

CHAPTER II

LITERATURE FRAMEWORK

A. General Overview of Halal

1. Halal in general

Islam is the world's second largest religion and also the fastest growing, both globally and in the U.S. The global Muslim population is 1.8 billion and the halal food market is estimated to be \$547 billion per year in the U.S.²⁵ The expected increase is to \$2.1 trillion in tandem with a fivefold increase in the global halal food market.²⁶

In the UK there are about 2 to 3 million Muslims but the consumption of halal meat is estimated to include 6 million people. This shows that the halal market's growing trend not only among Muslims but also for non-Muslims.²⁷

Islam is not merely a religion of rituals, it is a way of life. Rules and manners govern the life of the individual Muslim. There are set of halal dietary rules that Muslims are expected to follow and are meant to advance their well-being.²⁸ The halal dietary laws determine which foods are "lawful" or permitted for Muslims.

²⁵Dierks. (2011). *Market Watch 2010 – The Food Industry*. Malaysia: Malaysian-German Chamber of Commerce and Industry. Retrieved from Mian N. Riaz & Muhammad M. Chaudry, 2019, *Handbook of Halal Food Production*. Boca Raton, CRC Press. p.1.

²⁶ Dagang Asia Net. (2011). The emerging of global halal market. Taken from <http://www.dagangasia.net/articles>. Accessed on May 23, 2019.

²⁷ Gregory, N. G. (2008). Animal welfare at markets and during transport and slaughter. *Meat Science*, 80(1), 2–11. Retrieved from Mian N. Riaz & Muhammad M. Chaudry, 2019, *Handbook of Halal Food Production*. Boca Raton, CRC Press. p.1.

²⁸ Bonne, K. and Verbeke, QW. (2008). Religious values informing halal meat production and the control and delivery of halal credence quality. *Agriculture and Human Values*, 25(1), 35 – 47.

These laws are found in the Quran and in the Sunna, the practice of the Prophet Muhammad, as recorded in the books of Hadith, the Traditions.²⁹

Islamic law is referred to as Sharia and has been interpreted by Muslims scholars over the years. The basic principles of the Islamic law remain definite and unaltered. However, their interpretation and application may change according to the time and place and circumstances. Besides the 2 basic sources of Islamic law, Quran and the Sunna, 2 other sources of jurisprudence are used in determining the permissibility of food, when a contemporary situation is not explicitly covered by the first 2 basic sources. The first is Ijma, meaning a consensus of legal opinion. The second is Qiyas, meaning reasoning by analogy.³⁰

In Islam, eating is considered a matter of worship of God, just like religious prayers. Muslims follow the Islamic dietary code and foods that meet that code are called halal.³¹ Muslims are supposed to try to obtain halal food of good quality. It is their religious obligation to consume only halal food. For non-Muslim consumers, halal foods are often perceived as specially selected and processed to achieve the highest standards of quality along with being healthier.³²

By definition, halal foods are those that are free from any component that Muslims are prohibited (haram) from consuming. According to the Quran, all good and clean foods are halal. Consequently, almost all foods of plant and animal origin

²⁹ Regenstein, J. M., Chaudry, M. M., and Regenstein, C. E. (2003). The kosher and halal food laws. *Comprehensive Reviews in Food Science and Food Safety*, 2(3), p.111. 111–127.

³⁰ *Ibid.*

³¹ *Ibid.*

³² Mian N. Riaz & Muhammad M. Chaudry, 2019, *Handbook of Halal Food Production*. Boca Raton, CRC Press. p.1.

are considered halal except those that have been specifically prohibited by the Quran and the Sunnah.³³

In language, the word "*halal*" comes from Arabic that has been absorbed into Indonesian. Halal comes from the word "*halla*" which means it is permitted, permissible, or not prohibited, and the opposite of the word from *haram*.³⁴ Sherin Kunhibava and Shanthly Rachagan define halal as "*halal is that which is permitted, with respect to the restriction exists, and the doing of which Allah (SWT) has allowed.*"³⁵

Halal is something that is permitted or permitted to be consumed, which is released from the prohibition, and is permitted by the *syari'ah* maker to be carried out. While haram is something that is forbidden by *syari'ah* makers with a definite prohibition, where people who violate it will be punished in the hereafter, and there are times when they are punished in the world.³⁶

Before the arrival of Islam, the world was in a state of misguided and confused about what should be lawful and what should be forbidden. The nations of the world at that time allowed the unlawful and forbade the lawful ones to be good. Their isolation can be said to be too extreme, both extreme to the right like Brahmanism ascetics from India and senobitic monasticism from Christianity or

³³ *Ibid.* p.2.

