

# Legal Analysis on Indonesia Food Import Policy Review through TPRM WTO to Prevent an International Trade Dispute

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## Abstract

This article analyses how Indonesia as World Trade Organization Member State, may utilize and apply Trade Policy Review Mechanism's Review Outcome to prevent dispute settlement in the Dispute Settlement Body. This article consists of two legal issues, the first issues discuss how Indonesia may utilize the TPRM Review Outcome to prevent dispute in DSB Appellate Body. Meanwhile, the second issues discuss how Indonesia may apply the TPRM Review Outcome to prevent such dispute settlement. By applying Indonesia v. Brazil Dispute concerning Indonesia Measures on Brazil Chicken Meat and Chicken Product Case as this article's minor premise, writers may explain how TPRM Review Outcome may provide an individual well to Indonesia as the WTO Member States and may represent WTO's Common Will to achieve free trade. Furthermore, writers also explain how Indonesia may apply the TPRM Review Outcome which is by conducting bilateral cooperation with Brazil. This cooperation shall Indonesia conducted by involving Indonesia National Consumer Protection Agency as one of its technical negotiation teams and Indonesia Halal Product Assurance Agency as one of its operational negotiation teams. Furthermore, this cooperation shall also entail measures that abolish Indonesia's quantitative restriction measure or safeguard policy application.

## Keywords

World Trade Organization, Trade Policy Review Mechanism, Dispute Settlement Body, Import Measure, Bilateral Cooperation

## 1. Introduction

International trade is one state instrument that may provide welfare to a country. In explaining this premise, writers are quoting The Absolute Advantage Theory by Smith, stating that international trade can be conducted through an

international division of labor so that a country may produce particular goods cheaper than another country (Aprita and Aditya 2020). Quoting Smith, Aprita, and Aditya (2020) furthermore stated that international specialization and production efficiency shall also be conducted through goods importation if a state's domestic production is inefficient or less advantageous to acquire an absolute advantage.

Meanwhile, Ricardo addresses The Comparative Advantage Theory by stating that Smith's Absolute Advantage Theory has several weaknesses. The first weakness of Smith's Theory can be understood by the fact that some countries might have a better production of more than one good (Aprita and Aditya 2020). Furthermore, the second weakness of Smith's Theory can be explained by Ricardo's Premise stating that a state may still participate as an international trade actor if that state produces goods cheaper than other countries (Aprita and Aditya 2020). This premise is based on the Comparative Advantage's Theory Parameter which is the labor quantities to produce goods. Both Smith's and Ricardo's Theories above are the basis of the free trade notion, which has become the antithesis of protectionism or mercantilism. The notion of protectionism lies within a state policy in a form of domestic industry development contrary to the free trade notion itself (Suherman 2014). To achieve a balance between the free trade and protectionism notion itself, states were then agreed to be bound under the international trade law regime. Even though there is no consensus between jurists regarding the definition of international trade law, states as members of the international community have agreed to be bound under World Trade Organization (hereinafter mentioned as WTO) Regime that intended to achieve a non-discriminative trade relation through monitoring and settle disputes between its member states (Rubiyanto 2019).

Rubiyanto (2019) quoting Rae stated that WTO's Roleplay has become an essential element for a state in applying its economic strategy generally and to apply its international trade strategy specifically. Furthermore, Rubiyanto (2019) also stated that each WTO Member States shall also adjust its municipal law with WTO Multilateral Agreements and bilateral agreements made between each WTO Member States to have the capacity to compete in this free trade regime while protecting its domestic industry. Therefore, as one of the member states of the WTO, Indonesia shall comprehensively understand both WTO's Dispute Settlement Mechanism and WTO Agreements so that Indonesia won't apply a trade policy that can be qualified as a breach of WTO Agreements. Writers' premise herein is compatible with Marceau's Opinion (2002) stating that WTO Law is a specific legal subsystem that consists of a specific claim, specific breach qualification, and specific compensation caused by a wrongful act attributed from the WTO Agreement.

One of these specific elements can be seen in Article 22 para 2. Annex 2 WTO Agreement states that *"If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period determined under paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period, enter into negotiations with any party having invoked the dispute settlement procedures, to develop mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."* (BPK, 2022). By understanding this article, it can be seen that DSB has authority to suspend the application of a particular agreement that has a forcible nature towards one of a disputed WTO Member States *in concreto* the state that is proved to breach the WTO Agreement.

However, regardless of its forcible nature, DSB Authority mentioned above shall not be understood as a measure that might interevent a WTO Member State's Sovereignty. This premise can be found in Article 3 para 2. Annex 2 WTO Agreement that *inter alia* stated that a dispute settlement resolution shall not increase or reduce rights and obligations under the WTO Agreement from the condemned state (BPK, 2022). It can be seen that this stipulation favors the non-legalistic (power-oriented) point of view which states that the application of the WTO Agreement shall be conducted in a more flexible nature (Hata 2006). Even though Indonesia and other developed countries are viewing the WTO Agreement base on the legalistic (rule-oriented) point of view, the non-legalistic point of view is implied under Article 3 para 2. Annex 2 WTO Agreement is inherently undisputed (BPK, 2022).

