

## CHAPTER III

### ANALYSIS AND DISCUSSION

#### A. The Readiness of Halal Act and Its Challenges

This sub chapter will discuss and examine the problems and challenges that Halal Act faces when the implementation of Halal Act will be full in force on 19 October 2019. At this sub chapter, it will discuss the readiness of Halal Act according to the norms of Halal Act including its derivative regulation and the challenges faced by Halal Act due to several problematic provisions in Halal Act.

##### 1. The readiness of Halal Act

The next discussion is in regards with the challenge and readiness of Halal Act when it is fully implemented in October 2019. Halal Act was passed on 17 October 2014 and according to Article 67 (1) “Obligation of halal certification for product and traded in the territory of Indonesia as intended in Article 4 come into effect 5 (five) years from the legislation of this law.”<sup>97</sup> Which means that in 17 October 2019 the Halal Act will be fully come into effect. The question remains, is Halal Act ready? Does not Halal Act face many challenges when it is fully implemented? Those are the concerns of this sub chapter.

The first big problem faced by Halal Act is the lack of derivative regulation supporting the implementation of halal product assurance. The Government Regulation of Halal Act finally legislated on 3 May 2019, being late for almost 3 years from its mandate. According to Article 65 Halal Act “Regulation for the

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<sup>97</sup> Article 67 (1) Halal Act.

implementation of this Law is stipulated no later than 2 (two) years commencing from the legislation of this Law.”<sup>98</sup> This means that Government Regulation should be passed in 2016, in fact, being late for almost 3 years, on May 2019 it finally legislated namely Government Regulation of Republic of Indonesia No. 31 of 2019 on Regulation of Implementation of Law No 33 of 2014 on Halal Product Assurance Act.<sup>99</sup>

What does this lateness mean for the readiness of Halal Act? It means that the fully implementation of halal assurance system is not well prepared since the implementing regulation was late, many parties related will not be ready, only 5 months left to prepare. In case this implementing regulation came just in time, many parties involved in the process of halal assurance have more time to do the preparation, doing due diligence and compliance according to Halal Act and its implementing regulation.

The substance of this regulation of implementation also faces many challenges by many parties. For example, provisions regarding medicine which if not consumed will result fatal for the patient, should it be excluded or not,<sup>100</sup> or the protests posted by Indonesia Ministry of Industry, which argued that the provisions under Halal Act will obstruct the business sector and potentially disrupt foreign investment.<sup>101</sup>

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<sup>98</sup> Article 65 Halal Act

<sup>99</sup> <https://republika.co.id/berita/ekonomi/syariah-ekonomi/prjutz368/pemerintah-sahkan-pp-jaminan-produk-halal>. Accessed on 15 June 2019.

<sup>100</sup> <https://kemenag.go.id/berita/read/506787/pemerintah-bahas-rpp-jaminan-produk-halal>. Accessed on 20 June 2019.

<sup>101</sup> <http://www.kemenperin.go.id/artikel/11012/UU-Jaminan-Produk-Halal-Harus-Direvisi>. Accessed on 20 June 2019.

The readiness of Halal Act to be implemented effectively also raise concerns in another derivative-supportive regulation which is Ministerial Regulation. Minister of Religious Affair stated that there are 4 (four) ministerial regulations that are waiting to be enacted which will support the halal assurance system.<sup>102</sup> Yet this shows that the government is not ready to fully implement halal product assurance system. Another challenge faced by Halal Act is the lack of Halal Examination Agency (LPH)<sup>103</sup> the lack of Halal Examination Agency will hamper the effectivity in implementing halal product assurance system.

## 2. Challenges on elements and controversial provisions of Indonesia Halal Act

This sub chapter will examine and discuss the problems Halal Act possess regarding the elements of its provisions. This sub chapter will be divided into two discussion. *First*, is regarding the nature of its provisions that is considered burdensome and *second*, the controversy with Indonesia Compliance with WTO Law as Members.

### a. Burdensome provisions

A number of provisions in the Halal Act suggest onerous labelling requirements and certification processes which is posing potential barriers for the broader business landscape in Indonesia.<sup>104</sup> Number of provisions have the potential to disrupt international trade and create uncertainty for business. Some of the wording

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<sup>102</sup> <https://news.okezone.com/read/2019/05/17/337/2056773/jokowi-terbitkan-pp-jaminan-produk-halal-sertifikasi-akan-diterapkan-bertahap>. Accessed on 20 June 2019.

<sup>103</sup> <https://www.republika.co.id/berita/dunia-islam/islam-nusantara/18/09/14/pf14tm366-jumlah-lembaga-pemeriksa-halal-dinilai-masih-kurang>. Accessed on 19 June 2019

<sup>104</sup> Lementa et al., *Op cit.* p.5.

of the provisions is problematic in their current form as they are unclear as to the scope and reach of the Halal Act.<sup>105</sup>

*First*, is the wide scope of products coverage. According to the Article 1 (1) Halal Act, it states that “products are goods and/or services that are related to food, beverage, drug, cosmetic, chemical product, biological product, genetically engineered product, as well as consumer goods that are worn, used, or utilized by the public.”<sup>106</sup>

This raises concern as to whether the BPJPH has to certify all traded goods, not only food, beverages and drugs, as it was done by LPPOM MUI (foods, drugs, and beverages). Services also included in the coverage of products under Halal Act, this also raises question on a service can be certified halal. Several protests also have been claimed by relevant parties (Ministry of Health) arguing that there are drugs that composed from non-halal materials, is there any exemption to this kind of drugs is remain unclear.

*Second*, the separation of halal and non-halal. According to Article 24 (b) Halal Act “Business operators that submit application of Halal Certificate must separate the location, place, and equipment for processing, storing, packaging, distributing, selling, and presenting between halal and non-halal products.”<sup>107</sup> And also Article 25 (c) stated that “Business operators that obtain halal certificate must separate the

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<sup>105</sup> *Ibid.*

<sup>106</sup> Article 1 (1) Halal Act.

<sup>107</sup> Article 24 (b) Halal Act

location, place and equipment for processing, strong, packaging, distributing, selling, and presenting between halal and non-halal products.”<sup>108</sup>

The major challenge of this separation is associated with high cost. This will lead to the increased price of the end products, particularly for traders from non-Muslim countries where the kind of infrastructure required may not be available.<sup>109</sup> For the small medium enterprises, this provision is even suffocating them and will lead them to bankruptcy.

*b. Potential inconsistent provisions under WTO Law*

Halal Act contains provisions that can be taken to Dispute Settlement Body in WTO. EU, Brunei Darussalam, ASEAN expressed such concern in a note. It stated that number of provisions in the Halal Act (such as the mandatory nature of Halal labelling, the wide range of products covered, labels for Halal and haram products) demonstrate the far-reaching and draconian nature of law and the potentially high burden it will create on business.<sup>110</sup> The note also pointed out that the potential complications, prolonged process, as well as the logistic requirements would add substantially to the costs of producing and exporting products to Indonesia and imply unnecessary trade barriers with distortive effects on imports.

The provision which possibly be the central of issue is the distinction between imported products and domestic products. Imported products which already give halal certificate be registered first on BPJPH before circulated in domestic market.

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<sup>108</sup> Article 25 (b) Halal Act

<sup>109</sup> See Global Islamic Finance Report 2013, at 173.

<sup>110</sup> See the notes by European Union Delegation to Indonesia, Brunei Darussalam and ASEAN, *Indonesia: Law on Halal Product Guarantee*, Ref. Ares (2014)3356597.

Although the imported products have been labelled and/or certified ‘halal’ from origin countries, if the halal certification body from the importing country does not have recognition agreement, the products will not be allowed to enter the domestic market unless the foreign enterprise apply the halal certification in BPJPH. The problem does not stop there, even the halal certification body from importing country has already entered a recognition agreement, the imported products has to be registered prior to the circulation in Indonesia market.

