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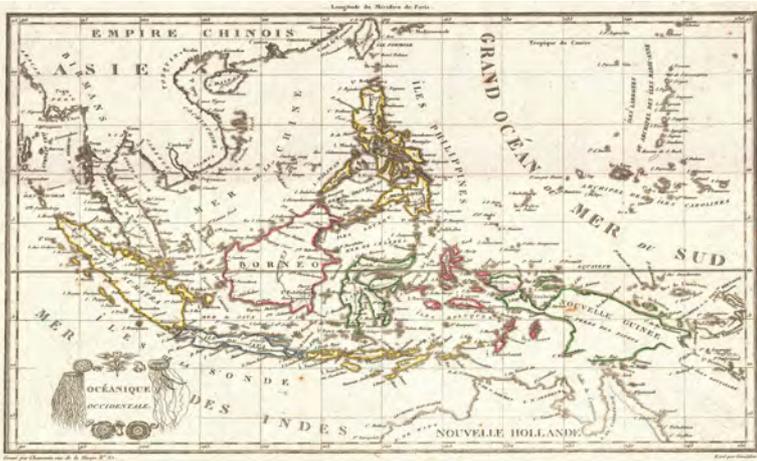
Finally we reflect on Indonesia's now long-standing policy of food security through self-sufficiency and what this is likely to entail for the country's poverty reduction efforts



Indonesia and Various Trade Remedy Actions

Indonesia admittedly has somewhat of a mixed record when it comes to trade remedies, a term which is generally understood to include antidumping duties (against goods that are being dumped at unfairly low prices), countervailing duties (against subsidized imports) and safeguards (against particularly injurious import surges). Indonesia can be considered a fairly frequent user of antidumping duties, and is one of the world's most frequent users of safeguards. To date, it has never used countervailing duties. But Indonesia is not only a big user of these instruments: its exports are regularly on the receiving end of all kinds of trade remedies, particularly its paper and shrimp exports.

Indonesia and these trade remedies have been in the news again recently. Indonesia is currently defending its export interests against both Pakistan and the United States in relation to the country's massive paper exports. Pakistan opened both an antidumping and countervailing duty investigation (a double-whammy) on exports of Indonesian paper. Although the investigation has not yet concluded, just the prospect that imports of paper from Indonesia could face duties is enough to have a hugely chilling and thus damaging effect on exports of these products.



Indonesian Trade and Investment Quarterly

1st Quarter 2015

This case is currently pending before the World Trade Organization, where Indonesia's victory, at least on some counts, seems fairly certain at this point.

More recently, the United States has also targeted Indonesia's paper exports, together with those of a number of other countries, including Australia and China. Similar to the actions taken by Turkey, US authorities have simultaneously launched both antidumping and countervailing duty investigations against the products in question, essentially arguing that they are both dumped at unfairly low prices, as well as benefitting from market-distorting subsidies. Indonesia is currently in the process of defending its interests in this case before the competent US agencies. Whether or not this dispute also makes it to the WTO remains to be seen. But for now, Indonesia's exports of paper to the United States can be considered as equally suffering from the chilling effects on trade that launching these investigations inevitably has on trade flows. In many ways, just launching an investigation may achieve the desired short-term effect for an import-competing industry, especially given that these cases can drag on for years at both the domestic and international levels. And once duties are imposed, they can stay in place for many more years thereafter.

But it would be wrong to think of Indonesia as simply a hapless victim in the context of this particular set of trade policy instruments. Indonesia plays this game as much as many other countries, and in some ways Indonesia's violation of both the letter and spirit of the rules is even more flagrant than many other users. Take for example an action filed very recently by Taiwan at the WTO against Indonesia's imposition of a safeguard against Taiwanese imports of various steel products. Rumor has it that in conducting the investigation, the Indonesian authorities violated even the most fundamental procedural and substantive requirements that these investigations are subject to. If this proves to be true, Indonesia stands not only to lose this case, but the inadequacy of its institutional arrangements and its negligent disregard for the rules at least in this particular case will be showcased to the 160 Members of the WTO.

Another example is furnished by recent statements made by the Indonesian Minister of Finance, Bambang Brodjonegoro, who has been quoted in the media as stating that Indonesia intends to use temporary antidumping duties to help narrow the current account deficit. Anyone with even the most rudimentary understanding of these instruments will know that this is not what they are intended for, and that if a government, like Indonesia's, explicitly uses them for this purpose, then they will make themselves susceptible to a WTO challenge that they simply cannot win.