One of the international trade disputes that involved Indonesia and caused Indonesia to be condemned by the DSB due to its breach of the WTO Agreement is the *DS 484: Indonesia Measures Concerning Importation of Chicken and Chicken Products*. This dispute was caused by the import prohibition measure conducted by Indonesia towards chicken meats and chicken products exported by Brazil (Sood 2018). Brazil Meat Exporting Association, therefore,

stated that Indonesia Measure is unfair since it caused their goods unable to enter Indonesia's Custom (Sood 2018). Meanwhile, based on Indonesia's Point of View, this measure was conducted for public moral and public health protection in a form of halal labeled meat and sanitized meat (Sood 2018). This different legal point of view caused Brazil as a complainant state to bring this dispute to DSB. According to Brazil's Argument, Indonesia has violated the Sanitary and Phytosanitary Measures Agreement, Technical Barriers to Trade Agreement, Agriculture Agreement, Import and License Procedures Agreement, and Preshipment Inspection Agreement covered under Annex 1A WTO Agreement (Jayanti and Ariana 2018).

After examining this dispute, DSB Panel finally announced its decision by stating that there are 3 points of argument won by Indonesia and there are 4 points of arguments won by Brazil (Jayanti and Ariana 2018). This decision was made because Brazil failed to prove the discriminative measure toward a halal product, direct transshipment terms, and the general prohibition on the chicken meat and chicken product by Indonesia (Jayanti and Ariana 2018). Furthermore, Brazil succeeds to prove Indonesia's Import Positive List, conditions to use import products, import license procedure, and Indonesia's undue delay on veterinary health certificates (Jayanti and Ariana 2018). In responding to this decision, Supit, Head of Farm and Fishery Department APINDO stated that Indonesia shall comply with this DSB Decision. Supit furthermore explains that this compliance shall be conducted to avoid future retaliation conducted by Brazil (Andri 2019).

Not only recorded by the DSB but this dispute is also recorded by the Trade Policy Review Mechanism (hereinafter mentioned as TPRM) in its review towards Indonesia's Trade Policies on 2020. Unlike the DSB, Annex 3A para i. WTO Agreement *inter alia* stated that TPRM is a WTO Permanent Organ that has a purpose to improve adherence by all members to rules, disciplines, and commitments made under the multilateral trade agreement as and where applicable the plurilateral trade agreements and hence to the smoother functioning of the multilateral trading system by achieving greater transparency in and understanding of trade policies and practices of Members (BPK, 2022). This stipulation furthermore expressed that TPRM is designed for a noncompliance function and it is not designed for a dispute settlement function. Regardless of its noncompliance nature, writers would like to explain how the application of TPRM Review Outcome may prevent a dispute.

Since this dispute is also written in TRPM Review for Indonesia, writers opined that Indonesia shall apply the TPRM Review Outcome instead of bringing this case to DSB Appellate Body. This premise is delivered by writers since Indonesia decided to bring this case to DSB Appellate Body due to its loss to Brazil and due to its disagreement to comply with the second-panel decision on December 22<sup>th</sup> 2020 (Organization 2020). The notion delivered by writers herein is based on Ghos's Doctrine (2020) stating that TRPM has benefit in a form of easier monitoring toward the WTO Member States conducting a bilateral agreement. Furthermore, Ghos (2020) also explained that information's provided by TPRM may achieve a bilateral agreement base on reciprocity and mutual advantage in the middle of uncertainties that existed within international trade practice.

Besides Ghos's Notion, the writers' idea herein is also expressed by Dematar's Opinion (2019) stating that TPRM may also have the function to prevent disputes between the WTO Member States. By applying Guzman's Doctrine, Dematar (2020) stated that TPRM may also have a dispute settlement preventive function if it has a linkage with DSB. Despite having a different point of view a form of notion in which Annex 3 WTO Agreement doesn't need to be amended, writers agree with Dematar's Opinion (2020) stating that TRPM may be used to prevent a dispute between the WTO Member States. Therefore, in this article, writers will explain how Indonesia may update its quantitative prohibition measures on Brazil's Chicken and Chicken Product based on the TPRM Review Outcome issued on 11 December 2020, to prevent a dispute in DSB Appellate Body.

This article consists of two objectives. The first objective seeks to analyze and understand how Indonesia as the WTO Member States may use TPRM Review Outcome on Indonesia's Trade Policy in Agriculture Sector as guidance for Indonesia to prevent a trade dispute in DSB Appellate Body. Meanwhile, the second objective seeks to analyze and understand how Indonesia may apply the TPRM Review Outcome on Indonesia's Trade Policy in Agriculture Sector as an instrument to prevent a trade dispute through DSB Appellate Body. Both of these objectives are formulated to provide a unique contribution to international trade literature.

## 2. Literature Review

To distinct this article from other previous research and for novelty purposes, writers will present four previous pieces of research that discuss the DS 484 Dispute and TPRM. Those researches are: **First**, Luh Made Junita Dwi Jayanti and I Gede Putra Ariana with the title *Penyelesaian Sengketa Impor Daging Ayam Antara Brasil dengan Indonesia Melalui Dispute Settlement Body World Trade Organization* (Universitas Udayana, Denpasar, 2018); **Second**, Muhammad Sood with the title *Hukum Perdagangan Internasional* (Raja Grafindo Persada: Depok, 2018); **Third**, Arunabha Ghos with the title *Developing Countries in the WTO Trade Policy Review Mechanism* (Princeton University, New Jersey, 2010); and **Fourth**, Dewangga Dura Dematar with the title *WTO's Trade Policy Mechanism (TPRM) and Indonesia's Compliance in Agriculture Sector* (Universitas Gadjah Mada, Yogyakarta, 2019).

