sections/thesalt/2011/11/02/141771712/how-fear-drove-world-rice-markets-insane> (last visited Dec 2, 2018).

DOMPET DHUFAFA DISASTER MANAGEMENT CENTER, *DROUGHT IN INDONESIA 2015* (2015), <https://reliefweb.int/report/indonesia/indonesia-drought-indonesia-2015-situation-report-period-31-august-2015> (last visited Jan 7, 2019).

Economic Research Service, DIRECT LOAN, <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/farm-policy-glossary/> (last visited Mar 23, 2019).

_____, PRODUCTION FLEXIBILITY CONTRACT, <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/farm-policy-glossary.aspx#Paid%20Land%20Div> (last visited Mar 22, 2019).

_____, REVENUE INSURANCE, <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/farm-policy-glossary/#Capacity%20&%20Infras%20Prog> (last visited Mar 23, 2019).

George Mermigas, AGRICULTURAL NEGOTIATIONS IN THE FRAMEWORK OF THE DOHA ROUND (2004), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjQ85yZh6jfAhUHGDQIHTicCPsQFjAAegQIChAC&url=http%3A%2F%2Fwww.minagric.gr%2Fimages%2Fstories%2Fagropol%2Fen%2Fagro_pol%2FWTO1-EN--310804.pdf&usg=AOvVaw2XC3_CM_jRzWHvdPZk91Xm (last visited Dec 17, 2018).

Jayati Ghosh, *India faces criticism for blocking global trade deal, but is it justified?*, August 22, 2014, <https://www.theguardian.com/global-development/poverty-matters/2014/aug/22/india-criticism-blocking-global-trade-deal> (last visited Apr 15, 2019).

Joanna Walters, *What went wrong at the summit*, THE OBSERVER, <https://www.theguardian.com/world/1999/dec/05/wto.globalisation1> (last visited Apr 19, 2019).

John Vidal, *Real battle for Seattle*, THE OBSERVER, December 4, 1999, <https://www.theguardian.com/world/1999/dec/05/wto.globalisation> (last visited Apr 19, 2019).

Johannes Friedrich, Mengpin Ge & Andrew Pickens, *This Interactive Chart Explains World's Top 10 Emitters, and How They've Changed* (2017), <https://www.wri.org/blog/2017/04/interactive-chart-explains-worlds-top-10-emitters-and-how-theyve-changed> (last visited Jul 11, 2019).

International Centre for Trade and Sustainable Development, *Quantitative Restrictions Cause Trouble for India*, 1997, <https://www.ictsd.org/bridges-news/bridges/news/quantitative-restrictions-cause-trouble-for-india> (last visited May 16, 2019).

Indonesia Investments, COMMODITY WATCH INDONESIA: TEA PRODUCTION, EXPORT UNDER PRESSURE (2018), <https://www.indonesia-investments.com/news/news-columns/commodity-watch-indonesia-tea-production-export-under-pressure/item8868> (last visited Nov 18, 2018).

_____, PALM OIL, <https://www.indonesia-investments.com/business/commodities/palm-oil/item166> (last visited Nov 18, 2018).

_____, POVERTY IN INDONESIA (2017), <https://www.indonesia-investments.com/finance/macroeconomic-indicators/poverty/item301?> (last visited Mar 14, 2018).

_____, RUBBER (NATURAL), <https://www.indonesia-investments.com/business/commodities/rubber/item185?> (last visited Nov 18, 2018).

International Cocoa Organization, INTERNATIONAL COCOA ORGANIZATION: ABOUT US, <https://www.icco.org/about-us/about-the-icco.html> (last visited Nov 18, 2018).

_____, MEMBERS OF THE INTERNATIONAL COFFEE ORGANIZATION, http://www.ico.org/members_e.asp (last visited Nov 18, 2018).

International Monetary Fund, ABOUT THE IMF, <https://www.imf.org/en/About> (last visited Apr 17, 2019).

International Rice Research Institute (IRRI), (2013), https://www.irri.org/index.php?option=com_k2&view=item&id=9151&Itemid=100480&lang=en (last visited Jul 11, 2019).

IPCC, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE FOURTH ASSESSMENT REPORT: CLIMATE CHANGE 2007: SYNTHESIS REPORT (2007). IPCC, *Intergovernmental Panel on Climate Change Fourth Assessment Report: Climate Change 2007: Synthesis Report* (2007), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=2ahUKEwjnlIKlINPFAhVIMXwKHQEyBBwQFjADegQIBBAC&url=http%3A%2F%2Fwww.un-documents.net%2Fipcc-ar4%2Fsyr.pdf&usq=AOvVaw3XKYBRFWb23NHbY0Cu93WC> (last visited Jan 3, 2019).

Khor Marin, LETTER SENT BY 11 COUNTRIES TO WTO CHAIR CRITICIZING GREEN ROOM PROCESS, <https://www.globalpolicy.org/component/content/article/209/43577.html> (last visited Apr 18, 2019). Khor Marin, *Letter Sent by 11 Countries to WTO Chair Criticizing Green Room Process*, <https://www.globalpolicy.org/component/content/article/209/43577.html> (last visited Apr 18, 2019).

Mervyn Piesse, *Indonesian Climate Change Policies: Striking a Balance between Poverty Alleviation and Emissions Reduction*, GLOBAL FOOD AND WATER CRISES RESEARCH PROGRAMME, September 18, 2019, <http://www.futuredirections.org.au/publication/indonesian-climate-change-policies-striking-a-balance-between-poverty-alleviation-and-emissions-reduction/> (last visited Jul 1, 2019).

Ministry of Foreign Affairs of Japan, JAPAN' S CONTRIBUTION IN THE URUGUAY ROUND NEGOTIATION, <https://www.mofa.go.jp/policy/economy/uruguay/mark.html> (last visited Nov 30, 2018).