³⁴ Louis Ma'luf, *Al-Munjid fi al-Lugah*, (Beirut-Lebanon: Dar El-Machreq Sarl Publisher, 1986), p.147. see Zulham, *Op. cit.* p.69

³⁵ Sherin Kunhibava & Shanthly Rachagan, *Shariah and Law in Relation to Islamic Banking and Finance*, (Thomson Reuters, Banking & Finance Law Review, 2012), p.7

³⁶ Yusuf Qaradhawi, *Halal dan Haram* (Jakarta: Rabbanu Pers, 2002), p.13

extreme left like the way of life of the Mazdak of Zoroastrian (Persian) religion which has the principle of absolute freedom.³⁷

Halal things always contain *fadhilah* (virtue) and all that is haram contains *kemudharatan* (dangerous).³⁸ Halal can be known through a proposition that justifies it explicitly in the Koran or Sunnah, and it can also be known that there is not a single argument that forbids or prohibits it. This means that everything that is made by God, as long as there is no prohibition from Him is lawful and may be used, even though it is not affirmed in the *Al-Quran and Sunnah*. Thus, everything that is affirmed is halal, or not confirmed, but there are no restrictions, including in halal or *mubah*.³⁹

The word halal in *al-Quran* related to halal food is mentioned 22 times, spread on 17 verses. According to Yusuf Al-Qaradawi 1984, there are eleven generally accepted principles regarding permissibility of foods (halal) and prohibited (haram) foods in Islam⁴⁰:

1. The basic principle is that all things created by God are permitted with a few exceptions that are specifically prohibited;
2. To make lawful and unlawful is the right of God alone. No human being, no matter how pious or powerful, may take this right in his own hands;

³⁷ Al Qaradawi, Yusuf. *The Lawful and The Prohibited in Islam*. Cairo, Egypt. Al-Falah Foundation for Translation, Publication & Distribution. 2001. p.3-5.

³⁸ Kholilah Marjianto, *Pandangan Imam Ghazali Tentang Halal dan Haram*, Surabaya: Tiga Dua. 1994. p.7.

³⁹ See Harun Nasution, dkk. *Ensiklopedia Islam Indonesia*, (Jakarta: Djambatan, 1992), p.289-290. Retrieved from Zulham. *Op cit.* p.70.

⁴⁰ Yusuf al-Qaradawi, *Op. cit.* hal. 6-32.

3. Prohibiting what is permitted and permitting what is prohibited is similar to ascribing partners to God.
4. The basic reasons for the prohibition of things are impurity and harmfulness. A Muslim is not required to know exactly why or how something is unclean or harmful or what God has prohibited. There might be obvious reasons and there might be obscure reasons;
5. What is permitted is sufficient and what is prohibited is the superfluous. God prohibited only things that are unnecessary or dispensable while providing better alternatives;
6. Whatever is conducive to the “prohibited” is in itself prohibited. If something is prohibited, anything leading to it is also prohibited;
7. Falsely representing unlawful as lawful is prohibited. It is unlawful to legalize God’s prohibition by flimsily excuses. To represent lawful as unlawful is also prohibited;
8. Good intentions do not make the unlawful acceptable. Whenever any permissible action of the believer is accompanied by a good intention, his action becomes an act of worship. In the case of haram. It remains haram no matter how good the intention, how honorable the purpose, or how lofty the goal. Islam does not endorse employing a haram means to achieve a praiseworthy end. Indeed, it insist not only that the goal be honorable, but also that the means chosen to attain it be proper. “The end justified the means” and “secure your right even through wrongdoing” are maxims not

acceptable in Islam. Islamic law demands that the right should be secured through just means only;

9. Doubtful things should be avoided. There is a gray area between clearly lawful and clearly unlawful. This is the area of “what is doubtful”. Islam considers it an act of piety for Muslims to avoid doubtful things and for them to stay clear of the unlawful;
10. Unlawful things are prohibited to everyone alike. Islamic laws are universally applicable to all races, creeds, and sexes. There is no favored treatment of any privileged class. Actually, in Islam, there are no privileged classes; hence, the question of preferential treatment does not arise. This principle applies not only among Muslims but between Muslims and non-Muslims as well; and
11. Necessity dictates exceptions. The range of prohibited things in Islam is very narrow, but emphasis on observing the prohibition is very strong. At the same time, Islam is not oblivious to the exigencies of life, to their magnitude, or to human weakness and capacity to face them. It permits the Muslim, under the compulsion of necessity, to eat a prohibited food in quantities sufficient to remove the necessity and thereby survive.