To achieve the first objective, writers apply The Social Contract Theory by Rosseau. In explaining the general understanding of this theory, writers quoted Rosseau's notion stating that social contract is a circumstance where people and their ruler bonded under a contract complied by the government (Gourevitch 2019). By quoting Friedrich's Commentary on Rosseau Notion, Jurdi (2016) furthermore stated that this contract is formed due to the transfer of rights conducted by the people to form a community. Utama (2012) transposed this theory into the field of international trade law by stating that such circumstances may also be achieved in international trade law practice by understanding the notion of international treaties regarding the establishment or international organization is formed. Due to state consent by wavering their political sovereignty and territorial integrity related to the objective of that organization, states as an international community may receive an advantage and destroy their isolationist barrier because of that social contract (Utama 2012).

Meanwhile, to achieve the second objective, writers will apply the *Pacta Sunt Servanda* Grand Theory as the basis of this analysis. As one of the general principles of law, Kusnowibowo (2018) stated that *Pacta Sunt Servanda* is a legal maxim from a theory of law that can be qualified as a legal doctrine. Fuady (2013) stated that this theory expresses a notion where an agreement made from a non-illegal action shall be fully complied with. He furthermore explained that this theory stresses the compliance of states toward an international agreement that they have signed (Fuady 2013). To elaborate on this grand theory, writers will also explain the Purposes of Law Theory by Radbruch stated that the purposes of law are justice in achieving balance, utility in pursuing happiness, and certainty in achieving clarity (Junaidi 2014). Such elaboration is expressed to explain how the TPRM Review Outcome may help both Indonesia and Brazil to achieve justice, utility, and certainty to prevent their dispute to be settled in DSB.

To wrap up this review, the writers stated that the objective of this paper will be achieved by summarizing the dispute between Indonesia and Brazil due to Indonesia Import Measure related to Brazil Chicken Meat and Chicken Products mentioned as DS 484, as is discussed in the first two previous types of research. Writers will also achieve the objective of this paper by disusing the function of TPRM in a bilateral relation between WTO member states and TPRM's role to ensure its member state compliance in the agriculture sector, based on the third and the fourth previous researches. Last but not least, writers also achieve the objective of this paper or answer the legal issues in this paper by applying the Social Contract Theory and the *Pacta Sunt Servanda* Theory by elaborating it with Radbruch's Doctrine.

### 3. Methods

This paper is applying a normative method that consists of a statutory approach and a conceptual approach. Amiruddin and Asikin (2004) stated that this research method is often conceptualized as what's written in a statute or treaty (law in books) or law conceived as a measure on how humanity shall be conducted. A normative method is also a method that only uses secondary data in answering its formulated issues (Amiruddin and Asikin 2004). Furthermore, in explaining Soemitro and Soekanto's notion, Amiruddin and Asikin (2004) also expressed that this method shall be conducted by gathering primary legal sources, secondary legal sources and tertiary legal sources explained herein: 1.) Primary legal sources are binding legal sources consisting of statutes or regulations, international agreements, judicial precedent, and customary law; 2.) Secondary legal sources are expert opinions explaining the validity, application, and interpretation of primary legal sources; 3.) Tertiary legal sources are texts providing not only guidance but also an explanation on both primary legal sources and secondary legal sources. Dictionary is one example of this legal source.

Furthermore, writers also use two sub-methods of the normative method which are the statute approach and the conceptual approach. A statute approach is an approach applied by relating a particular issue with the primary legal sources related to it. In applying this approach, researchers or writers shall study the *ratio legis* and *ontology* of laws

to expose the philosophic matter beneath those laws (Amiruddin and Asikin 2004). Fellmeth and Horwitz (2009) stated that *ratio legis* can be translated as a reason for the law or the purpose of the specific norm such as regulations and treaties. Meanwhile, Webster (2022) explained that ontology is a particular theory about the nature or character of a being or the kind of things that have an existence.

Meanwhile, the conceptual approach is an approach applicable by addressing writing publicists related to the discussed issue. This approach can be applied by analyzing legal issues based on developing legal doctrines in jurisprudence (Amiruddin and Asikin 2004). In applying this approach, writers will apply the legal theories explained in the literature review section in this paper. Furthermore, writers will also apply this approach by addressing the formulated issues of this paper by describing international trade law principles that will be explained in the result and discussion section of this paper.

#### **4. Data Collection**

This paper is formulated by collecting secondary data. Those data consist of periodic review outcomes of the review conducted by the Trade Policy Review Mechanism and a summary of cases adjudicated by the Dispute Settlement Body of the World Trade Organization. These documents can be accessed from the World Trade Organization's web pages mentioned in this paper reference. Writers also collected their secondary data from the WTO Agreement, Indonesia regulations, international law literature in a form of books and journals by conducting library research. The following WTO Agreement and Indonesia regulations can be accessed in Badan Pemeriksa Keuangan's website mentioned in the reference of this paper (officially abbreviated as BPK). Writers also conduct their data collection by collecting legal sources consisting of primary legal secondary legal sources to achieve this paper's objective as is explained in the method section of this paper.

#### **5. Results and Discussions**

##### **5.1 The Utilization of TPRM Review Outcome on Indonesia Food or Agriculture Import Policy**

The dispute discussed in this article started in consultation conducted by Brazil and Indonesia on October 16<sup>th</sup> 2014 (Organization 2020). This consultation was then helped by the other WTO Member States consisting of Australia, New Zealand, Taipei China, and the United States of America on October 31<sup>st</sup> 2014 and the European Union joined this consultation process on November 3<sup>rd</sup> 2014 based on the disputing party's demand (Organization 2020). This consultation was then failed to achieve a consensus within the disputed parties on October 15<sup>th</sup> 2015 so Brazil demanded a panel adoption on this date. Due to Indonesia's objection on October 29<sup>th</sup> 2015, the panel adoption between both parties was successful to be adopted on December 3<sup>rd</sup> 2015 (Organization 2020).