Renée Johnson & Jim Monke, WHAT IS THE FARM BILL? (2018), www.crs.gov (last visited Mar 22, 2019).

Song Sumaryanto, AGRICULTURAL WATER MANAGEMENT SYSTEMS IN INDONESIA: CURRENT STATUS AND POLICY DIRECTION, http://www.fftc.agnet.org/library.php?func=view&id=20140304101739&type_id=4.

Stanford News Service, *Climate change a threat to Indonesian agriculture, study says*, 2007, <https://news.stanford.edu/pr/2007/pr-indonesia-050207.html> (last visited Jan 6, 2019).

Steven Menelly, THE RICE CRISIS OF 2008: A LESSON IN MISMANAGEMENT (2016), <http://hir.harvard.edu/article/?a=13124> (last visited Dec 9, 2018).

Tahlim Sudaryanto, FERTILIZER SUBSIDY POLICY IN INDONESIA: IMPACTS AND FUTURE PERSPECTIVES (2014), http://ap.fftc.agnet.org/ap_db.php?id=365 (last visited Oct 23, 2018).

Titik Anas, INDONESIA'S NEW PROTECTIONIST TRADE POLICIES: A BLAST FROM THE PAST (2012), <http://www.eastasiaforum.org/2012/06/18/indonesia-s-new-protectionist-trade-policies-a-blast-from-the-past/> (last visited Oct 31, 2018).

The G33, *Press Statement of the G33: G33 Re-emphasizes the Importance of SP and SSM* (2004), <https://www.twn.my/title2/twninfo155.htm> (last visited Jul 19, 2019).

UNCTAD/PRESS/IN/2006/013, *JITAP WORKSHOP FOCUSES ON HELPING AFRICAN COUNTRIES WITH WTO NEGOTIATIONS* (2006), <https://unctad.org/en/pages/PressReleaseArchive.aspx?ReferenceDocId=7162> (last visited May 9, 2019).

Vikram Nehru, INDONESIA'S NEW TRADE POLICY RISKS REPEATING PAST MISTAKES <https://carnegieendowment.org/2012/07/30/indonesia-s-new-trade-policy-risks-repeating-past-mistakes-pub-48965> (last visited Oct 31, 2018).

WORLD BANK, WORLD DEVELOPMENT REPORT 2010: DEVELOPMENT AND CLIMATE CHANGE (2010), <https://www.google.com/search?client=firefox-b-1&q=world+development+report+2010%3A+development+and+climate+change> (last visited Jan 3, 2019).

_____, WHO WE ARE, <http://www.worldbank.org/> (last visited Apr 17, 2019).

World Integrated Trade Solution, TYPES OF TARIFFS, available at: https://wits.worldbank.org/wits/wits/witshelp/content/data_retrieval/p/intro/c2.types_of_tariffs.htm.

Interviews

Interview with the Indonesian Ministry of Agriculture, Head of Inter-Governmental Organizations, September 20, 2019.

Interview with the Indonesian Ministry of Trade Director General of Foreign Trade Staffs, September 13, 2019.

Interview with the Indonesian Ministry of Trade Director of APEC and International Negotiations, September 20, 2019.

Interview with the Indonesian Ministry of Trade Deputy Director for Agricultural Products, September 20, 2019.

Interview with the Indonesian Ministry of Trade Legal Advisor, September 10, 2019.

Journals

A. J. Rayner, K. A Ingersent & R. C. Hine, *Agriculture in the Uruguay Round: An Assessment*, 103 THE ECON. J. 1513 (1993).

Alan Swinbank, *CAP Reform, 1992*, 31 J. COMMON MKT. STUD. 360 (1993).

Alberto Alvarez-Jimenez, *Public Hearings at the WTO Appellate Body: The Next Step*, 59 THE INT'L AND COMP. L. Q. 1079 (2010).

Alex F. McCalla, *Liberalizing Agricultural Trade: Will It Ever Be a Reality?*, 28 J. AGRIC. RESOURCES. ECON. 419 (2003).

Anne Booth, *Indonesia's Economy: Performance and Policy Option in Post-OPEC World*, SOUTHEAST ASIAN AFFAIRS 122–136 (1986).

Amrita Narlikar, *New Powers in the Club: The Challenges of Global Trade Governance*, 86 THE ROYAL INST. OF INT'L AFF., 717 (2010).

_____, *The politics of participation: Decision making processes and developing countries in the world trade organization*, 364 THE ROUND TABLE 171 (2002).

_____, & Diana Tussie, *The G20 at the Cancun Ministerial: Developing Countries and Their Evolving Coalitions in the WTO*, 27 THE WORLD ECON. 947 (2014).

_____, & Rorden Wilkinson, *Collapse at the WTO: A Cancun Post-Mortem*, 25 THIRD WORLD Q. 447 (2004).

Armin von Bogdandy & Markus Wagner, *The Development of the WTO – Remarks on the Sutherland Report*, 2 INT'L ORG. L. REV. 167 (2005).

Arvind Subramanian & Shang-Jin Wei, *The WTO Promotes Trade, Strongly but Unevenly*, 72 J. INT'L ECON 151 (2007).

Bruce Gardner, Ian Hardie & Peter J. Parks, *United States Farm Commodity Programs and Land Use*, 92 AM. J. OF AGRIC. ECON. 803 (2010).

Carmen Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUMB. J. ENVTL L. 433 (2012).

Chantal Thomas, *Balance-of-Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order*, 15 AM. U. INT'L L. REV. 1249 (2000).

Charles Akande, *What's Wrong with the Cairns Group?*, 15 GENEVA WATCH, 1 (2015).

Christina Davis & Sarah Borneo, *Who Files? Developing Country Participation in GATT/WTO Adjudication*, 71 J. POL. 1033 (2009).