2. *Maslahah Mursalahah*

Maslahah Mursalah is one of the potential ijtihad methods in solving current problems. The legal products produced by this method can cope with the

developments.⁴¹ However, scholars differ in their opinions regarding legality of *maslahah mursalah* as one of Islamic legal method. Apart from that there are a variety of divisions and variations in their application in the field of Islamic law enforcement.⁴²

The term *mashlahah mursalah* is a combination of the words "*maslahah*" and "*mursalah*". The word *maslahah* in terms of etymology is the same as the word benefit or utility or public interest. *Maslahah* means benefits or a work that has implications for expediency.⁴³ According to the language, the word *maslahah* comes from Arabic and has been standardized into Indonesian into the word *maslahah* which means to bring goodness or to bring benefits and/or reject damage.⁴⁴

There are differences in the definition of *maslahah*, but when viewed in terms of content in essence there are fundamental similarities, namely establishing the law in matters that are not mentioned at all in the *al-Qur'an* or *al-Sunnah*, with consideration for the benefit or interests of human life based on the principle of attracting benefits and avoiding damage.⁴⁵



⁴¹ Achmad Mudatsir R. *Kedudukan Anak Luar Kawin Dalam Putusan Mahkamah Konstitusi No. 46-PUUVII-2010 Dalam Perspektif Teori Maslahah Mursalah Abu Ishaq Asy-Syatibi*. (Skripsi, FH UII: 2013). Hal. 29-30.

⁴² Abdul Wahhab Khalaf, *Mashadir al-Tasyri' al-Islami fima la Nashsha Fiihi*, (Kuwait, Dar al-Qalam, 1972). p.95.

⁴³ Achmad Mudatsir R., *Op cit.* p.29.

⁴⁴ Munawir Kholil, *Kembali Kepada Al-qur'an dan As-sunnah*, Semarang: Bulan Bintang, 1955. p.43.

⁴⁵ KN. Sofyan Hasan. *Op, cit.* p.96-7.

In essence the vision of *maslahah* is to maintain the goal of Sharia (*maqashid asy-sharia*). According to Asy-Syatibi, the purpose of Sharia (*maqashid asy-syariah*) which must be maintained has five aspects, namely:⁴⁶

- a. Protection of religion (*hifdh ad-din*);
- b. Protection of soul (*hifdh an-nafs*);
- c. Protection of reason (*hifdh al-'aql*);
- d. Protection of descendant (*hifdh an-nasl*);
- e. Protection of property (*hifdh al-mal*).

Someone who commits an act which is essentially intended to maintain the fifth or one of the above *maqashid sharia*, the act is called *maslahah*. It can also be interpreted that every effort to avoid any form of adherence related to the five principles of *maqashid shari'ah* is also called *maslahah*.⁴⁷

Maslahah is used by several scholars of *ushul fiqh* with different terms. Some scholars use the term *al-munasib al-mursal*. There are also scholars who use the term *istishlah* like Al-Ghazali, and some use *istidlal al-mursal* like Izzudin bin Abdisallam.⁴⁸

The above terms though appear different but have one meaning. Different terms are caused by different perspectives. The use of the term *maslahah* is used because the expert looks at the aspect of whether the subject is based on theorem or not. The term *al-munasib al-mursal* because the scholar *ushul fiqh* who uses this

⁴⁶ Al-Syatibi. *Al-Muwafaqat fi Ushul al-Ahkam*. (Dar Baida: Dar al-Rasyad al-Haditsah, 1987) p.15.

⁴⁷ *Ibid.*

⁴⁸ Achmad Mudatsir R. *Op. cit.* p.30

term sees in terms of its suitability with the aim of Sharia. While the term *istidlal mursal* is used more referring to the process of finding the law (*istinbath*) for a *maslahah* which is not found in a specific argument from the *Al-Quran* or hadith texts.⁴⁹

Regarding the scope of the enactment of *maslahah mursalah* is divided into three parts, namely⁵⁰:

- a. *Al-Maslahah al-Daruriyyah*, (essential interests in life) such as maintaining religion, nurturing the soul, nurturing reason, nurturing offspring, and preserving property.
- b. *Al-Maslahah Al-hajjiyah*, (Essential interests are below the degree of *al-maslahah daruriyyah*), but are treated in human life so as not to experience difficulties and narrowness which if not fulfilled will result in difficulties in life, only it will result in narrowness and difficulty for him.
- c. *Al-Maslahah Al-Tahsiniyah*, (Complementary interests) which if not fulfilled will not result in narrowness in his life, because he does not really need it, only as a complement or decoration of his life.