On March 31<sup>st</sup> 2017, The DSB Panel announced its disputed parties by stating that it can only issue its examination report in early May 2017 due to the complexity of this dispute. In October 2017, DSB spread the panel report to the disputed parties. The summary herein consists of the following points (Organization 2020):

*“i. An alleged (unwritten) general prohibition resulting from the combined operation of several different trade-restrictive measures (constitutive elements); and ii. Six individual trade-restrictive measures pertaining the following: a. The non-inclusion of certain chicken products in the list of products that may be imported; b. The limitation of imports of chicken meat and chicken products to certain intended uses; c. Indonesia's alleged undue delay in the approval of veterinary health certificates for chicken products from Brazil; d. Certain aspects of Indonesia's import licensing regime; e. Surveillance and implementation of halal slaughtering and labeling requirements for imported chicken meat and chicken products established by different Indonesian regulations; and f. Restrictions on the transportation of imported products by requiring direct transportation from the country of origin to the entry points in Indonesia.”*

Writers need to explain that four out of six elements presented on number ii. is part of a constitutive element expressed on number i. (Organization 2020). After exchanging arguments, this report was then adopted on November 22<sup>nd</sup> 2017. On December 15<sup>th</sup> 2017, Indonesia requested a reasonable period to adjust its measures with the Panel Recommendation following Article 21 para 3. Annex 2 WTO Agreement (Organization 2020). Furthermore, on February 7<sup>th</sup> 2018, Brazil and Indonesia announced to the DSB Panel that they need an adequate time to discuss the grace period of arbitration forum adoption (Organization 2020). This request is compatible with Article 21 para 3c. Annex 2 WTO Agreement (BPK, 2022). Therefore, this dispute has been conducted by both parties under the validity of the Annex 2 WTO Agreement (BPK, 2022).

Due to the absence of consensus, Brazil requested a second-panel adoption on June 13<sup>th</sup>, 2019. This second panel or compliance panel report was then adopted and spread to its disputed parties on November 10<sup>th</sup>, 2020 (Organization 2020). This panel report recommended its parties settle this dispute in DSB Appellate Body (Organization 2020). In responding to this report, Indonesia understood that the scope of this dispute is related to the application and the interpretation of the WTO Agreement (Organization 2020). This response was addressed by Indonesia on December 17<sup>th</sup>, 2020. On December 22<sup>nd</sup>, 2020, Brazil agreed that this dispute shall be settled by the DSB Appellate Body (Organization 2020).

Writers viewed this dispute as a chain for Indonesia due to Indonesia's dilemma to comply with Annex 1A WTO Agreement in one point and to protect its citizen's public moral and public health from non-halal chicken meats and chicken products. This illustration is expressed based on the opening of the sentence of the *Duc Contract Social* (The Social Contract) Book written by Rousseau. In addressing his social contract theory, Rousseau stated that an individual may only submit his entire rights if the association that received his rights may provide certain protection (Jurdi 2016). In transposing Rousseau's doctrine to the international trade law regime, Utama (2012) explained that Indonesia has submitted some of its self-determination in pursuing economic development to WTO, so that it may acquire advantages of the WTO Agreement.

Therefore, it can be understood that Indonesia consented to abolish its tariff barrier and non-tariff barrier to achieve free trade. This consent to be bound can be seen by Indonesia's signature on Annex 1, Annex 2 ad Annex 3 WTO Agreements based on Uruguay Round Final Act (BPK, 2022). Besides this consent, Indonesia also expects that its membership on WTO may achieve a free trade base on reciprocity and mutual advantage with the other WTO Member States as its written-on Para 3. Marrakesh Agreement Preamble (BPK, 2022). By understanding this notion, writers stated that Indonesia shall utilize the TRPM Review Outcome in 2020 to express its consent to be bound by WTO Agreements and to acquire a mutual advantage since Indonesia has signed the WTO Agreement.

The reciprocity and mutual advantage notion under Para 3. Marrakesh Agreement Preamble is compatible with the common will expressed by Friedrich. Friedrich emphasized Rousseau's Notion by explaining that the purpose of the social contract is to achieve common good within the community-made from that agreement (Jurdi 2016). Furthermore, this principle is also compatible with Rousseau's notion stating that besides achieving a common will, a social contract also has a purpose to achieve an individual good for each of its parties based on the notion of justice (Gourevitch 2019). Besides being affirmed by writers, The validity of social contract notion by Rousseau in international trade law practice is also affirmed by Henkin stated that a state shall have a self-determination right to pursue its happiness, therefore a state has a right to secure its right through a social contract that mainly stated that the state agreed to be regulated in an institution (Hata 2006).

Regulated under Annex 3 WTO Agreement, TRPM's main purpose is to help the WTO Member States to achieve transparency and to provide an understanding towards its trade policy and trade practice. Putra and Darmawan (2017) stated that TRPM has the authority to conduct research towards a member state trade policy base on five components consist of purpose, domestic transparency, research procedure, report, and its relation with the balance of trade under accordance of GATT 1947 and GATS. In exercising this authority, Annex 3C para ii. WTO Agreement stated member states report will be discussed in a periodic review base on frequencies herein (BPK, 2022): 1.) The first four member states (including European Union) shall be reviewed every two years; 2.) The sixty other member states shall be reviewed every four years, and 3.) The other member states shall be reviewed every six years, except for a least developed country that may be reviewed in a longer period.