Claus-Dieter Ehlermann & Lothar Ehring, *Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?*, 8 J. OF INT'L ECON. L. 51 (2005).

Cosette Creamer & Zuzanna Godzimirska, *(De)legitimation at the WTO Dispute Settlement Mechanism*, 49 VAND. J. OF TRANSNAT'L L. 275 (2016).

David Greenaway & André Sapir, *New Issues in the Uruguay Round: Services, TRIMs and TRIPs*, 36 EUROPEAN ECON. REV. 509 (1992).

David Hennessy, *Production effects of agricultural income support policies under uncertainty*, 80 AM. JOURNAL OF AGRICULTURAL ECONOMICS 46–57 (1998),

Daniel Sumner, *Implications of the US Farm Bill of 2002 for agricultural trade and trade negotiations*, 46 THE AUSTRALIAN J. AGRIC. AND RESOURCE ECON. 99 (2003).

David Dawe, *Can Indonesia Trust the World Rice Market?*, 44 BULLETIN OF INDONESIAN ECON. STUD. 115 (2008).

David Laborde & Will Martin, *Agricultural Trade: What Matters in the Doha Round?*, 4 ANN. REV. RESOURCE ECON. 265 (2012).

Devinder Sharma, *WTO and Agriculture: "Green Box" Subsidies Must Go*, 39 ECON. AND POL. WKLY. (2004).

Dilip K. Das, *The Global Trading System: From Seattle to Doha*, 57 INT'L J. 605 (2002).

Edward Aspinall, *Oligarchic Populism: Prabowo Subianto's Challenge to Indonesian Democracy*, 99 PROJECT MUSE 1–28 (2015).

_____, *The New Nationalism in Indonesia*, 3 ASIA & THE PACIFIC POL'Y STUD. 72 (2015).

Fiona Smith, “Multifunctionality” and “Non-Trade Concerns” in the Agriculture Negotiations, 3 J. INT’L ECON. L. 707 (2000).

Gregory Shaffer, *Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed*, 8 MINN. LEG. STUD. RES. PAP. (2008).

Hadi Soesastro & M. Chatib Basri, *The Political Economy of Trade Policy in Indonesia*, 22 ASEAN ECON. BULLETIN 3 (2005).

Jai S. Mah, *Reflections on the Special Safeguard Provision in the Agreement on Agriculture of the WTO*, 33 J. WORLD TRADE 197 (1999).

Jeff Neilson & Joseph Wright, *The state and food security discourses of Indonesia: feeding the bangsa*, 55 INST. AUST. GEOGR. 131 (2017).

Jennifer Clapp, *Food self-sufficiency: Making sense of it, and when it makes sense*, 66 FOOD POL’Y 88 (2017).

_____, *WTO Agriculture Negotiations: Implications for the Global South*, 27 THIRD WORLD Q. 563 (2006).

Jim Dixon, *Nature Conservation and Trade Distortion: Green Box and Blue Box Farming Subsidies in Europe*, 29 GOLDEN GATE U. L. REV. 415 (1999).

John M. Antle, *Climate Change and Agriculture in Developing Countries*, 77 AM. J. OF AGRIC. ECON. 741 (1995).

Iwan Hermawan, *Analisis Dampa Kebijakan Subsidi Pupuk Urea and TSP Terhadap Padi dan Capaian SWASEMBADA Pangan di Indonesia (Analysis of the Impact of Urea and TSP Fertilizer Subsidy Policy on Rice Production and Food Self-Sufficiency in Indonesia)*, 5 JURNAL EKONOMI & KEBIJAKAN PUBLIK 63 (2014).

Kent Jones, *Green room politics and the WTO’s crisis of representation*, 9 PROGRESS IN DEV. STUD. 249 (2009).

Kevin Watkins, *Agriculture and food security in the GATT Uruguay round*, 18 R. AFR. POL. ECON. 38–50 (1991).

Krzysztof J. Pelc, *Seeking Escape: The Use of Escape Clauses in International Trade Agreements*, 53 INT’L STUD. Q. 349 (2009).

Mari Pangestu, Sjamsu Rahardja & Lili Yan Ing, *Fifty Years of Trade Policy in Indonesia: New World Trade, Old Treatments*, 51 BULLETIN OF INDONESIAN ECON. STUD. 239 (2015).

M. Chatib Basri & Arianto A Patunru, *How to Keep Trade Policy Open: The Case of Indonesia*, 48 BULLETIN OF INDONESIAN ECON. STUD. 191 (2012).

_____ & Hal Hill, *Indonesian Growth Dynamics*, 6 ASIAN ECON. POL'Y REV. 90 (2011).

_____ & Hal Hill, *Indonesia - Trade Policy Review 2007*, 31 THE WORLD ECON. 1393 (2008).

Meredith Crowley, *An introduction to the WTO and GATT*, 27 ECON. PERSP. 42 (2003).

Michel Chossudovsky, *Seattle and Beyond: Disarming New World Order*, 35 ECON. AND POL. WKLY 100 (2000).

Minju Kim & Hyo-young Lee, *Looking Beyond the Doha Negotiations: A Possible Reform of the WTO Agricultural Subsidies Rules*, 12 ASIAN J. WTO INT'L HEALTH L. POL'Y 171 (2017).

Panagiotis Delimatsis, *Transparency in the WTO's Decision-Making*, 27 LEIDEN J. OF INT'L L. 701–726 (2014).

Pantjar Simatupang & Peter Timmer, *Indonesia Rice Production: Policies and Realities*, 44 BULLETIN OF INDONESIAN ECON. STUD. 65 (2008).

Pao-Li Chang & Myoung-jae Lee, *The WTO trade effect*, 85 J. OF INT'L ECON. 53 (2011).