" ... in some ways, Indonesia's violation of both the letter and spirit of the rules is even more flagrant than many other users ..."



Halal Certification the Next Big Headache

for everybody except the certifying bodies themselves

On, 25 September 2014, while most political observers in Indonesia and certainly the majority of the country's media were focusing on the appointment of the newly elected President's cabinet, the House of Representatives (DPR), sitting in plenary session, enacted a hitherto highly controversial piece of legislation, namely the Halal Product Assurance Act (*Undang-Undang Jaminan Produk Halal – UU JPH*). This new law has since attracted a lot of attention from domestic economic operators as well as from Indonesia's trading partners, since it is likely to have far-reaching implications for the manufacture and sale of any products intended for human consumption across the archipelago.

Our analysis of the bill is focused primarily on its compliance with Indonesia's international treaty obligations, particularly under the WTO agreements and any similar commitments entered into by Indonesia in the context of numerous free trade agreements. Laws and regulations on labeling are generally recognized as falling within the scope of the WTO Agreement on Technical Barriers to Trade (TBT Agreement). Arguably the most important provision in this context is Article 2 of the TBT Agreement, which sets out a number of requirements that WTO Members (including Indonesia) must comply with when adopting and applying technical regulations (such as the new Halal Product Assurance Act). The most important requirements here include non-discrimination (meaning foreign and domestic producers be treated equally) as set out in Art. 2.1, and an obligation to ensure that "technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade", as laid out in Art. 2.2. The same provision also states that "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfillment would create", and provides a non-exhaustive list of what constitutes such a legitimate objective, namely: "national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment". It's hard to see which of these legitimate objectives mandatory halal certification fulfills.

Also relevant in this context is Art. 2.4 of the TBT Agreement, which requires WTO Members to use international standards where they exist. This could be problematic in the Indonesian context, because the *Codex Alimentarius* has adopted General Guidelines for Use of the Term Halal (CAC/GL 24-1997), which specify in relevant part that "halal food can be prepared, processed or stored in different sections or lines within the same premises where non-halal foods are produced, provided that necessary measures are taken to prevent any contact between halal and non-halal foods" (2.2.1). At first glance this appears to be in direct contradiction to Article 21 of the Indonesian Act that requires that the location, place and equipment used for halal products must be separate from the location, place and equipment used for non-halal products. This means that, if Indonesia's halal legislation and the relevant implementing regulations were to be challenged at the WTO, Indonesia would first need to justify why it did not rely on international standards when formulating its halal legislation, while also being required to show that the halal legislation it has enacted is not more trade restrictive than necessary to achieve a legitimate policy objective.

Because the scope of application of the Act is so broad - affecting "goods and/or services that are related to foods, beverages, as well as consumer goods that are worn, used or utilized by the public" (Art 1.1) - and because it seems to not provide for any exceptions - "Products that enter, circulate, and are traded in the territory of Indonesia must be certified halal" (Art. 4), producers and providers of these goods and services are unlikely to take the act lying down if they think they have grounds for successfully challenging it.

The Act represents a boon to those bodies entrusted with providing the required halal certification, which for the moment is the Indonesian Ulema Council (UAM) before this task is eventually entrusted to a new body to be established under the auspices of the Ministry of Religious Affairs. Over the past year or so, *Tempo* and other domestic and foreign media outlets have uncovered a series of unsavory bribery allegations and corruption scandals in connection with halal certification and the UAM, even before the Act entered into force thereby rendering halal certification mandatory. The Ministry of Religious Affairs for its part seems like a strange choice for such an obviously lucrative licensing activity, given its extremely poor record in the past in administering funds in the context of Indonesia's annual Haj quota allotment.

We predict that the new halal legislation and the next bout of implementing regulations are likely to cause more problems than they solve for Indonesia, and note that both domestic and foreign industry players have consistently advocated for either the continuation of non-mandatory halal certification and labeling, or for a negative labeling scheme pursuant to which only products that are non halal (haram) need bear any corresponding labeling to that effect.