Furthermore, part ii of this article stated that TRPM has the authority to examine more than one member simultaneously if a trade policy of a member is related to another member's trade policy (BPK, 2022). This stipulation is applicable except if a change in a form of a trade policy of a reviewed member impacts its bilateral opposing party. Moreover, para iv. of this article stated that TRPM shall create a framework in conducting its review, discuss the reviewed member policy and practice and create a report regarding the review that shall be conducted by the reviewed member and create a yearly review in providing consultation to related members (BPK, 2022). Para v. of this article finally explained that TRPM shall conduct its obligation based on a complete report from the reviewed state and a report that will be drafted by the secretariat based on information earned from its review and the reviewed member (BPK, 2022). TRPM shall also conduct a clarification towards a state related to a reviewed state (BPK, 2022).

Since its entry to force on January 1<sup>st</sup> 1995, Indonesia has conducted its periodic reviews through TPRM five times. Those periodic reviews were conducted on December 3<sup>rd</sup> to 4<sup>th</sup> 1998, June 28<sup>th</sup> to 30<sup>th</sup> 2003, June 27<sup>th</sup> to 29<sup>th</sup> 2007, April 10<sup>th</sup> to 12<sup>th</sup> 2013, and its latest review on December 9<sup>th</sup> to 11<sup>th</sup> 2020 (Organization 2020). On its latest review, TPRM informed Indonesia is one of its summary reports (hereinafter mentioned as WT/TPR/S/401) that Indonesia is still conducting its import prohibition measure based on moral public and public health, instead of the safeguard basis (Para 12 WT/TPR/S/401) (Organization 2020). TRPM furthermore informed that such measure has caused more damage compared to the 20% import tariff measure conducted in 2013 (Para 11 WT/TPR/S/278) (Organization 2020).

In closing their analysis in answering this issue, writers will present urgencies on why Indonesia shall utilize this TPRM Report to avoid dispute in DSB Appellate Body. Urgencies of the utilization of this report will be presented herein:

**First**, according to the TPRM Report base on Brazil's Complaint on Indonesia's Measure, TRPM arrived with conclusions consisting of several points herein (Organization 2020): 1.) Indonesia's consumer protection measure, halal label standard measure, and fraud prevention measure contained discriminative nature and lack of transparency; 2.) Indonesia's consumer protection measure, health measure, and consumer education through health information measure is qualified as an unnecessary trade barrier and shall be qualified as a standard that needs to be re-examined; 3.) Indonesia's health protection for human, animals, and environment measures, meat and meat product import measures, and halal and non-halal product separation measures shall be qualified as discriminative and less transparent measures that were made under the consideration of the government instead of the market consideration; and 4.) Indonesia's Moslem Syariah Measures shall be re-examined due to its lack of transparency and shall be adjusted with international standards.

**Second**, writers quote Suherman's Opinion (2014) in explaining Indonesia's Obstacles each time it settles a dispute with the other WTO Member States through DSB. Those obstacles will be explained herein: 1.) The obstacle in economic politic cost in a form of lack of access to get a good international trade lawyer either for trade monitoring purposes or for defending Indonesia's Measure through litigation process; 2.) The obstacle in litigation expertise in a form of lack of human capital that has the good legal expertise and legal skill as a complainant state or a respondent state and lack of human capital in understanding the language of international trade law formulated trough WTO Agreement; 4.) The obstacle in a form of litigation fee since hiring a lawyer, economic analyst, and experts that will provide an argument in DSB has a fee standard between \$100.000, - to \$100.000.000, - meanwhile, the legal fee to conduct a proceeding in Appellate Body is up to \$300.000, -; 5.) The obstacle is in a form of legal complexity since analyzing and examining an international trade dispute including its legal facts requires a comprehensive understanding. Writers view Suherman's Opinion as a reasonable doctrine since both Indonesia and Brazil were unable to provide clear and bright arguments while exchanging their point of view towards the scope of the DS 484 Case.

**Third**, based on TRPM Report explained above, writers discovered that Indonesia's Measure towards Brazil's Chicken and Chicken Products is not compatible with four international trade law principles that lie within WTO Agreement herein: 1.) **Transparency Principle**: This principle states that the WTO Member States shall publish each of their trade-related legal products related to measuring affecting other member states conducting trade with it (Adolf and Maulana 2020); 2.) **Prohibition on Quantitative Restriction Principle**: This principle prohibits WTO Member States to conduct a quantitative restriction measure towards other WTO Member States Imported Products and this principle also prohibits voluntary export restraints (Sood 2018); 3.) **Most Favored Nations Principle**: Also known as the MFN, this principle obliged WTO Member States to conduct a non-discriminative trade policy towards the other WTO Member States under the most favored clause (a clause that obliges a non-discriminative treatment towards WTO Member State in position as a third party of a bilateral treaty made between WTO Member State) (Adolf and Suryawinata 2018).; 4.) **National Treatment Principle**: This principle obliges the WTO Member States to provide a national treatment towards an imported product. Or to provide a non-discriminative treatment towards both domestic and imported products (Adolf and Suryawinata 2018).

To explain this urgency further, writers describe the stipulations violated by Indonesia due to its import measure on Brazil Chicken Meat and Chicken Product in a form of the table below this paragraph. This table describes articles of WTO Agreement violated due to Indonesia measure and international trade law principles implied in these

articles. The table herein also explains the relationship between these WTO Agreement Articles and its international trade law principles (table1).