Ash-Syatibi built the theory of *maslahah*, which moved from the concept of *al-munasib*, namely the presence or absence of correspondence between the *maslahah* which will be the basis for finding the law with *maqashid sharia* which has no text and no *'illat* (legal cause) to use the *qiyas method*. Requirements for the

⁴⁹ Said Ramadan Al-Buthi. *Dlawabtt al-Mashlahah fi al-Syariah al-Ilamiyyah*, (Beirut, Muassasah al-Risalah, 2001). p.287.

⁵⁰ KN. Sofyan Hasan. *Op. cit.* p.98.

absence of *'illat* (legal cause) are absolutely needed in the use of *maslahah* as a valid method of a legal reasoning, because if there is *'illat* (legal cause), the method for finding the law is not using *maslahah mursalah*, but using the *qiyas* method.⁵¹

To determine whether something contains *maslahah* or not, in-depth and various aspects of research are needed, and in-depth consideration of its benefits and desires, with criteria that are in accordance with the objectives of the *shari'ah*. Abdul Wahhab Kholaf in his book *ilmu al-Ushul al-fiqh* said that the Ulama which uses *maslahah mursalah* are very careful, so it did not become a door for *shari'ah* law formation according to his own desires.⁵²

Therefore, *maslahah* can be used as Islamic law legislation when fulfilling the conditions which include:⁵³

- a. In the form of real *maslahah* (in *haqiqi*) it is not *maslahah* that is presumptive, but which is based on research, prudence and in-depth discussion and really benefits and rejects damage.
- b. In the form of general *maslahah*, not for individual interests, but for many people.
- c. Not contrary to the law set by *Nash* (*Al-Qur'an* and *Al-hadith*) and *Ijma' Ulama'*

⁵¹ Asy-Syatibi, *Op. cit.* hal.352-354.

⁵² Lihat KN. Sofyan Hasan. *Op. cit.* hal.99.

⁵³ *Ibid.*

B. General Overview of WTO/GATT

1. History of GATT/WTO

The WTO was created in 1995 as one of the outcomes of the Uruguay Round of multilateral trade talks. The Uruguay Round, which concluded in 1994 after eight years of complex and sometimes contentious negotiations, was a landmark in the history of the trading system. Agriculture and textiles and clothing became subject to stronger multilateral disciplines, and the trading system was extended to include intellectual property and trade in services.⁵⁴

The WTO establishes the rules of the trade policy game for its members, which increasingly include developing countries. A good understanding of how the WTO works and what it does is a necessary condition for maximizing the benefits of membership.⁵⁵

When it was established in 1995, the negotiated trade agreements were the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services, the Trade-Related Aspects of Intellectual Property (TRIPS) agreement. The origins of the GATT were in the abortive negotiations to create an International Trade Organization (ITO) following World War II. Negotiations on the charter of such an organization were concluded successfully in Havana in 1948, but the talks did not lead to the establishment of the ITO because the U.S. Congress was expected to refuse to ratify the agreement. Meanwhile the GATT was negotiated in

⁵⁴ Bernard Hoekman et al., 2002, *Development, Trade, and the WTO, A Handbook*. Washington D.C, The World Bank. p.39.

⁵⁵ *Ibid.*

1947 by 23 countries before the ITO negotiations were concluded.⁵⁶ As the ITO never came into being, the GATT was the only concrete result of the negotiations.⁵⁷

With the GATT came into being, GATT came to be the trade agreement which gives the rule of game on trade in goods.⁵⁸ Agreed GATT was based on the consideration what the international trade relationship should be carried out with the objectives to lift up the life standard, the access to job market, and increase the ability to be paid, utility of resources, and diminishing the discrimination in international trade.⁵⁹ In the next following period the work to complete the agreements had been carried out through the so-called “rounds”.⁶⁰

Other objective of GATT creation were technical objectives and specific objectives.⁶¹ Technical objectives the omission of barrier to trade, multilateral instead of bilateral, no discrimination, context for stabilization in industry and agriculture, and the specific objectives for the developing countries such as the development of their economic interest, boosting the export sector, etc.

There are 8 Rounds that had been brought, which are:

- a. GATT 1947 Geneva;

⁵⁶ The founding parties to the GATT were Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxemburg, the Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom, and the United States. See Bernard Hoekman *Op. cit.* p.41.

⁵⁷ *Ibid.*

⁵⁸ H.S. Kartadjoemena, *Substansi Perjanjian GATT/WTO dan Mekanisme Penyelesaian Sengketa : Sistem, Kelembagaan, Prosedur, Implementasi, dan Kepentingan Negara Berkembang.* UI Press, Jakarta, 2007. P.20.