Meanwhile, Limenta et al., highlighted 7 points on Halal Act provisions which raises controversy. Those articles are summarized below:<sup>111</sup>

No.	Elements	Article
1.	Mandatory Nature	Article 4, 47 (1)
2.	Too wide the scope of the products	Article 1 (1)
3.	Overlapping organization to oversight Halal products	Article 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16
4.	Halal Logistic	Article 24, 25
5.	Haram Labelling	Article 26
6.	Too Loong Procedures	Article 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45
7.	Halal labels not halal stickers	Article 38, 39

## **B. Halal Act as non-tariff barrier, the application of TBT Agreement**

### **Article 2.1.**

This sub chapter will focus on assessing whether Indonesian Halal certification and labelling (Halal Act) falls and consistent according to the TBT Agreement. Indonesia as a member of WTO can claim that it has a sovereign to impose halal

<sup>111</sup> Limenta et al., *Op cit.* p.1-14.

measures. However, Halal Act contains halal measures which can raise issues in terms of Indonesia compliance with regards to GATT/WTO rules. As has been addressed before that halal measures in Halal Act requires mandatory halal label/certification on the product marketed in Indonesia, meaning that non-compliance will prevent their products to enter Indonesian market. This contradicts with WTO long-set objectives to remove trade barrier. Halal measures can be constituted to be a trade barrier.

The WTO concerns arising from the taking of halal measures have been documented in many studies.<sup>112</sup> These concerns range from claims that the halal measures are restrictions that violate general GATT provisions such as Article III on national treatment, and claims that the measures taken by States are inconsistent with specific provisions on import licensing, technical barrier to trade (TBT), and sanitary and phytosanitary measures (SPS).<sup>113</sup>

Debates are among scholars on status of halal measures, whether it falls under TBT or SPS. Many countries that use halal regulations and measures justified their regulations and measures because they protect humans from risks in the food, making them related to SPS<sup>114</sup>. However, the food safety claims in halal should not

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<sup>112</sup> Haniff Ahamat & Nasarudin Abdul Rahman, "Halal Food, Market Access and Exception to WTO Law: New Aspects Learned from *Indonesia-Chicken Products*" *Asian Journal of WTO & International Health Law & Policy*. September, 2018. p.4.

<sup>113</sup> *Ibid.*

<sup>114</sup> Malaysian Protocol for the Halal Meat and Poultry Productions which prescribes practical guidelines for abattoir/slaughterhouse on slaughtering and stunning method was notified by Malaysia as an SPS on August 1, 2011. See Ministries Agencies Measures, MALAY. NAT'L TRADE REPOSITORY (2015), [http://mytraderepository.customs.gov.my/ms/ntm/tbtt/Documents/AFTER\\_Ministries-Agencies\\_Measures-Rev.xls](http://mytraderepository.customs.gov.my/ms/ntm/tbtt/Documents/AFTER_Ministries-Agencies_Measures-Rev.xls). Accessed 29 June 2019.



lead to the conclusion that consumption of non-halal food can give rise to risks to human health and life as this is not supported by concrete scientific evidence.

Thus, there objectives can be blurred with TBT being the better option because the drive for halal certifications is prompted by the need to prevent passing off, as well as deceptive practices which are one of the objectives of TBT. The finding by the WTO Panel that halal measures taken by Indonesia are not part of SPS may further add to the conundrum surrounding the TBT or SPS status of halal measures. The variety of halal measures may mean that some of them fall under the category of TBT and some others fall under the SPS category. This sub chapter will focus only on TBT.

The TBT Agreement is designed to address three major technical barriers to trade, namely mandatory ‘technical regulations’, voluntary ‘standards’, and ‘conformity assessment procedures’. This thesis will only focus on the TBT Agreement Article 2.1 and will not discuss the application of Article 2.2 and/or 2.5 or etc. This is due to the urgency merely to find out which measure that Halal Act falls upon and find out which article in GATT it deemed inconsistent so that later on this paper will justify using the public moral exception under Article XX(a) GATT 1994.

1. No less favorable treatment (Article 2.1)

- a. *The Halal certification/labelling constitutes a technical regulation*

First thing to do is to assess whether the regulatory provision within Indonesia Halal Act falls under the meaning of technical regulations so that halal measures can be classified under TBT Agreement. Defined in Annex 1.1. of the TBT



Agreement, technical regulation is “Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.”<sup>115</sup>

According to the Appellate Body, a document must meet three criteria to fall within the definition of ‘technical regulation’ in the TBT<sup>116</sup>:

- 1) The document must apply to an identifiable product or group or group of products;
- 2) The document must lay down one or more characteristics of the product;
- 3) Compliance with the product characteristics must be mandatory.

*First*, Halal Act covers wide variety of products, it can be seen from Article 1.1 Halal Act. However, the distinction between Halal and non-halal products can be determined as an identifiable group of products. The wording of the TBT is wide enough also to permit implied coverage of a product or product group, for example ‘through the “characteristic” that is the subject of the regulation’.<sup>117</sup> Thus, halal measures mentioned all products containing non-halal material are haram<sup>118</sup>, this measure addressed all relevant products, requiring the absence of non-halal materials or ingredients.

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<sup>115</sup> Terms and Their Definition for the Purpose of This Agreement. Annex 1.1 TBT Agreement

<sup>116</sup> *EC – Asbestos* (Appellate Body); *EC – Sardines* (Appellate Body). See Mitsuo Matsushita. 2005. *The World Trade Organization; Law, Practice, and Police*, 2<sup>nd</sup> Edition, The Oxford International Law Library. p.438.

<sup>117</sup> *EC – Asbestos* (Appellate Body), p.70.

<sup>118</sup> Article 17, 18, 20 Halal Act.

*Second*, the document must lay down one or more characteristics of the product. The TBT's definition of a 'technical regulation' in Annex 1.1 clearly extends the notion of characteristics beyond the product and its physical and chemical attributes to normatively prescribed attributes by including 'terminology, symbols, packaging, marking, or labelling requirements'.<sup>119</sup> Halal Act has provisions which prescribes product characteristics, which are technical requirement regarding halal labelling.<sup>120</sup>

*Third*, compliance with the product characteristic must be mandatory. The mandatory nature of Halal Act suggests a technical regulation is in place by itself or *per se*. The sanctions provided for non-compliance, coupled with the mandatory nature of the labelling requirements and the distinct characterization of the relevant products all point to the classification of the mandatory labelling provisions of the Halal Act as a technical regulation.<sup>121</sup>

As all three criteria have been fulfilled by Halal Act as technical regulation, therefore, Halal Act falls under the ambit of TBT Agreement. The next section will examine the potential inconsistencies of Halal Act provisions under TBT Agreement that raises concerns from other WTO Members.

*b. Like-Product*

WTO legal system always stresses that trade discrimination should not exist. In its Article 2.1, the TBT contains a specific non-discrimination obligation, which

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<sup>119</sup> Mitsuo Matsushita, et al., *Op. cit.* p.439.