Table 1. List of Violated WTO Agreement Stipulations and International Trade Law Principle

Violated WTO Agreements	Articles	Implied international trade law principles	Explanations
Agreement on Sanitary and Phytosanitary Measures	Article 2, Article 5, and Article 8	Most Favored Nations and National Treatment	Indonesia invoked a discriminative sanitary and phytosanitary measures towards Brazil Chicken Meat and Chicken Product to protect its public morals and public health. Despite the fact that public moral protection was not regulated under this agreement.
Agreement on Technical Barriers to Trade	Article 2 and Article 5	Most Favored Nations, National Treatment and Transparency	Indonesia conducted a practice in a form of undue delay towards Brazil Chicken Meat and Chicken Product, despite such delay was not regulated under its national law.
Agreement on Agriculture	Article 4 and Article 14	National Treatment	Due to its measure, This Brazil Commodity was unable to enter Indonesia's domestic markets.
Agreement on Importing Licensing Procedures	Article 1 and Article 3	Transparency and Prohibition on Quantitative Restriction	Indonesia invoked a strict non-automatic import license containing a quantitative restriction on Brazil's Chicken Meat and Chicken Product.
Article on Preshipment Inspection	Article 2	Most Favored Nations	Indonesia conducted a discriminative inspection on Brazil Chicken Meat and Chicken Product.

**Fourth**, Indonesia's Quantitative Restriction Measures will also cause Indonesia unable to acquire the advantages of free trade described herein (Sefriani 2016): 1.) Peace restoration since peace is both an outcome and an ambition of trade relations between states; 2.) Existence of product variety for consumers and enhancing fair competition; 3.) State income will increase since tariff and non-tariff barrier reduction will increase the advantage of trade; 4.) Stimulating economic growth since trade access will provide job creation; 5.) Stimulating effective and efficient trade since uniform rules in international trade will make merchants may conduct an international trade easier, and 6.) Stimulating clean governance since WTO Agreement prohibits trade distortion to achieve legal certainty. Based on four considerations or urgencies mentioned above and quoting Rousseau doctrine previously mentioned above, writers express that Indonesia may only achieve its good and represent WTO's General Will at the same time if it utilizes WT/TPR/S/401 as an instrument revised its food or agriculture import policy.

## 5.2. The Application of TPRM Outcome on Indonesia Food or Agriculture Import Policy to Prevent a Dispute through DSB Appellate Body

In this part of the article, writers analyze this legal issue base on the *Pacta Sunt Servanda* Theory. Fuady (2013) explained that as one of the oldest legal principles in roman and canonic law, *Pacta Sunt Servanda* means a contract created not based on fraud or illegal action shall be fully complied. This sentence was translated from the Latin sentence "*pacta convent quae neque contra leges neque dalo manlo initia sunt omnimodo observanda sunt*" (Fuady 2013). Fuady (2013) furthermore explained that in international law practice, *Pacta Sunt Servanda* emphasizes the practice of states to apply a signed treaty, under a threat in a form of dispute settlement in an international court, if that state does not fully apply its signed treaty.

Besides applying Fuady perspective towards this grand theory, writers will also apply the Goldstajn Version of this theory stating that *Pacta Sunt Servanda* is a fundamental and universal international trade law principle stating that a contract or a treaty shall be conducted by its parties in a good faith (Adolf 2014). Adolf (2014) furthermore



explained Goldstajn Doctrine by stating that this good faith shall not only be owned by contracting parties in conducting an agreement, but it must also own by them while preventing a dispute or preventing it. Based on this doctrine and its elaborations, writers believe that both Indonesia and Brazil shall have good faith not only in settling their disputes but also in preventing this dispute to be settled in the DSB Appellate Body.

By applying the notions described above, it can be understood that both Indonesia shall fully apply the WTO Agreement since it has expressed its consent to be bound through signatures conducted on January 1<sup>st</sup> 1995 (Article XIV para 1. Marrakesh Agreement) and its ratification through Law Number 7 the Year 1994 (BPK, 2022). Therefore, according to the international point of view, Indonesia shall also show its good faith by applying WT/TPR/S/401 in a good faith. This action shall be conducted based on a sense of legal obligation since WT/TPR/S/401 is a unilateral act issued by TPM which is a permanent organ of WTO based on the WTO Agreement. Furthermore, Indonesia shall also apply this unilateral act to avoid potential retaliation from Brazil authorized under Article 22 Annex 2 WTO Agreement (BPK, 2022).

Since writers have explained *in the abstract* regarding what Indonesia shall do as one of the WTO Member States, writers will also explain how Indonesia shall conduct cooperation with Brazil to fully realized its good faith. According to Indonesia's Municipal Law, the Ministry of Trade is responsible for conducting international cooperation in protecting and securing national interest (Article 82 para 2. Indonesia Trade Law) (BPK, 2022). Amalia and Pratama (2020) furthermore explained that this international cooperation is always conducted through a treaty-making process. Article 86 Indonesia Trade Law furthermore explained that the Indonesian Government *in concreto* Ministry of Trade may prepare an international trade agreement negotiation team (Tim Perunding Perjanjian Perdagangan Internasional in Bahasa Indonesia) that is mainly tasked for both preparing and conducting the negotiation process (BPK, 2022).

This international trade agreement negotiation team is furthermore regulated under President Regulation Number 82/2017. Article 7 para (2) of this regulation stated that this negotiation team formation may be formulated according to the related need in the negotiation process (BPK, 2022). Para (4) of this article furthermore divided this negotiation team into the operational negotiation team and the technical negotiation team (BPK, 2022). The operational team has a task in conducting the negotiation process with Indonesia's Opposing Party, meanwhile, the technical team has the task of analyzing, preparing, and formulating matters needed by the operational team (BPK, 2022).