⁵⁹ Hata, *Perdagangan Internasional dalam Sistem GATT & WTO: Aspek-Aspek Hukum dan Non Hukum*, Refika Aditama, Bandung, 2006, p.1-2.

⁶⁰ *Ibid.*

⁶¹ Rosyidah Rakhmawati, *Hukum Ekonomi Internasional Dalam Era Global*, Malang. Banyumedia Publishing, 2006, p.138.

- b. Annecy Round 1949;
- c. Torquay Round 1950
- d. Geneva Round 1986
- e. Dillon round 1960-1961;
- f. Kennedy Round 1962-1967; and
- g. Tokyo Round 1973-1979.

In playing the role the GATT has two primary function.⁶² *First*, function as the rules of the road for trade. Meaning that, GATT regulates trade transactions which is conducted by GATT Members. In this sense is GATT with its 38 Articles. *Second*, as a rule used in the negotiation.

2. The Structure of WTO.

In a nutshell divided into 3 primary administrative boards, as stipulated in the WTO Agreement: Ministerial Conference, General Council, and the Secretariat.⁶³ Ministerial Conference consist of Dispute Settlement Body and trade Policy Review Body, meanwhile General Council consist of Council for Trade in Goods, Council for Trade in Services, and Council for Trade in Trade-Related Aspects of Intellectual Property Rights.⁶⁴

While The Secretariat supervises administration under General Director of WTO which is appointed by Ministerial Conference. In addition to assisting

⁶² Huala Adolf, *Hukum Perdagangan Internasional*. PT Raja Grafindo Persada, Jakarta. 2013., p.2.

⁶³ Hwan Kim, "The World Trade Organization Dispute Settlement System: *China – Measures Affecting The Protection and Enforcement of Intellectual Property Rights*". *New York International Law Revire*. Vol. 23, 2010, p.2.

⁶⁴ Peter Van den Bossche et al., *Pengantar Hukum WTO (World Trade Organization)*. Yayasan Obor Indonesia, Jakarta, 2010. p.93.

technical helps and professional to Members, the main duty of Secretariat is to give advice to Countries intended to joining WTO Members and providing legal assistance to developing countries in the dispute settlement.⁶⁵

3. Principles

There are basic principles established by WTO to be the general rule of thumb in conducting the international trade. The WTO establishes a framework for trade policies; it does not define or specify outcomes. That is, it is concerned with setting the rules of the trade policy game, not with the results of the game. Five principles are part of particular importance in understanding both the pre- 1994 GATT and the WTO: nondiscrimination, reciprocity, enforceable commitments, transparency, and safety values.⁶⁶

a. Nondiscrimination.

In nondiscrimination principles, there are two basic principles, which are MFN (most favored nation) and national treatment. *First*, Most Favored Nation, this principle means that Members shall not differentiate a product by treating differently or not treating less favorably than similar product (like product) in any other country. Moreover, this principle covers broader scope by having in mind that Members shall not differentiate one member from the other or giving favorable treatment regarding tariffs or trade related matters.⁶⁷ *Second*, national treatment, this principle prohibits different

⁶⁵ Hwan Kim, *Op. cit.* p.2.

⁶⁶ Bernard Hoekman *Op. cit.* p.42.

⁶⁷ Munir Fuady, *Hukum Dagang Internasional, Aspek Hukum Dari WTO* (Bandung: PT. Citra Aditya Bakti, 2004) p.69.

treatment between imported products and domestic products. This also means that when foreign products have complied with all border measures, the product shall not be given treatment less favorably than the like products in the domestic market.⁶⁸

- b. Reciprocity. This principle is a fundamental element of a negotiating process. It reflects both a desire to limit the scope for free-riding that may arise because of the MFN rule and the desire to obtain better access to the foreign market.⁶⁹
- c. Binding Tariff or Enforceable commitments. This principle means a promise by one country to not raise the tariff in the next future. Binding is considered favorable for the international trade which gives export and import potential in regards of tariff certainty.⁷⁰
- d. Transparency. Enforcement of commitments requires access to information on trade regimes that are maintained by members. Transparency is basic pillar of WTO, and it is legal obligation, embedded in Article X of the GATT and Article III of the GATS. Members are required to publish their trade regulations, to let doing review for the administrative decisions affecting trade, to respond to request information by other Members, and to notify changes in trade policies to WTO.⁷¹

⁶⁸ Syahmin, *Hukum Dagang Internasional*. (Bandung: PT. Raja Grafindo Persada, 2006). P.47.

⁶⁹ Bernard Hoekman *Op. cit.* p.43.

⁷⁰ Mohammad Sood, *Hukum Perdagangan Internasional* (Jakarta Rajawali Pers, 2011), p.49.