Peter Warr & Arief Anshory Yusuf, *Fertilizer subsidies and food self-sufficiency in Indonesia*, 45 AGRIC. ECON. 571–588 (2014).

Rashid Shahidur et al., *Modern Input Promotion in sub-Saharan Africa: Insights from Asian Green Revolution*, 44 AGRIC. ECON. 705 (2013).

Robert Wolfe, *The special safeguard fiasco in the WTO: the perils of inadequate analysis and negotiation*, 8 WORLD TRADE REV. 517 (2009).

Richard Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (2004).

Richard Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002).

R. P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 14 THE INT'L AND COMP. L. Q. 788 (1965).

Sandra S. Batie, *Wicked Problems and Applied Economics*, 90 AM. J. OF AGRIC. ECON. 1176 (2008).

Sheila Mathrani, *Revolt of Developing Countries at Seattle*, 34 ECON. AND POL. WKLY 3568 (1999).

Sonia E Rolland, *Redesigning the Negotiation Process at the WTO*, 13 J. INT'L ECON. L. 65 (2010).

Sri Hery Susilowati, *Urgensi dan Opsi Perubahan Kebijakan Subsidi Pupuk (Urgent Policy Changes in Fertilizer Subsidy)*, 14 ANALISIS KEBIJAKAN PERTANIAN 163–185 (2016).

Sri Kasiyati & Purbayu Budi Santosa, *Analisis Dampak Subsidi Harga Pupuk Terhadap Output Sektor Produksi dan Tingkat Pendapatan Rumah Tangga di Jawa Tengah (Analysis of the Impact of Fertilizer Price Subsidies on the Production Sector Output and Household Income Level in Central Java)*, 6 JURNAL ORGANISASI DAN MANAJEMEN 28 (2010).

Suzanne M. Moon, *Takeoff or Self-Sufficiency? Ideologies of Development in Indonesia, 1957-1961*, 39 TECH. AND CULTURE 187 (1998).

Theo Eicher & Christian Henn, *In search of WTO trade effects: Preferential trade agreements promote trade strongly, but unevenly*, 83 J. INT'L ECON. 137 (2011).

Thomas Bernhardt, *North-South Imbalances in the International Trade Regime: Why the WTO Does Not Benefit Developing Countries as Much as it Could*, 12 CONSILIENCE: THE J. OF SUSTAINABLE DEV. 123 (2014).

Thomas Hertel & Stephani Rosch, *Climate Change, Agriculture, and Poverty*, 32 APPLIED ECON. PERSP. AND POL. 355 (2010).

Thomas Schoenbaum, *Agricultural Trade Wars: A Threat to the GATT and Global Free Trade*, 24 ST. MARY'S L. J. 1165 (1993).

_____, *Fashioning a New Regime for Agricultural Trade: New Issues and the Global Food Crisis*, 14 J. INT'L. ECON. L. 593 (2011).

_____, *WTO Dispute Settlement: Praise and Suggestions for Reform*, 47 INT'L & COMP. L. Q. 647 (1998).

Wenwei Guan, *Consensus Yet Not Consented: A Critique of the WTO Decision-Making by Consensus*, 17 J. OF INT'L ECON. L. 77–104 (2014).

William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L. J. 52–108 (1987).

Xavier Irz et al., *Agricultural Productivity Growth and Poverty Alleviation*, 19 DEV. POL. REV. 449 (2001).

Zuhair A. Hassan, *Agreement on agriculture in the Uruguay Round of GATT: from Punta del Este to Marrakesh*, 15 AGRICULTURAL ECON. 29 (1996).

Online Media Outlets

Alek Kurniawan, *Kementan: Kartu Tani Jadi Syarat Petani Dapatkan Pupuk Bersubsidi (Ministry of Agriculture: Farmer Cards Become Requirements for Farmers to Get Subsidized Fertilizers)*, KOMPAS.COM, February 24, 2019, <https://ekonomi.kompas.com/read/2019/02/24/131253726/kementan-kartu-tani-jadi-syarat-petani-dapatkan-pupuk-bersubsidi> (last visited Jul 6, 2019).

Basten Gokkon & Indra Nugraha, *Environmental issues to be a focus of Indonesian presidential debates: official*, MONGABAY, August 21, 2018, <https://news.mongabay.com/2018/08/environmental-issues-to-be-a-focus-of-indonesian-presidential-debates/> (last visited Jul 1, 2019).

CNN Team, *Darmin Sebut BPS Jadi Pemegang Kendali Data Produksi Beras (Darmin Called BPS to be the Data Control Holder for Rice Production)*, CNN INDONESIA, September 20, 2018, <https://www.cnnindonesia.com/ekonomi/20180920133742-92-331724/darmin-sebut-bps-jadi-pemegang-kendali-data-produksi-beras> (last visited Jul 3, 2019).

Deti Mega Purnamasari & Markus Junianto Sihaloho, *Joko Widodo Lays Out Agricultural Manifesto for Indonesia*, April 27, 2014, <https://jakartaglobe.id/news/joko-widodo-lays-agricultural-manifesto-indonesia/> (last visited Oct 22, 2018).

Ganug Nugroho Adi, *Thousands of Central Java villages threatened by drought*, THE JAKARTA POST, August 11, 2017, <https://www.thejakartapost.com/news/2017/08/11/thousands-of-central-java-villages-threatened-by-drought.html> (last visited Jan 8, 2019).

M Dani Pratama Huzaini, *Kalah di Kasus Pembatasan Impor Hortikultura, Indonesia Terancam Sanksi (Losing in the Case of Horticultural Import Restrictions, Indonesia is Threatened with Sanctions)*, HUKUM ONLINE, November 23, 2017, <https://www.hukumonline.com/berita/baca/lt5a169be7ae350/kalah-di-kasus-pembatasan-impor-hortikultura--indonesia-terancam-sanksi> (last visited May 24, 2019).