Investor State Dispute Settlement under Scrutiny in Indonesia too

(contribution by Francesca De Paolis, Jakarta-based arbitration expert)

In 2014 Indonesia announced its intention to terminate its bilateral investment treaty (BIT) with the Netherlands, which in any event is set to expire on July 1, 2015. However, under this treaty's "survival (or sunset) clause", investments made prior to the date of termination of the Agreement are protected for an additional period of 15 years from the date of termination of the BIT. Such investments would thus enjoy the protections afforded under the present BIT until July 1, 2030. It is unclear whether such action foreshadows the termination of additional BITs, following a recent worldwide trend of termination or inactivity, or whether it is a strategic move by the Indonesian Government to negotiate a new BIT which establishes clearly defined protections and dispute resolution provisions. Several countries in both the developed and developing world are exploring alternative, flexible models to accommodate both the national interest (in terms of public policy or economic development objectives) while at the same time ensuring the reliability and resulting use of national legal systems to foreign investors in lieu of international arbitration. Unfortunately, the current state of Indonesia's judiciary, regularly cited for its corruption and inefficacy, does not provide the requisite assurances or legal certainty that many foreign investors would ideally require.

Indonesia has recently faced a rising number of foreign investment arbitration proceedings, with transnational companies claiming up to billions in damages. Against this backdrop, the Indonesian Government's termination of its BIT with the Netherlands has subsequently been interpreted as a response to the increasing number of treaty claims brought by foreign investors against Indonesia. Most BITs contain dispute resolution clauses that give foreign investors extensive protection through the so-called Investor-State Dispute Settlement mechanisms (ISDS). Quintessential to the success of BITs - as a measure to promote investments and avoid further inundating national courts - is the inclusion of arbitration clauses, submitting disputes to a neutral arbitration tribunal that provides investors with an effective tool to enforce their rights under the treaty. Like many BITs, the Indonesia-Netherlands BIT includes an ICSID arbitration clause. It is also worth noting that Dutch BITs are renowned for being particularly expansive in the rights and protections they afford foreign investors.

Several noteworthy Indonesian arbitration cases have been brought before ICSID. For example, in *Churchill Mining*, a British-owned company brought suit for one billion dollars over the revocation of coal mining permits on the island of East Kalimantan. In addition to the Churchill case there was *Newmont Mining vs. Indonesia*, filed in July 2014 by Newmont Mining Corporation, one of the world's biggest mining companies, which produces mainly gold. Headquartered in the United States, its majority shareholder is based in the Netherlands. Newmont sued the Indonesian government together with the Dutch entity under the Dutch BIT with Indonesia, requesting interim relief to allow exports to resume. However, a month later, Newmont withdrew the case, and the ICSID Tribunal ordered accordingly. Various observers have pointed out that such a series of arbitration decisions against the Indonesian State and favoring foreign investors has prompted a more robust response by the Indonesian Government.

The current generation of BITs was initially established to protect and promote reciprocal investments in the respective contracting states. Foreign investors, especially those investing in emerging markets, are well advised to analyze not only the tax efficiency of a particular investment plan, but also the existence and substance of any BITs to which the host country is a signatory. Indeed, a key feature in planning foreign investment is identifying and assessing in advance risks related to the business relationship involved, both from a commercial perspective and a legal one. Investing in other countries inevitably entails certain risks, sometimes distinct from expectations linked to different social, legal, and economic expectations that the investor will invariably bring with it. Since contractual relationships between investors and the local governments ordinarily do not exist, BITs provide a higher degree of legal protection to foreign investors. On the other hand, one must also consider the sensitivities of developing countries in seeking development outcomes while maintaining regulatory and judicial sovereignty. The recent trend for many NGOs and civil society organizations to advocate against the ratification of BITs can perhaps best be understood in the context of a perception that governments must maintain a certain degree of regulatory autonomy while BITs generally do not sufficiently take into account obligations and standards to protect the environment, social justice or natural resources.

BITs have undoubtedly played a very significant role in driving and channeling foreign direct investment from developed to developing countries. Investment treaties are delicate tools for managing risks related to government actions that negatively impact investors. Often, the existence of treaty protection can help navigate the conversation between investor and State, even bringing the problem towards an alternative extrajudicial resolution. It would be desirable to read action by the Indonesian Government of termination of its BITs as a way to put the spotlight on a very delicate issue: balancing the needs of foreign investors for certainty and protection while simultaneously addressing the needs of emerging countries to protect their growth. Time will tell whether this recent Indonesian move is the opening gambit in efforts to negotiate a more equitable bilateral treaty.

2015 USTR Trade Barriers Report Published

and it's the usual litany of (well-justified) complaints

The United States Trade Representative (USTR) recently published its annual Trade Barriers Estimate Report, in which it regularly categorizes and updates different markets access and investment barriers plaguing US exporters, economic operators and investors around the world. Always a very informative read, and a good place to start for anyone looking to get a quick handle on a given country's prevailing political-economy constraints, this year's report lists the usual litany of complaints about the economic and business environment in Indonesia that has steadily been becoming more opaque and less predictable since the second half of the 2000s.