⁷¹ Bernard Hoekman *Op. cit.* p.44.

- e. Safety values. A final principle embodied in the WTO means that Members should be able to restrict trade in specific circumstances. There three types: (a) articles allowing for the use of trade measures to attain noneconomic objectives, (b) articles aimed at ensuring “fair competition”, and (c) provisions permitting intervention in trade for economic reasons.⁷²

Members in conducting their international trade activities have to conform with these principles laid down above. These principles were established to make sure that international trade activities are conducted in a conducive manner that elevate the trade activities in favor of all Members.

4. Dispute settlement in WTO

Dispute Settlement Body, hereinafter called DSB, has shown its contribution and significant role in settling the disputes between Members during the 15 years of ruling. This achievement has succeeded other international dispute settlement bodies such as International Court of Justice or The International Tribunal for the Law of the Sea.⁷³

The DSB dispute settlement mechanism has been globally known for its very active and effective in during the dispute settlement. DSB WTO also known for its speedy trial, which means it consumes less time compare to ICJ, ECJ, and NAFTA, the average timeframe for a panel to settle a dispute is 10 months.⁷⁴

⁷² *Ibid.*

⁷³ Ade Maman Suherman, *Hukum Perdagangan Internasional, Lembaga Penyelesaian Sengketa WTO dan Negara Berkembang*. Jakarta, Sinar Grafika, 2014. p.53.

⁷⁴ *Ibid.* p.54.

The system of dispute settlement through DSB is regulated under Understanding on Rules and Procedures Governing the Settlement of Dispute which is referred as DSU. The substance of DSU is interpretation and implementation from the Article III GATT 1947 and the party in charge to carry this is Dispute Settlement Body (DSB)⁷⁵

DSB has authority to establish panel, adopt panel and appellate body (AB) report, conducting the supervision in regards of the implementation of recommendation. With the existence of DSB, thus, all Members is obliged to settle a trade dispute through this available mechanism, and all Members also obliged to take a unilateral action which will create problems bilaterally or multilaterally.⁷⁶

Despite the consensus rule, according to the Article III DSU⁷⁷, the primary task of DSB are elaborated bellow:

1. Clarify the provisions in WTO Agreement and interpret according to the international customary law.
2. The result of dispute settlement shall not add or omit the rights and obligations regulated by WTO
3. Ensure the positive solution and accepted by all parties and consistent with WTO Agreement
4. Ensure that the withdrawal of violating State is conducted. An action of retaliation is possible however shall be carried out as last resort settlement.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Article III of Dispute Settlement Understanding

Meanwhile there are steps of flow regarding the dispute settlement. These processes are as follow⁷⁸:

1. Consultation. This is the first step in dispute settlement procedure. Consultation is a request by Members which is accused breaching the WTO rules within 10 days after the date of its receipt shall response. Then followed by 30 days of implementation since request for consultation, and should be settled by 60 days after the request for consultation, otherwise a panel should be established.⁷⁹
2. Panel. After fail the consultation process. The next mechanism is establishing a panel by the complaining state during 90 days since request for consultation. Panel consists of 3 (three) experts either government of non-government as regulated in Article 8 (1).⁸⁰ The Panel has the duty to conduct objective assessment and effort to propose mutually satisfactory solution in a final report.
3. Appellate Body (AB). AB consists of experts in international trade field, which is not affiliated with particular government. Appellate review consists of 7 representatives from 7 region: U.S, South America, Asia, North Africa, and South Africa, Europe. Each case is handled by 3 appellate review.

⁷⁸ Ade Maman Suherman, *Op cit.* p.57-66.

⁷⁹ Article IV Consultations DSU

⁸⁰ Article 8 (1) DSU

4. Adoption. Panel recommendation of AB recommendation shall be adopted. Meaning that conflicting Members shall comply with the WTO Agreements and also how conflicting parties implement its recommendation.

5. Implementation. This final step also covers the surveillance of implementation. The surveillance of implementation from Panel of AB recommendation. This to ensure that report or recommendation is conducted by conflicting parties within reasonable period of time however no more than 15 months.⁸¹

5. Technical Barrier to Trade

Progress in reducing tariffs that have been carried out by the GATT / WTO has resulted in industry and government seeking other ways to protect or protect their domestic industries. Therefore, the protection often results in obstacles in international trade. These obstacles are referred to as non-tariff barriers.⁸² Almost all countries have technical regulations on trade goods related to considerations such as security, health, human, and animals, environmental protection and other reasons. These regulations have the potential as non-tariff actions which pose obstacles in international trade. This is due to the application of the technical regulations with the intention of protecting domestic production.⁸³

The TBT Agreement as Annex IA at the Marrakesh Agreement Establishing the World Trade Organization has the role of reducing technical trade barriers

⁸¹ Article 21 (5) & 21 (4) DSU.

