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4<sup>th</sup> Quarter 2017



## WTO's Appellate Body Report Concerning Indonesia's Measures on Horticultural Products, Animals and Animal Products

Michelle Limenta

In the Appellate Body's report circulated on 9 November 2017, the Appellate Body upheld the panel's findings that Indonesia's measures relating to horticultural products and animals and animals products are inconsistent with Indonesia's obligations in the World Trade Organization (WTO).

This dispute was initiated by the United States and New Zealand in May 2014 claiming that Indonesia's import restrictions and prohibitions (made effective/operative through import licenses) are inconsistent with WTO law. In December 2016, the WTO panel ruled in favour of New Zealand and United States. The panel found that Indonesia's measures by virtue of their design, architecture and revealing structure are inconsistent with Article XI of the GATT 1994. Following the issuance of the panel's report, Indonesian government filed appeal against the WTO panel ruling.

In its notification of an appeal, Indonesia argued that the panel erred in law in finding that Article XI of GATT applies more specifically on quantitative import restrictions on agricultural goods than Article 4.2 of the Agreement of Agriculture. Indonesia invoked Article 21.1 of the Agreement of Agriculture to argue that Article 4.2 was *lex specialis*, thus Article 4.2 should have been applied to the exclusion of Article XI.

The Appellate Body recalled its previous ruling in the *EC – Export Subsidies on Sugar* dispute that 'Members explicitly recognized that there may be conflicts between the Agreement on Agriculture and the GATT 1994, and explicitly provided, through Article 21, that the Agreement on Agriculture would prevail to the extent of such conflicts.'



In the assessment, the Appellate Body found that Articles XI:1 and 4.2 in the context of this dispute are not in conflict, and both provisions in relation to these claims 'contain the same substantive obligations, namely, the obligation not to maintain quantitative import restrictions on agricultural products.' Accordingly, the Appellate Body ruled that Article 4.2 'does not apply "to the exclusion of" Article XI:1...and, thus, in these circumstances, they apply cumulatively'.

Indonesia also challenged the 'sequence of analysis' applied by the Panel under Article XX of the GATT in respect of measures 9 to 17 (measures applied to animals and animal products). The panel assessed these measures under the Chapeau without examining first whether they are justified provisionally under the sub-paragraphs of Article XX.

In assessing the claim, the Appellate Body highlighted that '[t]he normal sequence of analysis under Article XX of the GATT 1994 involves, first, an assessment of whether the measure at issue is provisionally justified under one of the paragraphs of Article XX and, second, an assessment of whether that measure also meets the requirements of the chapeau of Article XX. This reflects "the fundamental structure and logic of Article XX"'. The Appellate Body also provided that '[d]epending on the particular circumstances of the case, a panel that deviates from the sequence of analysis under Article XX might not necessarily, for that reason alone, commit a reversible legal error provided the panel has made findings on those elements under the applicable paragraphs that are relevant for its analysis of the requirements of the chapeau.' However, the Appellate Body acknowledged that 'following the normal sequence of analysis under Article XX provides panels with the necessary tools to assess the requirements of the chapeau.' The Appellate Body in the end declined to rule on Indonesia's claim under Article XX and declared that the Panel's findings that Indonesia had failed to demonstrate that measures 9 to 17 are justified under Article XX(a), (b) or (d), moot or of no legal effect.

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Accordingly, the question of whether Indonesia's right to protect religious belief under the Halal rules/regulations is justified Article XX(a) ('necessary to protect public moral', one of Indonesia's defenses) remains unanswered. It is important to note that in the future, if Indonesia's Halal Law is challenged in WTO dispute settlement and Indonesia invokes Article XX(a) to defend its Halal Law, the burden of proof will rest on Indonesia. We have evaluated the WTO TBT consistency of Indonesia Halal Law and whether the Law can be defended under Article XX(a). The paper can be found [here](#).