In elaborating the application of this municipal law, writers believe that the Indonesia National Consumer Protection Agency (Badan Perlindungan Konsumen Nasional in Bahasa Indonesia) shall also involve itself as part of the technical team in this bilateral cooperation process. Article 34 para (2) Indonesia Consumer Protection Law stated that Indonesian National Consumer Protection Agency is tasked with providing advice and recommendation to the government in formulating consumer protection policy (BPK, 2022). Furthermore, this article also stated that this agency is tasked with conducting research related to consumer safety. This task is conducted by National Consumer Protection Agency to increase goods and services qualities in ensuring consumer health, comfort, security, and safety (Article 3f. Indonesia Consumer Protection Law) and to uphold The Consumer Security and Safety Principle under Article 2 Indonesia Consumer Protection Law (BPK, 2022).

Besides the National Consumer Protection Agency, writers also believe that Indonesia Halal Product Assurance Agency (Badan Penyelenggara Jaminan Produk Halal in Bahasa Indonesia) shall also involve itself by joining the operational team of the international trade agreement negotiation team (BPK, 2022). This idea is valid under Indonesian municipal law since Article 5 Government Regulation Number 39 the Year 2021 authorized the Halal Product Assurance Agency to conduct international cooperation in ensuring Indonesia's halal product (BPK, 2022). Article 104 of this regulation furthermore authorized this agency in cooperating with Indonesia Trade Ministry in exercising its authority based on Article 5 (BPK, 2022). And finally, Article 123 of this regulation stated that the Halal Product Assurance Agency and other halal product assurance agencies may create a reciprocal halal certificate in a form of an international treaty (BPK, 2022).

By forming the international trade agreement negotiation team that consists of the National Consumer Protection Agency as part of the negotiation technical team and the Halal Product Assurance Agency as part of the negotiation operational team, Indonesia may conduct bilateral cooperation with Brazil both in good faith and in a precautionary way. This bilateral cooperation initiative and preparation will reflect Goldstajn's *Pacta Sunt Servanda* Theory

stating that a signed agreement shall be conducted in a good faith. Furthermore, this initiative and preparation will also reflect good faith that exists in a pre-contractual phase as Dunne expressed (Untung 2012).

Besides the good faith principle, this initiative may also help Indonesia and Brazil to achieve justice, utility, and certainty as to the three purposes of law according to Radbruch (Junaidi 2018). This bilateral cooperation may help Indonesia and Brazil to achieve justice since the outcome of this negotiation process may reflect the fair-trade concept in a form of both national and international non-discriminative halal standards. The utility principle may also be achieved because if a consensus is achieved between these disputing parties, both Indonesia and Brazil will acquire the greatest happiness in halal standard measures. And last but not least, this bilateral cooperation may also help Indonesia and Brazil in achieving certainties because if a consensus regarding the halal standard is made, transparency in Indonesia halal standard and Indonesia import measures will also exist.

While conducting the bilateral cooperation, Indonesia may choose one of these alternative measures to be invoked in protecting its national interest. These alternative measures are described by writers following WT/TPR/S/401. The first alternative measure that Indonesia may invoke is by abolishing its qualitative restriction measures (Organization 2020). Meanwhile, the second measure that Indonesia may invoke is the safeguarding policy by the Annex 1A WTO Agreement: Safeguards Agreement (Organization 2020). Explanations regarding these alternatives will be described herein.

Table 3.21 WT/TPR/S/401 stated that Indonesia has conducted a quantitative restriction policy under the basis of public health protection, environmental protection, and moral public protection by separating the halal and non-halal products (Organization 2020). Furthermore, Para 3.136 WT/TPR/S/401 stated that Brazil protested Indonesia's Sanitary and Phytosanitary Measures and Indonesia's undue delay on Brazil's Chicken Meat and Chicken Product in entering Indonesia Custom (Organization 2020). Even though Indonesia has applied Trade Minister Regulation Number 51 the Year 2020 that derogates previous regulations that applied a quantitative restriction, Indonesia shall apply the non-quantitative restriction in its trade practice too (Organization 2020).

The review outcome herein is issued by TPRM based on Article XI para 2. GATT 1994 prohibits WTO Member State from conducting quantitative restriction measures towards agriculture products (BPK, 2022). Furthermore, this review is the outcome is also provided by TPRM following Article 2 para 1. and para 15. Annex 1A WTO Agreement: Pre-shipment Inspection Agreement stating that the WTO Member States shall conduct an import inspection in a non-discriminative nature and undue delay shall not be invoked towards other WTO Member States Goods (BPK, 2022). Based on explanations herein and to show its good faith, Indonesia shall choose to abolish its quantitative restriction measure towards Brazil's Chicken Meat and Chicken Product temporarily while conducting its bilateral cooperation with Brazil.

Besides this measure, Indonesia may also invoke the safeguard policy base on Article XII GATT 1994. It is necessary to explain that this article is an exception to the application of Article XI GATT 1994 (BPK, 2022). Based on this article, the conditions of legality in invoking safeguard policy following this article are (BPK, 2022): 1.) The application of this measure shall be conducted in a non-discriminative nature; 2.) This measure shall be a temporary measure; 3.) Member state invoking this measure shall able to prove the serious injury on a local product not caused by mismanagement; 4.) Shall be invoked in a form of quantitative import measure, tariff measure, and adjustment towards currency; and 5.) Compensation shall be provided towards member states affected by this policy.

The application of this measure is valid since on Para 13. Summary of WT/TPR/G/401, It is stated that Indonesia did not apply a safeguard measure towards its agriculture products (Organization 2020). Instead of applying measures by WTO Agreement, Indonesia applied the local content requirements in protecting its domestic industries. Due to this report, Indonesia may invoke a safeguard policy base on a factual threat in form of serious injuries on its domestic industry or base on a potential threat in a form of potential injuries on its domestic industry (Article 4 para 1a. and b. Safeguards Agreement) (BPK, 2022). Therefore, if Indonesia chooses this alternative while negotiating with Brazil, Indonesia shall report this measure invocation to the Safeguards Committee and the Agriculture Committee by Article 12 Safeguards Agreement and Article 5 para 7. Agriculture Agreement (BPK, 2022).