⁸² Amesta Yisca Putri, 2010. Tinjauan Yuridis-Metodologis Pengaturan Technical Barrier to Trade dalam WTO dan Good Regulatory Practice (Bab III). FH UII. p.35.

⁸³ *Ibid*

related to technical regulations, standards, and conformity assessment procedures relating to: *First*, products both industrial and agricultural, and *second*, processes related to this and the method of production. Below are the trade barriers covered in TBT Agreement⁸⁴:

- a. Technical Regulation. Documents that regulate the nature of the product or related production processes and methods, including applicable administrative rules where compliance is mandatory. Technical regulations can also include or relate specifically to the requirements for terminology, symbols, packing, marking, or labeling that are applied to a product, process or method of production. An example of this is for example a rule that determines battery products with a capacity of nine volts or more must be rechargeable, or there are rules that determine that wine products should be sold in green bottles.
- b. Standard. Documents issued by an official body, which are for general and repetitive use, provide rules, guidelines, or characteristics for a product or related production processes and methods whose fulfillment is not mandatory (voluntary). Standards can also include or relate specifically to the terms of terminology, symbols of packing, marking or labeling that are applied to a product, process or method of production. Unlike technical regulation, standard is voluntary, which means that compliance with it is not mandatory. An example of a voluntary standard is the standard issued by CENELEC (the European for

⁸⁴ TBT Agreement Article, Annex I.

Electronic Standardization), which is the standard for mobile phones or portable computers.

- c. Conformity Assessment. procedures that are used directly or indirectly to determine that the relevant requirements in technical regulations or standards have been fulfilled. An example of this provision is the procedure for sampling, testing and inspection of goods.

TBT Agreement consist of several prominent provisions, which are Article 2.1 TBT⁸⁵:

"Members will be accorded a no less favorite treatment that is accorded to like products of national origin and to like products originating in any other country."

However, the reading in Article 2.1 is not appropriate to describe the range of non-discrimination principles or obligations. Hence, in Article 2.2 of the TBT⁸⁶, the context of this Article makes it clear that technical regulations cannot

"... prepared, adopted or not necessary obstacles to international trade. For this purpose, the trade-restrictive policy is more than necessary to fulfill a legitimate objective, taking account of the risks of non-fulfillment would create."

Consequently, all technical regulations must fulfill or comply with the necessity requirement. As a WTO member who wishes to implement technical regulations must adopt international standards or set them unilaterally if they are urgent and can legitimize their fulfillment, the principle of non-discrimination

⁸⁵ Article 2 (1) TBT Agreement

⁸⁶ Article 2 (2) TBT Agreement.

includes both. However, understanding international standards is often a problem.

As defined by international standards given in the TBT Agreement, Article 2.4⁸⁷:

"Where technical regulations are required and relevant standards exist or are completion, Members shall use them, or the relevant parts of them, as a basis for their technical regulations, except when international standards or relevant parts would be ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of the fundamental climatic or geographical factors or fundamental technological problems".

To avoid confusion in understanding this norm, members must always distinguish between international standards with domestic or domestic standards. Standard terminology is defined in Annex 1 (explanatory note) however, standard international terminology is not defined, except by reference as follows⁸⁸:

"Standards are prepared by the international standardization of community are based on consensus. This agreement covers also documents that are not based on consensus. "

Unlike the SPS agreement, the TBT agreement does not mention standard institutions or organizations, but organizations that are recognized and recommended by the WTO include ISO (International Organization for Standardization), IEC (International Electrotechnical Commission), CAC (Codex Alimentarius Commission), and ITU (International Telecommunication Union).

Then Article 2.5 TBT makes it clear that whenever a standard international standard meets the basis of the implementation of technical regulations, there will be an assumption that the application of international standards has respected the necessity requirement. Members who apply technical regulations based on

⁸⁷ Article 2 (4) TBT Agreement

⁸⁸ Standard Exploratory Note, Annex I TBT Agreement.

technical regulations that have significant effects on other members must provide an explanation in the form of justification:

"A Member preparing, adopting or applying a technical regulation which may have an effect on trade of other members shall, upon the request of another Member, explain the justification for technical regulations in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted from the legitimate objectives explicitly stated in paragraph 2, and is in accordance with the relevant international standards, it should be considered presumably not to create an unnecessary obstacle to international trade."