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## Taxing the Invisible: Indonesia's Tariff on e-Commerce

Oscar Fernando

From 11 to 13 December 2017, the WTO held the eleventh Ministerial Conference (MC11) meeting in Buenos Aires, Argentina. A number of agendas or issues such as subsidies on illegal, unreported and unregulated (IUU) fishing, public stockholding for security purposes and domestic support in agriculture were discussed during the meeting. Deliverables were expected, especially for subsidies on IUU fishing. However, in the meeting the Ministers from WTO Members could only commit to constructively engage in the fisheries subsidies negotiations with a view to adopting an agreement by the next Ministerial Conference in 2019. Furthermore, as reported in the WTO [website](#), the Ministers could not reach an agreement on other substantive issues such as public stockholding and agricultural measures.



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The Ministers also brought 'new' issues on the table such as e-commerce. Two years ago in Nairobi, they agreed to not impose customs duties on electronic commerce until the end of 2017. In Buenos Aires, the Ministers agreed to maintain this current practice until the next ministerial meeting in 2019.

Currently, Indonesian government is planning to adopt new policy to impose tariff on transaction of electronic commerce. According to [Mr. Enggartiasto Lukita](#) – Indonesian Trade Minister, Indonesia will impose tax and imports tariff to electronic transaction despite of the declaration made by WTO Ministers in Buenos Aires. Mr. Lukita explained that Indonesia will impose imports tariff on goods and services purchased through electronic means with the view to secure national interest. Indonesia has indicated its proposal during the MC11, and Indonesia's position was noted in the Heads of Delegation Meeting to be discussed further after the MC11.

The import tariff on electronic transaction draws its mandate from Law No. 17 of 2016 concerning Customs. Article 8 (b) of the Customs Law provides that transmission of software or electronic data for the purpose of export or import can be conducted electronically. Therefore, imports tariff should now be levied on software and other intangible goods.

It is interesting to see how Indonesian government will implement its policy to impose import tariff on electronic transaction since the WTO Ministerial Conference officially issued a declaration to extend the moratorium on electronic commerce. It is expected that trading partners will raise concern about this policy. However, whether or not a Ministerial Declaration could be used as a legal basis to pursue a claim in the WTO Dispute Settlement is questionable.

Article 3.2 of the WTO Dispute Settlement Understanding (DSU) provides in relevant part "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." Several articles in the DSU also point out that the dispute settlement mechanism only works under the framework WTO covered agreements.

Previous cases in the WTO could also provide a hint about the legal status of the Ministerial Decision. The Panel in *US – Lead and Bismuth II* noted that the Ministerial Declaration is a mere "Declaration", rather than a "Decision" of the Ministers. According to the Panel, a Declaration lacks the mandatory authority of a Decision. In another case, the Appellate Body in *US – Clove Cigarettes* ruled that the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the Vienna Convention. Indeed, in the Doha Round, the Ministers created a "Decision" instead of a "Declaration" such as in Buenos Aires. Should there a WTO Member claiming that Indonesia violates its commitment in the Buenos Aires Ministerial Declaration, Indonesia could try to argue that the Declaration is not part of the covered agreement and it lacks the mandatory authority of a decision.

"Another interesting aspect of this policy if adopted is the form of tariff that Indonesia will apply on these intangible goods such as e-book... will Indonesia consider physical book and e-book like products?"

Another interesting aspect of this policy if adopted is the form of tariff that Indonesia will apply on these intangible goods such as e-book, movie or song which do not have physical features. The question is whether Indonesia will apply different tariff to a book that is physically imported to Indonesia with a book that is electronically transmitted to Indonesia? In other words, will Indonesia consider physical book and e-book like products?



It is also interesting to look at the method that Indonesia will use to collect such tariff. If the tariff is imposed for tangible goods that are crossing Indonesia's border, the Customs could lead the effort to levy such customs duties. However, intangible goods such as software, e-book, movie or song do not physically cross the border. There is no Customs officers guarding Indonesia's internet or virtual border where the movement of these intangible goods take place. Implementing a system that could track each electronic transaction also raises the question of privacy. How far will the system monitor or track the activities of internet users to detect transactions? It is possible that the system could collect

other data from internet users from the transactions. Finally, it is also interesting to see who will pay the imports tariff. Would it be the consumers, the sellers, or marketplace that provides the platform?