Julkhaidar Romadhon, *Negara “Darurat” Lembaga Pangan (State “in Emergency” for Food Agency)*, INDONESIAANA, February 11, 2018, <https://www.indonesiana.id/read/122639/negara-darurat-lembaga-pangan> (last visited Jul 3, 2019).

Karina Tehusijarana, *Bulog, Trade Ministry spar over rice imports*, THE JAKARTA POST, <https://www.thejakartapost.com/news/2018/09/20/bulog-trade-ministry-spar-over-rice-imports.html>.

Pemerintah Hapus Tunggakan Kredit Usaha Tani, ANTARA NEWS, March 3, 2008, <https://www.antaranews.com/berita/95313/pemerintah-hapus-tunggakan-kredit-usaha-tani> (last visited Oct 24, 2018).

Polemik Impor Beras, Menko Darmin Salahkan Data Kementan (Rice Import Polemic, Coordinating Minister Darmin Blames Ministry of Agriculture Data), CNN INDONESIA,

September 19, 2018, <https://www.cnnindonesia.com/ekonomi/20180919224053-92-331586/polemik-impor-beras-menko-darmin-salahkan-data-kementan?> (last visited Jul 2, 2019).

Randy Fabi & Christina Munthe, *Subsidy sham: Fertilizers reach Indonesia plantations, not small farmers*, REUTERS, February 14, 2016, <https://www.reuters.com/article/us-indonesia-fertilizers/subsidy-sham-fertilizers-reach-indonesia-plantations-not-small-farmers-idUSKCN0VN127>.

RI kalah di WTO terkait pembatasan impor pertanian (*Indonesia lost at the WTO regarding restrictions on agricultural imports*), KONTAN, December 23, 2016, <https://nasional.kontan.co.id/news/ri-kalah-di-wto-terkait-pembatasan-impor-pertanian> (last visited Jun 19, 2019).

Safyra Primadhyta, *Dari Mata Turun ke Mulut, Data Beras Bikin Ribut (From the Eyes Down to the Mouth, Rice Data Makes Chaos)*, CNN INDONESIA, September 20, 2018, <https://www.cnnindonesia.com/ekonomi/20180920124221-92-331703/dari-mata-turun-ke-mulut-data-beras-bikin-ribut?> (last visited Jul 3, 2019).

Sanksi Dagang AS Ancam Kedaulatan Pangan Indonesia (*US Trade Sanctions Threaten Indonesian Food Sovereignty*), KUMPARAN, August 9, 2018, <https://kumparan.com/@kumparanbisnis/sanksi-dagang-as-ancam-kedaulatan-pangan-indonesia-1533799067124996044> (last visited Jun 19, 2019).

Tempo, *Presidential Debate Fail to Mention Climate Change Impacts: Walhi*, February 19, 2019, <https://en.tempo.co/read/1177126/presidential-debate-fail-to-mention-climate-change-impacts-walhi>.

Timothy Egan, *FAILING FARMERS LEARN TO PROFIT FROM FEDERAL AID*, THE NEW YORK TIMES, December 24, 2000, <https://www.nytimes.com/2000/12/24/us/failing-farmers-learn-to-profit-from-federal-aid.html> (last visited Apr 5, 2019).

Wahyudi Soeriaatmadja, *1.4m hit as severe drought ravages crops in Indonesia*, STRAITS TIMES, August 31, 2017, <https://www.straitstimes.com/asia/se-asia/14m-hit-as-severe-drought-ravages-crops-in-indonesia> (last visited Jan 7, 2019).

When Indonesia loses WTO appeal, THE JAKARTA POST, August 9, 2018, <https://www.thejakartapost.com/academia/2018/08/09/when-indonesia-loses-wto-appeal.html> (last visited Jun 19, 2019).

WTO Ancam Ketahanan Pangan Indonesia? (WTO Threatens Indonesian Food Security?), PINTERPOLITIK, December 5, 2017, <https://pinterpolitik.com/wto-ancam-ketahanan-pangan-indonesia/> (last visited Jun 19, 2019).

WTO Menghancurkan Nasib Petani Dan Nelayan Indonesia (WTO Destroys the Fate of Indonesian Farmers and Fishermen), SERIKAT PETANI INDONESIA, December 12, 2017,

<https://spi.or.id/wto-menghancurkan-nasib-petani-dan-nelayan-indonesia/> (last visited Jun 19, 2019).

Yoga Rusmana & Eko Listiyorini, *Indonesia Coffee Crop May Tumble Most in 5 Years on Drought*, BLOOMBERG BUSINESS, May 9, 2016, <https://www.bloomberg.com/news/articles/2016-05-09/indonesia-coffee-crop-may-tumble-most-in-five-years-on-drought>.

Thesis/Working Paper/Report

Alan Matthews, *Doha Negotiations on Agriculture and Future of the WTO Multilateral Trade System*, 135th Seminar, August 28-30, Belgrade (2013).

Amit Khandelwal, *Are U.S. Agricultural Subsidies Amber or Green?*, Colombia Business School Working Paper, Columbia University (2005).

Anthea Webb & Amit Wadhwa, *The Impact of Drought on Households in Four Provinces in Eastern Indonesia*, WORLD FOOD PROGRAMME INDONESIA (2016).

Arief Wijaya et al., *How Can Indonesia Achieve Its Climate Change Mitigation Goal? An Analysis of Potential Emissions Reductions from Energy and Land-Use Policies*, World Resources Institute Research Paper (2017).

Asep Surhayadi, Gracia Hadiwidjaja, Sudarno Sumarto, *The Role of Agriculture in Poverty Reduction in Indonesia*, Economic Policy, Poverty & Inequality Indonesia Working Paper, Jakarta (2012).