Under the heading "Technical Barriers to Trade" the report documents new testing requirements for toys that have slowed down clearance for these products from a previous average of 15 days to as long as three months. Although Indonesian regulators are rightly concerned about the dangers that toys can represent to children (recent scandals about lead paint on some toys imported into the US come to mind), government officials in Indonesia have resorted to highly trade-restrictive measures for mitigating the perceived health risks, namely testing requirements imposed on a per-shipment basis and onerous documentation requirements.

Also under the same heading, the USTR report describes new measures that severely hamper the import of consumer electronics devices such as cell phones, tablets and laptops, all very popular among Indonesia's rapidly growing middle class. It's not certain precisely what risks Indonesian government officials are seeking to mitigate here, since these products, especially the most popular products from major suppliers like Apple and Samsung, are already manufactured in accordance with internationally applicable safety standards and have tightly regulated quality control procedures in place. Nevertheless, the Government of Indonesia has taken it upon itself to issue onerous requirements, the sole purpose of which can only be to create and maximize rents, since there is almost no domestic industry in these products to protect in Indonesia. What is surprising here is that regulators issued these testing requirements without first setting up sufficient testing capacity, thus knowingly leading to a situation that would create supply-side bottlenecks (and thus rents), as well as being considerably more trade restrictive than necessary.

Under the section dedicated to "Sanitary and Phytosanitary Barriers" (a category of measures that mostly affects imports of food and beverages), the USTR report catalogues a long list of complaints that most trade policy observers in Indonesia will already have at least some familiarity with. Here the list of affected products is long, including beef, pork, animal-derived products, poultry and horticulture. For several years now these products have become increasingly subject to onerous and extensive licensing procedures from the Ministry of Agriculture on the one hand (to whom they must demonstrate the products are safe for human consumption), while on the other hand being subject to non-automatic and highly discretionary import licensing procedures administered by the Ministry of Trade that are anything but predictable and transparent. Although the policy rationale behind requiring food producers and importers to prove that the products they are importing are safe is understandable and laudable, again the Indonesian Government seems to consistently favor processes and procedures that are far from minimally trade restrictive and again seem designed to maximize rents for the issuing agencies. Although importing food and food products into developed-country markets such as the United States, the European Union or Australia is also subject to often onerous requirements, these are typically administered in a way that is at least transparent and predictable and is in any event free of the kind of petty rent-seeking behavior that seems to characterize the whole culture of license issuance in Indonesia. This is something many observers – both foreign and domestic - were hoping the new political leadership elected at the end of 2014 would address, but so far these hopes have remained unaddressed, to the distress of many including Indonesia's trading partners.

But the real burden is borne not by foreign economic operators but rather the Indonesian people who are still denied the choice of the best agricultural produce that global markets have to offer at the best prices. Until consumers and consumer groups in Indonesia become interested in and informed about trade policy and the implications that poor economic decisions by Indonesian trade policy officials have for them, this is unlikely to change. These interests are essentially without a voice in a debate about the country's economic competitiveness that still has yet to take place.

Economic Integration and Poverty Reduction as the Road to Food Security

Indonesia's food security efforts have all the hallmarks of a policy at war with itself

During his opening remarks at the third Jakarta Food Security Summit on 12 February 2015, President Jokowi reiterated his election promise that Indonesia will achieve food self-sufficiency during his first presidential term. His confidence seemed based on observations of local areas as well as from meeting with local farmers and the President's conclusions on several methods that farmers could employ to both boost productivity and market their products. While we share President Jokowi's noble intentions in improving the welfare of farmers and having a sustainable domestic food supply, the goal of food self-sufficiency is illusory as no country can be entirely food self-sufficient.

Among Indonesian policymakers, like those in many other developing countries, people tend to equate food security with self-sufficiency. Policies aimed at achieving self-sufficiency across certain agricultural commodities are generally steeped in a broader policy framework of ensuring food security, and likewise food security is seen by many as best guaranteed by self-sufficiency, as if they were two mutually enforcing elements of a virtuous policy circle. The United Nations Food and Agriculture Organization (FAO) has defined food security as "a situation in which all people at all times have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life." There are three elements in this definition: availability, access and stability. In contrast, food self-sufficiency is defined as the ability to meet consumption needs, particularly for staple foods, from a country's own domestic production rather than having to rely on importing or buying from non-domestic sources (minimizing dependence on international trade).