<sup>120</sup> Article 37-41 Halal Act

<sup>121</sup> Limenta et al., *Op. cit.* p.14-15.

encompasses both national treatment and Most Favored Nations obligation as stated “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country.”<sup>122</sup> Thus, states may not use their (mandatory) technical regulations in order to discriminate between like products from different WTO Members (MFN principle) and with regard to domestically produced ‘like products’ (National Treatment principle).<sup>123</sup>

According to the element of Article 2.1 the likeness of the product should be determined first. The AB in *US-Clove Cigarettes* stated that the determination of likeness under Article 2.1 of the TBT Agreement, as well as under Article III:4 of the GATT 1994, is a determination about the nature and extent of a competitive relationship between and among the product at issue,<sup>124</sup> based on an analysis of the traditional “likeness” criteria of physical characteristics, end use, consumer tastes and habits, and tariff classification.<sup>125</sup>

Therefore, the modified border tax adjustment test product’s physical characteristics, end-uses, consumer tastes and habits and regulatory (particularly:

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<sup>122</sup> Article 2.1 TBT Agreement

<sup>123</sup> Mitsuo Matsushita, et al., *Op. cit.* p.447.

<sup>124</sup> *US – Clove Cigarettes* (Appellate Body), para 120.

<sup>125</sup> One Page Key Summary Findings *US – Clove Cigarettes* [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds406sum\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds406sum_e.pdf). Accessed 30 June 2019.

tariff) classification has to be applied.<sup>126</sup> Thus, the imported halal products and domestic halal products to be considered ‘like product’ should fulfill all those four criteria developed by Working Party on Border Tax Adjustment.

However, the AB *US – Clove Cigarette* case added the interpretation of “Like Product”<sup>127</sup> as based on competitive relationship between and among the products and considers the regulatory concerns underlying technical regulation, to the extent that they are relevant to the examination of certain likeness criteria and are reflected in the product’s competitive relationship.

*c. Less Favorable Treatment*

The next step is to prove that the technical regulation at issue creates less favorable treatment to imported product compare to domestic products. Pursuant to TBT Article 2.1, like imported products have to receive treatment no less favorable that that accorded to like domestic products or to like product originating in any other country.<sup>128</sup> in principle, Article 2.1 TBT Agreement prohibits *de jure* and *de facto* discrimination against imported product, however, permitting detrimental impact on competitive opportunities for imports that *stems exclusively from*

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<sup>126</sup> See WTO, *Report of The Working Party on border tax adjustment*, 2 December 1970, para 18, WTO DSB, *Appellate Body Report* (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R), *Japan-Taxes on Alcoholic Beverages* (DS8,DS10,DS11), para 19,

<sup>127</sup> Appellate Body Report, *US – Clove Cigarettes*. Para. 156.

<sup>128</sup> Mitsuo Matsushita, et al., *Op. cit.* p.449.

*legitimate regulatory distinctions*.<sup>129</sup> Meaning that different treatment on imported and domestic products does not necessarily constitute discrimination.<sup>130</sup>

*US – Clove Cigarettes* then stands for the proposition that any complaint based on TBT Article 2.1 needs to pass a two-tiered test.<sup>131</sup> *First*, is to determine whether the technical regulation at issue modifies the condition (the detrimental impact is not dispositive of less favorable treatment) of competition between imported and domestic products, and, *second*, to further analyze whether the detrimental impact on imports stem *exclusively from a legitimate regulatory distinction*.<sup>132</sup>

The second test would also mean that the measure at issue is designed and applied in an even-handed manner. This is to make sure that the measure is not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination that distinction cannot be considered “legitimate”, and thus the detrimental impact will reflect discrimination prohibited under Article 2.1<sup>133</sup>

Halal Act draws distinction between foreign certified halal labels (imported products) and domestic certified halal labels (domestic products) such distinction become problematic.<sup>134</sup> Imported products, having been certified halal in their

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<sup>129</sup> *US – Clove Cigarettes* (Appellate Body) para. 175.

<sup>130</sup> Appellate Body Reports, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para. 135.

<sup>131</sup> *US – Clove Cigarettes* (Appellate Body) para. 182.

<sup>132</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, para. 215; *US – COOL*, para. 271; and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.26. See also Panel Reports, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.73; and *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.60-7.62.

<sup>133</sup> *US – COOL* (Appellate Body), para. 271, quoting, inter alia, *US – Clove Cigarettes* (Appellate Body), para. 182; *US – Tuna II (Mexico)* (Appellate Body), para. 216.

<sup>134</sup> Limenta et al., *Op. cit.* p.16.

country of origin, are required to undergo the certification process in Indonesia. certified halal labels issued by overseas halal certification bodies that do not have a collaboration of recognition with BPJPH are not recognized in Indonesia.<sup>135</sup> Meaning that, the required label itself is not one that generally distinguishes the product as halal, but one that has been approved by BPJPH.<sup>136</sup>

Michele Limenta et al argued that in the midst of this problem is the question of discrimination. In this respect, the extent to which favor is given to domestic products vis a vis imported products becomes a cause for concerns.<sup>137</sup> Therefore, Indonesia has to justify that the distinction draws between imported and domestic products which lead to less favorable treatment received by imported like products<sup>138</sup> is exception to the protection of public moral, otherwise, it can be concluded that Halal Act is likely to constitute not complying or inconsistent with Article 2.1 TBT Agreement

### **C. Legal standing/exceptions of Halal Act according to the WTO Laws**

After the discussion in the previous section, it is found that Indonesia Halal Act has inconsistencies with TBT Agreement under article 2.1. However, Indonesia can defend itself using the reason that this Halal Act has legitimate objective to protect public moral relying on GATT Article XX(a). This section will elaborate further the possibility of public morals exception to the Halal Act.

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<sup>135</sup> Article 47 (2) Halal Act

<sup>136</sup> Limenta et at., *Op cit.* p.17.

<sup>137</sup> *Ibid.*

<sup>138</sup> For those importers in which their originating country's halal agency does not have collaboration of recognition with BPJPH. They have to do the certification twice, in origin country and in BPJPH.

Halal concept was used to justify the taking of halal measures, which States rely on Article XX of GATT which 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.”<sup>139</sup> 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 (than halal measures) can achieve the objectives. The WTO jurisprudence shows that relying on Article XX is hard going.<sup>140</sup>

Indonesia may have grounds that exception should be granted to the Halal Act on points of inconsistencies with the TBT Agreement by arguing that public moral justification exists according to Article XX (a). However, Indonesia has the burden to proof that the measures taken fulfill the *chapeau* of Article XX that obligates the Members not applying the measures in manner which would constitute a means of arbitrary or unjustifiable discrimination between countries or as a disguised restriction on international trade.<sup>141</sup>

First thing first, to determine whether Indonesia can defend the Halal Act relying on Article XX(a), this section will look the meaning and scope of “public morals” developed in WTO jurisprudence. According to Mark Wu, the concept of

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<sup>139</sup> Article XX GATT (a), (b), and (d).

<sup>140</sup> Haniff Ahamat & Nasarudin Abdul Rahman, *Op. cit.* p. 4.

<sup>141</sup> *Chapeu* of Article XX GATT



protection of public moral was first introduced by US as a general exception to protect existing domestic restrictions on certain goods.<sup>142</sup>

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. Among many, this paper will examine several cases in WTO to be relevant jurisprudence upon the way public moral exception is defined and used by Members, which are *US—Gambling* case, *China-Audiovisual* case, and *EC-Seal Products* case.