After all, Indonesian government may want to contemplate the costs and benefits of this policy. Indonesian government should really consider whether imposing customs duties on these intangible goods will benefit the public in general. On one hand, imposing tariff will positively contribute to state income, create fair competition and level the playing field between physical and electronic businesses. On the other hand, the consumers will bear additional cost from the tariffs. The products affected by this policy are mostly products that could contribute to the human development in Indonesia. Software, e-book, movies, songs and video games are products that could be used for educational purposes. Imposing tariff will definitely increase the price of these goods and might hinder public access to knowledge. Aside from the concern about Indonesia's participation and commitment in international setting, the domestic impact of this policy should also be thoroughly considered.

**Focus Group Discussion: Issues to be Discussed in the WTO Ministerial Conference 11**  
Jakarta, 14 November 2017

Indonesian Ministry of Trade invited UPH-CITI's researchers to attend a focus group discussion (FGD) about the WTO MC11. Michelle Limenta and Oscar Fernando presented their view on Indonesia's position in the MC11.



**Oscar Fernando Participated in the Training by WTO/ESCAP on Empirical Trade Analysis**  
Bangkok, 18-21 December 2017

Oscar Fernando had the privilege to attend 13th ARTNeT Capacity Building Workshop on "Empirical trade analysis: Trade and welfare effects of trade facilitation and Aid for trade". The training focuses on quantitative research using gravity model with the state-of-the-art applications. More than 30 participants from various countries joined the training.

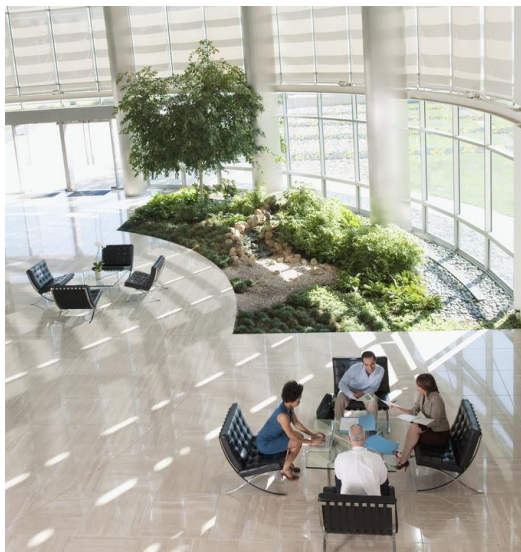


*As we are ending another joyful year, we realize that our works were made possible only with your support and cooperation. We offer our thanks, and wish you much peace and great happiness during this holiday season and throughout the New Year....*

*We wish you a Merry Christmas and a Wonderful New Year!*

*Season's Greetings*





**Our goal: To be the preeminent center for thought leadership and expertise on trade and investment policy and law in Indonesia**

## Universitas Pelita Harapan - UPH

Founded in 1994 with the vision of educating a new generation of leaders for Indonesia and the wider ASEAN region, Universitas Pelita Harapan is the number one private university in Indonesia according to the QS World University Ranking 2013. UPH was the first University in Indonesia to introduce programs entirely taught in English, the first to offer a liberal arts curriculum, and the first to introduce a multi-disciplinary approach to its programs. While consistently underlining the vision of "knowledge, faith and character", UPH, in cooperation with overseas partner universities, has developed a very rich curriculum in many areas of study, ensuring that its graduates are respected globally and appreciated by modern business and industry.

## The Center for Trade and Investment - CITI

Established in September 2014, CITI's objective is to raise awareness in Indonesia of the importance of an outward-looking and liberal trade and investment policy, so as to ensure the country's continued commercial competitiveness and support its economic development goals. CITI runs a number of research, education and outreach initiatives with the generous support of the Swiss State Secretariat for Economic Affairs (SECO) and the World Trade Institute (WTI), Switzerland.

This quarterly newsletter seeks to provide updates, insights and analysis on current developments in trade and investment law and policy in Indonesia. Constructive feedback and comments are always welcome.


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**Disclaimer:** The articles are representative of the author's view, not necessarily the general view of the Center

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