Benjamin Cantrell, *Food, the State, and Development: A Political Economy of Agriculture and Trade in Indonesia* (2015).

Camilo Gomez Osorio, Dwi Endah Abriningrum, Enrico Blanco Armas, and Muhammad Firdaus, *Who Is Benefiting from Fertilizer Subsidies in Indonesia?*, World Bank Policy Research Working Paper (2011).

Chad Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders*, 19 THE WORLD BANK ECONOMIC REVIEW (2005).

David Dawe & Cristian Morales-Opazo, *How Much Did Developing Country Domestic Staple Food Prices Increase During the World Food Crisis? How Much Have They Declined?*, ESA Working Paper No.09-09, The Food and Agriculture Organization, Rome (2009).

Eric Quincie, *Summary of Indonesia's Agriculture, Natural Resources, and Environment Sector, Assessment*, ADB Papers on Indonesia No. 08, Manila (2015).

European Commission, *DIRECT PAYMENTS: THE BASIC PAYMENTS SCHEME FROM 2015* (2015).

European Parliament's Committee on Agriculture and Rural Development, *THE SINGLE PAYMENT SCHEME AFTER 2013: NEW APPROACH - NEW TARGETS* (2010).

European Union Budget: The CAP After 2020, European Commission (2018)

European Union, *EUROPEAN COMMISSION AGENDA 2000: FOR A STRONGER AND WIDER UNION*.

Grey, Clark, Shih and Associates, *Green Box Mythology: Decoupling Fraud*, Study Prepared for Dairy Farmers Canada, Ottawa (2006).

Food and Agriculture Organization of the United Nations, *COUNTRY FACT SHEET ON FOOD AND AGRICULTURE POLICY TRENDS: Indonesia*, 1–6 (2017).

_____, FAOSTAT: TOP 20 COUNTRY, EXPORT QUANTITY OF COCOA, BEANS, (2016).

_____, FAOSTAT: TOP 10 COUNTRY PRODUCTION OF COFFEE, GREEN, (2016).

Ginandjar Kartasasmita, *Globalization and the Economic Crisis: The Indonesian Story*, WCFIA WORKING PAPER 01-03 (2011).

Giovanni Anania, *Agricultural Export Restrictions and the WTO: What Options Do Policy-Makers Have for Promoting Food Security?*, International Centre for Trade and Sustainable Development Working Paper, Geneva (2013).

International Centre for Trade and Sustainable Development, *G33 proposal: early agreement on elements of the draft Doha accord to address food security* (2013).

Jenny Hopkinson, *China's Retaliatory Tariffs on U.S. Agricultural Products*, Congressional Research Service Working Paper, Washington DC (2019).

J. MELLOR, *Faster, More Equitable Growth - The Relation Between Growth in Agriculture and Poverty Reduction Agricultural Policy Development Project*, Agricultural Policy Development Project Research Report No. 4, Cambridge (1999).

John M. Antle, *Climate Change and Agriculture: Economic Impacts*, 23 CHOICE AMERICAN AGRICULTURAL ECONOMICS ASSOCIATION (2008).

Jonathan Lassa & Maxi Shresta, *Food Sovereignty Discourse in Southeast Asia: Helpful or Disruptive?*, RSIS Commentary No. 231, Bangkok (2014).

Joseph Stiglitz, *SOME LESSONS FROM THE EAST ASIAN MIRACLE*, 11 THE WORLD BANK RESEARCH OBSERVER 151 (1996).

Luc Christiaensen, Demery Lionel & Jesper Kuhl, *The Role of Agriculture in Poverty Reduction: An Empirical Perspective*, 4013 Policy Research Working Paper, World Bank, Washington DC (2006).

Marcus Mietzner, *Reinventing Asian Populism: Jokowi's Rise, Democracy, and Political Contestation in Indonesia*, Policy Review No. 72, East West Center, Honolulu (2015).

Mayur Patel, *New Faces in the Green Room: Developing Country Coalitions Decision-Making in the WTO*, PEIO Conference Paper (2007).

MELAKU GEBOYE DESTA, *LAW OF INTERNATIONAL TRADE IN AGRICULTURAL PRODUCTS, FROM GATT 1947 TO THE WTO AGREEMENT ON AGRICULTURE* (2002).

Michael Cardwell & Christopher Rodgers, *Reforming the WTO Legal Order for Agricultural Trade: Issues for European Rural Policy in the Doha Round*, 55 THE INT'L AND COMP. L. Q. 805 (2006).

OECD, *AGRICULTURAL POLICY MONITORING AND EVALUATION 2017: INDONESIA* (2017).

_____, *OECD ENVIRONMENTAL OUTLOOK TO 2030* (2018).

_____, *OECD REVIEW OF AGRICULTURAL POLICIES: INDONESIA* (2012).

_____, *THE URUGUAY ROUND AGREEMENT ON AGRICULTURE: AN EVALUATION OF ITS IMPLEMENTATION IN OECD COUNTRIES* (2001).

Parthapratime Pal & Deepika Wadhwa, *An Analysis of the Special Safeguard Mechanisms in the Doha Round of Negotiations: A Proposed Price-Trigger-Based Safeguard Mechanism*, Trade Working Papers 22235, East Asian Bureau of Economic Research (2006).

Priasto Aji, *Summary of Indonesia's Poverty Analysis*, ADB Papers on Indonesia No. 04, Manila (2015).

P Simatupang, Supriyati & Susilowati, *Analisis Elastisitas Harga pupuk Terhadap Produktivitas Padi (Analysis on Fertilizer Price Elasticity on Rice Productivity)*, Indonesian Ministry of Agriculture Research Center, Bogor (2014).

Peter Kleen, *So Alike and yet so Different: A comparison of the Uruguay Round and the Doha Round*, 2 JAN TUMLIR POLICY ESSAY, 1-22 (2008).