1. *US—Gambling* case

In the *US—Gambling* case, the concept of “necessary to public moral” was first used to excuse the use of inconsistent measures according to WTO rules. Antigua and Barbuda challenged the U.S imposed measures which affected the cross-border supply of gambling and betting services due to alleged violation of US commitment under GATS to free trade in recreational service.<sup>143</sup> Antigua and Barbuda considered that the cumulative impact of the measures is to prevent the supply of gambling and betting services from other WTO Members on a cross-border basis.<sup>144</sup>

At first, the U.S responded to the claim arguing that the measure on banning gambling and betting services was necessary to protect public moral under GATS

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<sup>142</sup> Mark Wu, “Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine”, 33(1) *YALE Journal of International Law*. 215, 219. (2008)

<sup>143</sup> *United States--Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, paras. 6.465, 6.467, 6.535, WTO Doc. WT/DS285/R (Adopted April. 20, 2005)

<sup>144</sup> *Ibid.*

article XIV(a). later, in the second submission to the panel, the U.S resorted the Article XX. The panel acknowledged that “such laws are designed so as to protect public morals or maintain public order.” Showing deference to the national determination of what should constitute public moral or public orders, the Panel noted that, “the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.”<sup>145</sup>

In the *US—Gambling* case, the panel referred to the *Shorter Oxford English Dictionary* to determine the ordinary meaning of the term ‘public moral’.<sup>146</sup> The term ‘public’ in Article XX(a) means that the measures “must be aimed at protecting the interest of the people within a community or a nation as a whole”<sup>147</sup> and the term ‘public moral’ denotes “Standards or right and wrong conduct maintained by or on behalf of community or nation.”<sup>148</sup>

According to the considerations, the Panel justified the US measures as “designed to protect public morals” and/or “to maintain public order” within the meaning of Article XIV(a) of GATS.13 On appeal, the AB adopted the Panel’s definition of public morals and its evidentiary approach to determine whether the

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<sup>145</sup> *Ibid.*

<sup>146</sup> Michelle Limenta., et al. *Op. cit.* p.21.

<sup>147</sup> R. Rajesh Babu. “WTO and the Protection of Public Moral” *Asian Journal of WTO & International Health Law & Policy* September, 2018. p.3.

<sup>148</sup> Panel report, *United States--Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, paras. 6.465, 6.467, 6.535, WTO Doc. WT/DS285/R (Adopted April. 20, 2005)

U.S. measures were “designed to protect public morals or maintain public order.” The AB, however, did not dwell much on clarifying the scope of the concept.<sup>149</sup>

## 2. *China-Audiovisual case*

While *US – Gambling* was the first to define the concept of public moral, *China – Publications and Audiovisual Products* was the first case in which Article XX(a) 1994 was used to justify a measure. The U.S requested consultations with China concerning: (1) certain measures that restrict trading rights with respect to imported films for theatrical release, audiovisual home entertainment products (e.g. video cassettes and DVDs), sound recordings and publications (e.g. books, magazines, newspapers and electronic publications); and (2) certain measures that restrict market access for, or discriminate against, foreign suppliers of distribution services for publications and foreign suppliers of audiovisual services (including distribution services) for audiovisual home entertainment products.<sup>150</sup>

China justified the measures as necessary to protect “public morals”. China based its argument on the uniqueness of the goods which are “culturally sensitive” and stated that the measure was necessary to protect its legitimate policy objectives in the cultural sector.<sup>151</sup> China added that cultural goods have impact on cultural identity, values, societal and individual morals which later justified the implementation of the measures. It would ensure that goods with content that could

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<sup>149</sup> Appellate Body Report, *US - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005)

<sup>150</sup> Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, Adopted 19 January 2010.

<sup>151</sup> R. Rajesh Babu. *Op. cit.* p.4.

jeopardize public morals of people of China are banned. The U.S argued that the measures were not “necessary” without denying the cultural values correlation with public morals, due to the availability of other measures.<sup>152</sup>

The panel reiterated the Member specific nature of “public morals” developed in *US—Gambling* case<sup>153</sup> that “the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.”<sup>154</sup> Members in applying the societal concepts “should be given some scope to define and apply for themselves the concepts of ‘public morals’ ... in their respective territories, according to their own systems and scales of values.”<sup>155</sup>

Apart from the finding that the Panel was wrong in making intermediary findings that the requirements in one of China's actions could be categorized as "necessary" to protect public morals, in the sense of Art. XX (a), the AB finds that the Panel has not made a mistake in connection with other elements challenged from its analysis under Art. XX (a). The Appellate Body in accordance with this adopts the Panel's conclusion that China does not indicate that relevant provisions are "needed" to protect public morals, and as a result, China has not established that this provision is justified by Art.<sup>156</sup>

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<sup>152</sup> *Ibid.*

<sup>153</sup> Panel Report, *China – Publications and Audiovisual Products*.

<sup>154</sup> R. Rajesh Babu. *Op. cit.* p.4.

<sup>155</sup> R. Rajesh Babu. *Op. cit.* p.4.

<sup>156</sup> WTO, *One-page summary of key findings of the dispute China -- Audiovisual*. [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds363sum\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds363sum_e.pdf). Accessed on 29 June 2019.

### 3. *EC-Seal Products* case

*EC – Seal Product* case was another WTO case that imposed the use of Article XX(a) as the excuse of measures. Regulations of the European Union (“EU Seal Regime”) generally prohibiting the importation and placing on the market of seal products, with certain exceptions, including for seal products derived from hunts conducted by Inuit or indigenous communities (IC exception) and hunts conducted for marine resource management purposes (MRM exception).<sup>157</sup>

Canada and Norway challenged the EU Seal regime. The EU defended the legality of the Seal Regime as aimed at addressing “public morals concerns on the welfare of seals.”<sup>158</sup> and justify this measure under the general exception of GATT Article XX(a) and XX(b).<sup>159</sup> The panel concluded that the EU Seal Regime was justifiable to protect public morals under Article XX(a) and later adopted by the AB.

However, The Appellate Body found that the Panel erred in applying the same legal test to the chapeau of GATT Art. XX as it applied to TBT Art. 2.1, instead of conducting an independent analysis of the consistency of the EU Seal Regime with the specific terms and requirements of the chapeau. The Appellate Body therefore reversed the Panel's findings under the chapeau. However, the Appellate Body completed the analysis and found, as did the Panel, that the European Union had

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<sup>157</sup> WTO, *One-page summary of key findings of the dispute EC – Seal Products*. [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds400sum\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds400sum_e.pdf). Accessed on 29 June 2019

<sup>158</sup> R. Rajesh Babu. *Op. cit.* p.5.

<sup>159</sup> Panel Report, *European Communities--Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/R; WT/DS401/R (adopted June 18, 2014)

not demonstrated that the EU Seal Regime, in particular with respect to the IC exception, met the requirements of the chapeau of GATT Art. XX. Therefore, the Appellate Body found that the European Union had not justified the EU Seal Regime under GATT Art. XX(a).<sup>160</sup>

However, in addressing the justifiability of public moral concerns regarding seal hunts as a legitimate objective under Article 2.2 of TBT Agreement<sup>161</sup>, the panel noted that the concept of public morals is a relative term which needs to be defined based on the standard of right and wrong in a given society. Given that the European Union has established that the concerns of the EU public on animal welfare involve standards of right and wrong within the European Union as a community, we consider that addressing the public moral concerns on seal welfare, identified as the objective of the measure at issue, is ‘legitimate’ under Article 2.2 of the TBT Agreement.<sup>162</sup>

#### 4. *Colombia – Tariffs case*

Colombia imposed a measure (Presidential Decree) which called “compound tariff”<sup>163</sup> on textiles which was challenged by Panama.<sup>164</sup> Colombia justified the

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<sup>160</sup> Appellate Body Report, *European Communities-- Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014).

<sup>161</sup> The *EC – Seal Products* case also addressed the defense by EU on the use of public morals concept in Article 2.2 TBT Agreement regarding seal hunts as a legitimate objective.

<sup>162</sup> Panel Report, *EC – Seal Products*.

<sup>163</sup> Measure on imports of textiles, apparel and footwear, consisting of (i) a 10 per cent ad-valorem component; and (ii) a specific component, which varied according to the import value and customs classification of the merchandise. See *One-page summary of key findings of the dispute* [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds461sum\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds461sum_e.pdf). Accessed 29 June 2019.