In their point of view, Writers opined that Indonesia shall invoke a safeguarding policy in a form of import restriction under a reasonable time *in concreto* during its negotiation process with Brazil in determining the chicken meat and chicken product halal standard. Writers also opined that this measure shall be applicable since it may invoke potential injuries towards Food and Processed Food Industries that can be established under Indonesia Law consisting of Indonesia Government Regulation Number 5 the Year 2021 and Indonesia Central Bureau of Statistics Number 2 the Year 2020. Potential injuries might happen since these industries will unable to produce a food base

by Indonesia’s halal standard. Furthermore, writers also believe that this measure will not imply a discriminative nature since Indonesia has food import measures that have been complained about by the other WTO Member States. The non-discriminative nature of this aspired policy will be explained by writers, by describing the table below this paragraph. This table 2 is cited from WT/TPR/S/401 (Organization 2020).

Table 2. Lists of WTO Member States complaining about Indonesia’s Food Import Measures

Dispute	Raised by/against	Request for consultation	Panel established/panel report circulated	Current status	Document series
Importation of Horticultural Products, Animals and Animal Products	United States/Indonesia	10/09/2013	-	In consultations on 30 August 2013	DS465
Importation of Horticultural Products, Animals and Animal Products	New Zealand/Indonesia	30/08/2013	-	In consultations on 30 August 2013	DS466
Importation of Horticultural Products, Animals and Animal Products	New Zealand/Indonesia	08/05/2014	20/05/2015/ 22/12/2016	Report (s) adopted, with recommendation to bring measure (s) into conformity on 22 November 2017	DS477
Importation of Horticultural Products, Animals and Animal Products	United States/Indonesia	08/05/2014	08/10/2015 22/12/2016	Authorization to retaliate requested (including 22.6 arbitration) on 15 August 2018	DS478
Measures Concerning the Importation of Chicken Meat and Chicken Products	Brazil/Indonesia	16/10/2014	03/12/2015/ 17/10/2017	Compliance proceedings ongoing on 24 June 2019	DS484
Measures Concerning the Importation of Bovine Meat	Brazil/Indonesia	04/04/2016	-	In consultations on 4 April 2016	DS506

By viewing this table 2, it can be understood that Indonesia’s food import measure and halal standard related to those measures has been complaining about not only by Brazil but also by the United States and New Zealand. Although not all of these disputes have an object or *ratio materiae* in a form of chicken meat and chicken products, Indonesia may still fulfill its obligation under Article 7 para 1.a. Safeguards Agreement regarding on “particular domestic sector (that may get injured) element” (BPK, 2022). To comprehensively understand this stipulation, this article shall be read together with Article XII GATT 1994 as it is mentioned above.

To close this discussion, writers will describe how Indonesia’s bilateral cooperation with Brazil may achieve justice, utility, and certainty if it is applied together with its quantitative restriction abolishment or its safeguard measure on food product products. Writers will also explain how this alternative measure is interdependent with Indonesia’s bilateral cooperation with Brazil in determining their halal standard. These interdependent matters shall be explained since each of these alternative measures does not fully imply three purposes of law mentioned by Radbruch. These explanations will be described in a form of a table 3 herein.

Table 3. Conclusion and Conceptual Explanation regarding TPRM Review Outcome Application

Type of Measure	Justice	Utility	Certainty	Explanation
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Quantitative Prohibition Abolishment in trade policy application	-	-	✓	Despite this measure may achieve transparency or certainty, this measure won't be able to achieve fair trade and utility for Indonesia. Therefore, this measure shall be applied only during the negotiation process between Indonesia and Brazil.
Safeguard Measure on Food Product	-	✓	✓	This measure may help Indonesia in achieving transparency since the invocation of this measure oblige Indonesia to report it to the safeguard committee and the agriculture committee. Furthermore, this measure may also provide happiness toward Indonesia's population. However, without a consensus base on bilateral cooperation, this measure won't be compatible with the fair-trade notion in international trade law since Brazil will unable to export its commodity to Indonesia territory.

## 6. Conclusion

In concluding the first legal issue analysis writers would like to express that Indonesia shall utilize WT/TPR/S/401 to prevent a dispute settlement process occur in DSB Appellate Body. This premise is expressed by writers since TPRM Report may provide an individual good for Indonesia as WTO Member State and to protect Indonesia's national consent. And this utilization may also represent WTO General Will to achieve free trade. Indonesia shall also utilize WT/TPR/S/401 since dispute settlement through DSB has a long period, Indonesia measures have breached Annex 1A WTO Agreement and International Trade Law Principle within the WTO Agreement, Indonesia has obstacles in settling the dispute in DSB and Indonesia might lose its free trade advantages.

To conclude the second legal issue analysis writers would like to state that Indonesia shall apply WT/TPR/S/401 to show its good faith in conducting the WTO Agreement. This application can be realized by conducting bilateral cooperation with Brazil in determining their halal standard on their agriculture products. While conducting this cooperation, Indonesia shall involve its National Consumer Protection Agency to help Indonesia's technical negotiation team and it shall also involve its Halal Product Assurance Agency to help its operational negotiation team. This bilateral cooperation shall also be entailed with the invoking measure that abolishes Indonesia's quantitative restriction measure or invoking the safeguarding policy.

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