Peter Timmer, *Agriculture and Pro-Poor Growth: An Asian Perspective*, Center for Global Development Working Paper No. 63, Washington DC (2005).

Randy Schnepf et al., *Farm Policy: USDA'S Trade Aid Package*, Congressional Research Service Working Paper, Washington DC (2019).

Rege Vinod, 'WTO PROCEDURES FOR DECISION MAKING: EXPERIENCE OF THEIR OPERATION AND SUGGESTIONS FOR IMPROVEMENT', Background Paper, Commonwealth Secretariat (2000).

Richard R. Barichello, *Impact of Asian Crisis on Trade Flows: A Focus on Indonesia and Agriculture*, Proceedings of the 5th Agricultural and Food Policy Systems Information Workshop (2000).

Robert Howse, *Pursuing Sustainable Development Strategies: The Case of the Balance of Payment Rules in the WTO*, UNCTAD Sustainable Debt Conference (2005).

Rosamond L. Naylor et al., *Assessing Risks of Climate Variability and Climate Change for Indonesian Rice Agriculture*, 104 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 7752–7757 (2007).

Rubens Ricuperro, *Rebuilding Confidence in the Multilateral Trading System: Closing the Legitimacy Gap*, WTO Paper (2001).

Shefali Sharma, *WTO Decision Making: A Broken Process*, WTO Cancun Series Paper No. 4 (2003).

Sophia Murphy, Ben Liliston & Mary Beth Lake, *WTO AGREEMENT ON AGRICULTURE: A DECADE OF DUMPING*, Institute for Agriculture & Trade Policy (2005).

Thom Wright, *Indonesia Grain and Feed Annual Reports 2017*, USDA Foreign Agricultural Service Report, Washington DC (2017).

Timothy E. Josling, *Strengthening the Global Trade System: Rethinking the Rules for Agricultural Subsidies*, International Centre for Trade and Development, Geneva (2015).

World Bank, *PRIORITY ISSUES FOR INDONESIAN AGRICULTURE* (2005).

_____, *The Double Burden of Malnutrition in Indonesia*, April 23, 2015, <http://www.worldbank.org/en/news/feature/2015/04/23/the-double-burden-of-malnutrition-in-indonesia> (last visited Mar 4, 2018).

World Food Programme, *Proportion of Population Undernourished: 2014 Global Hunger Index Data*, Rome (2014).

WTO Agreements

WTO Agreement Establishing the World Trade Organization.

WTO Agreement on Agriculture (AoA).

WTO Agreement on Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU).

WTO Agreement on Subsidies and Countervailing Measures (The SCM Agreement).

WTO Agreement on the Application of Sanitary and Phytosanitary Measures (The SPS Agreement).

WTO Report Cases

Annex 1 WT/BOP/R/11, STATEMENT BY THE REPRESENTATIVE OF INDIA.

Annex B-1 WT/DS484/R/Add.1, INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL (2017).

Annex B-2 WT/DS484/R/Add.1, INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA (2017).

Annex C-1 WT/DS477/R/Add.1 - WT/DS478/R/Add.1, FIRST PART OF EXECUTIVE SUMMARY OF THE ARGUMENTS OF NEW ZEALAND (2016).

Annex C-3 WT/DS477/R/Add.1 - WT/DS478/R/Add.1, FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES (2016).

Annex C-5 WT/DS477/R/Add.1 - WT/DS478/R/Add.1, FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA (2016), para. 2.

Annex C-6 WT/DS477/R/Add.1 - WT/DS478/R/Add.1, SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA (2016), para. 17.

GATT, *General Agreement on Tariffs and Trade (GATT): Punta Del Este Declaration* (1986), http://www.sice.oas.org/trade/punta_e.asp (last visited Jul 19, 2019).

GATT L/5424, MINISTERIAL DECLARATION ADOPTED ON 29 NOVEMBER 1982 (1982).

GATT, MINISTERIAL DECLARATION ON THE URUGUAY ROUND (1986).

New Zealand First Written Submission WT/DS477, INDONESIA - IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS (2015),

New Zealand Second Written Submission WT/DS477, INDONESIA - IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS (2016).

Report of the Appellate Body WTO/DS477/AB/R - WT/DS478/AB/R, INDONESIA-IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS (2017).

Report of Appellate Body WTO/DS267, UNITED STATES – SUBSIDIES on UPLAND COTTON (2005).

Report of the Appellate Body WTO, WTO - DS54 (1998),
https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds54_e.htm (last visited Sep 6, 2018).

Report of Panel WT/DS90R, INDIA – QUANTITATIVE RESTRICTION ON IMPORTS OF AGRICULTURAL, TEXTILE AND INDUSTRIAL PRODUCTS (1999).

Report of Panel WTO/DS438/R, ARGENTINA – MEASURES AFFECTING THE IMPORTATION OF GOODS (2015).

Report of Panel WTO/DS477/DS478/R, INDONESIA - IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS (2016).

Report of Panel WTO/DS484R, INDONESIA - MEASURES CONCERNING THE IMPORTATION OF CHICKEN MEAT AND CHICKEN PRODUCTS (2017).

Request for the Establishment of a Panel by the United States (WT/DS478/9), INDONESIA - IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS, AND ANIMAL PRODUCTS: (2015).

Request for the Establishment of a Panel by Brazil WT/DS484/8, INDONESIA - MEASURES CONCERNING THE IMPORTATION OF CHICKEN MEATS AND CHICKEN PRODUCTS (2015).

The United States of America First Written Submission (DS477/DS478), FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA - INDONESIA IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS, AND ANIMAL PRODUCTS (2015).

WTO (WT/DS477/AB/R - WT/DS478/AB/R), ADDENDUM - INDONESIA - IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS (2016).