<sup>164</sup> Panel Report, *Colombia--Measures Relating to the Importation of Textiles, Apparel and Footwear*, WTO Doc. WT/DS461/R (adopted June 22, 2016)



measure as designed to combat illegal trade which is designed “to protect public morals.”<sup>165</sup>

The panel used the ‘necessity’ and ‘less trade restrictive alternative’ test to the measures. The panel concluded that the measures neither were designed to protect public morals or necessary,<sup>166</sup> therefore, the panel later found out that there is no correlation between the measures and the intention to protect public morals, as there is no connection between “compound tariff” and combating money laundering.

The AB reversed the Panel’s finding that Colombia had failed to demonstrate that the compound tariff was “designed” to combat money laundering and protect public morals. In completing the legal analysis, the Appellate Body concluded that the measure at issue was “designed” to protect public morals. The Appellate Body found, however, that Colombia failed to demonstrate that the compound tariff was “necessary” for the protection of public morals within the meaning of Art. XX(a).<sup>167</sup>

##### 5. Public morals application in Halal Act

Recent cases in WTO shows that the use of “public morals” has been increasing to legitimate measures taken by Members. While guidance on the scope and meaning of the phrase “necessary to protect public morals” was raised in a few recent WTO cases, the term “public morals” remains largely undefined and what may be considered “right and wrong” in any society may be country or culture

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<sup>165</sup> R. Rajesh Babu. *Op. cit.* p.6.

<sup>166</sup> *Ibid.*

<sup>167</sup> Appellate Body Report, *Colombia--Measures Relating to the Importation of Textiles, Apparel and Footwear*, WTO Doc. WT/DS461/AB/R (adopted June 22, 2016)



specific.<sup>168</sup> The observation of the panel, later confirmed by the AB, emphasizes the discretion of the WTO Members “in defining the scope of ‘public morals’ with respect to various values prevailing in their societies at a given time” and the right “the level of protection they consider appropriate”.<sup>169</sup>

The Panels and AB also interpreted “public moral” as “standards of right and wrong conduct maintained by or on behalf of a community or nation”. Such values and the determination of what is right or wrong in a given society may be community specific or specific to a nation as a whole. In other words, the public morals need not be universally recognized.<sup>170</sup>

According to R. Rajesh Babu, a pattern seems to be emerging that while the Panel/AB is showing considerable deference to the member’s determination of what constitutes a public moral in their given setting. Indeed, the Panel/AB seems to limit the damage of uncontested acceptance of public moral objective of a measures by a stricter interpretation of the “necessity” test, and identifying viable less trade restrictive alternatives. The cautious approach of Panel/AB not wanting to be the arbitrator of what should be “public moral” in a given context, could perhaps be explained by the reason that the notion of public morals is country or community specific and more sentimental in nature in terms of their belief of what is right or wrong rather than based on scientific justification.<sup>171</sup>

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<sup>168</sup> R. Rajesh Babu. *Op. cit.* p.2.

<sup>169</sup> *US-Gambling* Appellate Body Report

<sup>170</sup> R. Rajesh Babu. *Op. cit.* p.8.

<sup>171</sup> *Ibid.* p.9.

In the context of Halal Act. Can Indonesia defend this measure using general exception on Article XX(a) GATT? To answer this question, according to the WTO jurisprudence, Indonesia has to pass 3 tests:

- (1) Halal Act has to be designed to protect public moral;
- (2) Halal Act must be necessary to protect public moral; and
- (3) Halal Act must satisfy the requirement of 'Chapeau' of Article XX(a) GATT.

As has been mentioned before that the issue of Halal Act is its mandatory nature, imported products have to be registered first on BPJPH before circulated in domestic market. Although the imported products have been labelled and/or certified 'halal' from origin countries, if the halal certification body from the importing country does not have recognition agreement, the products will not be allowed to enter the domestic market unless the foreign enterprise apply the halal certification in BPJPH. The problem does not stop there, even the halal certification body from importing country has already entered a recognition agreement, the imported products has to be registered prior to the circulation in Indonesia market.

These measures invoke WTO issues as a non-compliance by Indonesia as Members of WTO. Other Members might argue that these measures are inconsistent with Article 2.1 TBT Agreement, but the objective of this subchapter is not in which potential agreements would be cited by the complainant members.

However, Indonesia could argue and justify these measures (Halal Act) using general exception of protection of public moral under Article XX(a) GATT. Using the definition of public morals according to the WTO jurisprudence, that public

morals is “standards or right and wrong conduct maintained by or on behalf of community or nation.” Indonesia could argue that Halal Act is a right conduct by Muslim community in Indonesia to worship Allah (religious practice), and it is maintained as a protection of religious belief. By addressing the public moral concerns on protection of religious practice, Indonesia could argue that this concerns can be identified as a design of public moral protection, which later justifiable under Article XX(a).

However, concluding that halal measures merely designated to protect public morals is not enough. Indonesia has the burden to prove that the measures at issue must be deemed “necessary” and “there is no less trade restrictive alternative” to justify the general exception according to Article XX(a). *First*, Indonesia should not fail to pass the ‘necessity’ test of Halal Act, meaning that the measures at issue is “necessary” to protect public morals.

The WTO jurisprudences laid out 3 criteria to determine that Halal Act is necessary by evaluating whether: (1) the interest that the Halal Act wants to protect is important, the more important the more likely Halal Act can be deemed necessary; (2) the contribution that Halal Act wants to pursue is achievable through the measure, the more achievable the realization of contribution of Halal Act to the objective the more likely Halal Act can be deemed necessary. Moreover, the AB has also aid down the “not incapable” test. This test is in line with the “necessity” test, due to the similarity of its objective, to test whether the measures is “necessary” or “capable” to contribute achieving the objective. The “no incapable” test means if the Members measures contributed to a certain extent, directly or indirectly,

addresses the public moral concerns, the Panel/AB has justified the measure as designed to protect public moral, thereby endorsing it.<sup>172</sup> Indonesia has to argue that the measures is capable to achieving the objective which is to protect the practice of religious belief. The requirements to get halal certification from Halal Agency which has collaboration of recognition with BPJPH can be argued capable to achieve the objective which is to ensure that the imported products are processed using the process that accepted by Indonesia Muslim; and (3) whether there is trade impact for the complaining party, meaning that the lesser trade impact on complaining party towards Halal Act the more likely Halal Act can be deemed necessary.

Indonesia could argue that without collaboration of recognition with foreign halal certification body from importing countries the halal of the product (meat) is questionable and even unknown, the threat of 'fake' halal certification is real as halal certificate is being abused arbitrarily solely to gain profit.

The difference between halal process may vary among countries depending on the Islamic teachings they practice, and the nonexistence of worldwide accepted halal certification bodies open the possibility of difference method of determining halal process. Indonesia could argue that without collaboration of recognition, the imported products (meat) might be processed differently from what Halal Act, BPJPH, and Indonesia Muslim community practiced and believed. Therefore, it could jeopardize the practice of religious belief (public morals), and later deeming halal measures in Halal Act as "necessary" to protect public morals.

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<sup>172</sup> R. Rajesh Babu. *Op. cit.* p.8-9.

*Second*, is to ensure that there is no less trade restrictive alternative. The availability of less trade restrictive and/or burdensome alternative which designated to protect public morals would fail Indonesia's intention to impose Halal Act relying under Article XX(a) GATT. Complainant might propose variety of alternative measures which is less trade restrictive than Halal Act provisions.

Despite of the potential less trade restrictive alternatives by possible complainant, Indonesia has to argue that there are no better alternative measures which can protect the protect the public morals. Lamenta argued that, Indonesia could argue that alternative measures would not contribute to the achievement of Halal Act objective: providing greater Halal assurance to Muslim consumers, considering the greater risk of non-compliance (if voluntary), confusion of consumers, and potential irregularities inflicted by the alternative measure.<sup>173</sup> So that Indonesia could justify its reliance on Article XX(a) due to the no less trade restrictive alternative that halal measures within Halal Act.