Regarding standards, this section will discuss legal requirements applied to domestic standards. Readers are warned that domestic standards play a role similar to technical regulations, however, their fulfillment is not an obligation, as explained above.

The principle of national treatment, in Article 4.1, makes it clear that all WTO members are bound by a discipline based on the Code of Good Practice which can be found in Annex 3 of the TBT agreement:

"Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for Adoption and Application of Standards in the Code of Good Practice".

They should take reasonable measures to ensure that local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies which they or one body within their territories are members, accept and comply with this Code of Good Practice. In addition, standardization of bodies to act in a manner that is inconsistent with the Code of Good Practice. The obligations of the Code of Good Practice will apply to the Code of Good Practice.

Regarding conformity assessment, foreign regulatory intervention will be accepted to the extent that the intervention meets the specifications of domestic regulations (both technical regulations and standards). In other words, through this process, a product is assessed based on specific requirements.

Different and special treatment, in Article 12.3 TBT explicitly requests that WTO members must pay attention to the interests or willingness of developing countries when they apply technical or standard regulations. However, the obligations imposed are very essential for natural procedures; assuming that caring WTO members can demonstrate that its implementation can effectively consider the interests of the export of developing countries during the preparation period, this can be said to have fulfilled the obligations in Article 21.3 of the TBT agreement. Then Article 14.2 regulates related to the wishes of the parties when presenting experts. The panel, at the request of one party, can listen to the opinions of an expert / group of experts made for the agenda. Annex 2 of the TBT agreement sets out in more detail the procedures for using experts.

6. General Exception

WTO Law provides rule to bridge the trade liberalization with others societal values. This provision is available in basic principles of WTO in the form of exception. These exceptions allow Members, in certain circumstances, to adopt a measure which can protect urgent matters, despite the measure contradicts with substantive discipline under GATT 1944.⁸⁹

⁸⁹ Peter van Den Bossche, et al. *Op. cit.* p.53.

Free trade and public morality coexist in a precarious balance. On the one hand, the international trading system was founded on the principle of nondiscrimination. Countries should not disadvantage those that fail to share their geopolitical or religious views. On the other hand, the system was also founded on the notion that countries should not be forced to liberalize trade when doing so would threaten their public morality.⁹⁰

The question is what does it mean by “necessary to protect public morals”? what scope is within this clause? For over fifty years, this question went unanswered, and in 2005, finally the WTO, for the first time, address this concept. In the case generally referred to as *US—Gambling*, the WTO recognized the right of the United States to ban internet gambling services on the grounds that such services violated American public morals.⁹¹

The public moral exception to free trade was arguably important enough that the original drafters of the world trade “constitution” listed it as the first of several exceptions to the principles of providing unfettered access to trade privileges.⁹² By far the most attractive possibilities to activist are expansive approaches that emphasizes the unilateral right of countries to delineate their own morals and/or the importance of transnational norms.

Also, the bifurcated approach, in which countries are given greater leeway to enact restrictions that protect their own citizens, but most concurrently meet more

⁹⁰ Mark Wu, *Op. cit.* p.215.

⁹¹ Appellate Body Report, *United States—Measures Affecting the Cross -Border Supply of gambling and Betting Services*, WT/DS285/Ab/R *April 7, 2005).

⁹² See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000)

stringent requirements if they seek to impose restrictions that affect citizens in other WTO members. This approach recognizes the right of countries to shape their own norms rather than have them imposed through trade leverage, but at the same time demands that those that make normative commitments actually follow them.⁹³

This elaboration will only be focusing on general exception provisions according to Article XX (a), (b), and (d) GATT. Article XX of GATT provides that “nothing in GATT shall preclude Member States from taking measures which are (a) necessary to protect public moral, (b) necessary to protect human, animal, and plant life and health, and (d) necessary to secure compliance with laws and regulations.”⁹⁴ However, there are tests that has to be taken by States to rely on Article XX to prove that no alternative measures that is less trade restrictive can achieve the objectives. The WTO jurisprudence shows that relying on Article XX is hard going.⁹⁵

According to Mark Wu, the concept of protection of public moral was first introduced by US as a general exception to protect existing domestic restrictions on certain goods.⁹⁶ The first case which emerged the discussion of public morals was *US—Gambling* case in 2003. Since that States Members of WTO have started to use this exception to protect public moral to justify themselves from the obligation to comply with WTO rules.

⁹³ Mark Wu, *Op. cit.* p.249.

⁹⁴ Article XX GATT (a), (b), and (d).

⁹⁵ Haniff Ahamat & Nasarudin Abdul Rahman, *Op. cit.* p. 4.

⁹⁶ Mark Wu, *Op. cit.* p. 215, 219. (2008)