WTO/WT/MIN(915)/45/WT/L/980, EXPORT COMPETITION: MINISTERIAL DECISION OF 19 DECEMBER 2015.

WTO, WT/BOP/R/11, COMMITTEE ON BALANCE-OF-PAYMENTS RESTRICTIONS: REPORT ON THE CONSULTATION WITH INDIA (1996).

WTO Documents

WTO: 2013 News Items, CHAIR UPDATES ON ARM ISSUES PROPOSED FOR BALI MEETING: TALKS CONTINUE ON KEY DIFFERENCES (2013),

https://www.wto.org/english/news_e/news13_e/agng_23may13_e.htm (last visited Sep 29, 2017).

WTO: 2016 News Items, *FARM NEGOTIATORS WELCOME PROPOSALS TO CURB SUBSIDIES AND OPEN AGRICULTURAL MARKETS* (2016),
https://www.wto.org/english/news_e/news16_e/agri_16nov16_e.htm (last visited Sep 26, 2017)

WTO: 2017 News Item, *AGRICULTURE NEGOTIATORS EXCHANGE VIEWS ON ISSUES FOR POTENTIAL OUTCOMES AT MC11* (2017),
https://www.wto.org/english/news_e/news17_e/agng_01jun17_e.htm (last visited Sep 26, 2017).

WTO: 2017 News Item, *NEW PROPOSALS IN AGRICULTURE TALKS FORM “TANGIBLE STEPS” FORWARD* (2017), https://www.wto.org/english/news_e/news17_e/agng_19jul17_e.htm (last visited Sep 27, 2017).

WTO, *AN UNOFFICIAL GUIDE TO AGRICULTURAL SAFEGUARDS: GATT, OLD AGRICULTURAL (SSG), AND NEW MECHANISM (SSM)* (2008).

WTO, *Deletion of the International Dairy Agreement* WT/L/251.

WTO, *DOHA MINISTERIAL DECLARATION*, WT/MIN(01)/DEC/1, 20 NOVEMBER 2001. (2001).

WTO Document JOB (06)/145 Committee on Agriculture Special Session, *G-20 COMMENTS ON THE CHAIR REFERENCE PAPER ON BLUE BOX* (2006).

WTO, *HOW THE NEGOTIATIONS ARE ORGANIZED*,
https://www.wto.org/english/tratop_e/dda_e/work_organiz_e.htm (last visited Nov 28, 2018).

WTO, ITC & UNCTAD, *WTO TARIFF PROFILES 2017 250* (2017), available at:
https://www.wto.org/english/res_e/booksp_e/tariff_profiles17_e.pdf.

WTO, *LEGAL BASIS FOR DISPUTE*,
https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c4s2p1_e.htm (last visited Nov 24, 2018).

WTO, *MINISTERIAL CONFERENCE NINTH SESSION OF 7 DECEMBER 2013: WT/MIN(13)38-WT/L/913 PUBLIC STOCKHOLDING FOR FOOD SECURITY PURPOSES* (2013).

WTO, *MINISTERIAL DECISION OF 19 DECEMBER 2015: WT/MIN(15)/44 — WT/L/979 PUBLIC STOCKHOLDING FOR FOOD SECURITY PURPOSES* (2015),
https://www.wto.org/english/thewto_e/minist_e/mc10_e/1979_e.htm (last visited Sep 23, 2017).

WTO, *MODALITIES AGREEMENT* MTN.GNG/MA/W/24 (1993).

WTO, *MODALITIES FOR THE ESTABLISHMENT OF SPECIFIC BINDING COMMITMENTS UNDER THE REFORM PROGRAMME* (1995),
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKewiV7v3xkIDfAhXGITQIHfrFBcUQFjAAegQIBhAC&url=https%3A%2F%2Fwww.wto.org%2Fenglis>

[h%2Ftratop_e%2Fagric_e%2F1993_ur_modalities_w24_e.pdf&usg=AOvVaw1MHY1yHxInQAdb_ma-C5vH](#) (last visited Dec 1, 2018).

WTO News - DDA June/July 2006 Modalities: Summary 24 July, TALKS SUSPENDED. “TODAY THERE ARE ONLY LOSERS.” (2006), https://www.wto.org/english/news_e/news06_e/mod06_summary_24july_e.htm (last visited Dec 13, 2017).

WTO Press 279, GOVERNMENTS PLEDGE CHF 30 MILLION TO DOHA DEVELOPMENT AGENDA GLOBAL TRUST FUND (2002), https://www.wto.org/english/news_e/pres02_e/pr279_e.htm (last visited May 9, 2019).

WTO, PRINCIPLES OF TRADING SYSTEM, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#seebox (last visited Nov 27, 2018).

WTO, SPECIAL AGRICULTURAL SAFEGUARD G/AG/NG/S/9/REV.1 (2002).
WTO, THE DOHA ROUND, https://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Nov 28, 2018).

WTO, THE DOHA ROUND TEXTS - INTRODUCTION, https://www.wto.org/english/tratop_e/dda_e/texts_intro_e.htm (last visited Nov 28, 2018).

WTO, THE TRADE NEGOTIATIONS COMMITTEE, https://www.wto.org/english/tratop_e/dda_e/tnc_e.htm (last visited Nov 28, 2018).

WTO, THE GATT YEARS: FROM HAVANA TO MARRAKESH, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Nov 20, 2018).

WTO, THE WTO CAN GIVE THE WEAK A STRONGER VOICE, https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi07_e.htm (last visited Apr 6, 2019).

WTO, THE WTO CAN HELP COUNTRIES DEVELOP, https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi06_e.htm (last visited Apr 2, 2019).

WTO, THE URUGUAY ROUND, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.

WTO, WHAT ARE “MODALITIES”?, https://www.wto.org/english/tratop_e/dda_e/modalities_e.htm (last visited Nov 28, 2018).