The last test is to pass the requirement of 'Chapeau' of Article XX(a) GATT. This means that Halal Act should not be applied to constitute "arbitrary or

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<sup>173</sup> Limenta et al., *Op. cit.* p.20. Indonesia may refer to the Appellate Body's finding in *US-Tuna II (Mexico)* as their legal basis. In this case, Mexico proposed the co-existence of the 'dolphin safe' label of the Agreement on the International Dolphin Conservation Program (AIDCP) and the US official dolphin safe label. Under the proposed alternative measure, the method of fishing tuna inside the Eastern Tropical Pacific (ETP) protects dolphins, enabling the use of the AIDCP dolphin-safe label (even though this method is not eligible for the US dolphin-safe label). The Appellate Body disagreed with the Panel's finding that the alternative measure would contribute to both the US' intended objectives – consumer information and the dolphin protection – to a lesser degree of trade restrictiveness than the measure at issue. The Appellate Body viewed that the proposed measure 'would allow more tuna harvested in conditions that adversely affect dolphins to be labelled "dolphin-safe"'. Thus, according to the Appellate Body, the proposed alternative measure would not contribute to the same extent to the attainment of the US' objective as the existing US 'dolphin-safe' label- ling provision. See Appellate Body Report, *US -Tuna II (Mexico)*.

unjustifiable discrimination” or a “disguised restriction on international trade”.<sup>174</sup> Therefore, Halal Act has to apply to both foreign and domestic player, meaning that halal measure should not be applied in a manner that distinguishes the foreign halal products and domestic halal products.

The fulfillment of ‘*Chapeau*’ Article XX GATT is hard going for Indonesia (This is similar as has been discussed before in the previous section regarding application of Article 2.1 TBT Agreement on Halal Act). This is due to the distinction between foreign halal products and domestic halal products according to Halal Act. WTO jurisprudence shows that even though Members can defend themselves by arguing that the measure is designated to protect public morals and necessary, however if the measure discriminates between foreign and domestic player, thus the measure at issue cannot be justified using public moral concept in Article XX(a) GATT.<sup>175</sup> Therefore, Indonesia is likely to be defenseless when it comes to the non-fulfillment of Halal Act according to the ‘*Chapeau*’ Article XX GATT, which later will end up that Indonesia probably could not justify the Halal Act using public moral exception.

#### **D. Halal Act compliance with Islamic Law**

After the examination that due to protecting public moral, the existence of Indonesia Halal Act can be justified under Article XX(a) GATT 1994. This section will elaborate further whether the regulatory provisions in Halal Act conforms with

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<sup>174</sup> Article XX GATT 1994

<sup>175</sup> See *US – Shrimp Case* (1998), *US – Gambling Case* (2004), and *EC – Seal Products Case* (2014).

Islamic Law on regulating the Halal food, specifically in determining the halal of a product.

The objective is to find out whether the intended objective of Halal Act conforms with Islamic Law. Because, the existence of this Halal Act claims that this Act will protect religious belief and public morals. If there were really conformities between Islamic Law and Halal Act. Therefore, it is legally correct to say that Indonesia Halal Act really protects religious belief and public morals, thus the existence of it has a legitimate ground.

1. Halal Act and *Maslahah Mursalah*

- a. Halal Act from the perspective of *maslahah mursalah*

There is no verse in *al-Quran* which states that mankind should establish or enact a Law (by themselves) to regulate halal certification. As has been elaborated before in the Chapter II that *al-Quran* and *Hadith* only stipulate that mankind should eat what Allah has given to us, either with direct order or not (noted that there are things allowed to be consumed as long as there is no *nash* which prohibits it. In conclusion, there is no single verse in *al-Quran* which orders mankind to legislate a Halal Act.

However, Islamic scholar might argue that enacting Halal Act can be legitimated using *maslahah mursalah* approach. This sub chapter will elaborate that the role of a state in regulating halal certification through Halal Act can be analyzed from the perspective *maslahah mursalah* in order to protect public interest (consumer protection). The discussion not only focusing on Halal Act as a Law, but



also looking at several provisions which potentially contradicts with other principles, such as: economic perspective and international perspective.

Theory *maslahah mursalah* also has been elaborated before in the Chapter II. It is understood that in the context of halal food, the instruction to consume halal food and prohibition to consume haram food contains the principle of *maslahah mursalah*. Where the instruction to consume halal food and avoid haram food is attributed with *maqasid Syariah*, this can be done from either the allocation (*min nihayati al wujud*) and the elimination (*min nihayati al-adam*).<sup>176</sup>

Theory *al-maslahah al mursalah* (utility) rooted from the theory of *al-maslahah* which is attributed and reflected from *maqasid al-syari'ah*.<sup>177</sup> Between *al-maslahah* and public interest have meaning similarity which relies on welfare and utility or benefits for the public interest. The word '*maslahah*' itself can be translated as public interest, and is a well-established term in *fiqh* denoting the same, and it was on the basis of these that the *maqasid al-syariah* were constructed.<sup>178</sup>

The test has to be carried out to determine the state of Halal Act (regulation of halal certification and halal label) so that it falls under the spectrum of *maslahah mursalah*, thus, the existence of it can be justified. Ulama have formulated requirements for *maslahah mursalah*; (1) reasonable (*ma'qul*), relevant (*munasib*) and intrinsic; (2) in line with *syari'ah*; (3) must be urgent and essence (*al-daruriyat*);

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<sup>176</sup> Al-Syatibi, *Al Muwafaqat fi Usul al-Syariah*, juz II, (Bairut: Dar Kutub al-'Ilmiyah, t.th,) p.16-25.

<sup>177</sup> Al Syatibi, *Op cit.* p.15-27.

<sup>178</sup> Rauf A. Azhar, *Economics of an Islamic Economy*, (Leiden: Brill, 2010) p.195.

(4) for public interest; (6) not sacrificing *al-maslahah* which is more important.<sup>179</sup>

Below, these requirements will be elaborated further.

*First*, reasonable (*ma'qul*), relevant (*munasib*), and intrinsic, has been the core of Halal Act, the wide products coverage (massive and credential products). *Second*, in line with syari'ah due to the objectives which is giving information on halal/haram in product, so that Muslim consumers can consume halal food as it is instructed from Syariah. *Third*, *daruriyat*, the threat of Muslim consumers from practicing their religious belief or market failure. *Fourth*, public interest to protect Muslim consumers. *Fifth*, not sacrificing other *maslahah*, it is proven by there is no other *al-maslahah* which is sacrificed. Therefore, Zulham argued that the halal certification under Halal Act is solid from the perspective *maslahah mursalah*.<sup>180</sup>

b. Halal Act from the perspective *maslahah al-dauliyah* (state interest)

After the examination of Halal Act which can be legitimated from the perspective of *maslahah mursalah*, the next is the discussion of the state intervention in this matter to regulate halal certification. The role of a state according to Islamic scholars are to create: *amar ma'ruf nahyi munkar*, *al-salihah*, protection (*al-himayah*), *al-maslahah*, order (*al-nizam*), security (*al-amn*), solidarity (*al-'asabiyah*), and freedom (*huryah*).<sup>181</sup>

Without the role of a state in regulating halal certification assurance, including incorporating halal agency and halal label, Muslim as customers could not practice

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<sup>179</sup> Zulham, *Op. cit.* p.449.

<sup>180</sup> Zulham, *Op. cit.* p.450.