A report by the Organization for Economic Cooperation and Development entitled "OECD Agricultural Policy: Monitoring and Evaluation 2013" points out that the link between higher food self-sufficiency and greater food security is in fact extremely tenuous. Policies for pursuing food self-sufficiency might even be counterproductive in the quest to obtain food security. Governments in many countries often employ import restrictions and erect trade barriers against food imports. Such policies inevitably increase food costs and impose an additional economic burden on consumers, and are more than likely to adversely impact the poor who pay a relatively larger share of their already moderate incomes in covering basic necessities - particularly food. Import restrictions and trade barriers almost inevitably are a flanking measure to protect and insulate less efficient and competitive domestic agricultural producers, who must be subsidized from public funds in order to remain viable. In this way, consumers actually pay for their food twice - once when they buy their food at artificially inflated prices and again when they pay their taxes.

Another point that the Government of Indonesia in particular must consider is whether we have sufficient land and water resources to feed more than 200 million people purely on the basis of domestic production. According to the 2013 "OECD Review of Indonesia's Agricultural Policies", if Indonesia is to achieve its self-sufficiency targets, this will only put additional pressure on the country's limited natural resources and further threaten an already endangered environment. Achieving self-sufficiency would require the expansion of agricultural land which would lead to further deforestation, a problem already being acutely felt by both Indonesia and its neighbors as a result of the sharp rise in palm-oil production. Overall, seeking to achieve Indonesia's self-sufficiency goals as currently formulated would certainly do more harm than good.

Economic integration and poverty reduction offer a more holistic and ultimately sounder approach to achieving the aim of food security. Economic integration reduces costs and maximizes efficiency through sharing knowledge, technology, production, storage and distribution techniques. These benefits also can help countries to produce agricultural products in the most efficient and sustainable manner. Thanks to economic integration, producers will have access to new markets and a way to diversify sales outlets, thereby giving producers both greater security and stimulating efficiency in production. Countries also benefit from a diverse supply of nutritious food that cannot be grown domestically. Singapore is a good example of a country that has benefited from economic integration. It is a small country with a rapidly growing population and extremely limited agricultural land and access to fresh water. Despite these considerable constraints, Singapore was ranked fifth in 2014 by the Economic Intelligence Unit's Annual Global Food Security Index, which evaluates a country's food security based on a number of factors including availability, affordability, quality and the safety of food.

Singapore's success should come as no surprise if one looks at the food resilience efforts pursued by the Singaporean government. It invests in research and development to boost local productivity. To complement its local production, Singapore leverages its existing integration into international supply chains and employs a food import diversification strategy. It imports its food supply but diversifies its sources to spread any future risks.

Poverty is a huge stumbling block for food security. The poor's lack of purchasing power inhibits their ability to fully avail themselves of the full range of food sources on offer, even where food is both abundant and freely available at the market. Vietnam is an example of a country that is facing this issue in much the same way as Indonesia. Vietnam is always in the top five largest rice exporters globally. Self-sufficiency particularly in rice is at the heart of their agricultural policies. Although they have a sufficient supply of food, there are large numbers of people who lack sufficient income to purchase food in Vietnam. Income from growing rice is also not that high, so that farmers are hindered from abandoning their land, because they are not permitted to use their land for other purposes. This situation creates land waste and adds another thread to the complex web of poverty.

In the end, food security involves many complex issues ranging from health and environment to trade and economic development. Pursuing food self-sufficiency would not guarantee food security. As a political strategy, it is also very costly. The beneficiaries of this policy are a group of large farmers, absentee landowners and middleman at the expenses of consumers and taxpayers. Small farmers who are also consumers become more and more vulnerable. For the reasons we have described above, we believe that the path to greater food security is not through food self-sufficiency but through economic integration and poverty reduction.



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



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University Pelita Harapan - UPH The Center for Trade and Investment - CITI

Founded in 1994 with the vision of educating a new generation of leaders for Indonesia and the wider ASEAN region, University 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 study, ensuring that its graduates will be respected globally and appreciated by modern business and industries.

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 to support its economic development goals. CITI runs a number of research, education and outreach initiatives with the generous support of both the Swiss State Secretariat for Economic Affairs (SECO) and the WTO Secretariat (in the form of the WTO Chairs Program). This quarterly newsletter seeks to provide updates, insights and analysis on current developments in Indonesia in the area of trade and investment law and policy.