<sup>181</sup> *Ibid.*

their religious belief on reason that they do not have the capacity to validate the halal of a product. Hence, this so-called intervention from states in the Islamic perspective can fall under the classification of *al-wajib al-kafa'i* (collective responsibility)<sup>182</sup>

Thus, *al-maslahah al mursalah* can be reason or causation on state intervention to Muslim consumers to access the availability of halal food, it falls under the spectrum of *al-maslahah al-dauliyyah*. Zulham argued that in the perspective of Islamic Law, if the state is not intervening to protect religious practice will threaten the outbreak of market failure, it is justified that the State role in this matter has been accorded as *al-maslahah al-dauliyyah*.<sup>183</sup>

c. Halal Act provisions according to Islamic perspective

The next discussion will elaborate several provisions in Halal Act which is deemed contradict with other perspectives such as economic perspective and international perspective and later will be justified with Islamic principles. In this sub chapter, the discussion will be focused in the: (1) mandatory nature; (2) separation of halal process with non-halal; (3) collaboration of recognition with foreign Halal Agency to gain access to Indonesia market.

Since those provisions have the potential contradiction with other perspectives which is becoming the reason on the further discussion. *First*, is regarding the mandatory nature. Article 4 Halal Act states that “Products that enter, circulated,

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<sup>182</sup> *Fardu Kifayah* is a principle that the obligation which already done by half of Muslim, the the others are freed from sins. See Yusuf al-Qaradwi, et al. *Kebangkitan Islam dalam Perbincangan Para Pakar*. (Jakarta, Gema Insani, 1998). p.72.

<sup>183</sup> Zulham, *Op. cit.* p.454.

and traded in the territory of Indonesia must be certified halal.”<sup>184</sup> This mandatory nature is justified as has been discussed the previous section that obligation to certify the products with halal label is considered protection of consumers and can be attributed theory *maslahah mursalah*. Without this mandatory nature, for the products that has massive demand and the business operators choose not to apply for certification, consumers do not have the capacity to validate the halal of a product.

*Second*, separation of halal process with non-halal. Article 24 & 25 Halal Act stipulates the separation of location, place, and equipment for processing, storing, packaging, distributing, selling, and presenting between halal and non-halal product.<sup>185</sup> In the Government Regulation of Halal Act, the separation of location place and equipment goes way more detail and stricter than in the Halal Act.<sup>186</sup>

This provision contradicts from the economic point of view. The separation is carried out from upstream and downstream it will add burdensome cost to the business operators. However, “halal” is an Arabic word meaning “allowed” or “lawful”. The word “wholesome” means to be good, clean, gentle, excellent, fair, and lawful. Halal should be viewed legalistically as any action, product, or food that a Muslim is allowed to consume or partake in, and from the food industry perspectives, “wholesome” can be equated to food quality and safety.<sup>187</sup> Both the

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<sup>184</sup> Article 4 Halal Act.

<sup>185</sup> Article 24 and 25 Halal Act.

<sup>186</sup> See Article 43-60 Government Regulation of Halal Act.

<sup>187</sup> Mohammad Mazhar Hussaini, and Ahmad Hussein Sakr. (1984). *Islamic dietary laws and practices*, 2nd edn. Chicago, IL: Islamic Food and Nutrition Council of America. p.69.

halal and wholesome aspects of processed meats should be taken into consideration in establishing the Halal Control Points (HCPs) for any processed meat product.<sup>188</sup>

Processed meats are meats whose inherent characteristics have been altered by further processing involving more than the simple act of grinding, cutting, or mixing. This include meats that have undergone processes, such as curing, smoking, dehydration, or where certain additives such as enzymes have been used. When such meats are produced to comply with halal and wholesome requirements, they are termed “Halal and Wholesome Processed Meats.”<sup>189</sup> Thus, the only difference between conventional processed meats and their halal counterparts is that the latter is produced using halal and wholesome meat and ingredients throughout the production process up to the finished product and the supply chain to consumer.<sup>190</sup>

In meeting the halal and wholesome processed meats criteria it is not difficult to produce processed meats that meet the halal and wholesome requirements as long as processors use halal and wholesome meat, plant-based ingredients wherever possible and avoided doubtful ingredients.<sup>191</sup> Ensuring that halal and wholesome criteria are met should be built into each processor’s quality control and auditing procedures.<sup>192</sup> The ingredients listed on processed meats’ packages must be clear and unambiguous, consistent with national regulation, and the design and graphics

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<sup>188</sup> Mustafa Farouk et al., *Halal Processed Meat Requirements*. Retrieved from Mian Nadeem Riaz and Muhammad Munir Chaudry, *Handbook of Halal Food Production*. CRC Press (2019). p.125-126.

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*

<sup>191</sup> Mustafa Farouk, (1997), *Meeting the Halal Criteria*. *Food Technology in NZ*, p.32-34.

<sup>192</sup> Mian Nadeem Riaz and Muhammad Munir Chaudry, *Op. cit.* p.126.

chosen should not be offensive to avoid doubts in the minds of halal consumers and to ensure the success of the products. To avoid costly mistakes and delays, it is advisable to work with reputable and recognized halal certifying bodies accepted in the processed meats target markets along with an internal HCP program.<sup>193</sup>

There seems no *nash* (*al-Quran and Hadith*) basis for the separation of halal and non-halal process. The relevant regulation to be the ground of this separation also doubtful to exist. However, it seems that HCP for halal processed meats which according to halal and wholesomeness considers the separation of halal from-non-halal materials for any processed meat products. It can be seen from the writings of Muhammad Farouk et al., which provides the relevant steps in the manufacture of processed products and the critical control points during the manufacture.

Nevertheless, the nature of separation is not that strict compare to those stipulated by Article 24 and 25 of Halal Act, and Article 43-60 of Government Regulation of Halal Act. It is indeed that HCP recognizes the importance of avoiding the cross-contamination between halal and non-halal, however it should be done in a manner that is necessary not the opposite, which is unnecessary, more than what is needed.

The lack of internationally recognized halal standards for the processed halal products is one of the reasons that separation method varies among those manufactures. One might argue that this strict separation under Halal Act can be justified using the principle of *maslahah mursalah* as it is to protect the consumer and in line with public interest which brings greater good compared to the loss. And

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<sup>193</sup> *Ibid.*

also, one might add that the excuse of costly method can be negated from the perspective of *maqasid al-syariah*. Meaning that there is hierarchy in the *maqasid Syariah*, the protection of religious practice (*hifdz al-din*) has to be prioritize compare the protection of property or treasure (*hifdz al-mal*). However, this justification does no necessarily mean that it is perfect and solid. One might also debate this arguing that he/she does not recognize the principle of *maslahah mursalah* and/or *maqasid al-syariah*. As we know that there is Islamic teaching or Imam which rejects the concept of *maslahah mursalah*.

Imam Syafi'i and his followers reject to use *maslahah mursalah*. He argued the rejection is linked with his rejection on the *istihsan*, saying that *maslahah mursalah* is the door for the abuse of those who wants to accept only the benefit, and no basis or ground in Islam.<sup>194</sup> Imam Ghazaly from Syafi'iyah also reject the use of *maslahah mursalah*, arguing that all the *maslahah* has been covered in *al-Quran* as well as arguing that *maslahah* will be misused to justify man's carnality (*talazzuz*).<sup>195</sup>

Therefore, it is still unknown the motive of Halal Act legislators in this provision of separation halal and non-halal products. nevertheless, to argue that this is based on *maslahah mursalah* should be taken carefully on this matter, because the application of this principle is not that solid.

*Third*, last provisions being discussed in this chapter is the Article 47 Halal Act. This provision is regulating that foreign or imported halal products should also

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<sup>194</sup> Abdul Latif Badul Aziz Al-Barzanji, *Al-Ta'arudz wa al-Tarjih baina al-Adillah al-syari'iyah*. Darul Kutub Al-Amaliyah. I. p.312.

<sup>195</sup> Al-Ghazali, *Al-mustafamin Ilmu Ushul Al-Fiqih*, Kairo, *Al-Ammiriyyah*, 1422, I, p.331.



comply with the Halal Act unless the importing business operators has received halal certification from foreign halal agency which has collaboration of recognition with BPJPH.<sup>196</sup>

The logic lies in following discussion is similar from the previous Article 24 & 25 Halal Act. The lack of internationally recognized halal process is the center of issue why halal agencies have differences. There are no “third party” halal verification bodies akin to ISO to impartially verify/assess the competence of the multitudes of halal certifying bodies or even the many competent authorities from the importing countries.<sup>197</sup>

The reason of this provision is deemed stemming from the difference of general guidelines for halal food production. The Halal Act legislature needs to make sure that the foreign-certified halal products are processed in a manner which is recognized and accepted by Indonesian Muslim for the sake of Muslim protection to practice religious belief. Therefore, Halal Act regulates that the foreign halal product has to apply halal certification unless the halal certificate labelled in the products coming from foreign halal agency which has collaboration of recognition with BPJPH.

The most source of differences is coming from the slaughtering matter. The religious slaughter of animals is an issue of contention in many parts of the world.<sup>198</sup>

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<sup>196</sup> Article 47 Halal Act.

<sup>197</sup> Mian Nadeem Riaz and Muhammad Munir Chaudry, *Op. cit.* p.142.

<sup>198</sup> Joe Regenstine et al., *The Religious Slaughter of Animals a US Perspective on Regulations and Animal Welfare Guideliness*. Retrieved from Mian Nadeem Riaz and Muhammad Munir Chaudry, *Handbook of Halal Food Production*. CRC Press (2019). p.85.

This section will only focus on the differences stem from Islamic perspective, meaning that differences in slaughtering process by 4 (four) prominent Mahzab.

Among the steps in the slaughtering process; the slaughterer, the instrument, the cut, only in the invocation step that has differences among Imam. The *tasmiyyah* or the invocation means pronouncing the name of God by saying Bismillah (in the name of Allah) or Bismillah Allahu Akbar (in the name of God, God is Great) before cutting the neck.<sup>199</sup>

Opinions differ somewhat on the issue of the invocation as addressed by three earlier jurists (Imam). According to Imam Malik, if the name of God is not mentioned over the animal before slaughtering, the meat of the animal is haram or forbidden, whether one neglects to say Bismillah intentionally or unintentionally. According to the jurist Abu Hanifah, if one neglects to say Bismillah intentionally, the meat is haram; if the omission is unintentional, the meat is halal. According to Imam Shaf'ii, whether one neglects to say Bismillah intentionally or unintentionally before slaughtering, the meat is halal so long as the person is competent.<sup>200</sup>

Next is the discussion regarding 'stunning'. Once the animal is restrained in a manner so as not to produce pain or fear there are two possible major ways to undertake the slaughter; slaughter with the use of or stunning device prior to the

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<sup>199</sup> Mian N. Riaz and Munir M. Chaudry, *General Guidelines for Halal Food Production*. Retrieved from Mian Nadeem Riaz and Muhammad Munir Chaudry, *Handbook of Halal Food Production*. CRC Press (2019). p.19.

<sup>200</sup> See Khan, G.M (1991). *Al-Dhabh: Slaughtering animals for food the Islamic way*; Department of Standards Malaysia (2009) *Halal food-production, preparation, handling, and storage—general guidelines*. Mian N. Riaz and Munir M. Chaudry. *Op. cit.* p.19.

halal slaughter cut or immediate halal slaughter. Slaughter by hand without prior intervention is still preferred by most Muslims and quite widely followed in Muslim countries.<sup>201</sup>

No matter whether stunning is used or not in Islam, the animal must die from a cut to the throat that serves the carotid arteries, jugular veins, the trachea, and the esophagus, without severing the spinal cord. If prior stunning is to be done, it must be done in a way that leaves the animal's heart beating throughout the process of exsanguination.<sup>202</sup>

Stunning with gas is religiously equated to killing by strangulation. Captive bolt or mushroom head stunners are violent blows, and, while electric stunners are not directly addressed in the *al-Quran*, they may be considered another form of violent blow. By this logic, it is clear why most Muslims prefer meat from animals that have not been stunned but the final line of the above quote allows for a certain degree of theological flexibility.<sup>203</sup>

Indonesia could justify this provision by arguing that without collaboration of recognition between BPJPH and foreign halal agency, it is unknown which slaughtering method that is used, particularly in the invocation step and in stunning matter. Halal Monitoring Committee from UK for example, not allowing the

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<sup>201</sup> *Ibid.* p.108.

<sup>202</sup> The debate surrounding the use of stunning in halal slaughter stems from the surah al-Maa'idah 5:3 "prohibited to you are dead animals, blood, the flesh of swine, and that which has been dedicated to other than God, and (those animals) killed by strangling or by a violent blow or by a head-long fall or by the goring of horns, and those from which a wild animal has eaten, except what you (are able to) slaughter (before its death). *Ibid.*

<sup>203</sup> *Ibid.*

stunning method prior to the slaughter<sup>204</sup> and also in many European countries, the type and severity of stunning usually kills the animals before bleeding, which makes it unacceptable for halal.<sup>205</sup> Meanwhile, stunning of animals before the non-religious slaughter is generally accepted by Muslims in the U.S and Canada when the methods of intervention are non-lethal, that is, the animal can recover, and be healthy and functioning sometime after the intervention.<sup>206</sup>

Even though Indonesia accepts the practice of stunning prior slaughter (the use of pre-slaughter stunning), it does not necessarily mean that Indonesia Accept all kind of pre-slaughter stunning. Indonesia with majority Muslim population have recognized non-penetrative PSS (NPPSS) as a method in halal slaughter. MUI has issued the Halal Assurance System (HAS 23103 2012) and Indonesia National Standardization Body issued Indonesia's National Standard for ruminant halal slaughter (SNI 99003 2018).<sup>207</sup> HAS 23103 and SNI 9903 2018 allow the use of stunner-powered cartridges and pneumatic stunner.

Just in case, the halal methods from U.K, U.S and Canada, that they apply it differently, by collaboration of recognition, BPJPH can ensure whether the method is accepted or not so that the halal product is safe and validated to be circulated in Indonesia market. This is to make sure that the practice of stunning prior slaughter has been carried out in a manner that Muslim in Indonesia has accepted. That is

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<sup>204</sup> Ismail Abd Latif et al., "A Comparative Analysis of Global Halal Certification Requirements". *Journal of Food Products Marketing*. October 2014. P.93. full.85-101

<sup>205</sup> Mian N. Riaz and Munir M. Chaudry. *Op. cit.* p.18.

<sup>206</sup> *Ibid.*

<sup>207</sup> Supratikno Kasmono et al., *Pre-Slaughter Stunning of Ruminant Slaughter Based on MUI HAS 23103 2012, MS 1500 2009 and SNI 99003 2018*. Proc. Of the 20<sup>th</sup> FAVA Congress & The 15<sup>th</sup> KIVNAS PDHI, Bali Nov 1-3, 2018.

might be the justification of this provision. It also can be classified as the use of *maslahah mursalah*, however, the discussion is more or less the same with the previous discussion in the use of *maslahah mursalah* in article 24 and 25 Halal Act, therefore, there is no need to repeat the elaboration.

All in all, the lack of internationally recognized and accepted halal process is also due the threat of halal certification abuse. This creates condition where home country should be careful in opening the access for foreign halal products, therefore this matter should be considered.

